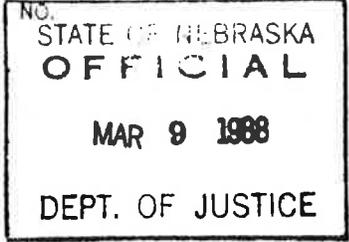


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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
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#88021



ROBERT M. SPIRE
Attorney General
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DATE: March 9, 1988

SUBJECT: Constitutionality of LB 377 Concerning Penalties for DWI and Implied Consent Refusal

REQUESTED BY: Senator Don Wesely
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Yvonne E. Gates, Assistant Attorney General

LB 377 requires the Director of the Department of Motor Vehicles to revoke the motor vehicle operator's license for refusal to submit to a chemical test unless the licensee pleads guilty or is convicted of driving while under the influence of alcoholic liquor or a drug (DWI). A possible amendment provides for waiver of the revocation only when the licensee enters a plea of guilty. You have requested our opinion regarding the constitutionality of both the bill and the amendment. Either version is constitutionally permissible.

To declare what shall constitute a crime and how it is to be punished is a power vested solely and exclusively in the Legislature. State v. Cutright, 193 Neb. 303, 226 N.W.2d 771 (1975). In the implied consent statute the Legislature has provided that an individual who refuses to submit to a chemical analysis of his or her blood breath or urine "shall be subject to the administrative revocation procedures of the Director of Motor Vehicles . . . and shall be guilty of a crime. . . ." Neb.Rev.Stat. §39-669.08 (Cum.Supp. 1987). LB 377 does not propose to change that aspect of the statute.

Whether an individual waives or exercises the right to trial, the criminal penalties are the same. Likewise with the crime of refusal. Since all parties are treated equally, LB 377 does not violate the Equal Protection Clause.

An argument might be raised that the disparate treatment in the civil action is violative of this right. However, the Nebraska Supreme Court has repeatedly ruled that while the same motor vehicle operation may give rise to two separate and distinct proceedings, each action proceeds independently of the other and the outcome of one action is of no consequence to the

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other. Ziemba v. Johns, 183 Neb. 644, 163 N.W.2d 780 (1968).
See also, Neil v. Peterson, 210 Neb. 378, 314 N.W.2d 275 (1982)
and Raymond v. Department of Motor Vehicles, 219 Neb. 821, 366
N.W.2d 758 (1985).

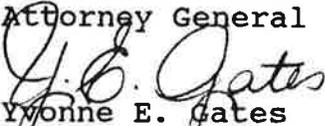
Nebraska case law consistently indicates that "if the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end." State v. Michalski, 221 Neb. 380, 385, 377 N.W.2d 510 (1985). The Nebraska Supreme Court has consistently ruled that driving is not a fundamental right. Porter v. Jensen, 223 Neb. 438, 390 N.W.2d 511 (1986), Michalski, supra.

Equal protection of the law requires that similarly situated persons be treated equally by the government; however, "It does not foreclose government from classifying persons or from differentiating one class from another when enacting legislation." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911). Should the Legislature decide that it is in the public interest to encourage motorists to submit to a chemical test by permitting admitted or convicted drunk drivers to avoid civil penalties, that is clearly within its prerogative. The classification made in LB 377 is related to the legitimate state interest of deterring drug and alcohol use by motorists.

Although the wisdom of such an action may be subject to challenge, the constitutionality of the bill, on equal protection grounds, is unmistakable.

Sincerely,

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Attorney General


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13-119-2

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:


Attorney General