WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

October 23, 1974

FILE NO. S-817

CONSTITUTION:
Constitutionality of Section 314
of the Illinois Controlled Substances
Act

Ronald E. Stackler
Director
Department of Registration and Education
628 East Adams Street
Springfield, Illinois

Dear Mr. Stackler:

This is to acknowledge receipt of a letter and other materials from your predecessor in which he requested my opinion concerning the constitutionality of section 314 of the Illinois Controlled Substances Act. Ill. Rev. Stat. 1973, ch. 56 1/2, par. 1314.

Section 314 provides:

"§ 314. Except when a practitioner shall dispense on behalf of a charitable organization

> as defined in Section 501(c) of the Federal 'Internal Revenue Act', and then in conformance with other provisions of State and Federal laws relating to the dispensing of controlled substances, no practitioner shall dispense a controlled substance by use of the United States mails or other commercial carriers."

Dr. Barringer stated in his letter that a bona fide need exists for an opinion because investigations by your Department reveal that numerous mail-order dispensers are operating in Illinois in conformance with Federal laws and regulations, but in violation of section 314. Several issues are raised with regard to the constitutionality of section 314.

I. Whether section 314 constitutes an unconstitutional regulation or interference with the Federal postal system.

Section 8, clause 7, of article I of the United States Constitution provides that Congress shall have power to "establish post offices and post roads".

It is, of course, clear that where a State statute imposes a direct, physical interference with Federal activities under the postal power, or some direct, immediate burden on the performance of the postal functions, the statute cannot stand. (Railway Mail Ass'n. v. Corsi, 326 U.S. 88.) Thus, in Illinois C. R. Co. v. Illinois, 163 U.S. 142, 154,

the Supreme Court stated: "A statute of the State which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States cannot be considered as a reasonable police regulation".

Section 505 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1973, ch. 56 1/2, par. 1505) provides for forfeiture of property and conveyances which are used to transport controlled substances dispensed in violation of the Act. No exception is made in the case of Federal postal service conveyances. Forfeiture of such conveyances would clearly be an unconstitutional interference with the postal system. However, section 602 (Ill. Rev. Stat. 1973, ch. 56 1/2, par. 1602) provides:

> "If any provision of this Act or the application thereof to any person or circumstance is invalid, such invalidation shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Pursuant to the above provision, section 505 may be limited in its application so as to preclude the forfeiture of postal service vehicles.

However, the inquiry does not end here. The power

granted to Congress under section 8, clause 7 of article I has been construed to embrace not only the regulation of the entire postal system, but also to include the right to determine what may be carried in the mails, and what may be excluded. Ex parte Jackson, 96 U.S. 727; In re Rapier, 143 U.S. 132; Public Clearing House v. Coyne, 194 U.S. 497; McCrossen v. U.S., 339 F. 2d 810.

Title 18 U.S.C., § 1716, which precludes injurious articles from the mails such as poisons, provides in part:

> "The transmission in the mails of poisonous drugs and medicines may be limited by the Postmaster General to shipments of such articles from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, cosmetologists, barbers, and veterinarians, under such rules and regulations as he shall prescribe."

39 CFR, § 124.2(f)(2) provides:

> "Poisonous drugs and medicines may be shipped only from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, cosmetologists, barbers, and veterinarians."

39 CFR, § 124.2(f)(3) provides:

> "The Veterans Administration, including its

> hospitals and other facilities, are authorized to send prescription medicines containing narcotics by registered mail to certain veterans. Other shipments containing narcotics addressed to individuals are limited to provisions of § 124.2(f)(2)." (cited above)

From the foregoing, it is apparent that the Congress, and the Postmaster General, under authority delegated to him by Congress, (see, Jeffries v. Olesen, 121 F. Supp. 463), have determined that non-poisonous and non-narcotic drugs and medicines are mailable items.

It should be noted that some of the controlled substances which are regulated under the Illinois statute fall within the class of non-poisonous and non-narcotic drugs. The issue presented, therefore, is whether the State may punish the dispensing of non-narcotic and non-poisonous drugs to ultimate users by use of the mail.

It is my opinion that section 314 is unconstitutional as a usurpation of exclusive Federal power under section 8, clause 7 of article I.

Practitioners who are in full compliance with all other provisions of State and Federal law are not prohibited

from dispensing drugs by any other means. The gravamen of the offense under section 314 is not the "dispensing" of drugs, but rather the use of the mails for that purpose. Consequently, it must be considered as purely a regulation of the use of the Federal postal system. Thus, the offense proscribed is distinguishable from prohibitions considered in a line of cases which have held that the States may make punishable the use of the mails to perpetrate a separately stated offense.

State v. McHorse, 85 N.M. 753, 517 P. 2d 75, involved a prosecution for distributing a controlled substance to a person under 18 years of age. Defendant made the distribution through the mail. The court carefully drew the distinction between the "mail" offense under the Federal statute, and the "distribution" offense under State law.

In West Va. v. Adams Exp. Co., 219 F. 794, defendant solicited orders through the mail for intoxicating liquors to be delivered in West Virginia contrary to the laws of that State. The Circuit Court of Appeals, 4th Circuit, stated on page 799:

"It makes no difference that the U.S. mail

> was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. * * *" (See, also: In re Palliser, 136 U.S. 257; U.S. v. Thayer, 209 U.S. 39; State v. Seaman, 60 A. 2d 275; Hayner v. State, 93 N.E. 900, State v. Morrow, 18 S.E. 853; State v. Reader's Digest Ass'n., Inc., 501 P. 2d 290.)

In Zinn v. State, 88 Ark. 273, 114 S.W. 227, an Arkansas statute made it unlawful to solicit orders for intoxicating liquors in prohibition territory through agents, posters, circulars, or advertisements. Defendant mailed such an advertisement into the prohibited territory. In answer to the contention that the statute was unconstitutional as infringing the power of Congress to designate what may be excluded from the mails, the Arkansas Supreme Court stated at page 228:

> "The statute does not relate to that subject at all. It simply prohibited the soliciting

> of orders for the sale of intoxicating liquor in territory where the sale of such liquors is prohibited. The gravamen of the offense is the soliciting of orders for the sale. It matters not how the circular forthat purpose reaches the prohibited territory, and the statute does not undertake to designate or condemn the manner by which the circulars may be carried into or excluded from the prohibited territory. It is the presence of the circular there for the unlawful purpose of soliciting that the statute denounces and prohibits, not the method by which they may be conveyed there or distributed. Had the statute made the use of the United States mail for sending circulars into districts where the sale of intoxicating liquors is prohibited the crime, then the argument of the learned counsel for appellant would be sound. But as such is not the case, his contention cannot be sustained.
>
> * * * "
>
> (emphasis added)

Finally, in R. M. Rose Co. v. State, Tenn., 65 S.E. 770, the Supreme Court of Tennessee stated:

> "The establishment of post offices and the regulation of the mails has been dealt with by the federal authorities under their constitutional powers. Subject to federal laws and regulations, they are open to all who desire to conduct through them legitimate transactions."

Under section 314, no distinction can be made

between the "dispensing" offense and the "mail" offense. They are the same. A practitioner who has fully complied with all other dispensing requirements would be in violation solely for using the mail. This constitutes a mail offense, and is preempted by the Federal regulations which specifically permit the mailing of non-poisonous, and non-narcotic drugs and medicines.

II. Whether section 314 is in violation of the Interstate Commerce clause. Section 8, clause 3 of article I of the United States Constitution.

As a general rule, a State, in the exercise of its police power, may enact statutes and ordinances to protect the health, safety, morals and convenience of its inhabitants, concurrent with laws passed by Congress concerning the same subjects, provided the State law is local in character and affects interstate commerce only incidentally and does not conflict with the requirements of Federal legislation or the Federal Constitution. 15 Am. Jur. 2d, Commerce, § 69, p. 714.

The constitutionality of section 314 must be tested by considering its various applications as they pertain to

the commerce clause. There are three possible fact situations to which section 314 might apply. The first deals with its application to out-of-state practitioners who dispense drugs in Illinois by means of commercial carrier. The second deals with practitioners in Illinois who dispense drugs to ultimate users in other States by means of commercial carrier. The third application involves the dispensing of drugs by an intrastate practitioner to an in-state ultimate user by means of commercial carrier.

It is clear that under the first two applications mentioned above, the transactions are not local in nature and present a direct burden and regulation of interstate commerce.

The transactions involve a sale or exchange and a shipment of goods from one State to another and clearly constitute interstate commerce. (Ware v. Mobile County, 209 U.S. 405; The Lottery Case, 188 U.S. 321; Hump Hairpin Mfg. Co. v. Emerson, 258 U.S. 465; Arkansas Power and Light Co. v. F.P.C., 368 F. 2d 376.) A State cannot under the cover of exercising its police power directly regulate or burden interstate commerce. (Ry. Co. v. Husen, 95 U.S. 465.)

Section 314 does not merely regulate the incidental aspects of commerce. By denying the use of interstate conveyances to carry on purely interstate business, the section places a direct burden on interstate commerce. Cf State v. Rasmussen, Iowa, 213 N.W. 2d 661.

The shipment of drugs by an in-state practitioner to an in-state ultimate user presents a different problem. Limited to intrastate transactions only, it would appear that such an application would have merely an incidental burden on interstate commerce. Although it may be argued that such a regulation is merely economic in nature (protection of local pharmacists), it seems clear that this section also seeks to protect the health and safety of the people of the State by preventing illicit trafficing in drugs, and diversion of drugs into the wrong hands. The presumption should be indulged that the State is regulating under its police power. (Dahnke-Walker Co. v. Bondurant, 257 U.S. 278.) Furthermore, since commercial carriers are expressly exempted from the forfeiture requirements of section 505 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1973, ch. 56 1/2,

par. 1505), there is no burden upon, or interference with, an interstate carrier.

The primary issue concerning the intrastate application of section 314 is whether it has been preempted by the provisions of the federal Comprehensive Drug Abuse and Control Act. 21 U.S.C. § 801 et seq.

The statement of Congressional findings and declarations in 21 U.S.C. § 801, provides in part:

> "* * * (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce.
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
>
> (5) Controlled substances manufactured and

> distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
>
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.
>
> * * *
>
> However, 21 U.S.C. § 903, provides:
>
> "No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any state law on the same subject matter which would otherwise be within the authority of the state, unless there is a positive conflict between that provision of this subchapter and that state law so that the two cannot consistently stand together."

I must conclude from the above language that the Federal government has not preempted the entire field of regulation of narcotics and dangerous drugs; the States have the power to regulate in the area. See, Ledcke v. The State, Ind., 296 N.E. 2d 412.

Therefore, the issue is narrowed to determination of whether there is a "positive conflict" between the Federal

regulations and section 314 "so that the two cannot consistently stand together".

The meaning of "direct" or "positive" conflict, as that term applies to Federal and State law under the commerce clause, has been held to mean "hostile encounter, contradictory, repugnant, so irreconcilably inconsistent as to make one actually inoperable in the face of the other". Powers v. McCullough, Iowa, 140 N.W. 2d 378, 382. See, also, Head v. New Mexico Bd. of Examiners, 374 U.S. 424; Kelly v. Washington, 302 U.S. 1.

A determination of whether the two statutes are in conflict requires an examination of the scheme of the Federal regulations. The best exposition of the Federal legislative scheme is found in U.S. Code, Congressional and Administrative News, 91st Congress, Second Session, 1970, Vol. 3, p. 4571:

> "The bill is designed to improve the administration and regulation of the manufacturing, distribution, and dispensing of controlled substances by providing for a 'closed' system of drug distribution for legitimate handlers of such drugs. Such a closed system should significantly

> reduce the widespread diversion of these drugs out of legitimate channels into the illicit market, while at the same time providing the legitimate drug industry with a unified approach to narcotic and dangerous drug control."

From the foregoing, it is apparent that as long as the States are within the Federal scheme, they can enforce their own regulations to meet local needs for protection. In International Union, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245, it was held that where a Federal statute neither forbids nor legalizes certain conduct, it does not preempt a State's exercise of its police power over a subject normally within the State's exclusive power, and reachable by Federal regulations only because of its affect on that interstate commerce which Congress may regulate.

In view of the fact that drug abuse and diversion takes place at the local level, and further, that the States are invited under section 903 of the Federal Act to regulate in the area, the States may impose stricter requirements without conflicting with the Federal statute. See, Huron & Portland Cement Co. v. Detroit, 362 U.S. 440.

In Fla. Avacado Growers v. Paul, 373 U.S. 132, 142, the U.S. Supreme Court stated: "The test of whether both the Federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the Federal superintendence of the field, not whether they are aimed at similar or different objectives."

In Whitehall Laboratory Div. of America v. Wilbar, 397 Pa. 223, 154 A. 2d 596, the Supreme Court of Pennsylvania held that a State statute which required a prescription for phenobarbital was not in conflict with the Federal Food, Drug and Cosmetic Act, which did not require a prescription. The court stated that the Federal Act revealed neither an express nor implied intent of Congress to preclude State action in the field and further that the Federal scheme could not be considered so pervasive as to exclude State action. The court pointed out that Federal law does not require sale of the drug without a prescription but merely permits it. The State may then in appropriate circumstances, as a police measure, require a prescription. This would not constitute interference with

the broad purpose of Congress to prevent misbranding of drugs.

Finally, it is fundamental that Congressional intention to displace local laws in the exercise of its commerce power should not be inferred unless clearly indicated by those considerations which are supportive of the statutory purpose, and that is particularly true when public health and safety are concerned. Maurer v. Hamilton, 309 U.S. 598; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148.

From the foregoing, it is my opinion that insofar as section 314 applies to purely intrastate transactions involving commercial carriers, it is not in violation of the interstate commerce clause, and does not conflict with the provisions of the Federal Drug Abuse and Control Act.

III. Whether section 314 is severable.

The final issue left for determination is whether the invalid applications of section 314 are severable from the valid applications.

Generally, the question of severability must be resolved on two bases. First, the legislature must have

intended that the act be severable, and second, the act must be capable of severability in fact. (Dorchy v. The State of Kansas, 264 U.S. 268.) Section 602 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1973, ch. 56 1/2, par. 1602) provides:

> "If any provision of this Act or the application thereof to any person or circumstance is invalid, such invalidation shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

It has been held that a severability clause provides a rule of construction in determining legislative intent. However, it must be considered as an aid only and not an inexorable command. (Dorchy v. The State of Kansas, supra; Grennen v. Sheldon, 401 Ill. 351; Bowes v. Howlett, 24 Ill. 2d 545.) The constitutional and unconstitutional provisions of a statute may be included within the same section (People ex rel. Barrett v. Union Bank & Trust Co., 362 Ill. 164), or even within the same sentence (People ex rel. Adamowski v. Wilson, 20 Ill. 2d 568), and still be severable.

Where, as here, the legislature has intended that the act be severable, the valid parts will remain if the act is severable in fact. The test is whether the legislature would have passed the statute had it been presented without the invalid features. Baim v. Fleck, 406 Ill. 193; Lee v. Retirement Board, 31 Ill. 2d 252.

"The fact that one part of the statute is unconstitutional does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, dependent on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed the one without the other." People v. Crowe, 327 Ill. 106, 119. See, also, People v. Isaacs, 22 Ill. 2d 477.

With regard to section 314, it is my opinion that the valid applications of the section depend upon those applications and provisions of the same section which I have held herein are invalid. They form together a scheme or network of regulation and enforcement. It could not be

said that the legislature would have enacted only that which remains after the excision. In terms of regulating practitioners, it is now incomplete. It is a mere shadow of its original enactment, and would apply only to in-state dispensers who ship only intrastate by common carrier. Since the original purpose of the section can be easily avoided, it is unlikely the legislature would have passed the section in its present form.

In conclusion, it is my opinion that section 314 is unconstitutional in violation of the Federal postal clause, (section 8, clause 7 of article I of the United States Constitution), and in violation of the commerce clause (section 8, clause 3 of article I of the United States Constitution), insofar as it applies to interstate transactions or applications. In addition, it is my opinion that since that which has been declared invalid cannot be severed from the remaining valid applications, all of section 314 must be declared invalid as being non-severable.

Very truly yours,

ATTORNEY GENERAL