

Opinion No. 38-1932

April 13, 1938

BY: FRANK H. PATTON, Attorney General,

TO: Mr. Ray M. Hall, Director Operators License Department Bureau of Revenue Santa Fe, New Mexico

{*228} This is in response to your inquiry of April 12 relative to the constitutionality of a proposed amendment to our Drivers License Law providing for a mandatory physical examination of body fluid of individuals involved in motor vehicle accidents. You have enclosed a letter from the National Association of Coroners suggesting that such an amendment could be made constitutional by providing that the applicant for a driver's license sign a waiver of his constitutional privilege against self-incrimination.

The suggested amendment is so novel that we have been unable to find any authority which furnishes an accurate guide for an answer to your question. Therefore a dogmatic answer to the constitutionality of such a proposition cannot be made. However, constitutional provisions against self-incrimination have always been liberally construed in order that they may not be emasculated by subtle encroachments. Thus privilege not only extends to oral testimony given in civil and criminal actions, but likewise extends to protections against unreasonable examinations, etc. This rule is well settled and would certainly include mandatory submission to physical examinations as outlined in your letter. Of course, this privilege may be waived. However, such waiver must be free and voluntary and cannot be made under compulsion or duress. This is the very essence of the constitutional guaranty. It would offer no protection whatsoever to the person invoking the same if he could be compelled to give evidence under duress or compulsion. It would seem to the writer that in view of the fact that an automobile in many instances is virtually a necessity, certainly in the case of one making a livelihood by operating the same, such a provision in a general driver's license act would be duress in the most aggravated form. The applicant would either have to sign such a waiver or forego his only means of livelihood. It does not amount to simply a question of electing whether or not to operate an automobile under the reasonable restrictions imposed pursuant to police power, but to the contrary requires complete surrender of rights guaranteed by the Constitution. It is therefore my opinion that such a provision would be unconstitutional. However, the question is debatable, and in the face of the modern tendency to uphold the constitutionality of state statutes, it might conceivably be upheld.

In your letter you suggest that such a law might be discriminating. It is not the function of this office to pass upon the policy of legislation or the policy of administration. As to such matters we respectfully refer you to the Legislative Reference Bureau.

By: RICHARD E. MANSON,

Asst. Atty. Gen.