

Creating Criminal Penalties for Non-Compliance with Animal Identification Rules

Bill Analysis: House Bill 2525

by Marc A. Levin & Vikrant P. Reddy

House Bill 2525 (HB 2525) by Rep. Tim Kleinschmidt amends section 161.041(c) of the agriculture code to delegate additional powers to the Texas Animal Health Commission (TAHC) to create and enforce criminal offenses. The bill is overbroad and an example of “over-criminalization,” the misguided tendency of government to use criminal law to regulate behavior not traditionally criminal, including ordinary business activity such as, in this case, ranchers failing to report all movements of all of their animals.

The federal National Animal Identification System (NAIS) of 2004 looms large behind this bill. The NAIS was a short-lived federal program designed to require individuals to register animals handled on their premises with a 15-character radio-frequency identification tag and report any movements of the animals. The NAIS was ostensibly intended to address isolated outbreaks of disease through quarantines, but it was needlessly overreaching, and it raised both civil rights and financial concerns. In 2010, the federal government announced the end of the program, but it is now using federal funds to cajole states to adopt their own “traceability” programs that similarly mandate tagging animals and reporting their movements.

Spurred by the prospect of obtaining federal funds, individual states are now pursuing animal identification schemes of their own, and many are nearly as overreaching. In Texas, administrative authority for animal identification and tracking has been delegated to the TAHC. HB 2525 would significantly expand the TAHC’s administrative authority by providing penalties for people who knowingly fail to properly handle an animal “the movement of which is restricted under the rules adopted by [TAHC].” In effect, the TAHC would be authorized to make its own rules and set its own criminal penalties for violations of these rules.

Although it is reasonable and practical for the Legislature to delegate certain functions to administrative bodies, it is unwise to allow such bodies to designate any of their rule violations as a criminal offense. The Legislature is the body that should specify exactly what conduct constitutes a criminal offense. Doing otherwise would transfer the power to take away an individual’s liberty from duly elected officials to unelected commission members. Moreover, as each day brings new agency rules and revisions of existing rules, these broad delegation provisions make it virtually impossible for businesses and individuals to keep track of what constitutes criminal conduct, undermining the fair warning principle.

Yet another problem with HB 2525 is the inadequacy of it mens rea protections. “Mens rea” refers to the mental state that is necessary for criminal culpability—all crimes must consist of a bad act (actus rea) and a bad intent (mens rea). In this bill, the existence of the word “knowingly” in section 161.041(c) may appear to offer some protection, but in fact it is of limited benefit. The language would likely be interpreted by courts as only requiring that the defendant knew he failed to tag or report the movement of the animal, not that he knew he failed to comply with a rule set by the commission. In other words, the bill would ensure a “mistake of fact” defense, but not a “mistake of law” defense. The longstanding maxim that “ignorance of the law is no excuse” was sensible when criminal law was limited to traditional offenses such as murder, rape, and theft, but in a world with thousands of “boutique” offenses (Texas, for example, has over 1,700 criminal laws, including eleven felonies related to oysters), the maxim is less applicable. In this context, for instance, farmers and ranchers have been breeding and transporting animals for centuries while reasonably believing that they did not need to consult the government every step of the way.

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Small farmers and ranchers are particularly at risk under HB 2525. Large agribusiness operations might be able to devote resources to monitoring the actions of the TAHC and complying with its rules, but it is unlikely that small farmers and ranchers will be able to do so.

In the interest of preserving accountable government and sensible criminal law, the House Agriculture and Livestock Committee should replace the criminal penalties in HB 2525 with civil or administrative fines. In addition to better preserving the traditional role of criminal law, this change would better preserve limited prosecutorial resources because civil and administrative fines do not generally require the involvement of a court. Finally, HB 2525 should require that the TAHC establish a “safe harbor” provision

that protects animal owners from liability or penalty if no harm has occurred as a result of their rule violation and if they have taken prompt steps to come into compliance.

It is troubling that Texas would contribute to the overall expansion of government regulation in a bill that essentially imposes a state scheme similar to the NAIS. Requiring all farmers and ranchers to report every movement of every animal to the government goes beyond the traditional role of government in this area—managing isolated outbreaks of disease through quarantines. At a minimum, it is important that sweeping authority to create new criminal penalties not be delegated to a state commission in service of this intrusive and burdensome growth in government regulation. ★

¹ HB No. 2525, 83rd Session (2013).

² Precise definitions of overcriminalization vary, but the general sense that overcriminalization is a problem is widespread. Notre Dame School of Law Professor Stephen F. Smith explained this well in his 2010 testimony before Congress:

It is, of course, difficult to make such claims [of overcriminalization] without a normative baseline—an idea of what constitutes the ‘right’ number of criminal laws—and such a baseline is elusive. Still, history and crime rates provide relevant benchmarks, and they strongly suggest that the criminal sanction is being seriously overused....According to a 1998 report issued by an American Bar Association task force, an incredible 40 percent of the thousands of crimes on the federal books were enacted after 1970....On average, Congress created 56 new crimes every year since 2000, roughly the same rate of criminalization from the two prior decades.

Testimony of Stephen F. Smith, Hearing on Reining In Overcriminalization: Assessing the Problems, Proposing Solutions before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 112th Cong. (28 Sept. 2010) 1.

³ William Neman, “U.S.D.A. Plans to Drop Program to Trace Livestock,” *New York Times* (5 Feb. 2010).

⁴ *Ibid.*

⁵ Janet Kubat Willette “Rules Governing Animal Identification are Changing,” *Agrinews* (28 Mar. 2013). Although the issue is beyond the scope of this bill analysis, the Legislature should be increasingly concerned about how the federal government uses federal funds to coerce states into compliance with ill-advised programs like NAIS. See generally Mario A. Loyola, “Trojan Horse: Federal Manipulation of State Governments and the Supreme Court’s Emerging Doctrine of Federalism,” 16 *TEX. REV. L. & POL.* 113, 134-141 (2011).

⁶ *Ibid.*; see also Jason Smith, “From the Hill: Reagan’s Words are Still Relevant,” *St. James Leader Journal* (25 Mar. 2013).

⁷ Marc A. Levin, “Animal Tagging Law is Too Big a Burden,” *San Antonio Express-News* (8 Apr. 2006).

⁸ HB No. 2525.

⁹ Marc A. Levin & Vikrant P. Reddy, “Twelve Steps for Overcoming Overcriminalization,” Texas Public Policy Foundation (2012) 2. Professor Eric Luna has also written eloquently about the pervasive problem.

The impact of [overcriminalization] has been exacerbated by the rise of the modern administrative state, erecting a vast legal labyrinth but-tressed by criminal penalties in areas ranging from environmental protection and securities regulation to product and workplace safety. Many public welfare offenses, such as submitting an incorrect report or serving in a managerial role when an employee violates agency regulations, expose otherwise law-abiding people to criminal sanctions.

Erik Luna, “The Overcriminalization Phenomenon,” 54 *AM U. L. REV.* 703, 708 (2005) (citations omitted).

¹⁰ Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Heritage Foundation and National Association of Criminal Defense Lawyers, May 2010) 1.

¹¹ See generally Edwin Meese & Paul Larkin, “Reconsidering the Mistake of Law Defense,” 102 *J. CRIM. L. & CRIMINOLOGY* 725 (2012).

¹² *Ibid.*

¹³ Testimony of Marc A. Levin, Texas House of Representatives, “Hearing Regarding Animal Identification Program before the Texas Senate Subcommittee on Agriculture, Rural Affairs, and Coastal Resources” (6 Sept. 2006) 2.

¹⁴ Marc A. Levin & Vikrant P. Reddy, “Engulfed by Environmental Crimes: Overcriminalization on the Gulf Coast,” Texas Public Policy Foundation (Dec. 2012) 6.

