



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GROVER SELLERS  
ATTORNEY GENERAL

Honorable C. L. King  
Assistant District Attorney  
Amarillo, Texas

Dear Sir:

Opinion No. 0-6633  
Re: Authority of Commissioners'  
Court or City Commission to  
defray expense of returning  
Federal prisoner to Texas  
for trial.

Your recent request for an opinion of this department reveals that two persons arrested by an Amarillo police officer shot him while he was transporting them to the police station. Subsequently they fled the State, were apprehended in New Mexico, and Federal authorities having obtained jurisdiction, they were tried and convicted of Federal offenses. It is your understanding that the principal offender is to be incarcerated in Alcatraz located in San Francisco Bay and that the other will be in a Federal institution at Texarkana. Murder indictments having been returned against both offenders in Potter County, it is your desire to secure the return of these defendants to Amarillo for trial and for the purpose of securing accomplice testimony while they are still serving their Federal sentences. You state that Federal authorities have conditionally agreed to their return provided the expenses of bringing them to Amarillo and returning them to their places of confinement, including the expense of a Federal guard, be paid by Texas authorities. You have asked us the following questions in this connection:

"(1) May the Commissioner's Court of Potter County, Texas, provide funds with which to pay the expenses of returning Thompson to Amarillo to stand trial, and also the expenses of returning Day to Amarillo to testify in the trial against Thompson?

"(2) May the City Commission of the City of Amarillo, Texas, provide funds with which to pay the expenses of returning Thompson to Amarillo to stand

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trial, and also the expenses of returning Day to Amarillo to testify in the trial against Thompson?"

In the outset we should like to point out that Texas has no right to secure the return of the prisoners inquired about under the law of extradition as it applies only as between states and not as between a state and the Federal government. 22 Am. Jur. 252. Since the Federal government has the right to exclusive custody of the prisoners until they have served their sentence, they may be returned to Amarillo only by consent of that sovereignty. 14 Am. Jur. 921. In the absence of express authority the courts have held that the Attorney General of the U. S. as a matter of comity may in his discretion allow the transfer of a Federal prisoner under sentence to a state court for trial, "provided it does not prevent enforcement of the sentence of the Federal courts, or endanger the prisoner." See *Ponzi v. Fessender*, 258 U. S. 254, 66 L. Ed. 607, 22 A. L. R. 879, 42 Sup. Ct. Rep. 309; 14 Am. Jur. 921; also notes in 22 A. L. R. 886 and 62 A. L. R. 279. Furthermore to facilitate the handling of persons who have offended both state and Federal sovereignty, the Congress in 1940 passed the following statute:

"Whenever any person confined in any penal or correctional institution pursuant to a judgment of conviction of an offense against the United States has been indicted or convicted of a felony in a court of record of any State, other than the State in which such person is confined, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority of such state, and upon the presentation of a certified copy of such indictment or judgment of conviction, cause such person to be transferred prior to his release to a penal or correctional institution situated within such State that is authorized to receive United States prisoners. In the event more than one such request is presented in respect to any prisoner, the Attorney General shall determine in his discretion which request should receive preference. The expense of personnel and transportation incurred in carrying out the provisions of the section shall be chargeable to the appropriation for the 'support of United States prisoners.'" Tit. 18, Sec. 733 U. S. C. A.; 6. 176, Sec. 1, 54 Stat. 176.

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It would thus appear that the Attorney General of the United States in his discretion, may not only permit the trial by Texas courts of prisoners serving a Federal sentence, but that he is authorized to transfer prisoners confined out of the state to Federal institutions within the state in aid of the process.

Since the problem of securing the return of these prisoners to Amarillo is clearly not a matter of extradition and there being no express statutory authority provided for such expenditures, the power of a Commissioners' Court or a City Commission to provide them must rest on an implied authority if it exists at all.

A Commissioners' Court's authority is strictly limited to powers given by constitution or statute or to such powers as are necessarily implied therefrom. 11 Tex. Jur. 564; Baldwin vs. Travis County, (Civ. App.), 88 S. W. 480; Commissioners' Court vs. Wallace (Civ. App.) 15 S. W. 2d 535; 11 Tex. Jur. 566; and Anderson v. Wood (Sup) 152 S. W. 1084. In the case last cited it is said, "Where a right is conferred or obligation imposed on said court, it has implied authority to exercise a broad discretion to accomplish the purpose intended." We know of no constitutional or statutory duty, right or obligation which has been placed upon the Commissioners' Court in connection with the return of Federal prisoners to Texas for trial. In the absence of such a provision we see no basis for implying an authority in this connection.

We believe a different rule would apply to the City Commission under the facts you have outlined in the absence of a charter provision of the City of Amarillo to the contrary. In the case of the City of Corsicana vs. Ebb, (Com. App.) 290 S. W. 736, in upholding the authority of the city to appropriate funds for a special prosecutor in a murder case arising out of the killing of a city policeman while making an arrest, it was said:

"Whenever a city is authorized to appoint and have policemen charged with the duties of peace officers, the city, in the absence of charter provision to the contrary, has the implied power, exercisable at its discretion, to provide suitable means for the protection of its policemen in the bona fide discharge of their official duties. The duties of a policeman

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are performed for the benefit of the public, and the public is directly concerned in preserving and protecting these officers from the hazard of death or bodily injuries to which the performance of their official duties expose them. Aside from any considerations purely personal to the officer, it is for the public good that these officers, as instruments through which the city performs its functions, shall be shielded from the personal hazards which attend the discharge of their official duties.

"If a city policeman be slain in the bona fide performance of his official duties, the city has implied power, unless such power be clearly denied in its charter, to employ an attorney to prosecute his slayer and to appropriate city funds to that purpose. The foundation of this power does not rest in theories of rendering benefit to the dead officer, for he can derive no benefit from such prosecution; nor does it rest in motives of retaliation for his death; but it does rest in those considerations of public policy which justify the city in protecting the instrumentalities through which it performs its functions, and in adopting means deemed suitable for the purpose. The selection of these means is confided to the discretion of the city, and courts will not undertake to control the city's discretion in this respect, unless the lack of relation of the selected means to the end sought to be attained be clearly apparent. The city, in the present instance, might well have considered that its employment of special prosecution in the case against the Graces, as a means calculated to deter law breakers from killing its policemen in the future, would result in diminishing the hazard of death or bodily injury to those who might thereafter serve the city in the capacity of policemen. For this reason, it cannot be said that there is no relation between the services of special counsel in such a case and the protection of policemen in the service of the city."

It is our view that the reasoning in this case applies with even greater force to the situation outlined in this request. If an expenditure by the city for a special prosecutor, which

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would only be an aid to the prosecution if warranted, then certainly expenditures which are necessary to secure jurisdiction of the person of the offender, a "sine qua non" of the prosecution, would be allowable.

We conclude, (1) that the Commissioners' Court of Potter County is not authorized to pay the expenses inquired about, and (2) that the City Commission of Amarillo may in its discretion and in the absence of charter provisions to the contrary, pay such expenses as it deems reasonably necessary to insure the protection of policemen in its service.

We trust that we have sufficiently answered your inquiry and that our views will assist you in working out your problem.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *Eugene Alvis*

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APPROVED JUL 2 1945  
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