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Texas: A Weak Governor State, or Is It?

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ARTICLE

TEXAS: A WEAK GOVERNOR STATE, OR IS IT?

Governor Greg Abbott asserts control over all agency rulemaking and may use “holdover officers” to control the decisions of regulatory agencies.

RON BEAL*

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I. THE CONSTITUTIONAL BACKGROUND

A. *The Constitutional Setup of the Executive Branch*

The interpretive commentary to our current, 1876 Texas Constitution states our constitutional framers deliberately intended to weaken the executive branch of government.¹ Hence, it is commonly held that Texas is a weak governor state.

This was effected by providing for not only a governor in the executive branch, but “a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General.”² All of these positions, except the secretary of state, are directly elected by the people³ rather than appointed to serve at the pleasure of the governor. This arrangement diffuses the authority within the executive department itself so that such officers are largely independent of the governor—thus establishing a “plural executive.”⁴ This independence from governor influence is guaranteed for the officers solely dependent upon the electorate for maintaining their offices.⁵

However, the framers labeled the governor the chief executive officer⁶ and provided: “He shall cause the laws to be faithfully executed”⁷ Yet, the interpretive commentary points out this general grant of power is in essence an empty vessel for its lack of specificity.⁸ In other words, this

1. TEX. CONST. art. IV, § 1 interp. commentary; see also Ronald L. Beal, *Power of the Governor: Did the Court Unconstitutionally Tell the Governor to Shut Up?*, 62 BAYLOR L. REV. 72, 76–81 (2010).

2. TEX. CONST. art. IV, § 1.

3. *Id.* § 2.

4. *Id.* § 1 interp. commentary (stating a plural executive “makes for a separation of powers within the executive department itself).

5. *Id.*

6. *Id.* § 1.

7. *Id.* § 10.

8. *Cf. id.* § 10 interp. commentary (stating this obligation does “not confer upon [the governor] any specific power. . . .” and that it is, in fact, “more fiction than reality”).

general grant of power “is more fiction than reality” and merely allows the governor “to give direction to the arrangement of affairs in all the branches of the executive department.”⁹

In addition, the governor may appoint all statutory state officers, but those appointments are only valid “subject to the approval of two-thirds of the senate.”¹⁰ The officers have a two-year term¹¹ unless they serve on a board, in which case they serve six-year, staggered terms.¹² The interpretive commentary suggests, while one person may be better equipped to analyze the qualities of a person to serve in state government, requiring senate approval prevents patronage and recognizes the importance of these officers to state government.¹³ The commentary also suggests the ultimate approval of these persons to serve is “too important to the public welfare to vest exclusively in one man”—namely, the governor.¹⁴

During their terms of service, state officers have a significant degree of independence from the control of the governor.¹⁵ The Texas Constitution mandates the legislature shall provide by law for trial and removal from office of all state officers created by statute—they cannot be removed directly by the governor.¹⁶ At one time, the legislature did so provide, but for unknown reasons repealed the law, now providing for the trial of a state officer.¹⁷ Currently, the only recourse by which a governor may remove a state officer is seeking the agreement of the senate by a two-thirds vote.¹⁸ Therefore, the interpretive commentary states the governor’s power of removal cannot be considered an effective instrument of administrative control.¹⁹ Hence, the common phrase used by all is that they are “independent officers.”

9. *Id.*

10. *Id.* § 12(a)–(b), interp. commentary.

11. *Id.* art. XVI, § (30)(a), interp. commentary.

12. *Id.*

13. *Id.* art. IV, § 12 interp. commentary.

14. *Id.*

15. *See infra* text accompanying notes 17–19.

16. *Id.*

17. *Compare id.* (quoting the now-repealed statute: “All state officers appointed by the governor, or elected by the legislature, where the mode of removal is not otherwise provided by law, may be removed by him for good and sufficient cause, to be spread on the records of his office, and to be reported by him to the next session of the legislature thereafter.”), *with* TEX. REV. CIV. STAT. ANN. art. 5967, *repealed by* Act of May 31, 1993, 73rd Leg., R.S., ch. 268, § 461(1), 1993 Tex. Gen. Laws 986 (demonstrating the statute was repealed).

18. TEX. CONST. art. XV, § 9(a).

19. *Id.* § 7 interp. commentary.

Yet, some power remains in the governor while state officers serve their terms.²⁰ The power of appointment along with set terms provides some continuing control of these officers, for the power to reappoint someone upon the conclusion of their term vests exclusively within the governor.²¹ Officers with two-year terms know the governor will be there to consider their reappointment since the governor serves a four-year term.²² As for officers serving on boards in six-year, staggered terms, at least one officer, if not two, will have to ponder whether this governor is capable of re-election. However, generally, the overwhelming majority of officers know they will have to answer for refusing a governor's request if they desire reappointment.²³

B. *They Shall "Cause the Laws to Be Faithfully Executed"*

Beyond the governor's express power to be commander-in-chief of the military forces;²⁴ to convene the legislature for extraordinary meetings;²⁵ and to speak to the legislature at the commencement of each session;²⁶ they simply have the express power to "cause the laws to be faithfully executed."²⁷ So, what does that mean? What power, if any, does that grant to the governor?

The interpretive comment says it is more fiction than reality.²⁸ At best, it means the governor only has such executive power that is specifically granted by the legislature, express or implied.²⁹ It goes without citation that the legislature grants civil, regulatory power in our various elected officials—particularly the attorney general, who is wholly independent of the governor—as well as regulatory agencies created to enforce specific regulatory schemes. Even though governor-appointed (and sometimes reappointed) state officers manage the regulatory agencies, the attorney general represents the state's interest "upon the filing of a suit to challenge the validity of an agency rule or contested case order." That interest goes to the degree of the attorney general's duty and power to exercise judgment

20. *See infra* text accompanying notes 21–22.

21. *See* TEX. CONST. art. IV, § 12(a)–(b) (vesting appointment power in the governor's office).

22. *Id.* § 4.

23. *Cf. supra* text accompanying notes 21–22.

24. TEX. CONST. art. IV, § 7.

25. *Id.* § 8.

26. *Id.* § 9.

27. *Id.* § 10.

28. *See supra* text accompanying notes 6–9.

29. *Id.*

and discretion, which cannot be controlled by agency authorities even if the officers act at the direction of the governor.³⁰ Even outside of specific litigation, the constitution provides it is the attorney general, not the governor, who may issue opinions as to the meaning of state law.³¹

So, can the governor do anything with their duty and power to “cause the laws to be faithfully executed”? Amazingly, we have literally no reported caselaw issued by the judiciary interpreting the power of the governor to faithfully execute the law. However, we have a few hints.

On October 27, 2005, Governor Rick Perry issued Executive Order RP 49 mandating the Texas Commission on Environmental Quality (TCEQ) “prioritize and expedite the processing of environmental permit applications” to generate electrical power.³² He also ordered the State Office of Administrative Hearings (SOAH) to conduct hearings on those permits “no later than one week after the [expiration of the] required 30 day public notice” period.³³ A lawsuit commenced seeking injunctive relief against the TCEQ and SOAH on the basis that Governor Perry’s Executive Order was unconstitutional because he had no power to order an agency regarding the exercise of their statutory powers.³⁴ Judge Stephen Yelenosky of the 345th District Court of Travis County issued a letter opinion that granted a temporary injunction against the TCEQ and SOAH because the plaintiffs would likely prevail on their constitutional argument.³⁵ This litigated issue ended shortly after the issuance of this order, but it suggested at least one highly skilled judge with extensive administrative law experience believed the constitution barred the Governor’s actions.

The second hint involves former Governor Perry again. On February 2, 2007, Governor Perry issued another Executive Order to the Texas Department of State Health and Human Services (HHS) to adopt rules mandating the pre-appropriate vaccination of all female children for human papillomavirus (HPV).³⁶ This controversy did not result in litigation, but

30. RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 1.2.1, at 67 (23rd ed. 2020).

31. *Id.*

32. The Governor of the State of Tex., Exec. Ord. No. RP 49, 30 Tex. Reg. 7797, 7797–98 (2005).

33. *Id.*

34. *See* Original Petition at 22–24, Citizens Org. for Res. & Env’t v. Perry, No. D-1-GN-07-000129 (200th Dist. Ct., Travis Cnty., Tex., filed Jan. 18, 2007).

35. Letter Op. by Judge Stephen Yelenosky, Citizens Org. for Res. & Env’t v. Perry, No. D-1-GN-07-000129 (200th Dist. Ct., Travis Cnty., Tex., issued Feb. 20, 2007).

36. The Governor of the State of Tex., Gov. Exec. Ord. No. RP 65, 32 Tex. Reg. 599 (2007).

former Judge F. Scott McCown, a highly respected retired Travis County judge, published an op-ed commentary declaring Governor Perry's order unconstitutional.³⁷ The judge stated:

Asking instead of telling is not merely a matter of form. When the Governor asks a state agency to consider a rule, he allows the rulemaking process to work. When the Governor orders a state agency to adopt a rule, he short-circuits the process.

. . . [I]t will only be a charade.³⁸

Thus, we have two judges who seem to believe that a governor "faithfully executing the law" cannot order a state officer how to exercise their statutory power.³⁹

What if the governor asks or requests a certain act to be done, but not with the dressing of "executive order" at the top? We have no hints from the judiciary on this issue under the 1876 Constitution, but we do have a judicial opinion based on the 1845 Constitution.⁴⁰ In 1859, the Texas Supreme Court was confronted with the issue of whether the judiciary should order a state officer to comply with a governor's request to which they had refused.⁴¹ The court held:

It is evidently contemplated, that [the governor] shall give direction to the management of affairs, in all the branches of the executive department. Otherwise he has very little to do. Where he has the power of removal, he can assume authoritative control absolutely, in all of the departments. This being the case in the United States government[] results in the entire unity of its executive department. The absence of that absolute power of the chief executive in this [S]tate[] must occasionally produce a want of harmony in the executive administration, by the inferior officers of that department, declining to comply with the wishes, or to follow the judgment of the governor. That is an inherent difficulty in the organization of that department, and the conflicts arising out of it, cannot be adjudicated or settled by the judiciary. The fact that there is no remedy for an injury growing out of such conflict, cannot justify another department, to wit, the judiciary, in overstepping the

37. F. Scott McCown, Opinion, *Governor's HPV Order Is Unconstitutional*, CTR. FOR PUB. POL'YS, Feb. 7, 2007, at 1–2.

38. *Id.* at 2.

39. See *infra* text accompanying notes 32–49.

40. TEX. CONST. of 1845, art. V, § 1; see *infra* text accompanying notes 41–49.

41. *Houston Tap & Brazoria Ry. Co. v. Randolph*, 24 Tex. 317, 318 (Tex. 1859).

boundary of its prescribed authority, for the purpose of furnishing a remedy. The other department, the legislative, may be able to furnish a remedy. The judiciary act on past facts. The legislature acts by devising for the future. It is the peculiar province of the legislative department, to shape future events, so as to obviate and remedy, the jars and difficulties of the past.⁴²

Despite the statements of the interpretive commentary,⁴³ the court held the power to “take care the laws be faithfully executed” was in fact a grant gubernatorial power to give direction to the management of affairs of the executive branch.⁴⁴ Does it matter if it is in the form of a request or an order? The court was silent in that regard.⁴⁵

Yet, as the court noted, if the state officer did not serve at the pleasure of the governor, it would “occasionally produce a want of harmony” when inferior officers declined to comply with the governor’s wishes and refrained to follow their judgment.⁴⁶ The court’s implications here are twofold. First, by stating an officer’s refusal of such orders would occasionally—not always—result in disharmony, the court implied that oftentimes the officers would comply.⁴⁷ Second, the court tacitly admitted the officers have the legal right to comply with gubernatorial wishes.⁴⁸ But, the key to this analysis is the court clearly stated governors have the power to request or order these “independent officers” with set terms to carry out the laws according to their bidding—because, if not, the officers would never have to decline the requests.⁴⁹

Therefore, the power of the governor to direct the affairs of the executive branch is not a fiction;⁵⁰ it is a real constitutional power that will undoubtedly place significant pressure upon appointed officers to heed the concerns of the chief executive officer elected by the people to direct the course of state government.⁵¹ Obviously, the decision to comply is highlighted by the fact these officials were hand-picked by the governor to

42. *Id.* at 343–44.

43. *See supra* text accompanying notes 6–9.

44. *Randolph*, 24 Tex. at 344.

45. *See generally id.*

46. *Id.* at 343.

47. *Id.*

48. *See generally id.* (implicating the same by not discussing any legality issues).

49. *See id.* at 343 (“The governor has manifested his wish, that this act should be performed, . . . by the inferior officers” who may “declin[e] to comply with the wish[], or to follow the judgment of the governor.”).

50. *See supra* text accompanying notes 6–9.

51. *See supra* text accompanying notes 40–49.

do their will and depend on the governor to maintain their offices after their terms expire.⁵² This should not be seen necessarily as a threat, but as an integral part of the constitutional setup, which empowers the governor to direct the officers of the executive branch while the check-and-balance system allows an officer to refuse acting upon belief that there is no legal basis to so act or that it would be inconsistent with statutory authority.

Therefore, these modern hints of what the power of the governor is under the 1876 Texas Constitution appear to be fundamentally wrong: Judge Yelenosky's and Judge McCown's assertions that the governor is powerless to request or order state officers to take action have no basis in law or fact at the present time.⁵³

II. RULEMAKING: GOVERNOR ABBOTT'S "REQUEST" TO BE A MAJOR PLAYER IN DECIDING WHAT RULES TO ADOPT

A. *Constitutional Power of the Governor to Participate in the Rulemaking Process*

The Texas Supreme Court has repeatedly upheld the legislature's ability and right to delegate rulemaking power to regulatory agencies.⁵⁴ The court has held that a legislative body would be hard put to contend with every detail involved in carrying out its laws in a complex society.⁵⁵ It is absolutely impossible to do. However:

The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes as long as it establishes reasonable standards to guide the entity to which the powers are delegated. The separation of powers clause merely requires that the standards of the delegation be reasonably clear and hence acceptable as standard of measurement.⁵⁶

52. *See supra* text accompanying notes 20–23.

53. *Randolph*, 24 Tex. at 344; *see also* Beal, *supra* note 1, at 81–88 (“Coupled with the label of ‘Chief Executive Officer’ that denotes him or her as the leader of the executive branch, the only conclusion that can be drawn is that the Governor has the constitutional power and duty to tell the subordinate state officers how he or she believes the law should be interpreted and applied”) (footnote omitted).

54. RONALD L. BEAL, 1 TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 2.1, at 175–76 (Lexis 22d ed. 2020).

55. *Id.*

56. *Id.* at 2–3.

Then, the legislature can give the agency the power to make such rules to fill in or carry out the details of the legislation.⁵⁷

Since the governor is to “cause the laws to be faithfully executed,” does that include rulemaking?⁵⁸ The legal definition of executed is “[t]hat [which] has been done, given, or performed.”⁵⁹ As set forth above, the legislature delegates pursuant to a statute to provide the agency with the discretionary duty to fill in the details of the statute pursuant to legislative standards.⁶⁰ This means there is no separation of powers problem, as the legislature is not delegating the inherent, exclusive power of general legislation.⁶¹ The policy is adopted by the legislature and it establishes the primary standards that the agency must adhere to.⁶² Therefore, the agency and the governor may exercise this delegated power to “complete the duty” of filling in the details of the statute in order to fulfill the legislative intent.⁶³

This appears to be the exact interpretation of Governor Greg Abbott’s office; on June 22, 2018, the regulatory agencies were informed they must submit all proposed rules to his office so he and his staff may render “a dispassionate ‘second opinion’ on the costs and benefits of the proposed agency actions.”⁶⁴ Governor Abbott is the first to assert such control over the agency rulemaking process in the history of Texas. He did so not in the form of an executive order, but merely a letter. Whether it was intentional or coincidental, the letter was not written by Governor Abbott himself, but by his Chief of Staff, Louis Saenz. Finally, the letter did not order or request it to be done, but simply stated it was a clarification of the rulemaking process by reviewing all proposed rules before the agencies commenced the notice and comment rulemaking process.⁶⁵

Was this approach taken to avoid Judge Yelenosky’s implied holding that a governor cannot “order” agency officials as to what they must do pursuant to a particular statute? Was it also written in this manner to avoid Judge McCown’s argument that governors cannot order an agency to adopt a rule? It is significant that Governor Abbott is not attempting to be the

57. *Id.*

58. TEX. CONST. art. IV, § 10.

59. *Executed*, BLACK’S LAW DICTIONARY (11th ed. 2019).

60. BEAL, *supra* note 54.

61. *Tex. Workers’ Comp. Comm’n. v. Patient Advocs. of Tex.*, 136 S.W.3d 643, 654 (Tex. 2004).

62. *Id.*

63. *Id.*

64. *See infra* Appendix 1.

65. *Id.*

one who has the idea for a particular rule, which was true with Governor Perry. However, governors clearly have such power, for the Administrative Procedure Act (APA) provides that any “interested person” may petition an agency to request the adoption of a rule.⁶⁶ Without doubt, the chief executive officer is such an interested person. Based on such a petition, the agency has the power to initiate rulemaking proceedings.⁶⁷ However, that would be done in the public sphere, which the governor might not favor. Yet, it is probably a sound idea that the governor did not include the power to suggest new rules in private. Why private?

It appears to be intentional, but it might be argued it is the only time that makes sense for governor review to be held *before* notice and comment rulemaking. Why? If governor review is done during the comment period, it is incumbent upon the agency to summarize the governor’s comments, identify the governor as a commentator, and set forth whether the governor was for or against the rule, all of which would appear in the Texas Register.⁶⁸

This decision to review proposed rules prior to commencement of notice and comment rulemaking is very troublesome due to the lack of transparency. As indicated, this letter went out June 22, 2018, and there has been no acknowledgement by the Governor’s office regarding the agencies’ compliance since they can refuse due to their set terms of office with a very limited possibility of removal by two-thirds of the senate.⁶⁹ If they are complying, there has been no publication by the Governor’s office or any agency as to what was discussed and what action, if any, was taken regarding any proposed rule(s). Most importantly, what does a “dispassionate second opinion” mean? Does the governor’s office say (1) “this rule cannot be adopted,” or (2) “this rule can be adopted if you make these amendments,” or (3) “you can adopt the rule ‘as is?’” In addition, when the governor’s office says, “no rule” or “amended,” is it because the rule does not meet the legislative standards for adoption or is it because the governor, for political or economic reasons, does not want such a rule to be adopted? In other words, is the “review” of proposed rules done so Governor Abbott can say to companies thinking of moving to Texas: “I cannot get rid of regulatory

66. *Interested Person*, BLACK’S LAW DICTIONARY (11th ed. 2019); TEX. GOV’T CODE ANN. § 2001.021(a).

67. *Id.* § 2001.021(c)(2).

68. *Id.* § 2001.033(a)(1)(A).

69. TEX. CONST. art. XV, § 9(a).

agencies, but I can assure no rule will be adopted without my approval. I have your backs?”

That brings us back to the concerns of the legislature. When the legislature adopted the APA, they did not expressly provide for the governor’s input on rules to be adopted except that the governor could clearly comment, as set forth above, in public as an interested person.⁷⁰ However, the APA expressly provides for legislative comment by requiring all agencies to send their notices of proposed rules to them and allowing any committee to comment by a vote of a majority of its members.⁷¹ This is true whether the committee is for or against the rule to be adopted.⁷²

Was the omission of the governor in the APA and a lack of procedure to have agency send notices to the governor intentional? It is an accepted canon of statutory construction that the court believes “every word [excluded from] a statute must be presumed to have been [excluded] for a purpose.”⁷³ So, was the exclusion of the governor from the rulemaking process intentional?

It could be argued, whether it was the intent of the legislature or not, that a canon of construction cannot supersede the governor’s constitutional executive power to faithfully execute the law, whether it be rulemaking or law applying. Governor Abbott clearly decided, as the chief executive officer, that he has the constitutional power to be intimately involved in rulemaking of regulatory agencies. So, did the legislature not specifically include the governor’s office in the APA because they knew he would set up his own procedure to be involved?

The opposite argument could be made—that the legislature has the constitutionally inherent power to delegate. The legislature has the *ability* to delegate, but not the duty to do so.⁷⁴ Thus, the legislature has discretion as to when power is delegated, who will be included in the rulemaking process, and who is expressly or implied excluded. Clearly, the governor has absolutely no part in the details of formulating a statute except for the power

70. See TEX. GOV’T CODE ANN. § 2001.021(a) (providing the only way an interested person may comment during the rulemaking process).

71. *Id.* § 2001.032(a).

72. *Id.* § 2001.032(c).

73. *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002).

74. *City of Pasadena v. Smith*, 292 S.W.3d 14, 17–19 (Tex. 2009); *Tex. Workers’ Comp. Comm’n v. Patient Advoc. of Tex.*, 136 S.W.3d 643, 654 (Tex. 2004).

to threaten a veto.⁷⁵ Further, it should be emphasized, the constitution provides the governor “shall cause the laws to be faithfully executed.”⁷⁶ If “the laws” impliedly or expressly exclude the governor’s participation, under separation of powers, this statutory decision was made by the legislature and the governor must abide by it. Therefore, the governor can constitutionally be involved, not solely based on their constitutional power, but in conjunction with a legislative grant providing for their participation.

The second argument seems a more compelling and reasonable interpretation of the constitution. However, it is unclear whether the judiciary would find this exclusion by implication sufficient to overcome the governor’s general power to faithfully execute the law. But the argument may be more forceful after what the legislature did in the 2019 Texas Legislative Session.⁷⁷

B. *Legislative Delegation of Rulemaking Power to the Governor*

Just like Governor Abbott’s assertion of control over agency rulemaking, the Texas Legislature, for the first time in Texas history, expressly delegated to the governor the power to participate in the rulemaking process for select agencies and select rules they may propose for adoption.⁷⁸ The bill, S.B. 1995, amended the Texas Occupations Code by adding Subchapter C regarding the review of rules of agencies with a governing board that is controlled by persons who provide services regulated by the agency.⁷⁹

The governor is instructed to create a division within their office in order to review state agency rules of the aforementioned boards.⁸⁰ The only rules that may be reviewed by the governor’s office are rules related to a license issued by the agency and a rule affecting market competition in the state. This includes any rulemaking proceeding affecting market competition.⁸¹ It also includes the repealing of an existing rule or the amending of an existing rule that affects market competition.⁸² A rule affects market competition if the rule would (1) create a barrier to market participation in

75. Compare TEX. CONST. art. III, § 29–38 (describing the various legislative processes involving a bill), with TEX. CONST. art. IV, § 14 interp. commentary (providing the gubernatorial veto process).

76. *Id.* § 10.

77. See discussion *infra* Section II.B.

78. Act of June 10, 2019, 86th Leg., R.S., ch. 57, § 57.101–.107, 2019 Tex. Sess. Law Serv. 668 (codified as TEX. OCC. CODE ANN. § 57.101–.107).

79. OCC. § 57.102.

80. *Id.* § 57.103(1).

81. *Id.* § 57.105(a).

82. *Id.* § 57.105(b).

the state or (2) result in higher prices or reduced competition for a product or service provided by or to a license holder in the state.⁸³

Even though it is not expressly stated in the amendments, the governor's review will have to happen after the agency complies with notice and comment rulemaking. The reason being, the amendments provide that an agency may not adopt or implement a proposed rule unless the division has approved it.⁸⁴ By definition, the notice and comment process is designed to have the agency learn from the public comment and, as a result, the agency may often adopt a rule different from the one proposed.⁸⁵ Therefore, if an agency files with the governor's office and gets approval, but then goes through notice and comment and modifies the rule, the statutory provisions clearly require the final, amended rule to be submitted for approval again before the rule can go into effect.

After the governor's office review is complete, the division may either (1) approve the proposed rule, or (2) reject it and return it to the agency with instructions for revising the rule to be consistent with applicable state policy.⁸⁶ Therefore, the governor is given the express power to determine which rules may be adopted and exactly how they will be written. Is this the same power the governor is exercising under his own policy of rendering a dispassionate second opinion?⁸⁷ Not necessarily, for there are two key differences. First, under the statutory plan, the governor and the governor's division can only reject or require modification if a rule contradicts statutory criteria, not merely the political or economic views of the governor. Second, the governor's approach is to conduct the entire review and decision-making process in private, whereas the new statutory provision requires it to be done publicly.⁸⁸ The statute mandates the governor and their division provide an explanation of the reasons for approving or rejecting a rule to the public.⁸⁹

83. *Id.* § 57.105(d)(1)–(2).

84. *Id.* § 57.105(a).

85. *Tex. Workers' Comp. Comm'n v. Patient Advocs. of Tex.*, 136 S.W.3d 643, 649–50 (Tex. 2004); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 801 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

86. OCC. § 57.105(d)(1)–(2) (Vernon Supp. 2019).

87. *See supra* text accompanying notes 41–52.

88. OCC. § 57.105(c).

89. *Id.*

C. *Did the Legislature Intentionally Set a Precedent for the Governor's Involvement in Rulemaking?*

More than a month after Governor Abbott issued his letter to review all rules of all agencies before they were adopted, a long-powerful, Republican lawmaker stated this action was a “potentially unconstitutional power grab.”⁹⁰ Representative Byron Cook stated: “[N]othing in our state’s constitution or statutes gives the Office of the Governor the power to veto or delay the proposal of a rule”⁹¹ The legislature can change this to enhance the governor’s clout—but only by passing a law or constitutional amendment.

Since the legislature has now, in fact, adopted a law to provide the governor power in rulemaking for a select number of agencies and a select type of rule, was there more to this legislative act than appears on the face of the bill?

Governor Abbott signed the bill into law. Did the act of signing it constitute his acknowledgement that his involvement in rulemaking must be predicated on a legislative act and the restrictions set forth therein? In other words, did he admit he has no inherent power to participate in agency rulemaking based on his general grant and duty to faithfully execute the law? Thus, the constitutional power to participate only “kicks in” when the legislature grants such power by statute. And, as to restrictions and requirements in the statute, do they not limit the governor? Under Governor Abbott’s rulemaking policy in his letter, all actions are done in private with no information provided the public or legislature.⁹² Under the statutory grant, any action taken by the governor’s rulemaking division must be set forth in writing and provided to the public and the legislature.⁹³

Thus, by signing SB 1995, Governor Abbott has expressly or impliedly acknowledged he only has rulemaking power if the legislature grants it to him by statute and, therefore, he must comply with the procedures and restrictions set forth therein. So, did the legislature realize if it amended the APA to prohibit the governor’s involvement generally in rulemaking, he probably would have vetoed that bill? Whereas, by taking the approach of delegating him some limited rulemaking power, has it set the precedent of

90. Emma Platoff, *Retiring GOP State Rep Blasts Abbott's Move to Expand Power over Agencies*, TEX. TRIB. (Aug. 14, 2018, 1:00 PM), <https://www.texastribune.org/2018/08/14/byron-cook-texas-governor-abbott-agency-rule-making-power-grab/> [<https://perma.cc/NAY6-7F65>].

91. *Id.*

92. *See infra* Appendix 1.

93. OCC. § 57.105(f).

being the sole body that can allow the governor to participate in the agency rulemaking process?

Finally, the APA does not expressly provide for governor involvement in rulemaking—and impliedly prohibits it—and the legislature has now established it decides when the governor can be involved. Because of the lack of constitutional authority to do so, does this set up a potentially viable legal challenge to the governor’s policy of reviewing every rule in secret? A possible alternative could be that the legislature should pass a bill requiring the governor’s review of rules to be done in public by providing written reasons for adopting or not a particular rule. Could the governor, politically, veto such a bill?

Representative Byron Cook concluded his statements by stating: “Something like this has extraordinary consequences”⁹⁴ Governor Abbott’s assertion of control over all agency rulemaking significantly enhances the power of the Texas governor. The label of the governor’s office being constitutionally “weak” when the governor has total control over all rulemaking by all agencies clearly falls by the wayside and allows the governor to exercise.

III. LAW APPLYING: THE GOVERNOR’S POWER TO DIRECTLY CONTROL STATE OFFICERS: HOLDOVER OFFICERS

A. *To Be a Successor Who Is Qualified*

In the Texas Constitution, the requirements for one to be a “successor” to another state officer lawfully holding an office are clear and unambiguous. If one is an elected official, they obviously need to win an election. If one is appointed, the governor has the power of appointment, but the senate must approve the selection by a two-thirds vote.⁹⁵ A successor is legally defined as “[s]omeone who succeeds to the office, rights, responsibilities, or place of another”; and, accordingly, “succession” is the “right of legally or

94. Robert T. Garrett, *Lawmaker Accuses Greg Abbott of Unconstitutional Power Grab, Citing Governor’s Push to Review Texas Regulations*, DALL. MORNING NEWS (Aug. 14, 2018, 11:12 AM), <https://www.dallasnews.com/news/politics/2018/08/14/lawmaker-accuses-greg-abbott-of-unconstitutional-power-grab-citing-governor-s-push-to-review-texas-regulations/> [https://perma.cc/GHE7-JAA3].

95. TEX. CONST. art. IV, § 12(a)–(b), interp. commentary; see *supra* text accompanying notes 9–11.

officially taking over a predecessor's office, rank, or duties.”⁹⁶ Thus, winning an election or being appointed with senate approval makes one a successor to another state officer and vests in them the right to exercise the powers of that office.

However, it does not end there. The successor must also be qualified, meaning: “Possessing the necessary qualifications; capable or competent.”⁹⁷ If one is elected, the secretary of state conducts several seminars throughout the year before an election to educate persons on any qualifications.⁹⁸ Generally, the individual must obtain a certificate of elections, a statement of the elected official, must take an oath of office, and must secure an adequate bond.⁹⁹ As to appointed officers, after approval by the senate, they must take an oath of office¹⁰⁰ and establish proof of residency within the state.¹⁰¹ In addition, based on the particular office's statutory requirements, an officer may have to establish proof of holding a particular license, years of practice in a particular profession or specialty, and possibly secure a bond.¹⁰²

Therefore, within the context of securing a state office, there are two separate conditions precedent before one has the legal right to exercise the powers of that office: they must be (1) duly elected or appointed with senate approval and (2) qualified.¹⁰³ Proof of qualification is a condition subsequent to succession, whether by winning the election or securing office by appointment and senate approval.

The framers of the constitution anticipated that, in some instances, securing requisite proof of qualification (even though they are clearly the successor) may take time that extends beyond the beginning of one's term.¹⁰⁴ If that is so, the person may not hold or exercise the powers of the office until the qualifications are met. Thus, the framers provided: “All

96. *Successor*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Succession*, BLACK'S LAW DICTIONARY (11th ed. 2019).

97. *Qualified*, BLACK'S LAW DICTIONARY (11th ed. 2019).

98. *Seminar Dates*, TEX. SEC'Y OF STATE, <https://www.sos.state.tx.us/elections/laws/seminars/dates.shtml> [https://perma.cc/3L76-QSVU].

99. *Qualifications for All Public Offices*, TEX. SEC'Y OF STATE, <https://www.sos.state.tx.us/elections/candidates/guide/2020/qualifications2020.shtml> [https://perma.cc/6BH6-9LL3].

100. TEX. CONST. art. XVI, § 1.

101. *Id.* § 14.

102. See *Qualifications for All Public Offices*, *supra* note 98 (providing additional qualifications for constable, for instance).

103. TEX. CONST. art. XVI, §§ 1, 17.

104. See *infra* text accompanying notes 102–03.

officers of this State shall continue to perform the duties of their office until their successors shall be duly qualified.”¹⁰⁵ Thus, even though the current officeholder does not have a new term, they may “hold over” until their successor is qualified.¹⁰⁶

The clear and unambiguous language demonstrates this provision only applies to a current officeholder if, at the time their term expires, a successor is in existence whether by election or appointment and senate ratification.¹⁰⁷ The language clearly states the current officeholder’s extended term is until that successor, who is in existence, takes the steps to become qualified for the office. The reason being, becoming “qualified” is wholly irrelevant until such time the person is the designated successor. As set forth above, the person only takes the steps to secure the proof of qualification with certain constitutional and statutory requirements after they have become a successor.¹⁰⁸

Therefore, if the current office holder’s term expires, and there is no “successor” in place, this constitutional provision simply does not apply. The language does not say one can continue in office as the current officeholder until there *is* a successor *and* that successor becomes qualified. No. The entire focus is extending their term until “their” successor is qualified.¹⁰⁹ The term “their” is used to indicate possession.¹¹⁰ Clearly, this indicates a person in existence who has the right to hold the office. If there is no successor at the time, the current officeholders term expires because they simply do not have a specific successor.¹¹¹

We need not rely on this language above. Article IV, regarding the executive branch, provides expressly that “the expiration of a term of office . . . constitutes a vacancy.”¹¹² The legal meaning of a vacancy is: “The quality, state, or condition of being unoccupied, esp[ecially] in reference to an office, poste, or piece of property.”¹¹³ Therefore, reading the two provisions as a whole, if there is no existing successor at the time a

105. TEX. CONST. art. XVI, § 17(a). Subsection (b) limits the time for appointed officers who do not receive a salary. *Id.* § 17(b). Even if their successor is not qualified by the end of the next legislative session, their term expires and the office becomes vacant. *Id.*

106. *Id.* § 17(a).

107. *See infra* text accompanying notes 100–03.

108. *See supra* text accompanying notes 96–105.

109. TEX. CONST. art. XVI, § 17(a).

110. WEBSTER’S II: NEW COLLEGIATE DICTIONARY 1143 (2001).

111. TEX. CONST. art. XVI, § 17(b).

112. *Id.* art. IV, § 12(i).

113. *Vacancy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

current officeholder's term expires their term ends and they have no right to remain in office or exercise the powers of that office.¹¹⁴ However, if a successor is in existence, by election or appointment and senate approval, the current officeholder's term continues until their successor becomes qualified.¹¹⁵

It is a fundamental canon of constitutional construction that one provision of the constitution should not be construed to render other portions of the constitution as superfluous,¹¹⁶ nor render them to be meaningless or inoperative.¹¹⁷ So, if the holdover provision also applied when no successor existed at the expiration of the current officer's term, and the current officer continued in office until a successor became qualified, that would render the second constitutional provision superfluous and void.¹¹⁸ Simply put, no office would ever become "vacant" when an officer's term expired—every officer would be entitled to remain in office for an unknown number of years until a successor came into existence and was duly qualified.¹¹⁹

B. *Governor Abbott's Apparent Interpretation of the Constitutional Holdover Provision*

Even though Governor Abbott has not publicly, orally, or in writing stated his legal interpretation of the holdover provision, the governor's actions speak louder than words. On June 2, 2016, his office provided staff documentation and oral acknowledgement that the governor, at that time, had 336 holdover appointees who were designated as such because their terms had expired, but they were allowed to remain in office until he appointed someone new or decided to reappoint the current holdover

114. *See supra* text accompanying notes 110–12.

115. *Id.*

116. *See* *Duncan v. Gabler*, 215 S.W.2d 155, 159 (Tex. 1948) (“An important established rule for construing the [c]onstitution is that all of its provisions affecting the same thing must be construed together and so construed if possible as to give effect to all of them.”) (citing *Jones v. Williams*, 45 S.W.2d 130 (Tex. 1931)).

117. *Carrington v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 344 (Tex. 2001) (citing *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000)); *Hanson v. Jordan*, 198 S.W.2d 262, 263 (Tex. 1946).

118. *See supra* text accompanying notes 110–12.

119. *Id.*

officer.¹²⁰ Some had served as holdover officers up to five years after their terms expired.¹²¹ The *Texas Tribune* concluded they could stay in office as long as they were eligible; that is, alive and Texan.¹²² On June 6, 2019, the governor's office produced documentation indicating there were 418 holdover officers whose terms expired up to eight years prior.¹²³ Once again, they were considered holdover officers because no successor had been appointed when their term expired.¹²⁴

Clearly the governor, his staff, or both, believe the constitutional holdover provision includes or covers current officeholders whose terms have expired and there is no existing appointed new officer.¹²⁵ Therefore, those officers remain in office and exercise the powers of that office (sometimes up to eight additional years) simply because the governor has failed, intentionally or not, to reappoint them or appoint someone new.¹²⁶

There are significant problems with this existing scenario. Since staff members' original appointments have expired, their continuation in office does not necessitate senate approval and they have no set term, allowing them to serve up to eight years or more with no constitutional limit to their terms of office.¹²⁷ Further, they serve at the pleasure of the governor since they are not appointed—which is much easier than convincing two-thirds of the senate to agree. Additionally, the governor is allowed to direct their activities through the implied threat of terminating their position. Even the chief judge of the State Office of Administrative Hearings (SOAH) has been privy to this scenario.¹²⁸ The SOAH was created to be an independent forum for the conduct of adjudicative hearings in the executive branch that would separate the adjudicative functions from the policy making functions.¹²⁹ Despite the obvious conflict of interest created by allowing

120. Ross Ramsey, *More Than 300 Gubernatorial Appointees Have Expired Terms*, TEX. TRIB. (June 6, 2016, 11:00 AM), <https://www.texastribune.org/2016/06/02/texas-gov-abbotts-300-plus-holdover-appointees/> [https://perma.cc/97HE-ETC4].

121. *Id.*

122. *Id.*

123. Michael King, *Law Professor Ron Beal Surrenders to Governor Abbott's "Code of Silence"*, AUSTIN CHRON. (June 6, 2019, 9:30 AM), <https://www.austinchronicle.com/daily/news/2019-06-06/law-professor-ron-beal-surrenders-to-governor-abbotts-code-of-silence/> [https://perma.cc/S2S8-2P3L].

124. *Id.*

125. *See supra* text accompanying notes 119–23.

126. *Id.*

127. *Id.*

128. *Id.*

129. TEX. GOV'T CODE ANN. § 2003.021(a).

governors to control the actions of an officer serving in a judicial capacity, governors retain total control over officer actions.

Could this have been the intent of the original framers? Despite setting up a weak governor system, the framers, in essence, sought to allow—though the holdover provision—a fiefdom, per se, of state officers to serve at the governor's pleasure as they implement the legislative policy of the state in agency rulemaking or adjudication?

It would appear the legal, judicial response would be—and should be—that these officers have no power, maintaining them in office is unconstitutional, and all agencies headed by one or more holdover officers lack the power to enforce their statutory schemes. The reason being, as discussed above, the judiciary will not interpret one section of the Texas Constitution in a way rendering other sections meaningless or inoperative.¹³⁰ Governor Abbott's apparent legal interpretation of the constitutional holdover provision nullifies:

- (1) That when an officer's term expires and there is no successor in existence, the office becomes vacant;¹³¹
- (2) Constitutional term limits have no application since the officer has not been appointed and approved by the senate;¹³²
- (3) The senate may only review appointed and reappointed officers, so they have no voice in officers serving terms far beyond the constitutional maximum;¹³³
- (4) Removal of an officer by the senate is inapplicable because there are no set terms giving them for-cause protection, thereby vesting sole power in the governor;¹³⁴ and
- (5) The governor's sole power to remove eliminates any concept of "independent agencies" due to the lack of set terms.¹³⁵

Governor Abbott's alleged interpretation and his actual acts literally gut the constitution that was designed to restrict the power of the governor over appointed officers. He is currently in total control of their tenure and the

130. Carrington v. Ameritrust, 49 S.W.3d 342, 350 (Tex. 2001).

131. TEX. CONST. art. IV, § 12(i).

132. *Id.* art. XVI, § 30a.

133. *Id.* art. IV, § 12(c).

134. *Id.* art. XV, § 9(a).

135. *Id.* art. XVI, § 30(a).

exercise of the power of their office. Now *that* is a powerful governor. How many holdover officers will there be next year?

IV. CONCLUSION: AT THE PRESENT TIME, GOVERNOR ABBOTT
IS A VERY POWERFUL GOVERNOR

It has been established that Governor Abbott has taken steps in his official capacity to wholly control all rulemaking by regulatory agencies in Texas and—at his discretion—maintain select state officers who will do his bidding for a tenure potentially lasting until the people of Texas decide he should no longer guide the State of Texas as governor. Pursuant to this actual reality, the State of Texas cannot be labeled a weak governor state.

Governor Abbott has chosen to exercise the powers due to a total lack of judicial interpretation of the relevant constitutional provisions and a seemingly unwillingness on the part of the legislature and other state officials to confront him as to his exercise of rulemaking power and holdover officers. The framers must be wondering where all of the independent, elected executive branch officers—the attorney general, lieutenant governor, and comptroller—are throughout this exercise of significant executive power based on very questionable legal basis. Only time will tell.