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## The Texas Tax Relief Act after Twelve Years: Adoption, Implementation &(and) Enforcement.

Michael Weiss

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## COMMENT

### THE TEXAS TAX RELIEF ACT AFTER TWELVE YEARS: ADOPTION, IMPLEMENTATION & ENFORCEMENT

MICHAEL WEISS\*

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\* Michael D. Weiss is a Fellow at the Texas Public Policy Foundation. He is currently an Articles Editor of the Texas Law Review. He has an B.A. in philosophy from the University of Texas where he wrote his honors thesis on modern political philosophy. He spent 1988 and 1989 studying political philosophy at Harvard College. He has published in the Review of Litigation, The Houston Chronicle, The Dallas Morning News, and Reason Magazine.

This Report was Prepared by: Michael Weiss, Principle Author; Jennifer E. Means, Copy Editing; Cory Birenbaum, Drafting & Editing; James Peden, Legislative Chronology.

## I. THE CAMPAIGN FOR THE CONSTITUTIONAL AMENDMENT AND ITS IMPLEMENTATION

### A. *Legislative History*

In early 1978, California voters passed the landmark Proposition 13. Designed to decrease the size of government by limiting state property taxes, Proposition 13 sparked a full-fledged tax revolt in other states. California tax revolt leader Howard Jarvis became a hero to the many Americans who believed that state taxes had become unbearably high. Across the nation, similar tax initiatives sprang up in response to rising county taxes and government spending.<sup>1</sup> In almost every state, legislatures met to discuss ways of cutting government spending and taxes. In 1978 and 1979, property taxes fell in thirty-seven states, twenty-eight states reduced income taxes, thirteen states limited sales taxes, and twelve states cut or eliminated other taxes. In total, state legislatures trimmed over \$4 billion from tax revenues. State and local taxes fell from 12.1% of personal income in 1977 to 10.9% in 1979.<sup>2</sup> A favorite method of limitation involved tying spending to the rate of economic growth.<sup>3</sup> This plan sought to ensure that state government would not inevitably command more than a prescribed share of the total state economy. The people of Texas chose such a solution.

In June 1978, outgoing Texas Governor Dolph Briscoe called a special session of the Texas Legislature to bring "hundreds of millions of dollars" of tax relief to Texas taxpayers.<sup>4</sup> The governor's call had appeared likely in light of recent tax protests in California.<sup>5</sup> The suggestion of a tax rebate was so popular that both gubernatorial candidates, Republican Bill Clements and Democrat John Hill, took pains to pledge their unlimited support.<sup>6</sup> In his proclamation to the legislators, Governor Briscoe described the special session as one imposing limits on government spending and taxation.<sup>7</sup>

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1. DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* 226 (1982).

2. ALVIN RABUSHKA & PAULINE RYAN, *THE TAX REVOLT* 189 (1982).

3. PAUL RICHTER, *CALIFORNIA AND THE AMERICAN TAX REVOLT: PROPOSITION 13 FIVE YEARS LATER* 180 (Terry Schwadron ed., 1984).

4. Jon Ford, *Special Session July 10—Governor Summons Legislators to Consider Tax Relief*, *AUSTIN AMERICAN-STATESMAN*, July 1, 1978, at A1.

5. *Id.*

6. *Id.*

7. H.J. OF TEX., 65th Leg., 2nd C.S. 1 (1978); see also Mark Dooley, *Briscoe To Specify*

When the legislators gathered in Austin on July 10, they were greeted with an opening address by Billy Clayton, Speaker of the Texas House of Representatives. He said,

Since last we assembled in this historic chamber, Texans as well as other Americans have made clear their concerns about taxes. From all across our land, they have spoken, and some have acted in ways that leave no questions as to their feelings. Inequitable administration and over-taxation is the sound which rumbles like distant thunder. As that distant sound nears, its message indicates that the time has come and we are called on to provide the necessary relief.<sup>8</sup>

Governor Briscoe made his purpose clear—to limit state spending though limitations on state income.<sup>9</sup> To this end, Governor Briscoe put eight proposals before the legislature.<sup>10</sup> Through a process of

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*Agenda For Special Tax Relief Session*, DAILY TEXAN, July 3, 1978, at 1, col. 3. Gov. Dolph Briscoe stated, "I shall ask the Legislature to act on several items which can mean real tax benefits now and particularly in the future. . . . The single objective of this session will be to construct a tax reduction and limitation program consistent with the long-range best interests of Texas." *Id.*

8. H.J. OF TEX., 65th Leg., 2nd C.S. 3 (1978). In his address, Dolph Briscoe stated, "You have been called to participate in one of the most important special sessions in our history. While tax reductions of various kinds have occurred in the past, never before has a legislature been asked to accomplish a tax relief program of the magnitude to be placed before you." *Id.* It should be noted here that, because Texas law forbids deficit spending, pegging tax rates to income growth has the same effect as cutting spending. Texas' prohibition on borrowing is found in TEX. CONST. art. III, § 49a which states, "no bill containing an appropriation shall be considered as passed or be sent to the governor for consideration until and unless the comptroller of public accounts endorses his certificate thereon showing that the amount appropriated is within the amount estimated to be available in the affected funds." There are, however, four ways in which this debt is accumulated which would be otherwise prohibited under art. III, §§ 49 and 49a: (1) constitutional amendment, (2) issuance of revenue bonds, (3) issuance on non-self-supporting revenue bonds, and (4) lease-purchase agreements. Glen H. Cope & Thomas M. Keel, *Texas Constitutional Spending Limits: Reality versus Perception*, 36 PUB. AFF. COMMENT 1, 3 (1990).

9. *Id.* at 7.

10. *Id.* at 2. The governor's proposals included: repeal general use tax on residential utilities, increase exemptions for inheritances, make a legislative super-majority necessary to raise taxes, place limits on tax growth, shift the agricultural taxes, increase tax exemptions for houses, give the voters the ability to vote for or against a tax increase, and consider any new proposals from the governor.

The governor's plan was not the only one. By July 17, the constitutional amendments committee had forty-three different versions of the five constitutional amendments that the governor had asked the legislature to deal with. Since Texas special sessions last only thirty days, bills moved rapidly.

The constitutional amendments committee reported out a bill that included the fiscal growth limit. Many legislators found this version unacceptable for reasons unrelated to the spending limit. Many more bills were proposed, adjusted, and finally defeated. On July 28, a proposal

compromise, the legislators ultimately proposed an amendment to the Texas Constitution.<sup>11</sup>

The amendment was offered to the people as a measure to limit government spending increases to the growth in the state economy.<sup>12</sup> On the eve of the vote, Governor Briscoe called the amendment "a policy of fiscal restraint."<sup>13</sup> Voters supported it overwhelmingly. In fact, the measure garnered 84.1% of the vote—the highest approval percentage of any tax limitation law in America.<sup>14</sup> The law was adopted as follows:

§ 22. Appropriations from state tax revenues; rate of growth

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was put forth by Representatives Donaldson, Ceverha, Henderson, Wright, Hartung, Schieffer, and Robbins. This bill included a limit on state spending as a function of growth in total personal income, a way to circumvent this limit in emergencies, and a statement that the system must be "pay-as-you-go." The vote on the house joint resolution failed to reach the two-thirds majority needed when one legislator did not remain to confirm her vote of "aye." With her vote stricken, the resolution failed ninety-nine to forty-two.

The following Monday, August 31, it became clear that the one hundred votes needed to carry the resolution would not materialize. Because the vast majority of lawmakers liked H.R.J. 1, they were able to control the parliamentary procedure and leave H.J.R. 1 up for consideration. On August 2, the chairman of the constitutional amendments committee, Representative Tim Von Dohlen (D-Goliad) changed the language of the bill to address the issues of state spending and taxation. As before, the limit in increased state expenditure depended on the estimated rate of growth in the level of total personal income. This version was adopted by a vote of 104 to 29, with 17 abstaining.

Given the problem of forcing house members to stay in the chamber, Speaker Clayton went to work on August 2, ready to have tardy representatives arrested and brought to the special session. This was not necessary as the legislators stayed long enough to pass the final version of the house bill again, this time by a margin of 113 for, 21 against, and 16 abstaining.

The next step on the road to final passage lay in the senate. The Texas Senate and Lt. Governor Bill Hobby had expressed dismay at the house version. The senate version was passed on August 3, and sent to the house for reconciliation. The senate version was so unpopular in the house that no representative could be found to make a concurrent motion. The bill then went to conference committee.

On August 7, one day before the special session ended, the conference committee reported out a version of H.J.R. 1 which included the present language of art. VIII, § 22 which limits state spending. On August 8, the senate passed, and with little time left before the official end of the session, the house passed the law 107-33 with 10 abstentions. James Peden compiled this chronology from H.J. of Tex., 65th Leg., 2nd C.S. 3 (1978), *The San Antonio Express-News*, and *The Houston Post* for the dates of July 8 through Aug. 9, 1978, and an interview with The Honorable Tim Von Dohlen, June 12, 1991.

11. TEX. CONST. art. VIII, § 22.

12. ALVIN RABUSHKA & PAULINE RYAN, *THE TAX REVOLT* 188 (1982).

13. Mark Dooley, *Legislators Doubt Results of Session Tax Measures*, DAILY TEXAN, Aug. 10, 1978, at 1, col. 2.

14. PAUL RICHTER, *CALIFORNIA AND THE AMERICAN TAX REVOLT: PROPOSITION 13 FIVE YEARS LATER* 180 (Terry Schwadron ed. 1984).

Sec. 22 (a) In no biennium shall the rate of growth of appropriations from state tax revenues not dedicated by this constitution exceed the estimated rate of growth of the state's economy. The legislature shall provide by general law procedures to implement this subsection.

(b) If the legislature by adoption of a resolution approved by a record vote of a majority of the members of each house finds that an emergency exists and identifies the nature of the emergency, the legislature may provide for appropriations in excess of the amount authorized by Subsection (a) of this section. The excess authorized under this subsection may not exceed the amount specified in the resolution.

(c) In no case shall appropriations exceed revenues as provided in Article III, Section 49a, of this constitution. Nothing in this section shall be construed to alter, amend, or repeal Article III, Section 49a, of this constitution.<sup>15</sup>

The constitutional amendment was meant to restrict state government expenditures to the growth in the economy of the state.<sup>16</sup> This limitation applied to "about one-half of appropriated state revenues. . . . The other half of state revenues are constitutionally dedicated."<sup>17</sup> However, the limit was not unduly constricting or inflexible. For example, subsection (b) contained an emergency spending clause. In addition, the legislature's statutory implementation of the provision provided further flexibility. The legislature restricted the increase in state expenditures by using the rate of growth of total per capita personal income as the measure. The limitation was intended to keep government spending in line with the growth of the population and income inflation.<sup>18</sup> Whether or not one likes the constitutional amendment, its purpose is clear—to limit spending. The voters of Texas voted by a five-to-one margin to pass an amendment having been told that the constraints would provide a regulation of government spending.<sup>19</sup>

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15. TEX. CONST. art. VIII, § 22.

16. Glen H. Cope & Thomas M. Keel, *Texas Constitutional Spending Limits: Reality versus Perception*, 35 PUB. AFF. COMMENT 1, 6 (1990).

17. *Id.* at 7. Dedicated funds are those funds whose collection is limited to a particular appropriation.

18. Glen H. Cope & W. Norton Grubb, *Restraint in a Land of Plenty: Revenue and Expenditure Limitations in Texas*, PUB. BUDGETING & FIN., Winter 1982, at 143, 145.

19. *Id.* at 155.

### B. *Implementation of Article VIII, Section 22*

The amendment took effect on January 1, 1979. The Texas Legislature met later that year to design a system to implement the spending limitation. The task of creating and enforcing the spending limits was given to the Legislative Budget Board (LBB). The Texas Government Code spells out the functions of the LBB. One of these functions is estimating the rate of growth of the state economy from one biennium to the next. The law provides a mechanism for estimating state personal incomes and names the U.S. Department of Commerce as the source for the necessary base statistics. The law requires public hearings and publication of these estimates. The LBB must also decide how many revenues are not dedicated by the constitution. In addition, the section assigns the LBB the task of proposing the amount of revenues that can be spent under constitutional limitation. If an adoption committee composed of the governor, lieutenant governor, speaker, and comptroller, takes no action to counter the proposal, it becomes law.<sup>20</sup>

In the same statute, the adoption committee's duties were also codified. The committee meets to adopt a growth limit. If they do not meet, however, the items of information submitted by the board are treated as adopted. Once the adoption committee approves, either by action or inaction, a limit on non-dedicated tax revenues, the legislature cannot exceed this limit in its budget recommendations unless directly authorized to do so by a majority vote of both houses.<sup>21</sup>

The spending limits are incorporated into the budget process at various levels. In order to understand the procedures that the law introduced into the authorization procedure, the actual structure of budgeting should be reviewed. The budgeting lasts almost a full year and begins in January of the year preceding budget passage.

In February and March of the year preceding the biennial regular session, state agencies receive instructions for making budget requests.<sup>22</sup> In June, the state agencies make their first budget requests

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20. TEX. GOV'T CODE ANN. § 316.002 (Vernon 1988). Legislative Budget Bd., 15 Tex. Reg. 6876 (1990) (codified at TEX. GOV'T CODE ANN. § 316), says "To implement this provision of the Texas Constitution, the 66th Legislature enacted Article 9, Chapter 302, Laws 1979 (Texas Government Code, Sec. 316) which placed with the Legislative Budget Board the responsibility for initial approval of a limitation on the growth of certain state appropriations."

21. Glen H. Cope & Thomas M. Keel, *Texas Constitutional Spending Limits: Reality versus Perception*, 35 PUB. AFF. COMMENT 1, 7 (1990).

22. TEX. GOV'T CODE ANN. § 322.007 (Vernon 1988).

to the LBB and to the Governor's Office of Budget and Planning (GOBP).<sup>23</sup> At this point, the LBB begins to analyze these requests and to make estimates of growth.<sup>24</sup> Meanwhile, the GOBP undertakes a separate analysis of the requests and begins to compile a budget.<sup>25</sup> From June until September, the LBB and the GOBP hold public hearings on the agencies' budget requests.<sup>26</sup> The LBB convenes in August and sets guidelines for a line-by-line examination of the budget. In October, the LBB and GOBP receive revised budget requests.<sup>27</sup> The LBB's review lasts from September to December. During this time, the LBB must publish information on the sources and methodology for its growth estimates and hold a public hearing on its methodology.<sup>28</sup> During this review period, the LBB must establish the official growth rate and the limits on appropriations and spending of non-dedicated tax revenues.<sup>29</sup> The adoption committee may then meet to adopt the LBB spending limits.<sup>30</sup> The limits legally bind any expenditures by the legislature. The adoption committee has ten days in which to adopt the LBB's recommendations.<sup>31</sup> If the committee fails to meet or takes no action, the statute provides that the LBB growth estimates are the legal limits on spending for the next biennium.<sup>32</sup> The budget recommendations and growth projections must then be sent to the legislature in January.<sup>33</sup> The limits bind the legislature.<sup>34</sup>

The main mechanism for enforcing the spending limit comes into play once an appropriations bill reaches the legislature. Before the

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23. *Id.*; TEX. REV. CIV. STAT. ANN. art. 689a-2 (Vernon 1988).

24. TEX. GOV'T CODE ANN. § 316.002 (Vernon 1988).

25. TEX. REV. CIV. STAT. ANN. art. 689a-5 (Vernon 1988).

26. *See* TEX. GOV'T CODE ANN. § 322.010(c) (Vernon 1988). The Governor participates in these hearings pursuant to TEX. REV. CIV. STAT. ANN. art. 689a-4a (Vernon 1988).

27. TEX. GOV'T CODE ANN. § 322.007 (Vernon 1988).

28. TEX. GOV'T CODE ANN. § 316.002-.003 (Vernon 1988).

29. *Id.* § 316.002.

30. *Id.* § 316.005.

31. *Id.*

32. TEX. GOV'T CODE ANN. § 316.005(c) (Vernon 1988). Comptroller Sharp and others have taken the position that the LBB must officially recognize the growth projections for them to become law. *See* J. SHARP, TEXAS PERFORMANCE REVIEW: BREAKING THE MOLD 79 (1991) (noting that the LBB has not recognized an official Texas economic growth rate).

33. TEX. GOV'T CODE ANN. § 316.007 (Vernon 1988). *See* W. CLEMENTS, HANDBOOK FOR MEMBERS OF TEXAS STATE BOARDS AND COMMISSIONS vii-4 to -5 (1981) (on file with St. Mary's Law Journal).

34. TEX. GOV'T CODE ANN. § 316.008(a) (Vernon 1988).



legislature passes any bill, it must be read three times to each house, and each reading must take place on a different day.<sup>35</sup> The house and the senate have identical rules regarding bills that, by themselves or in concert with other bills, exceed the constitutionally permissible limit.<sup>36</sup> According to these rules, no bill that exceeds the spending limit may be presented for a third reading or for final passage.<sup>37</sup> This rule includes bills brought forward as committee reports or as senate amendments.<sup>38</sup>

After the legislature passes a general appropriations bill, the comptroller must review it. The comptroller must certify that "the amount appropriated is within the amount estimated to be available in the affected funds."<sup>39</sup> Because the spending limits control the availability of funds, the comptroller's certification serves as a final enforcement of these limits. If the comptroller finds that the appropriation exceeds the budget, the bill returns to its house of origin.<sup>40</sup> If the comptroller approves the bill, it passes to the governor who may sign it or veto any part of it.<sup>41</sup>

The spending limits procedures were first followed in the 1982-1983 biennium.<sup>42</sup> The LBB adopted an estimated growth rate for the next biennium of thirty-three percent. This growth rate limited spending for the next biennium to \$15.220 billion.<sup>43</sup> In 1982 Governor Clements made it clear that he intended to live up to the constitutional mandate, and as a result, the budgetary procedures worked. In that year the threat of a veto from Governor Clements forced the legislature to adopt a budget below the limit and kept spending within the legal limit in the June special session.<sup>44</sup> Because the governor steadfastly refused to allow the legislature to break the constitutional ban

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35. TEX. CONST. art. III, § 32. This rule may be suspended by a four-fifths majority, roll-call vote. Such a vote determines that there exists an imperative public necessity for setting aside the rule. *Id.*

36. Tex. H.R. Rule 9, § 14(f); Tex. S. Rule 7.22.

37. Tex. H.R. Rule 9, § 14(f); Tex. S. Rule 7.22.

38. Tex. H.R. Rule 9, § 14(f); Tex. S. Rule 7.22.

39. TEX. CONST. art. III, § 49a; Tex. H. R. Rule 9, § 14.

40. TEX. CONST. art. III, § 49a.

41. *Id.* art. IV, § 14.

42. Glen H. Cope & W. Norton Grubb, *Restraint in a Land of Plenty: Revenue and Expenditure Limitations in Texas*, PUB. BUDGETING & FIN., Winter 1982, at 145. Because of the biennial budgeting, it was adopted too late to be used for the 1980-1981 biennium.

43. *Id.* at 146.

44. *Id.*

on illegal spending, the appropriations made in the special session were held below those urged without the limit.<sup>45</sup>

Unfortunately, the taxpayers of Texas did not see the savings of 1982 repeated in subsequent years. The amendment passed by an eighty-four percent majority has failed in its purpose of limiting the government growth and spending.<sup>46</sup>

The noncompliance of the LBB is clearly in contravention of the people's will and the laws established to set spending limits.

While the statute dictates a clear procedure that must be followed every two years prior to the adoption of [a] new budget, actual practice has proven to be quite different. The last time the Legislature Budget Board approved the three items it is required to consider by law was over five years ago. The special committee . . . has only approved the LBB recommendations once in the 12 years since the amendment has been in effect. . . . [T]he LBB did not carry out its statutory duty to approve the staff recommendations in 1986, 1988 and 1990.<sup>47</sup>

To quantify the damage done by ignoring the constitution, consider that the State of Texas plans to spend \$24.5 billion in non-dedicated funds in the biennium fiscal year 1990-1991 (which ended on August 31, 1991). That figure is \$1 to \$1.5 billion over the LBB's highest estimate of personal income growth.<sup>48</sup> In November 1990, the LBB set its highest estimate of the rate of economic growth for the next biennium fiscal year 1992-1993 (from September 1, 1991 to August 31, 1992) at 15.4%. However, all the budgets under consideration seem to exceed this amount significantly in proposed spending.<sup>49</sup>

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45. Glen H. Cope & Thomas M. Keel, *Texas Constitutional Spending Limits: Reality versus Perception*, 36 PUB. AFF. COMMENT 1, 7 (1990).

46. *Id.* at 7.

47. *Constitutional Limitations on the Budget*, RESEARCH REPORT 6 (Texas Conservative Coalition, Austin, Tex.), Mar. 12, 1991, at 4.

48. Cyndi Taylor Krier, *Entitled Compliance with Texas Constitution Urged* 4 (June 1991) (on file with St. Mary's Law Journal).

49. *Id.*

## II. ENFORCEMENT

## A. Government Authority

## 1. Duty

As the state's chief legal officer,<sup>50</sup> the Attorney General of the State of Texas has "the duty . . . to institute necessary proceedings in the courts to enforce or protect any right of the public that is violated. . . . It is an inherent function of his office to protect the public through the courts. . . . Who else could institute or direct a suit for the public?"<sup>51</sup> Texas law provides a potent array of statutes to enforce violations of its budgetary laws.<sup>52</sup> The code provides both criminal and civil penalties for infractions. In the case of a criminal violation, the attorney general may hold jurisdiction concurrently with county attorneys.<sup>53</sup> If the state sues the budgetary authorities in the Supreme Court of Texas, the attorney general is exclusively authorized to argue such actions.<sup>54</sup>

## 2. Violations

Texas' budgetary laws may be enforced against governmental officers in three ways: criminal action, civil action, and docking of pay.

50. See generally TEX. CONST. art. IV, § 22; TEX. GOV'T CODE ANN. § 402.021 (Vernon 1990).

51. *Queen Ins. Co. v. State*, 22 S.W. 1048, 1052 (Tex. Civ. App.—Austin 1892), *rev'd on other grounds*, 24 S.W. 397 (Tex. 1893); see, e.g., *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943) (noting "The Attorney General is the chief law officer of the State, and it is incumbent upon him to institute in the proper courts proceedings to enforce or protect any right of the public that is violated."); *Brady v. Brooks*, 89 S.W. 1052, 1054-56 (Tex. 1905) (discussion of the attorney general's constitutional obligation to "perform such other duties as required by law").

52. In fact, the Texas Court of Appeals held that the safe-keeping of public funds was central to offices of county attorney and attorney general. *State v. Bratton*, 192 S.W. 814, 816 (Tex. Civ. App.—Austin 1917, writ ref'd). The court in *Bratton* held that

[if] any officer entrusted with the safe-keeping of any public funds is in any manner neglecting or abusing his trust, or failing to discharge his duties under the law, it shall be the duty of the county attorney to institute such proceedings as are necessary to preserve and protect the public interests.

*Id.*

53. See generally TEX. CONST. art. IV, § 22; *Maud v. Terrell*, 200 S.W. 375, 377-78 (Tex. 1918) (discusses concurrent jurisdiction in general terms); *State v. Waller*, 211 S.W. 322, 323 (Tex. Civ. App.—San Antonio 1919, no writ) (concurrent jurisdiction between attorney general and county attorney).

54. See generally TEX. CONST. art. IV, § 22; *Brady v. Brooks*, 89 S.W. 1052, 1054 (Tex. 1905).

Some statutes apply only to certain budgetary officers; others apply to any officer who violates the authorization and spending procedures.

a. Criminal Actions

Two code sections provide criminal sanctions against budgetary authorities who knowingly or intentionally violate their duties. The Texas Government Code provides that "A person who knowingly or willfully violates [its provisions] commits an offense.<sup>55</sup> An offense . . . is punishable by a fine of not less than \$50 nor more than \$500, by confinement in the county jail for not less than 30 days nor more than six months, or by a fine and confinement."<sup>56</sup> Similarly, article 689 a-21,<sup>57</sup> governing budgetary procedure, states that

Any officer, employee or official of State Government . . . who shall refuse to comply with the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than One Hundred Dollars nor more than One Thousand Dollars, or be imprisoned in the county jail for not less than one month, or more than twelve months, or shall be punished by both such fine and imprisonment.<sup>58</sup>

Under these statutory provisions, the comptroller, members of the LBB, and others could all be neglecting their duties concerning the current budget and the next one and, therefore, subject to discipline. They are not, however, the only officials involved. According to the Texas Government Code, the treasurer is authorized to countersign only warrants "authorized by law."<sup>59</sup> To be considered authorized, expenditures must be properly appropriated by the legislature.<sup>60</sup> The

55. TEX. GOV'T CODE ANN. § 404.063 (Vernon 1990). The law actually refers to chapter 404 of the Texas Government Code which regulates the conduct of the treasurer's office. Its subchapters include the State Depositories and Investment of State Funds, The General Duties of the Treasurer and the State Funds Reform Act. *Id.*

56. *Id.*

57. This section, "Neglect of Duty Concerning Budget," does not explicitly state to what act it is referring. It is a fair interpretation, however, to state that it is referring to the Uniform Budget Act of which it is a part. *Id.*

58. TEX. REV. CIV. STAT. ANN. art. 689a-21 (Vernon Supp. 1991).

59. See generally TEX. GOV'T CODE ANN. § 404.046 (Vernon 1988).

60. See *Calvert v. Hull*, 475 S.W.2d 907, 908 (Tex. 1972) (comptroller would have been enjoined from spending appropriated money if legislative prerequisites had not been complied with); *Anderson v. Houts*, 240 S.W. 647, 648 (Tex. Civ. App.—San Antonio 1922, no writ) (expenditures unauthorized by constitution are illegal); *Terrell v. Middleton*, 187 S.W. 367, 268 (Tex. Civ. App.—San Antonio 1916, writ denied) (appropriations made in contravention of Tex. Const. art. III, § 51 are illegal); cf. *Commissioners Ct. of Caldwell County v. Criminal*

procedure to increase non-dedicated spending appears in article VIII, section 22 of the Texas Constitution and section 316.001 of the Texas Government Code. If the legislature does not follow constitutional procedure, any funds expended may be considered unauthorized.

#### b. Civil Action

According to Texas statutes, a civil cause-of-action is to be directed against the comptroller. The comptroller "must perform such duties as are or may be required by law" according to article IV, section 23 of the Texas Constitution. He or she may disburse state funds only as "required by law"<sup>61</sup> and must first draw these monies from the general revenue fund.<sup>62</sup> The comptroller may withdraw only "authorized" funds.<sup>63</sup> As previously noted, it seems likely that fiscal year 1991 withdrawals and spending either are already or will soon become unauthorized as they exceed the highest 1988 LBB estimate.

The attorney general has the authority to sue the comptroller if he or she "intentionally neglects or refuses to perform a duty."<sup>64</sup> The punishment prescribed for such an offense is "not less than \$100 or more than \$1000 per day."<sup>65</sup> If the comptroller is aware that he or she is spending unauthorized funds, he or she may be liable under this section.

#### c. Deductions from Pay; Removal from Office

The Texas Constitution directs the legislature to "provide for deductions from the salaries of public officers who may neglect the performance of any duty that may be assigned to them by law."<sup>66</sup> Unless the legislature has made specific provisions, the courts cannot dock an

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Dist. Attorney, 690 S.W.2d 932, 934 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (listing important civic objectives of budget procedures). See generally J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1167-73 (1989) (discussing meaning of phrase "appropriations made by law"). On the county level it is settled that ignoring statutory procedures invalidates the budget. See, e.g., *Guerra v. McClellan*, 250 S.W.2d 241, 245 (Tex. Civ. App.—San Antonio 1952), *aff'd*, 258 S.W.2d 72 (Tex. 1953) (to ignore budgetary procedure is "to declare the budget law a dead letter upon our statute books."); *Bexar County v. Hatley*, 150 S.W.2d 980, 988 (Tex. 1941) (terms of budget law are complied with strictly).

61. TEX. GOV'T CODE ANN. § 403.011(17) (Vernon 1990).

62. *Id.* § 403.093.

63. *Id.*

64. *Id.* § 403.002(b)-(c).

65. TEX. GOV'T CODE ANN. § 403.002(b) (Vernon 1990).

66. TEX. CONST. art. XVI, § 10.

official's pay.<sup>67</sup> In the case of budgetary matters, however, the legislature provided that "All public officers of the State . . . who are required by law to publish legal notices . . . and who shall fail, refuse, or neglect to make such publications shall be guilty of non-feasance of office and subject to forfeiture of salary for the month in which such failure occurs."<sup>68</sup> The legislature went beyond the minimum dictates of the constitution and further provided that "Such officers shall be subject to removal from office upon willful continuance of such neglect of duty."<sup>69</sup>

Members of the LBB may be in violation of this provision of the code. They are required by law to submit the approved LBB statistics to the adoption committee.<sup>70</sup> They are also to incorporate the limitations on spending in budget recommendations.<sup>71</sup> A court might find that these documents fall within the definition of "legal notices" as provided in the enforcement statute since they are legally required notices to legislators and the governor concerning predetermined limits on appropriations upon which the governor and legislators must act. If so, a court could order docking the pay of the responsible parties; and if they continued to violate their legal duty, it could remove them from office.

## B. *Taxpayer Remedies*

### 1. Standing

Unlike the federal government,<sup>72</sup> but like almost all other states,<sup>73</sup>

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67. *Miller v. James*, 366 S.W.2d 118, 121 (Tex. Civ. App.—Austin 1963, no writ).

68. TEX. REV. CIV. STAT. ANN. art. 6252-2 (Vernon 1970).

69. *Id.*

70. TEX. GOV'T CODE ANN. § 316.005(a) (Vernon 1988).

71. *Id.* § 316.007.

72. Under federal law, individual taxpayers cannot sue for an injunction against alleged improper appropriations and expenditures of federal tax revenues. Federal courts maintain that lawsuits were designed not to test the legality of government action but rather to compensate for damages to individuals. To bring a federal suit, a taxpayer must demonstrate a "special injury," proof that he or she has personally suffered harm as a result of a defendant's actions. People who bring suit to stop allegedly illegal federal spending fail this test. In the eyes of federal courts, an individual's tax dollars constitute too small a percentage of total federal expenditures to be considered consequential. Hence, it is virtually impossible for any one person to show sufficient actual economic injury resulting from improper federal expenditure. See *Frothingham v. Mellon*, 262 U.S. 447, 453 (1923); *Taub v. Commonwealth of Ky.*, 842 F.2d 912, 917 (6th Cir. 1988). The *Taub* court noted that a federal taxpayer's interest in treasury money is "shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuat-

Texas courts recognize an individual's right to bring suit in cases of illegal expenditures by state officials. This right was already well recognized in 1922 when Judge Cobb wrote:

It has been too many times decided that a citizen and a taxpayer may institute and maintain an action to restrain an officer, state, or municipal from performing illegal, unauthorized, and unconstitutional acts, to require further discussion. A citizen may, by injunction, sue to prevent the illegal expenditures of money or taxes collected, no matter how small.<sup>74</sup>

Texas values the "watchdog effect" of such lawsuits as a check against misappropriation of public funds. These cases make public officials directly accountable to those whose tax dollars provide public funds. In a 1946 ruling, Judge Hickman wrote, "The vigilance of a citizen who takes upon himself that burden in the interest of good government is to be commended."<sup>75</sup>

Because they are the guardians of the public trust, public officials may have enhanced standing in illegal appropriation cases. Writing about this issue in 1917, Judge Moursund stated, "it is, of course well established that a public officer in the absence of a prohibition, has the implied authority to institute suits necessary to the proper and faithful performance of his duties."<sup>76</sup> In *Coleman v. Miller*,<sup>77</sup> the U.S.

ing and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Taub*, 842 F.2d at 917. See generally Susan L. Parsons, Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMPLE L.Q. 951, 957-62 (1986) (noting that *Flast v. Cohen*, 392 U.S. 83 (1968), which made an exception to the *Frothingham* doctrine in the case of violation of the establishment clause, has been narrowly interpreted); Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 915-19 (1960).

73. Susan L. Parsons, Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMPLE L.Q. 951, 962-63 (1968) (every state except New Mexico allows taxpayer suits through either common law or statute).

74. *Anderson v. Houts*, 240 S.W. 647, 649 (Tex. Civ. App.—San Antonio 1922, no writ) (taxpayer suit against road district).

75. *Wantland v. Anderson*, 203 S.W.2d 787, 788 (Tex. Civ. App.—San Antonio 1947, writ ref'd n.r.e.). See generally Susan L. Parsons, Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMPLE L.Q. 951, 971 (1968); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 904-06, 911 (1960). It has been noted that

the availability of such litigation is insurance against the instances in which responsible prosecutors, usually political officers, are themselves allied with the action challenged. . . . [T]axpayers' suits often offer the only avenue to legal challenge, particularly when, as often happens, those sufficiently affected to have standing are the beneficiaries of the illegality or corruption.

*Id.* at 911.

76. *Uhr v. Brown*, 191 S.W. 379, 385 (Tex. Civ. App.—San Antonio 1916, no writ).

Supreme Court recognized such a role for state legislators in fulfilling their obligations to state government.<sup>78</sup>

The practical use of such lawsuits is illustrated by the infamous "chicken salad" case of 1914.<sup>79</sup> In this suit, a taxpayer sought to restrain the Texas Comptroller of Public Accounts from authorizing payments on expenditures made by Governor O.B. Colquitt.<sup>80</sup> These expenditures included an account at the Driskill Hotel in Austin for fifteen gallons of chicken salad, five gallons of olives, punch, mints, other food, and waiter hire. Other accounts listed engraved invitations and embossed cards and envelopes, all purchased for "private use."<sup>81</sup> These expenditures were deemed unconstitutional under an article limiting compensation of the governor to a specific dollar amount.<sup>82</sup> In addition, the constitution specifically prohibited the legislature from appropriating additional funds for "private individual purposes," including those of the governor.<sup>83</sup> The Texas Supreme Court held:

Citizens are allowed to prevent, by injunction, the collection of illegal taxes, and the reasons for allowing them this power are no stronger than to allow restraint of an officer who seeks to expend the taxes when collected for an illegal or unconstitutional purpose. The diversion of the taxes after collection would be equally as injurious to the taxpayer as the collection of illegal taxes.<sup>84</sup>

77. 307 U.S. 433 (1939).

78. *Id.* at 438. See generally Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); Arthur H. Abel, Note, *The Burger Court's Unified Approach to Standing and its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187 (1985); Ernest A. Benck, Jr., Comment, *Standing for State and Federal Legislators*, 23 SANTA CLARA L. REV. 811 (1983); David G. Mangum, Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371 (1982); Paul Robert Tapia, John P. James, Richard O. Levine, Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352 (1974); Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977); Comment, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366 (1974); Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665 (1974).

79. *Terrell v. Middleton*, 187 S.W. 367, 368 (Tex. Civ. App.—San Antonio 1916, writ ref'd n.r.e.).

80. *Id.*

81. *Id.*

82. *Id.* at 369.

83. *Terrell*, 187 S.W. at 369.

84. *Id.* The sovereign immunity doctrine did not apply because "When a state officer acts without legal authority he is not acting for or in the interest of the state, and a suit against him is not a suit against the state." *Id.*



Since the ruling against Governor Colquitt's "chicken salad," Texas courts have upheld the individual's right to bring suit for an injunction against illegal spending of tax dollars.<sup>85</sup> These suits must meet certain guidelines. First, the lawsuits may challenge only clearly illegal action; unwise use of discretion is not enough.<sup>86</sup> In addition, the courts do not allow taxpayers to sue to recover funds already expended.<sup>87</sup> Such lawsuits can seek only to enjoin funds not yet spent.<sup>88</sup>

## 2. Taxpayer Causes of Action

### a. Injunctions to Stop Illegal Spending

A taxpayer can seek an end to illegal spending by filing suit for injunctive relief.<sup>89</sup> The court will take action if it determines that the applicant is entitled to relief, and relief requires the restraint of some governmental action. The court will then enjoin the appropriate state official under section 65.011(1) of the Texas Civil Code.<sup>90</sup>

In order to increase spending of non-dedicated funds, certain procedural hurdles must be surmounted. These requirements are outlined in part in Part I(B) of this article. Unless they follow the prescribed procedure, officials have no lawful authority to raise non-dedicated

85. See, e.g., *Calvert v. Hull*, 475 S.W.2d 907, 908 (Tex. 1972) (suit against state comptroller); *County Commissioners Court of Dallas County v. Williams*, 638 S.W.2d 218, 222 (Tex. App.—Eastland 1982, writ ref'd n.r.e.); *Parker v. City of San Antonio*, 609 S.W.2d 877, 878 (Tex. Civ. App.—San Antonio 1980, no writ) (city manager and director of finance); *Kordus v. City of Garland*, 561 S.W.2d 260, 262 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (taxpayer suit against city); *Garcia v. State*, 290 S.W.2d 555, 559 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.); *Anderson v. Houts*, 240 S.W. 647, 649 (Tex. Civ. App.—San Antonio 1922, no writ) (taxpayers can enjoin county fund payments in contravention of budget law). For a discussion of federal law on injunction to prevent illegal expenditure, not necessarily by private taxpayers, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1386-87 (1988) (courts can authoritatively decide if operating branch of government complies with specified limitations).

86. See, e.g., *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570, 575 (Tex. 1971); *Weber v. City of Sachse*, 591 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1979, writ dismissed).

87. See, e.g., *Kordus*, 561 S.W.2d at 262 (In *Kordus*, the court noted that "the authorities make a distinction between suits by a taxpayer to recover funds already illegally expended and suits to restrain the illegal expenditure of public funds." *Id.*; see also *Bryce v. Corpus Christi Area Convention and Tourist Bureau*, 569 S.W.2d 496, 500 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

88. *Bryce*, 569 S.W.2d at 500; *Kordus*, 561 S.W.2d at 262.

89. An injunction is a legal order from court prohibiting a person, or a group of people, from carrying out a given action.

90. See, e.g., *Walker v. Walter*, 241 S.W. 524, 527 (Tex. Civ. App.—Tyler 1922, no writ); TEX. CIV. PRAC. & REM. CODE ANN. § 65.001 (Vernon 1986).

spending above that of the previous biennium. Texas courts have enjoined exactly this type of illegal expenditure ever since the days of Governor Colquitt.

Furthermore, because Texas government is already likely spending above the rate of growth of the state's economy, the additional spending clearly contravenes article VIII, section 22(a) of the Texas Constitution and section 316.001 of the Texas Government Code. All expenditures over this limit could therefore be enjoined.

To enjoin state spending, a court could issue orders against Texas' chief budgetary officers. These officers include the comptroller, the chief of the claims division of public accounts, and the treasurer. The assent of all three officers is necessary to continue state expenditure.<sup>91</sup> Hence, enjoining one or all could halt state spending.

#### b. Writ of Mandamus

Aggrieved taxpayers and public officials could also bring a mandamus action<sup>92</sup> against those budget officers who refuse to perform their legal duties. The Texas Constitution empowers the supreme court to issue a writ of mandamus against any state official, with the exception of the governor.<sup>93</sup> The constitution also requires the legislature to define the supreme court's authority to issue such writs. Implementing this constitutional mandate, the legislature gave the supreme court exclusive jurisdiction to issues writs against "officers of the executive departments."<sup>94</sup>

These "officers of executive departments" include the lieutenant governor, the comptroller of public accounts, and the treasurer.<sup>95</sup> Hence, any mandamus actions against these three officers can be filed

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91. There are four stages in the issuance of a state warrant. First, the comptroller must draw money from the general fund pursuant to the Texas Government Code. TEX. GOV'T CODE ANN. § 403.093 (Vernon 1988). Second, the chief of the claims division prepares the pay warrant. *Id.* § 403.004. Third, the comptroller issues the state warrant. *Id.* § 403.011(17). Finally, the treasurer must countersign all warrants. *Id.* § 404.046. An injunction of any of these actions would put a stop to all state expenditures.

92. 38 TEX. JUR. 3d *Mandamus* § 114 (1985). A "writ of mandamus is an order issued by a court of competent jurisdiction, requiring some inferior court, official, corporation or board to perform a duty compelled by law." *Id.*

93. TEX. CONST. art. V, § 3.

94. TEX. GOV'T CODE ANN. § 22.002(c) (Vernon 1988).

95. TEX. CONST. art. IV, § 1; *see, e.g.*, *Hargett v. McDaniel*, 717 S.W.2d 688, 690 (Tex. App.—Texarkana 1986, no writ); *Herring v. Houston Nat. Exch. Bank*, 241 S.W. 534, 540 (Tex. Civ. App.—Galveston 1922, no writ).

only in the supreme court.<sup>96</sup> Since the LBB includes the lieutenant governor, it similarly falls in the exclusive jurisdiction of the supreme court under the principle of "the writ must go against all or none." This principle applies whenever a court seeks to issue a writ against a board. The entire board enjoys the same legal status as its most protected member.<sup>97</sup>

For the supreme court to grant a writ of mandamus, the complaining party must establish three things:<sup>98</sup> an official's legal duty to perform a nondiscretionary act, a demand for the official to perform this act, and refusal of the demand.<sup>99</sup> Here, the LBB has a legal duty to impose a binding limit on non-discretionary spending. Although the amount of the limit remains within the officials' sound discretion, the necessity of choosing a limit is a clear, legal, and nondiscretionary duty.<sup>100</sup> Before an applicant can begin a mandamus action, however, he or she must make a demand for action and see it refused.<sup>101</sup>

An individual seeking such a writ would first request the budgetary authorities to perform their legal duties; the comptroller to certify the budget, the treasurer to balance the state books, and the lieutenant governor and the LBB to meet and set an official growth limit. If any of these officials refused to perform his or her statutory duty, the supreme court would have exclusive jurisdiction over the resulting conflict. Because these budgetary authorities have a clear duty to act under the Texas Constitution, state statutes and, in some cases, legis-

96. See, e.g., *American Nat'l Bank of Austin v. Sheppard*, 175 S.W.2d 626, 627-29 (Tex. Civ. App.—Austin 1943, writ ref'd w.o.m.) (discussion of exclusive jurisdiction issue).

97. See, e.g., *McFall v. State Bd. of Educ.*, 101 Tex. 572, 110 S.W. 739, 740 (1908) (when issuing writs of mandamus against board "writ must go against all or none"). In *McFall*, the court held a writ of mandamus could not be issued against the state board of corrections because the governor was a member of the panel. Since the court could not issue a writ against the governor and the governor was a member of the board, the court held that all were immune. *Id.* at 739-40; cf. *City of San Antonio v. Zogheib*, 129 Tex. 141, 101 S.W.2d 539, 543 (1937) (mandamus could issue against state officer or board); *Driggs v. City of Denison*, 420 S.W.2d 446, 448 (Tex. Civ. App.—Dallas 1967, no writ).

98. See, e.g., *Bantuelle v. Renfroe*, 620 S.W.2d 635, 639 (Tex. Civ. App.—Dallas 1981, no writ).

99. *Id.*

100. See, e.g., *Hawthorne v. La-Man Constructors, Inc.* 672 S.W.2d 255, 258-59 (Tex. App.—Beaumont 1984, no writ) (writ may be issued when public body that legally must take discretionary action takes no action at all); *Fenner v. Brockmoller*, 404 S.W.2d 369, 372 (Tex. Civ. App.—El Paso 1966, no writ).

101. If such an action would be futile, however, it may be dispensed with. *Harney v. Pickens*, 120 Tex. 268, 37 S.W.2d 717, 718 (1931); *City of Austin v. Cahill*, 99 Tex. 172, 88 S.W. 542, 551-52 (1905).

lative rules, the supreme court could order them to perform their duties. Violation of a supreme court order would amount to contempt.<sup>102</sup>

### III. CONCLUSION

The constitutional amendment limiting spending was passed in 1978 by a vote of over eighty-four percent. The act was sold to the voters as a real limit on the growth of government spending. In the biennium following the adoption of the act, it served to limit the growth of government spending. The act's initial effectiveness, however, has not been repeated. Today, the Texas Tax Reform Act is ignored but still vital and enforceable.

For the next biennium, as for the past three, the Texas Tax Reform Act is probably being violated at almost every level of the budget process. The Legislative Budget Board begins the string of potential violations by neglecting its duty to set formal growth limits. The legislature violates senate and house rules by allowing the unconstitutional budget to be presented for a final reading. The comptroller acts in contravention of law by certifying the budget absent the spending limits.

By issuing checks under an illegal budget, state officials may be violating other statutes. The comptroller may be liable for issuing funds unauthorized by law. The treasurer may become similarly culpable as she counter-signs the comptroller's warrants. Other budget officers who knowingly or intentionally violate these laws may also risk legal action.

Many of these illegal actions of state officials may be redressed by taxpayers. The attorney general is also required to address this problem. Indeed, he or another prosecuting attorney may have criminal sanctions available to ensure compliance. No one is above the law. The people of Texas spoke in 1978 and demanded restraint in government. That demand can still be enforced.

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102. See, e.g., *Wolters v. Wright*, 623 S.W.2d 301, 305 (Tex. 1981); *Ex parte Smith*, 110 Tex. 55, 214 S.W. 320 (1919); *White v. State*, 122 S.W.2d 714, 718 (Tex. Civ. App.—Fort Worth 1938, no writ).