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POSTSCRIPT: IN BUDGET DISPUTES BETWEEN ELECTED STATE OFFICIALS, WILL THE RULE OF LAW PREVAIL?

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I. INTRODUCTION

A group of conservative Texas legislators introduced a new form of litigation into the state earlier this month in an attempt to restrict the five billion dollar increase in the 1991-92 budget. In a petition for a writ of mandamus, they asked the Texas Supreme Court to order the Legislative Budget Board (LBB)—whose members include Lt. Gov. Bob Bullock, House Speaker Gib Lewis, and eight other Democratic legislators—to follow procedures enforcing the state's constitutional spending limitation.[1] The supreme court denied the legislators' leave

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1. *See* Petition for Writ of Mandamus, Heflin v. Legislative Budget Board, No. D-1392 (Tex. filed Aug. 8, 1991).

The plaintiffs in the action included Representative Talmadge Heflin, Senator Cyndi Krier, Representative Ted Kamel, Representative Warren Chisum, Representative Fred Hill, Representative Glenn Repp, Representative Harvey Hildebran, Representative Billy Clemons, Representative John Culberson, Representative Pat Haggerty, Representative A.R. Ovard, Representative Bob Turner, Representative Will Hartnett, Representative Kevin Brady, Representative John Carona, Representative Gerald V. Yost, Representative Alan Schoolcraft, Representative M.A. Taylor, Representative Jim Horn, Representative William N. Thomas, Loyce McCarter, and Jeannine Stroth. *Id.*

The LBB, in addition to Lt. Gov. Bullock, includes Speaker of the House of Representatives Gibson "Gib" Lewis, Representative Hugo Berlanga, Senator Chet Brooks, Senator Bob Glasgow, Representative James Hury, Senator John Montford, Senator Carl Parker, Representative Jim Rudd, and Representative Richard "Ric" Williamson. *Id.*

to file the mandamus petition;[2] nevertheless, the incident has considerable significance. For the first time in recent memory, Texas legislators have asked the judiciary to settle a dispute with a body of the state government. Although unsuccessful in this instance, the action may have inaugurated a new mechanism through which minority-party politicians in Texas will insist upon the rule of law.

II. THE CONSTITUTIONAL LIMITATION AND THE 1991-92 TEXAS BUDGET

The lawsuit brought by the house and senate members focused on article VIII, section 22 of the Texas Constitution, which limits increases in government spending.[3] This constitutional provision states that the rate of growth of appropriations from non-dedicated state revenues cannot exceed the rate of growth of the state's economy. To implement this limitation, the legislature created the LBB from the ranks of the house and senate.[4] Procedures codified in the government code require the LBB to estimate the economy's growth and to establish an amount of the state tax revenue that the legislature may appropriate each biennium.[5] The legislature cannot pass a budget that exceeds the amount established by the LBB.[6]

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2. *See* Heflin v. Legislative Budget Board, No. D-1392 (Tex. Aug. 12, 1991). The court's one sentence order does not state the reasons for its decision. *Id.*

3. The central portion of this constitutional provision states: "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." TEX. CONST. art. VIII, § 22(a). The legislature has codified this provision at TEX. GOV'T CODE ANN. § 316.001 (Vernon 1988).

4. The LBB, by statute, must include the lieutenant governor, the speaker of the house of representatives, the chairmen of the senate state affairs and finance committees, the chairmen of the house appropriations and ways and means committees, and two other senators and two other representatives. *See* TEX. GOV'T CODE ANN. § 322.001 (Vernon 1988).

5. The relevant statute provides:

> (a) Before it submits the budget as prescribed by section 322.008(b), the Legislative Budget Board shall establish:
>
> (1) the estimated rate of growth of the state's economy from the current biennium to the next biennium;
>
> (2) the level of appropriations for the current biennium for state tax revenues not dedicated by the constitution; and
>
> (3) the amount of state tax revenues not dedicated by the constitution that could be appropriated for the next biennium within the limit established by the estimated rate of growth of the state's economy.

Id. § 316.002.

6. *Id.* § 316.001.

The Government Code, however, does not specify what should happen if the LBB fails to establish the amount that the legislature may appropriate. Two possibilities appear to exist. Under the most restrictive interpretation, the legislature could not increase appropriations at all without an estimate of the rate of growth of the economy. This rule would insure that no violation of the constitutional restrictions on spending could occur. Under another interpretation, however, the legislature might increase appropriations by any amount that it chooses if the LBB does not establish a limit. This latter interpretation effectively would permit any increase in spending.

The LBB, confronted with adamant demands for spending, took advantage of this ambiguity in the Government Code during the budgeting process this year. Its members did not estimate the rate of the economy's growth or establish a growth limitation. All appearances indicate that they understood that their inaction would give them and their colleagues in the legislature a free hand in enacting a budget.

The LBB's apparent desire to thwart the constitutional spending limitation attracted the attention of many conservative legislators and policy analysts and prompted considerable dissent. On August 7, the Texas Public Policy Foundation released a study which detailed the history and subsequent non-enforcement of the limitation.[7] Later that week, nineteen representatives, one senator, and two taxpayers petitioned the Texas Supreme Court for a writ of mandamus ordering the LBB to estimate the economy's growth rate as required by the Government Code.[8] The Texas Supreme Court denied legislators' leave to file the petition three days later without holding a hearing.[9] The grounds for the denial remain unclear because, despite the prominence of the parties and the importance of the question, the supreme court did not issue an opinion.

On August 12, 1991, following this loss in the court, Senator Cyndi Krier attempted to prevent passage of the 1991-92 budget on the floor of the senate. Raising a point of order, she inquired whether the senate may consider a bill making appropriations when the LBB has not

7. MICHAEL WEISS, THE TEXAS TAX RELIEF ACT AFTER TWELVE YEARS: ADOPTION, IMPLEMENTATION & ENFORCEMENT (1991) (on file with St. Mary's Law Journal).

8. *See* Petition for Writ of Mandamus, Heflin v. Legislative Budget Board, No. D-1392 (Tex. filed Aug. 8, 1991).

9. Heflin v. Legislative Budget Bureau, No. D-1392 (Tex. Aug. 12, 1991).

established a budget limitation. Presiding over the senate, Lt. Gov. Bullock overruled the point of order. Citing the failed mandamus action, Bullock concluded: "[U]nder present circumstances, there is not an effective limit on appropriations which the senate may judge appropriation bills."[10] The legislature shortly afterward passed a record two-year, $59 billion budget, which Governor Ann Richards signed into law on August 30, 1991.[11]

Other challenges to the budget may arise in the future. Various policy organizations already have vowed to undertake litigation.[12] At present, however, the budget remains intact.

III. LAWSUITS BY STATE OFFICIALS

The legislators who sued the LBB did not originate the idea of using litigation to resolve legal disputes among state officials. Politicians in other states and in the federal government have had experience with this kind of lawsuit for some time. A case brought by Kansas legislators reached the United States Supreme Court in the 1930s.[13] Earlier this year, Minnesota legislators prevailed in a suit against the governor over the validity of the governor's veto of a controversial labor bill.[14] The federal courts have entertained several suits between Congress or its members and the White House over similar matters.[15]

Lawsuits initiated by representatives and senators, although increasingly common, remain somewhat controversial. Many jurisdictions, through the doctrine of standing, permit only litigants individually injured by governmental actions to challenge those actions in court.[16] This limitation poses theoretical problems to suits by

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10. Prepared Statement of Lt. Gov. Bob Bullock in Response to Senator Krier's Point of Order, distributed Aug. 12, 1991, at 5:55 p.m. on the Senate Floor.

11. Ken Herman, *Governor Grumbles, Signs $59 Billion Budget "Mass"*, HOUSTON POST, Aug. 31, 1991, at A1.

12. One organization, Texans Against State Income Taxes, has decided to bring a lawsuit in a state district court. *See* David Elliot, *Legislators Broke Law in Budget, Group Says*, AUSTIN AMERICAN STATESMAN, Sept. 13, 1991, at A1.

13. Coleman v. Miller, 307 U.S. 433, 436 (1939).

14. Seventy-Seventh Minn. State Senate v. Carlson, 472 N.W.2d 99 (Minn. 1991).

15. *See* Barnes v. Kline, 759 F.2d 21, 24 (D.C. Cir. 1985); Moore v. United States House of Representatives, 733 F.2d 946, 948 (D.C. Cir. 1984); Kennedy v. Sampson, 511 F.2d 430, 432 (D.C. Cir. 1974).

16. *See* Valley Forge Christian College v. Americans United for Separation of Church and State Inc., 454 U.S. 464, 473 (1982). (United States Constitution establishes this rule in Art. III's "case or controversy" requirement).

legislators. Under the customary view of our democracy, legislators merely represent the electorate and have no more personal stake in the outcome of the legislative process than their constituents. By bringing a lawsuit against other elected officials, legislators challenge the conception of legislators merely representing the electorate by asserting that they individually suffer harm when they lose a legislative struggle.[17]

In the situation in Texas, however, the legislators did not have to assert any greater interest in having the LBB follow the law than that of their constituents. Taxpayers in Texas traditionally have had standing to challenge illegal government actions relating to taxes and the budget. The Texas courts, indeed, recognized taxpayer standing as early as 1914 in the famous "chicken salad" case.[18] Taxpayers in that suit sought to restrain the Texas Comptroller of Public Accounts from authorizing expenditures by Governor O.B. Colquitt at an Austin hotel for chicken salad, punch, and other food served at a party. The court of civil appeals held that taxpayers in Texas have a right to stop illegal spending of tax dollars.[19] The legislators who sued the LBB thus sought a remedy that any taxpayer might seek.

Why the supreme court rejected the legislators' legal challenge remains a mystery. The court might have refused to reach the merits either because it found mandamus the wrong procedural device or because it considered itself improper as the original forum for adjudicating the legislators' claim against the LBB.[20] Given a lack of precedents of similar actions, the appropriate procedure remains unclear. Yet, if the supreme court did see a procedural defect, in fairness it should have identified it in an opinion. Lawsuits by legislators now have come to Texas and other legislative litigants undoubtedly will file similar actions in the future. They should not have to waste resources experimenting until they find a procedure that satisfies the silent court.

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17. Judge Robert H. Bork forcefully discussed the idea of politicians having standing to challenge government action in Barnes v. Kline, 759 F.2d 21, 50 (D.C. Cir. 1985) (Bork, J., dissenting).

18. Terrel v. Middleton, 187 S.W. 367, 374 (Tex. Civ. App.—San Antonio 1916, writ ref'd n.r.e.).

19. *Id.* at 368-69.

20. The legislators argued in their petition for writ of mandamus that TEX. CONST. art. VIII, § 22 and TEX. GOV'T CODE § 22.002(c) (Vernon 1981) gave the supreme court jurisdiction. *See* Petition for Writ of Mandamus, Heflin v. Legislative Budget Board, No. D-1392, at 4-5 (Tex. filed Aug. 9, 1991).

The supreme court, alternatively, may have denied leave to file the petition for a writ of mandamus on grounds that the court should not use its judicial power to order the LBB to undertake its duties under the Government Code. In the absence of a procedural obstacle to the mandamus action, this alternative seems likely to explain the court's decision. No one disputed that the LBB had failed to fulfill its obligation to estimate the growth of the economy. Yet if the court decided not to act despite a violation of the government code, it insured that only political strength would govern the budgeting process.

IV. CONCLUSION

Texas courts should have power to force the LBB to follow the law and to establish the economy's growth rate. The state's voters, in approving the constitutional spending limitation in 1978, did not want to leave such limitations to the vagaries of politics. The constitutional amendment adding the budget growth limitation instructs the legislature "to adopt by general laws procedures to implement" it.[21] The legislature has placed these procedures in the government code, and the courts should enforce them like any other statutes. Although the present suit failed, others apparently will follow. Politicians in the minority cannot force the majority to adopt their policies, but they can insist on the rule of law.

21. TEX. CONST. art VIII., § 22(a).