Rulemaking: The Governor's Participation In the Process

Governor Abbott Asserts Control Over All Agency Rulemaking

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TABLE OF CONTENTS

Rulemaking: The Governor's Participation In the Process:
Governor Abbott Asserts Control Over All Agency Rulemaking

I. The Constitutional Background

- **A. The Constitutional Set Up of the Executive Branch**
- **B. He (She) Shall Cause the Laws to be Faithfully Executed**

II. Rulemaking: Governor Abbott's "Request" to be a Major Player In Deciding What Rules Are Adopted, Amended or Repealed

- **A. The Constitutional Power of the Governor to Participate in the Rulemaking Process**
- **B. Legislative Delegation of Rulemaking Power to the Governor**
- **C. Did the Legislature Intentionally Set Precedent for the Governor's Involvement in Rulemaking?**

Rulemaking: The Governor's Participation in the Process

Governor Greg Abbott Asserts Control Over All Agency Rulemaking

I. The Constitutional Background

A. The Constitutional Set Up of the Executive Branch

The interpretive commentary to our current, 1876, Constitution states that our constitutional framers deliberately intended to weaken the Executive Branch of government.[1] Hence, the common phrase used by all is that Texas is a "weak governor state."

This was done by first 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 Lend Office and Attorney General.[2] All of whom, except the Secretary of State, were to be directly elected by the people[3] instead of appointed to serve at the pleasure of the Governor. Once again, the interpretive commentary explains that this arrangement diffuses the executive authority within the executive department itself so that such officers are largely independent of the Governor and thus, establishes a plural executive.[4] This independence from the Governor's influence was guaranteed for said officers were solely dependent upon the electorate for maintaining their offices.[5]

However, the framers did in fact label the Governor the "Chief Executive Officer"[6] and provided that "He shall cause the law 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. In other words, this general grant of power "is more fiction than reality" and merely seems to allow the Governor "to give direction to the arrangement of affairs in all the branches of the executive department.[8]

In addition, for all statutory state officers, the Governor may appoint them, but those appointments are only valid if approved by two thirds of the Senate.[9] The officers have a two-year term[10] unless they serve on a board in which they serve six year, staggered terms."[11] The interpretive commentary suggests this "appointment-Senate approval" arrangement was made for one person is better equipped to analyze the qualities of a person to serve in state government,

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[1] Tex. Const. art. 4 § 1 interp. Commentary (Vernon 2007); see also Beal, Power of the Governor: did the Court Unconstitutionally Tell the Governor to Shut Up?, 62 BAYLOR L. REV. 72, 76-81(2010).
[2] *Id*. § 1.
[3] *Id.* § 2.
[4] *Id*. § 1 interp. commentary.
[5] *Id.*
[6] *Id.* § 1.
[7] *Id*. § 10.
[8] *Id*. interp. commentary.
[9] *Id*. § 12 (a)-(b).
[10] Tex. Const. art. 16 (30)(a) (Vernon 2007).
[11] *Id*. § 30a.

but to avoid patronage and to recognize the importance of these officers to state government, the ultimate approval of these persons to serve is too important to the public welfare to vest it exclusively in one person, the Governor.[12]

During their term of service, state officers have a significant degree of independence from the control of the Governor. The Constitution mandates the Legislature shall provide by law for trial and removal from office of all State Officers created by statute, not removal directly by the Governor.[13] At one time, the Legislature did so provide, but for unknown reasons repealed the law providing for the trial of a state officer.[14] The only recourse of a Governor to remove a state officer currently is by seeking the agreement of the Senate by a two thirds vote.[15] Therefore, the interpretive commentary states the Governor's power of removal cannot be considered an effective instrument of administrative control.[16] Hence, the common phrase used by all is that they are "independent officers."

Yet, some power remains in the Governor while state officers serve their term. The power of appointment along with set terms provides some continuing control for it obviously vests exclusively within the Governor, if and when a term expires, should he or she reappoint the person or not. For those officers with two-year terms, they know the Governor will be there to consider their reappointment since the Governor serves a 4-year term.[17] As to officers serving on boards who have 6-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 that if the Governor asks them to do or not do something, if they refuse, they will have to answer for that decision if they desire to be reappointed.

B. He (She) Shall Cause the Law to Be Faithfully Executed

Beyond the Governor's express power to be Commander – in – Chief of the military forces,[18] to convene the Legislature for extraordinary meetings,[19] to speak to the Legislature at the commencement of each session,[20] he or she simply has the express power to "cause the laws to be faithfully executed."[21] So, what does that mean or explicitly, what power, if any, does that grant to the Governor?

It has been established that the interpretive comment says it is more fiction than reality.[22] At best, it means the Governor only has such executive power that is specifically granted by the Legislature, express or implied.[23] It goes without citation, that the Legislature grants civil,

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[12] Tex. Const. art. 4, §12 in interp. commentary (Vernon 2007).
[13] Tex. Const. art. 15, §7 (Vernon 2007).
[14] See Tex. Rev. Civ. Stat. Ann. art. 5967 (Vernon 1962) repealed by Act of May 31, 1993, 73rd Leg. R.S., ch. 268, §461(1) 1993 Tex. Gen. Laws 986.
[15] Tex. Const. art. 15, §9(a) (Vernon 2007).
[16] *Id*. § 7 interp. commentary.
[17] Tex. Const. art 4, §4 (Vernon 2007).
[18] *Id.* § 7.
[19] *Id*. § 8.
[20] *Id*. § 9.
[21] *Id*. § 10.
[22] See supra text accompanying notes 6-8 at 3.
[23] *Id*.

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