

ARTICLE II

THE POWERS OF GOVERNMENT

Sec. 1. DIVISION OF POWERS; THREE SEPARATE DEPARTMENTS; EXERCISE OF POWER PROPERLY ATTACHED TO OTHER DEPARTMENTS. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

History

Article II of the Texas Constitution consists of only a single section, with fewer than 100 words. Yet, the principle it establishes, that the powers of government are divided among three separate and distinct branches or departments of government, is one of the most basic to Texas government and has had a significant impact on the remainder of the state constitution and on the structure and operation of government in Texas.

The separation-of-powers concept in Texas is traceable to both Anglo and Mexican influences. The importance of the concept in the history of government in the United States is well known, but both the Mexican National Constitution of 1824 (Art. II, Sec. 1, para. 3) and the Coahuila Constitution of 1827 (Sec. 29) contained specific separation-of-powers statements similar to the one that appeared in Article I, Section 1, of the 1836 Constitution of the Republic of Texas. A separation-of-powers provision has been present, with only minor changes, in every Texas constitution since that first one.

The United States Constitution also establishes a federal government generally organized into three separate branches, but does so without a specific separation-of-powers statement. Instead, the separation is accomplished by the constitution's assignment of certain duties and powers to each branch. So strong was the fear that political power might be concentrated in one or a few hands and so pervasive was the belief that separation of powers was the remedy against abuse of power that Madison, writing in the *Federalist*, found it necessary to defend the constitution against those who charged neglect of this principle. "No political truth," he wrote, "is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is based. The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (The *Federalist*, No. 47).

The separation-of-powers statement in the 1836 Constitution of the Republic of Texas was a simple one:

The powers of this government shall be divided into three departments, viz: legislative, executive, and judicial, which shall remain forever separate and distinct. (Art. I, Sec. 1.)

In the 1845 Constitution, the provision was moved to Article II and was altered to appear as it does today. The major change occurring with the 1845 version was recognition that the doctrine of separation, however rigid in principle, was subject to exceptions "expressly provided" in the constitution. Only minor changes in punctuation have occurred as the provision has been carried forward as Section 1 of Article II in each subsequent Texas constitution.

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Explanation

The importance of Article II is not in its precise language but in the general concept of government it announces—a concept that in turn pervades the remainder of the Texas Constitution and has been vigorously developed by the courts and attorneys general in application to government at both the state and local level. The principle has basically two facets. The first is obvious from a reading of Article II—that no member of one branch or “department” of government may exercise powers that are confided to another. The second is present by implication from the first—that those powers constitutionally confided to one body of government cannot be delegated to another body, agency, or level of government. Yet, as indicated by both court decisions and attorney general opinions, neither the concept nor its basic facets are rigid. Each has evolved as the nature and role of government has changed and as legal opinions have more precisely defined the lines between what is permissible and what is not.

Article II must be read in conjunction with many other sections of the constitution. Article II indicates that the powers of government are divided among three named departments, but it fails to define what powers are legislative, executive, or judicial in nature and properly assigned to each department. Therefore, the first effect of other sections of the constitution granting specific powers to a department or a member of a department is to define generally what constitutes legislative, executive, or judicial powers within the separation concept. For example, if the power to pass laws is confided to the legislature, the power is legislative in nature. Article II also indicates that no person “being of” one department may exercise any power properly attached to another department, but it fails to provide a list of those persons constituting each department. Again, other sections and articles of the constitution provide at least some indication as to constitutional officers. For example, Section 1 of Article IV prescribes officers of the executive department. However, as discussed elsewhere, efforts to extend the separation downward and to segregate all state and local government officers and employees into their appropriate departments of government has proven difficult and generally unsuccessful.

In determining those powers “properly attached” to a department, it is necessary to go beyond those set out in the constitution. Generally, it is said that the duty of the legislature is to enact laws; the duty of the executive is to enforce them; and the duty of the judiciary is to construe, interpret, and uphold them. Specific determinations are more difficult. Whereas the powers of the legislature are plenary, limited only by restrictions contained in or necessarily arising from the constitution, the executive and judiciary have only those powers granted by law or the constitution. See *Government Services Insurance Underwriters v. Jones*, 368 S.W.2d 560 (Tex. 1963) (plenary power of the legislature); *In re House Bill No. 537 of the Thirty-eighth Legislature*, 113 Tex. 367, 256 S.W. 573 (1923) (judiciary). However, powers may be within the general constrictions of being executive or judicial in nature without being expressly set out in the constitution either because “inherently” within or properly “inferred” from powers or jurisdiction directly granted by the constitution. (See *Ex parte Hughes*, 133 Tex. 505, 129 S.W.2d 270 (1939).) Therefore, another effect of express grants of authority in the constitution is to provide those instances in which one department of government may exercise a power that is either granted elsewhere in the constitution to another department of government or is intrinsically within the powers of another department without express mention in the constitution. For example, Section 59 of Article XVI was adopted in part to serve as an exception to the separation concept. See *Corzelius v. Harrell*, 143 Tex. 509, 186 S.W.2d 961 (1945).

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Few writers or courts have taken time specifically to construe the wording of Article II. As a result, several aspects of the article have gone virtually unnoticed. For example, although the doctrine of separation of powers is usually described as being between "branches" of government, Article II speaks in terms of "departments" of government. The use of "department" is carried forward in each of the articles of the 1876 Texas Constitution creating the three separate repositories of authority—Legislative Department, Article III; Executive Department, Article IV; Judicial Department, Article V. Section 1 of Article IV goes so far as to specify those officers who constitute the "Executive Department."

A second aspect of the significance of the wording of Article II is that the separation required is that of "powers." It is also possible to speak of "functions" of government. (Some states have distinguished between powers and functions in determining separation issues.) If one were to use this distinction, many separation issues arising under the Texas Constitution could be solved easily. Article II distributes powers among three departments; each of these departments is "closed" by definition. That is, Section 1 of Article III makes the senate and the house the legislative department; Section 1 of Article IV names certain officers as constituting the executive department; and Section 1 of Article V names the courts that constitute the judicial department. (This is a bit oversimplified; the drafters of the 1876 Constitution were not so precise in their terminology.) If the officers named in these three sections were considered the only ones "being of one" department and forbidden to exercise powers belonging to another department, the way would be open to treat differently constitutional or statutory officers not designated as part of one of the three "departments." Instead, they could be characterized as not "being of" or exercising the "powers" of a particular department but, rather, carrying out a "function" of government under authority established by law. However, apparently neither the Texas courts nor attorneys general have utilized this approach to the separation dilemma.

A third aspect of the wording of Article II that has gone virtually unnoticed is that it permits only those exceptions to the separation-of-powers principle that are "expressly" permitted elsewhere in the constitution, suggesting that the mere presence of another constitutional provision is not necessarily adequate to establish an exception.

Development in Texas of the concept of the separation of powers is discussed in four areas: (1) administrative agencies; (2) separation of legislative-executive powers; (3) separation of legislative-judicial powers; and (4) separation of executive-judicial powers.

Administrative agencies. The work of government today is done largely through administrative agencies. Estimates of the number of existing state agencies in Texas have run as high as 200, with at least 70 performing major legislative, executive, or judicial functions. Texas courts, like those in other states, have had to reconcile the appearance and growth of this "fourth branch" of government with the constitutionally ordered system of a separation of powers among three branches. Agencies created under specific constitutional authority or direction are more easily accommodated in the system because if not strictly in compliance with the separation principle, they become an "exception" as authorized in Article II. (E.g., Board of Pardons and Paroles, which is created in Art. IV, Sec. 11.) However, the great majority of agencies are created by statute and must function under the separation requirement, thus compelling Texas courts to establish parameters for application of the separation principle to the myriad of different statutory agencies and circumstances.

To understand the nature of a state agency in regard to the separation

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doctrine, it is important to bear in mind that, unless constitutional in origin, an agency derives its authority solely from the legislature. But the legislature cannot grant an agency power that the legislature itself does not have. Since the power of the state legislature is plenary, limited only by express or implied restrictions necessarily contained in or necessarily arising from the constitution, the power that potentially may be entrusted by the legislature to an agency is considerable. However, the legislature cannot grant an agency powers that properly are purely "legislative," "judicial," or "executive" in nature unless authorized to do so by the constitution. (See *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301 (1921).) In the instance of "judicial" powers, the distinction as enunciated by the court in *Scott v. Texas State Board of Medical Examiners* (384 S.W.2d 686, 690-691 (Tex. 1964)), is whether the legislative authorization "involves public policy or is policy-making in effect, or whether the action concerns only the parties who are immediately affected." The former may be granted to an agency; the latter, being judicial, cannot.

An initial issue affecting state agencies and arising under the separation-of-powers doctrine is the extent of authority, and the discretion in the exercise of that authority, that an agency may be delegated by law. Conceptually, governmental policy is to be decided by the legislature, with agencies merely charged with making rules in furtherance of the policy. However, the realities of government are decidedly different. Appointed or civil service administrators greatly outnumber elected officers and are by necessity making important day-to-day decisions. The administrators are not performing merely ministerial tasks; they are making and effecting policy. The greater the discretion they have under their operating statute, the greater the opportunity they have for determining policy.

Texas courts continue to enunciate the rule that a delegation of legislative authority is valid only if there are sufficient statutory standards, but the adequacy of such standards is determined on a case-by-case basis. Apparently no Texas court has declared a statute unconstitutional as an invalid delegation of authority to a state agency because it lacked adequate standards. But see Tex. Att'y Gen. Op. Nos. M-1264, M-1191, M-1190 (1972). Instead, Texas courts have upheld various statutes by either denying that the delegation exists; finding that the powers involved were only quasi-legislative, quasi-executive, or quasi-judicial in nature; or concluding that the statutory standard was sufficient. See Ray, "Delegation of Power to State Administrative Agencies in Texas," 16 *Texas L. Rev.* 20 (1937); Harris, "The Administrative Law in Texas," 29 *Texas L. Rev.* 213 (1951).

In recent cases Texas courts have upheld agency authority under very general legislative standards. For example, the Texas Supreme Court in *Jordan v. State Board of Insurance* (160 Tex. 506, 334 S.W.2d 278 (1960)) upheld an order applying a statutory standard requiring that officers and directors of a proposed insurance company be "worthy of public confidence." In 1972, the court upheld a statute providing for revocation of a license for the practice of medicine on the basis of "grossly unprofessional or dishonorable conduct, or of a character which in the opinion of the Board is likely to deceive or defraud the public." (*Martinez v. State Board of Medical Examiners*, 476 S.W.2d 400 (Tex. 1972).) The standard applied in recent cases has been that the legislature may delegate such authority to establish rules, regulations, or minimum standards as may be reasonably necessary to carry out the expressed purpose of the Act. (*Beall Medical Surgical Clinic and Hospital v. Texas Board of Health*, 364 S.W.2d 755 (Tex. Civ. App.—Dallas 1963, no writ); *Williams v. State*, 514 S.W.2d 772 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).)

A second issue arising under Article II and affecting state agencies is the scope of judicial review of agency decisions. The threshold question is whether a person

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may obtain admission to the judicial system for review of agency decisions. Texas courts have recognized that except in the presence of a statutory provision for appeal or review agency decisions are not reviewable unless they affect the constitutional or property rights of the individual making the appeal. (*Brazosport Savings and Loan Ass'n v. American Savings and Loan Ass'n*, 161 Tex. 543, 342 S.W.2d 747 (1961); *City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788 (1951).) Decisions affecting privileges are not automatically reviewable. (See *White Top Cab Co. v. City of Houston*, 440 S.W.2d 732 (Tex. Civ. App.—Houston [14th Dist.] 1969, *no writ*.) Recent practice in Texas and elsewhere has been to provide by statute for appeals by “persons aggrieved,” “interested in,” or “affected” by particular agency decisions. (See *Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966).) In 1975, the Texas Legislature enacted an Administrative Procedure and Register Act (APA) (Tex. Rev. Civ. Stat. Ann. art. 6252-13a), which provides an appeal for “persons aggrieved” by final agency decisions. To what extent the law will change prior practice of Texas courts with regard to the availability of review must await judicial construction of the act.

Once a person seeking review of an agency decision obtains access to the judicial system, the question becomes the extent to which the court will hear and decide the matter anew. The Texas Legislature and Texas courts have butted heads over whether the courts should review agency decisions *de novo*. Perhaps because of a distrust of the agency decision-making process, the Texas Legislature has tried repeatedly to provide courts with authority to hear the matter *de novo*, but the courts have refused. Finding that a statute requiring a completely new trial and decision would result in an indirect delegation of powers that could not be directly delegated to the courts because violative of Article II, Texas courts have preferred to review agency decisions on the basis of whether, as a matter of law, there is “substantial evidence” to support the agency action. Cases illustrating the courts’ attitude include *Gerst v. Nixon* (411 S.W.2d 350 (Tex. 1967)), in which the court refused to follow the statute’s requirement that courts review decisions of the savings and loan commissioner on the basis of a preponderance of evidence; *Chemical Bank & Trust Co. v. Falkner* (369 S.W.2d 427 (Tex. 1963)), in which the court refused to follow statutory provisions requiring that it determine what constituted “public necessity” for a new bank charter; and *Bradley v. Texas Liquor Control Board* (108 S.W.2d 300 (Tex. Civ. App.—Austin 1937, *no writ*)), in which the court refused *de novo* review of board action as an invalid effort to confer administrative power on the court. The most recent opinion evidencing this attitude is *Texas Vending Commission v. Headquarters Corp.* (505 S.W.2d 402 (Tex. Civ. App.—Austin 1974, *writ ref'd n.r.e.*)), in which the court found the function of vending machine licensing to be legislative in nature and therefore one not susceptible to judicial determination.

This rule against *de novo* review is applicable except in that circumstance in which the authority being exercised by the agency is judicial, rather than legislative or administrative in nature. (See *Scott v. Texas State Board of Medical Examiners*, 384 S.W.2d 686 (Tex. 1964) (agency exercised power to “revoke” medical license, a power “traditionally” committed to the courts); *Chemical Bank & Trust Co. v. Faulkner*, *supra* at 433 (Calvert, J., dissenting).) However, as discussed previously, the right of an agency to exercise “judicial” powers is limited to those instances authorized in the constitution.

The legislature’s solution to the roadblock constructed by state courts has been to attempt to amend the Texas Constitution to permit *de novo* review. An amendment submitted in 1961 that would have permitted such review was defeated by the voters of the state.

As a result of the controversy over *de novo* review and in the absence in the

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past of a state administrative procedure act to provide uniformity in appeals, the result has been "a hodge-podge of judicially created principles and inconsistent statutory provisions." (Guinn, "Judicial Review of Administrative Orders in Texas," 23 *Baylor L. Rev.* 34, 37 (1971).) Although pure de novo review is not possible except in the limited circumstance mentioned above, no fewer than five separate "types" of "substantial evidence" review have developed in Texas, each depending on the presence of certain statutory language. (See Reavley, "Substantial Evidence and Insubstantial Review in Texas," 23 *Sw. L. J.* 239 (1969).) The newly enacted Administrative Procedure and Register Act (Tex. Rev. Civ. Stat. Ann. art. 6252-13a) sets out a procedure for courts to follow in determining substantial evidence appeals, but there remains a question of whether the act will supersede other acts and bring uniformity to appeal procedures and court review in Texas. The applicable provision, Section 19, states that the review is "cumulative of other means of redress provided by statute." The act became effective on January 1, 1976, and as yet no Texas court has decided whether the APA "review" will bring a procedural sameness to the variant standards currently applied by Texas courts.

Legislative-Judicial. The entire de novo controversy discussed above is illustrative of the hesitation of Texas courts to accept responsibility for apparent "policy" determinations even when expressly authorized to do so by law. (See *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (1959).) Unlike some courts, particularly certain federal courts acting in the areas of redistricting, penal system operation, and educational desegregation, Texas courts have continued to apply a rather stern doctrine of judicial restraint. Such elements of this doctrine as the presumption of a statute's constitutionality, the refusal to provide "advisory" opinions, and deference to the policy pronouncements of legislative and administrative bodies at both the state and local level remain present and virulent judicial principles in Texas. (See generally, *Dick v. Kazen*, 156 Tex. 122, 292 S.W.2d 913 (1956); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W.2d 424 (1946); *State v. Hogg*, 123 Tex. 568, 70 S.W.2d 699, *aff'd on rehearing*, 72 S.W.2d 593 (1934); *State v. Margolis*, 493 S.W.2d 695 (Tex. Civ. App.—Austin 1969, *writ ref'd n.r.e.*.)

In those instances in which the constitution provides the legislature with authority to act in areas otherwise within the auspices of the judicial branch, the courts also have been hesitant to overturn legislative enactments. One of these areas is with regard to rules of judicial procedure. (See Annotation of Sec. 25 of Art. V.) In *Government Services Insurance Underwriters v. Jones* (368 S.W.2d 560 (Tex. 1963)), the Supreme Court indicated that it would be reversible error for a court to fail to grant a continuance when the legislative continuance act (Tex. Rev. Civ. Stat. Ann. art. 2168a) provided for one because a legislator was acting as attorney. In this regard, however, the court has emphasized that the legislature's power is limited by other provisions in the constitution and does not extend to interference with a court's power to enforce its judgments. (See *Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975); *Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025 (1934).)

Perhaps the most extraordinary example of a legislature's exercise of judicial powers is in the impeachment process. (See Secs. 1-5 of Art. XV and Tex. Rev. Civ. Stat. Ann. arts. 5961-63.) On three occasions in the 20th century the Texas Senate has convened as a court of impeachment for the trial of a state official. The first trial occurred in 1917 and resulted in removal from office and disqualification from holding future public office of Governor James E. Ferguson. (Senate Journal, 35th Legislature, 2nd Called Session (1917).) The second resulted in acquittal for District Judge J. B. Price in 1931. (Senate Journal, 42nd Legislature, 2nd Called

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Session (1931).) The third was in 1975-1976 and resulted in the removal and disqualification of District Judge O. P. Carrillo. Texas courts have clearly indicated that the senate's authority to "try" impeachment charges is judicial in nature and possibly only as a constitutionally authorized exception to the separation doctrine. (*Ferguson v. Maddox*, 114 Tex. 85, 94, 263 S.W. 888, 890 (1924).) In reality, the process itself is a strange blend of legislative and judicial procedures, with the senate providing its own procedures and constituting the "court of original, exclusive, and final jurisdiction." (114 Tex. at 100, 263 S.W. at 894.) Once the legislature has sat in a judicial capacity and exercised its constitutionally granted judicial power, it cannot return in its legislative capacity and reverse its actions. (*Ferguson v. Wilcox*, 119 Tex. 280, 28 S.W.2d 526 (1930).)

A recent Texas Supreme Court decision reflects the narrow line walked by courts in determining whether the remedy sought by a plaintiff is one the court can grant because it requires the exercise of judicial powers or one which the court cannot grant because it requires the exercise of legislative powers. In *Southwestern Bell Telephone Co. v. State* (523 S.W.2d 67 (Tex. Civ. App.—Austin 1975)), the court of civil appeals denied the effort of the attorney general to enjoin the "unreasonable" rates of the defendant telephone company because "rate-making is a legislative power which the judiciary cannot exercise" (*Id.* at 69). The court pointed out that, although it was not being directly asked to set rates, the practical effect was otherwise (*Id.* at 70). The supreme court reversed, noting that, in the absence of regulation by governmental agencies, public utilities are held by common law to a standard of reasonableness in their rates and that such a standard is enforceable in a court. (*State v. Southwestern Bell Telephone Co.*, 526 S.W.2d 526 (Tex. 1975).)

Another recent case depicts an irony in the position taken by Texas courts with regard to authority delegated to them by the legislature. Whereas the supreme court long ago announced that courts are limited to powers strictly judicial in nature (In *re House Bill No. 537 of the Thirty-eighth Legislature*, 113 Tex. 367, 256 S.W. 573 (1923)), and Texas courts have refused to accept de novo review of agency decisions despite persistent efforts of the Texas Legislature to grant them such authority, the Texas Supreme Court in *Commissioners Court of Lubbock County v. Martin* (471 S.W.2d 100 (Tex. 1971)) upheld a statute giving district judges broad authority for carrying out local probation programs. The authority included the power to appoint and set the salaries of probation officers, subject only to an undefined "consent" required of the commissioners court of the county. The court went so far as to indicate in dictum that even absent the specific statute in question, "We have no doubt that a district judge has the implied power to appoint probation personnel and to set their compensation in the event such action is essential to the continuing effective administration of the business of the court" (*Id.* at 110). Apparently the standard for determining whether any particular action is "essential" would be whether the action of the judge is so unreasonable, arbitrary, or capricious as to amount to an abuse of discretion. This suggests that, despite holdings to the effect that a court lacks "inherent" powers, a court's "implied" powers may be extensive within the general purpose of "effective administration of the business of the court." (See *Ex parte Hughes*, 133 Tex. 505, 129 S.W.2d 270 (1939).)

Legislative-Executive. The greatest occasion for conflict over legislative and executive powers has been with regard to fiscal matters. Conceptually, the legislature is charged with appropriating state funds and the executive department or agencies with executing the appropriation. Unless the legislature appropriates funds from the state treasury for the purpose in question, the administrative or

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executive officer is without authority to spend funds for that purpose. In *Bullock v. Calvert* (480 S.W.2d 367 (1972)), the Texas Supreme Court denied the secretary of state authority to use money in his hands to defray costs of the state primary when the primary filing fee system was declared unconstitutional. On the other hand, the inability to obtain money unless appropriated may be removed by the constitution itself. (See *Lightfoot v. Lane*, 104 Tex. 447, 140 S.W. 89 (1911).) The *Lightfoot* case involved the refusal of the comptroller to pay the salary of the attorney general because there was no appropriation. The court held that an appropriation was unnecessary when the constitution provided that the officer was to receive a specific salary. The case does not answer the question whether the legislature could refuse to appropriate funds for a constitutional officer of another department if the constitution fails to require a specific amount.

The governor's fiscal or budget powers lie in his authority to submit a budget at the commencement of each regular session of the legislature (Art. IV, Sec. 4) and his authority to veto items of appropriation (Art. IV, Sec. 14). The latter power is the important one and, as indicated in *Fulmore v. Lane* (104 Tex. 499, 140 S.W. 405 (1911)), is actually a legislative power and thus the governor must be strictly held to only that power which is granted to him in the constitution. Therefore, as held in *Pickle v. McCall* (86 Tex. 212, 24 S.W. 265 (1893)), once the governor has exercised his veto powers and returned the bill to the legislature, he loses control over it and cannot veto further items when the legislature is no longer in session.

The controversial interface on fiscal matters has occurred over the control of the expenditure of state funds by agencies or officers after the funds are appropriated. In 1971, the legislature attempted to create a State Budget Committee consisting of both legislative and executive officers to exercise some authority over the approval of agency expenditures. The attorney general ruled the attempt unconstitutional as granting executive powers to legislative officers (Tex. Att'y Gen. Op. No. M-824 (1971)). In 1973, the attorney general advised that a bill giving the governor broad budgetary authority was also unconstitutional because:

It is our opinion that the Legislature may not invest the Governor with supervisory authority over any agencies or offices whose functions and duties could not have been assigned originally to the Governor's office by statute; . . . it cannot subordinate to his office any other executive office of constitutional rank except as the Constitution allows; and . . . it cannot confer upon him either strict legislative or strict judicial powers. Where, however, the Legislature has created agencies whose only functions are those which originally might have been conferred upon the Governor had the Legislature so chosen, we think the Legislature may restructure the agencies to make them answerable to the Governor . . . , without violating the principle of separation of powers.

Only the Legislature may designate the purposes and uses to which public moneys may be devoted. The veto power of the Governor is a negative instrument assigned to him by the Constitution as a check upon the legislative branch of government. It is the only constitutional means by which the Governor can control the legislative power . . . and the Legislature is constitutionally incapable of delegating to him a larger legislative role. (Letter Advisory No. 2 (1973).)

The governor presently possesses certain expenditure control authority under a 1972 statute (Tex. Rev. Civ. Stat. Ann. art. 689a-4b), which permits the legislature to make the expenditure of appropriated funds contingent on a finding by the governor that a particular event has occurred. (See Tex. Att'y Gen. Op. No. H-207 (1974).) Theoretically the governor may have no discretion in the matter, but as indicated by the failure of Governor Dolph Briscoe to release certain funds in 1976 even after the attorney general indicated that the requisite "fact" had been

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determined, the governor, at least as a practical matter, can make policy an element of the decision to release funds under the statute. (See Tex. Att'y Gen. Op. No. H-822 (1976).) Neither the relevant court decisions nor attorney general opinions clearly or conclusively answer the issues affecting who can or should control expenditures.

Executive-Judicial. The issue of the separation of executive and judicial powers has largely arisen with regard to state agencies and judicial review of the decisions of such agencies or officers. The hesitancy of state courts to review such decisions is discussed elsewhere and need not be repeated here.

Another area is the separation doctrine as applied to prevent an officer in one department from serving as an officer in another department. This has been of particular significance to judicial and executive officers because of the number of such constitutional officers named in Articles IV and V and assumed therefore to be a member "of" the respective department. Attorneys general have attempted in various opinions to identify the particular department into which each state or local official falls. Attorneys general have also extended the separation doctrine to include "employees" as well as officers. (See Tex. Att'y Gen. Op. No. H-7 (1973).) The effect has been a needless and confusing series of opinions, resulting recently in a decision that, unless authorized by the constitution, a university professor could not serve as a county commissioner because as an employee of the "executive" department, he could not exercise the powers of the "judicial" department (Tex. Att'y Gen. Op. No. H-6 (1973)). Such results fail to serve any apparent purpose under the separation-of-powers concept and spawn amendments to the constitution to authorize such dual officeholding. (See Sec. 40 of Art. XVI.) In the opinion of this writer, such opinions reflect an inaccurate reading of Article II and the separation concept.

In 1973, the Texas Court of Criminal Appeals considered a law, the Texas Controlled Substances Act (Tex. Rev. Civ. Stat. Ann. art. 4476-15 § 6.01(c), which provided that in criminal actions pending and on appeal when the act became effective, defendants could elect to be sentenced or resentenced under the less severe penalty provisions of the new act. The court held that the resentencing portion of the act was violative of separation of powers because it conflicted with Section 11 of Article IV, which grants clemency powers to the governor. (Ex parte *Giles*, 502 S.W.2d 774 (Tex. Crim. App. 1973).)

Comparative Analysis

Approximately 40 state constitutions have separation-of-powers provisions similar to the one in Texas. The general principles applied in the several states are basically the same. However, court or attorney general decisions on particular types of programs may vary considerably between states according to other provisions in each state's constitution or to the historical development of the separation concept. Presumably the 10 states without specific separation-of-powers provisions derive their separation doctrine from the presence of specific grants of authority in the constitution, just as occurs under the United States Constitution.

Author's Comment

Few sections of the Texas Constitution are as basic to the structure and functioning of government in Texas as Article II. The principle of separation remains legally viable today, although the boundaries of each department are not clear and Texas courts have not been completely consistent in deciding when one

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department may obtain by law powers otherwise exercisable by another. However, such a result is not surprising or undesirable. As the court in *State Board of Insurance v. Betts*, 158 Tex. 83, 90, 308 S.W.2d 846, 852 (1958), stated:

Co-ordination or co-operation of two or more branches or departments of government in solution of certain problems is both the usual and the expected thing The system of checks and balances running throughout the governmental structure of both general and state organizations, while designed to prevent excesses, is not intended to make effective action impossible

The separation principle is not and cannot be rigid.

Several areas of future controversy with regard to separation can reasonably be predicted. One, the issue of the scope of judicial review of administrative decisions, has been present for some time and is likely to continue. Unless a future constitutional amendment provides for de novo review, there appears to be little likelihood that Texas courts will reconsider their refusal to accept statutorily authorized de novo jurisdiction. Development in the area of judicial review is likely to come through judicial construction and legislative amendment of the Administrative Procedure and Register Act (Tex. Rev. Civ. Stat. Ann. 6252-13a).

A second area of controversy is likely to be the control of state expenditures. As indicated earlier, prior court holdings and attorney general opinions in this area are not clear or conclusive. Concern over the growth of the cost of state government is likely to generate new and varied approaches to ways to supervise expenditures and to prevent wasteful spending of appropriated funds. The variety in approaches will be affected by conflicts between the governor and the legislature over who should possess the supervisory authority.

A third area may be in the exercise of supervisory authority over the rule-making and regulatory activities of state agencies. Several states have attempted to empower legislative committees to review and suspend agency rules. Such attempts have been upheld in some states, while being denied in others because violative of the separation of powers. In 1975, House Bill 1209 was introduced, but not passed, which would have provided that no state agency rule, regulation, or change or repeal of a state agency rule or regulation could take effect until approved by a legislative committee. The appropriate committee was to be designated by the speaker of the house and the lieutenant governor. Whether such legislative supervision or a less broad form of such supervision can be sustained under the Texas Constitution awaits attorney general or court action.

As noted by James Madison in his defense of the United States Constitution, a complete separation of powers would be self-defeating. Since the three branches are unequal, the more powerful might soon dominate the others. Therefore, each branch must be given weapons of defense against the others in order to retain the bulk of its allotted power. These weapons of defense might consist, for example as they do in Texas, of extraneous powers such as the veto, a legislative power entrusted by the constitution to the executive, or the right to confirm appointments, an executive power entrusted to the legislature. It is the judiciary, through interpretation of the laws and the constitution, that finally has responsibility for protecting the integrity of each department. Although certain anachronisms are identifiable among the holdings of Texas courts, generally they reflect a reasonable approach to a difficult and ill-defined concept.