

Article IV

EXECUTIVE DEPARTMENT

Sec. 1. OFFICERS CONSTITUTING THE EXECUTIVE DEPARTMENT. The Executive Department of the state shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, and Attorney General.

History

This section originated in the 1869 Constitution. In earlier constitutions the comparable provision stated: "The supreme executive power of the State shall be vested in the Chief Magistrate, who shall be styled the Governor of the State of Texas." Other sections of the early constitutions created additional executive offices (secretary of state, treasurer, comptroller of public accounts, and attorney general).

The 1866 Constitution added the office of superintendent of public instruction. The 1869 Constitution retained all the executive offices created in the previous constitutions, added a commissioner of the general land office (see the *History* of Art. IV, Secs. 2 and 23), and consolidated them all into an "executive department," with the governor the "chief magistrate." When this section was adopted in 1876, the superintendent of public instruction was eliminated, and the governor became the "chief executive officer." Several attempts to eliminate the office of lieutenant governor were narrowly defeated. (See *Debates*, pp. 96, 152; *Journal*, p. 284.) Apparently no one suggested that any of the other officers might not be worthy of constitutional stature.

Explanation

The sole apparent constitutional function of this section is the creation of the seven enumerated offices, but it is not necessary for that purpose. The remaining sections of Article IV deal with each of those offices individually and would have created them in the absence of this section. The section does not ensure a fragmented executive by creating the seven offices. Section 2 of this article, by requiring all but the secretary of state to be elected rather than appointed by the governor, takes care of that.

The section designates the governor as the chief executive officer, but that apparently has no legal significance. At least no court has cited that designation as grounds for distinguishing the governor from the other constitutional executive officers who are elected, and if the office enjoys greater political significance and prestige, it is by virtue of the powers vested in it elsewhere in this article and the status that traditionally inhere in the title.

A technical reading of the section might indicate that it limits the number of executive offices, since it provides that the executive department "shall consist of" enumerated offices and does not expressly authorize the legislature to create additional ones. Courts frequently conclude that similar constitutional terminology is exclusive and permits no expansion. No reported judicial opinion has considered the issue, however, and it obviously is too late now. In the 100 years since Section 1 took effect, the legislature has created an average of more than two additional executive offices, agencies, etc., per year. (See Texas Advisory Commission on Intergovernmental Relations, *Handbook of Governments in Texas* (Austin, 1973), pp. I-35 through I-364.) Moreover, a 1972 amendment to Section 23 of Article IV expressly mentions statutory executive officers, impliedly recognizing the legis-

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lature's power to create them. Finally, unlike Section 1 of Article III and Section 1 of Article V, which "vest" legislative and judicial power, this section does not grant executive power. Indeed, unlike legislative and judicial power, executive power is not vested in any office or political body by this constitution. Individual executive powers are lodged in individual offices elsewhere in the constitution, particularly in the remaining sections of this article.

In the absence of a provision vesting executive power, Section 1, as the initial section in the executive article, is a logical point at which to discuss the constitutional limits on the power to execute the laws. Because of the failure of the constitution to make a general grant of that power and because of the theory of democratic, constitutional government that *all* power inheres in the people unless they have delegated it through their constitution, there are no inherent executive powers. (See, e.g., *Fulmore v. Lane*, 104 Tex. 499, 140 S.W. 405, *aff'd on rehearing*, 104 Tex. 499, 140 S.W. 1082 (1911); *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S.W. 865 (1887).) Executive officers may exercise only those executive powers granted by the people either through the constitution or through the repository of their legislative power, the legislature. (See the *Explanation* of Art. III, Sec. 1.) On the other hand, the powers granted to executive officers by the constitution usually are exclusive, and the legislature may not limit their exercise or authorize other officials to exercise them. (See, e.g., *Snodgrass v. State*, 67 Tex. Crim. 615, 150 S.W. 162 (1912); *State v. Paris Ry.*, 55 Tex. 76 (1881).)

Comparative Analysis

Some 20 states have an "executive department" provision similar to this section, listing from 5 to 12 executive officers. In most of those states, the governor is the "supreme" executive; and in two states nothing sets the governor apart from the other members of the executive branch except a statement, similar to Section 10 of this article, enjoining the governor to take care that the laws be faithfully executed.

In the remaining 30 states, executive offices are created in separate sections, as was done in earlier Texas constitutions. All but two, however, have multiple executives of at least three and usually six or more offices.

Several states have adopted various measures designed to impose an organizational structure on the executive branch. For example, approximately eight state constitutions have a provision limiting the executive branch to no more than 20 separate departments. Two of those provide that departments are headed by a single executive appointed by the governor. The Missouri Constitution creates five departments in addition to six executive officers and provides that the legislature can create no more than five additional departments. The New York Constitution creates 19 departments in addition to the governor's office and prohibits the creation of new ones. Nebraska requires a two-thirds vote of the legislature to create new departments. Recently, a few states have also adopted a provision authorizing the governor to reorganize the executive branch. (Two of them also have the 20-department limit.)

The *Model State Constitution* provides for a single executive officer—the governor—who appoints all heads of departments. The *Model* also would impose a 20-department limit and authorize gubernatorial reorganization as follows:

Administrative Departments. All executive and administrative officers, agencies and instrumentalities of the state government, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments so as to group them as far as practicable according to major purposes.

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Regulatory, quasi-judicial and temporary agencies established by law may, but need not, be allocated within a principal department. The legislature shall by law prescribe the functions, powers and duties of the principal departments and of all other agencies of the state and may from time to time reallocate offices, agencies and instrumentalities among the principal departments, may increase, modify, diminish or change their functions, powers and duties and may assign new functions, powers and duties to them; but the governor may make such changes in the allocation of such functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the legislature while it is in session, and shall become effective, and shall have the force of law, sixty days after submission, or at the close of the session, whichever is sooner, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members. (Sec. 5.06.)

Author's Comment

The two most notable innovations in recent constitutions—20 departments and executive reorganization—suggest that there has been considerable dissatisfaction with the performance of legislatures in structuring the executive branches of state governments. The Texas experience has been no better than that in any other state. The Texas executive branch consists of a chaotic, ever-increasing list of independent agencies, boards, commissions, bureaus, offices, committees, departments, etc. The officials who govern them are chosen in a variety of ways, although most are appointed by the governor with advice and consent of the senate; but once in office, they are as immune from removal as an elected official. (Fortunately for the voter who has difficulty informing himself about the candidates in all the constitutionally mandated statewide elections, only one statutory officer—the commissioner of agriculture—is elected.) The duties of the agencies frequently involve a single, often minute, problem area, but in many instances several govern different aspects of a larger problem area. The negative impact of this confusion on efficiency, economy, and responsiveness is immeasurable.

The lack of discernible organization in the executive branch is not entirely the fault of the constitution, however. Section 1 creates only seven offices and the constitution elsewhere creates only a handful of agencies—e.g., State Board of Education (Art. VII, Sec. 8), Water Development Board (Art. III, Sec. 49-c), Board of Pardons and Paroles (Art. IV, Sec. 11), Veterans' Land Board (Art. III, Sec. 49-b), State Building Commission (Art. III, Sec. 51-b), Teacher Retirement System (Art. III, Sec. 48b), Employees Retirement System (Art. XVI, Sec. 62(a)). (The last two are now covered by Sec. 67 of Art. XVI.) Most of the confusion was created by legislative enactment, and therefore, the legislature could restructure most of the executive branch without a constitutional mandate to have a limited number of executive departments. The governor could propose a reorganization plan without express constitutional authority, too. Of course, in the absence of a constitutional provision like that in the *Model State Constitution* (quoted in the *Comparative Analysis*), a gubernatorial proposal could take effect only if enacted into law by the legislature.

Thus under the present constitution the legislature must act affirmatively to impose order, and it may be, as some states and the drafters of the *Model State Constitution* apparently have concluded, that the pressures on legislatures to restructure the executive branch need constitutional assistance to overcome the pressures against reorganization. Neither the departmental limitation provisions nor the gubernatorial reorganization provisions, however, would guarantee a rational executive organization.

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Sec. 2. ELECTION OF OFFICERS OF EXECUTIVE DEPARTMENT. All the above officers of the Executive Department (except Secretary of State) shall be elected by the qualified voters of the State at the time and places of election for members of the Legislature.

History

The Constitution of the Republic of Texas required election of only the president and vice president. The president appointed a secretary of state "and such other heads of executive departments as may be established by law," with the advice and consent of the senate. The 1845 Constitution adopted the same organization of the executive branch with some modification. The governor and lieutenant governor were the only elected executive officials; and the governor appointed the secretary of state and attorney general (and district attorneys) with senate confirmation; but a treasurer and a comptroller of public accounts were elected by the legislature.

The genesis of the present executive selection method came in 1850 when a constitutional amendment provided for election of the treasurer, comptroller of public accounts, and attorney general as well as the commissioner of the general land office, which was a statutory office created to administer the general land office required by another section of the 1845 Constitution. (See the *History* of Art. XIV, Sec. 1.) Since adoption of that amendment, constitutional executive officers other than the secretary of state, who has always been appointed, have been elected with only two exceptions. The 1866 Constitution created an appointed superintendent of public instruction (the 1869 Constitution made the office elective after the first term), and the 1869 Constitution made the attorney general an appointive official. Until the adoption of this section in 1876, however, the method of selection of each officer was prescribed in the individual sections creating each office.

The only debate about this section in the 1875 Convention involved unsuccessful efforts to make the secretary of state an elected official. (*Debates*, pp. 152, 256; *Journal*, pp. 284, 371-72.)

Explanation

This section simply provides that all the executive officers created by Section 1, except the secretary of state, are elected. The secretary of state is appointed by the governor with the advice and consent of the senate. (See also the *Explanation* of Sec. 21.) Another section of the constitution requires statewide election of three railroad commissioners (Art. XVI, Sec. 30). In addition, a statute requires election of a commissioner of agriculture and another requires election, by districts, of members of a state board of education. As a consequence, there are eight divisions of the executive branch that are headed by elected officers and therefore are wholly independent of the governor.

Comparative Analysis

Two states provide for election of only the governor and the governor's successor, and two more elect only one additional executive officer. All the rest elect several executive officers, usually six to eight, but in one case 12. In addition, many states, like Texas, provide for election of one or more statutory officers plus officers of multimember boards and commissions. The *Model State Constitution* recommends only one elected executive officer—the governor—who appoints and removes the heads of all departments.

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Author's Comment

The advantages and disadvantages of a fragmented executive branch governed by several independently elected officials have been debated extensively and do not merit further discussion. It is curious, however, that the proponents of a single elected executive have had so little success. As the *Comparative Analysis* notes, some 95 percent of the states still elect four or more executive officials. That, of course, does not provide much opportunity for comparing the performance of the two types of executive organization.

Sec. 3. RETURNS OF ELECTION; DECLARATION OF ELECTION; TIE VOTES; CONTESTS. The returns of every election for said executive officers, until otherwise provided by law, shall be made out, sealed up, and transmitted by the returning officers prescribed by law, to the seat of Government, directed to the Secretary of State, who shall deliver the same to the Speaker of the House of Representatives, as soon as the Speaker shall be chosen, and the said Speaker shall, during the first week of the session of the Legislature, open and publish them in the presence of both Houses of the Legislature. The person, voted for at said election, having the highest number of votes for each of said offices respectively, and being constitutionally eligible, shall be declared by the Speaker, under sanction of the Legislature, to be elected to said office. But, if two or more persons shall have the highest and an equal number of votes for either of said offices, one of them shall be immediately chosen to such office by joint vote of both Houses of the Legislature. Contested elections for either of said offices, shall be determined by both Houses of the Legislature in joint session.

History

The substance of this section first appeared in the 1845 Constitution. (The Constitution of the Republic provided only that the house of representatives determine ties and that the returns of elections for president and vice president be sealed and transmitted to the speaker of the house, who was directed to open and publish them before congress.) In 1845, however, the governor and lieutenant governor were the only state executive officers who were elected, and the section applied only to the governor. (The section providing for a lieutenant governor stated that he was to be "chosen at every election for Governor, by the same persons, and in the same manner. . . .")

Although four additional state executive officers were made elective by an amendment adopted in 1850 and the 1861, 1866, and 1869 Constitutions each required election of several state executive officers, the section was not expanded to include them until 1869, and then it provided only that the legislature determine contests. Only the 1876 Constitution has called on the legislature to canvass returns and break ties in elections of the attorney general, treasurer, comptroller of public accounts, and commissioner of the general land office.

Other than the inclusion of additional officers, the only changes in the original 1845 version were the addition in 1861 of the current language authorizing the legislature to provide other methods of handling the returns and the naming in 1876 of the secretary of state as the recipient of the returns until the speaker is chosen.

Explanation

This section serves four purposes: (1) it provides the means for gathering and transmitting the returns of elections for executive officers to the canvassing authority "until otherwise provided by law"; (2) it establishes the method of

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canvassing those returns and determining who has been elected; (3) it provides the means for breaking ties; and (4) it provides a forum to settle election contests. (It also permits election by a plurality.) These purposes are served, however, only for the elected offices named in Section 2 and only in general elections. Canvassing, breaking ties, and settling contests in general elections of all other officers and in primary elections of nominees to all offices are governed wholly by statute.

The details covering transmittal of the returns to the speaker are now provided by statute (Election Code art. 8.37), and the constitutional provision is no longer operative.

In practice the legislature apparently has never canvassed returns for offices other than the governor and lieutenant governor. As mentioned above, the other officers were not included in the sections from which this section derived. After adoption of this section the legislature apparently ignored the inclusion of additional offices and continued the practice under prior constitutions of canvassing only the returns for governor and lieutenant governor. Within six months after this constitution took effect the legislature passed a statute providing another method for canvassing returns and certifying elections of all officers other than the governor and lieutenant governor (Tex. Laws 1876, ch. 166, sec. 19, 8 *Gammel's Laws*, p. 1143), and that has been the practice since that time. (See Election Code, arts. 8.38, 8.39.) Moreover, all officers other than the governor, lieutenant governor, and members of the legislature are required to take office on January 1 after the general election—before the legislature convenes (Tex. Rev. Civ. Stat. Ann. art. 17.)

The courts have held that the designation of the legislature as the forum to settle contests and determine eligibility is exclusive—the judiciary has no jurisdiction to determine those issues when a general election for one of the enumerated offices is involved. (*Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012 (1924); *Kilday v. State*, 75 S.W.2d 148 (Tex. Civ. App.—San Antonio 1934, writ *dism'd*.) The courts will rule on qualifications in primary elections, however, and since candidates are ordinarily nominated in primaries, the judiciary usually will determine whether a questionable candidate is qualified. (See *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924).)

Comparative Analysis

Approximately one-half of the states provide that the legislature determine the results of elections for governor. (One state specifies only the lower house and another provides for a joint committee of both houses to canvass the returns.) A few states specify the procedure and name a board of executive officers or judges or both to canvass returns. Eight states leave canvassing to be determined by law, and, presumably, the same obtains in the states that have no provision for canvassing.

About 20 states direct the legislature, the lower house (one state), or a joint committee of both houses (two states) to settle contests in gubernatorial elections; five specify that the method be prescribed by law; and one requires the highest court to settle contests. In other states the matter is handled by legislation.

About three-fourths of the states direct the legislature to break a tie by a joint vote. In two of those the procedure applies when no candidate receives a majority. Massachusetts requires the lower house to select two of the four highest candidates, if no one receives a majority vote, and its senate elects as governor one of those two. In Mississippi the lower house elects a governor if no candidate receives a majority. Kentucky directs that the choice be made by lot. Hawaii directs that the choice be made as prescribed by law, and the remaining state constitutions are silent.

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In general, each state applies the same rules to canvassing, contests, and ties for other state offices. There are a few exceptions, however. In Maryland, for example, the governor breaks the tie in elections for attorney general.

The *Model State Constitution* simply states that the legislature shall provide for the administration of elections.

Author's Comment

It is obvious that detailed provisions for canvassing votes, breaking ties, and determining contests are traditional and that placing control in the hands of the legislature is also traditional. With modern election equipment and rapid communications making the results known within a short time after the polls close, however, it seems unnecessary to hold all official action in abeyance for the two months that elapse before the legislature meets. It is also questionable whether the legislature is the appropriate forum to determine contests. An election contest involves legal and evidentiary questions, which the legislature is not designed or prepared to handle properly. Moreover, the stakes are political, and the legislature—a political body by definition—is more likely to make a political determination of the legal issues than is a court.

The fitness of the legislature as the forum for contest disputes is not the only objection. The courts can begin to consider a contest immediately after election day or, if a candidate's qualifications are at issue, for example, even before the election. The legislature, however, must wait until it convenes and the results are published.

It is, of course, advisable to have some method for breaking ties. The procedure ought to be left to statute, however.

Sec. 3a. DEATH, DISABILITY OR FAILURE TO QUALIFY OF PERSON RECEIVING HIGHEST VOTE. If, at the time the Legislature shall canvass the election returns for the offices of Governor and Lieutenant Governor, the person receiving the highest number of votes for the office of Governor, as declared by the Speaker, has died, then the person having the highest number of votes for the office of Lieutenant Governor shall act as Governor until after the next general election. It is further provided that in the event the person with the highest number of votes for the office of Governor, as declared by the Speaker, shall become disabled, or fail to qualify, then the Lieutenant Governor shall act as Governor, until a person has qualified for the office of Governor, or until after the next general election. Any succession to the Governorship not otherwise provided for in this Constitution, may be provided for by law; provided, however, that any person succeeding to the office of Governor shall be qualified as otherwise provided in this Constitution, and shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this Constitution on the Governor.

History

This section was added in 1948. Apparently, the confusion generated by the death of a governor-elect in Georgia created the concern. (See A.P. Cagle, *Fundamentals of the Texas Constitution* (Waco: Baylor University Press, 1954), p. 66.)

Explanation

The primary purpose of this section is to provide that the lieutenant governor-elect assume the duties of the governor in the event something occurs prior to the

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inauguration that prevents the governor-elect from taking office. Otherwise, the outgoing governor, presumably, would hold over. (See Art. XVI, Sec. 17.) The wording of the section presents an ambiguity about the tenure of the successor to the office similar to an ambiguity in the other succession provisions. (See the *Explanation* of Art. IV, Sec. 17, for discussion of the ambiguity.)

This section also permits succession in circumstances not governed by the constitution to be determined by statute. A statute now provides that when both the governor-elect and lieutenant governor-elect are unable to take the oath of office and qualify, the legislature, in joint session, elects a governor and lieutenant governor. (Election Code art. 8.46; see also Tex. Rev. Civ. Stat. Ann. art. 6252—10.)

Comparative Analysis

Approximately ten states expressly provide for succession in case of the death of the governor-elect. Most of them also provide for failure of the governor-elect to take office for other reasons. In each instance the officer-elect who is first in line to succeed as governor assumes the office for the full term or until the governor-elect qualifies. Although the governor-elect does not become governor until he qualifies, close to 20 states apparently deal with this situation by including failure of the "governor" to qualify or to take the official oath as an additional circumstance under the traditional succession provisions.

The *Model State Constitution* provides that the presiding officer of the legislature (or of the senate in a bicameral legislature) acts as governor until the governor-elect qualifies and assumes office. If the governor-elect does not qualify and assume office within six months, it requires a special election to fill the unexpired term with the presiding officer acting as governor until the newly elected governor takes office. The *Model* also provides for the outgoing governor to hold over until the legislature organizes and elects a presiding officer.

Author's Comment

Obviously a succession scheme that neglects to provide for the possibility of death, disqualification, or disability of a governor-elect is incomplete. Without it, a defeated former governor might be held over under Article XVI, Section 17. Logical organization, however, would dictate that the constitutional details on succession be grouped in a single place. This section and the succession provisions of Sections 16 and 17 of this article should be combined.

Sec. 4. INSTALLATION OF GOVERNOR; TERM; ELIGIBILITY. The Governor elected at the general election in 1974, and thereafter, shall be installed on the first Tuesday after the organization of the Legislature, or as soon thereafter as practicable, and shall hold his office for the term of four years, or until his successor shall be duly installed. He shall be at least thirty years of age, a citizen of the United States, and shall have resided in this State at least five years immediately preceding his election.

History

The date of the governor's inauguration has always been tied to the organization of the legislature because the results of the election are not official until the legislature has organized and canvassed the returns. (See the *Explanation* of Sec. 3.) Prior to the 1866 Constitution, however, this section referred only to "the regular time of installation." In 1869 inauguration was set on the first Thursday after organization of the legislature, "or as soon thereafter as practicable."

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All Texas constitutions have required the governor to be “at least thirty years of age,” but citizenship and residence requirements have varied from constitution to constitution. The 1845 Constitution required the governor to be “a citizen of the United States, or a citizen of the State of Texas, at the time of the adoption of this Constitution” and to have resided in the state for three years. The 1861 Constitution retained the residency provision but required the governor to be only a citizen of this state (Texas was then a part of the Confederate States). The 1866 Constitution returned to the 1845 citizenship requirement but increased the residency requirement to six years. In the 1869 Constitution the governor had to be a citizen of the United States and “a resident and citizen” of this state for three years.

The governor’s term has also varied. In the 1845 and 1861 Constitutions the governor’s term was for two years but the governor could not serve more than four years in any six-year period. In 1866 the term was increased to four years and the limitation on successive terms was increased accordingly; the governor could serve no more than eight in any 12 years. The 1869 Constitution retained four-year terms and was the first constitution that imposed no limits on successive terms. The delegates to the 1875 Constitutional Convention debated the governor’s term extensively. The report of the Committee on the Executive Article provided for two-year terms and allowed only two terms in any six-year period. At first, that was increased to four years and only two terms in a 12-year period, but the vote was reconsidered the next day and the Convention reduced the term to two years without limitation. (See *Debates*, p. 152; *Journal*, pp. 284, 294, 297-98, 372.) An amendment adopted in 1972 increased the governor’s term to four years.

Explanation

This section prescribes the term of office, qualifications, and date of inauguration of the governor. The courts have ruled that the constitutional qualifications are exclusive—the legislature may not impose additional qualifications. (*Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012 (1924); *Kilday v. State*, 75 S.W.2d 148 (Tex. Civ. App.—San Antonio 1934, writ *dism’d*.)

The 1972 amendment adopting four-year terms also provided for gubernatorial elections in nonpresidential years.

The inauguration date apparently is made flexible because of the possibility of delay caused by an election contest, which cannot be considered until the legislature has organized. (See Art. IV, Sec. 3.)

Comparative Analysis

Terms. In about 40 states, including Texas after the 1974 general election, the governor is elected for four years. In about one-fourth of those states the governor cannot succeed himself. Another one-fourth of the states limit the governor to only two consecutive terms, and a few states have an absolute limit of two terms, consecutive or otherwise. Almost one-half of the states with four-year terms, however, have no limit on the number of terms. One of the states with two-year terms limits consecutive terms to two.

About one-fourth of the four-year states hold gubernatorial elections in presidential years. Most of the others hold the elections in the other even-numbered years, but a few hold elections in odd-numbered years. All two-year states hold elections in even-numbered years. The *Model State Constitution* calls for a four-year term and election in an odd-numbered year; it has no limitation on reelection.

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Qualifications. In 34 states the minimum age for governor is 30. Two states have a higher minimum age (31 and 35) and five states have a lower minimum age (25). Approximately 40 states specify that the governor must be a citizen of the United States. Almost half of these specify no minimum number of years. Of the others, the number of years ranges from two to 20. Residency (or state citizenship) requirements also vary widely from no minimum to up to ten years. The most common minimum is five years (17 states, including Texas). The *Model State Constitution* requires only that the governor be a qualified voter of the state but includes a minimum age requirement with the age figure to be supplied.

Inauguration. Only about four states other than Texas tie the beginning of the governor's term to the convening of the legislature after the election. Some 30 states fix the inauguration date in their constitutions. Those states usually specify a weekday (for example, the second Wednesday in January after the election), and only three specify a month other than January after the election. (Two of those specify December, one specifies February.) The *Model State Constitution* provides that the governor's term begins on the first day of the month and suggests December or January following the election.

Author's Comment

If the governor is not inaugurated until after the legislature convenes, the governor has no time to prepare for the legislative session, and the session may be half over before the governor learns the ropes. Moreover, with modern election equipment and communications the results of the election are known within a few days and the delay is no longer necessary to prepare returns and transmit them to the capital. Thus inauguration could be as early as the first of December after the election to give the new governor time to organize a staff and prepare for the legislative session. Of course, an early inauguration date would also require a change in canvassing procedures specified in Section 3.

The *Model State Constitution* requires elections to be in odd-numbered years to ensure that the focus on state issues will not be diminished by races for federal office. Of course, much of the intrusion of federal issues is avoided by election in nonpresidential years. On the other hand, voter participation is usually greater in presidential election years.

Sec. 5. COMPENSATION OF GOVERNOR. The Governor shall, at stated times, receive as compensation for his services an annual salary in an amount to be fixed by the Legislature, and shall have the use and occupation of the Governor's Mansion, fixtures and furniture.

History

Under the Constitution of the Republic the president received a salary that was not subject to increase or decrease "during his continuance in office." The early state constitutions contained similar provisions for the governor—he received compensation that could not be changed "during the term for which he shall have been elected." The 1845 and 1861 Constitutions, however, added a second sentence providing that "the first Governor shall receive an annual salary of two thousand dollars and no more," and a section in another article fixed the governor's salary at that figure for the first ten years. In 1866 the reference to the first governor was deleted and the governor's salary was increased to \$4,000 "until otherwise provided by law." The 1869 Constitution increased the governor's compensation to \$5,000 until changed by law and added the use of the mansion.

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The departure came in 1876. Initially, this section simply fixed the compensation at \$4,000 annually plus the use of the mansion and provided that the legislature could not change it. Apparently, the inadequacy of that sum led some to resort to subterfuge. The appropriation for maintenance of the mansion, which amounted to \$110 per year in 1876, grew to \$5,000 per year by 1915 and then a deficiency appropriation of \$1,500 more was required. Finally, someone discovered that money appropriated to maintain the mansion was being spent for groceries, stationery, gasoline, and other personal needs of the governor and his family. (See *Terrell v. Middleton*, 187 S.W. 367 (Tex. Civ. App.—San Antonio), *writ ref'd n.r.e. per curiam*, 191 S.W. 1138 (1916).) The court declared the practice an illegal circumvention of constitutional limits on compensation, and the governor subsequently was impeached, although not convicted, for engaging in it. (See Tex. Sen. Jour., 35th Leg., 3d Called Sess., (1917), at 14-15, 895-96.)

Between 1908 and 1929 five efforts to amend this section to increase the salary to either \$8,000 or \$10,000 failed. (The 1929 proposal would have added a new Sec. 30a to Art. XVI fixing salaries and repealing “all provisions of the Constitution of Texas fixing or limiting the amount of salary” state officers received.) Finally, an amendment adopted in 1936 increased the constitutionally fixed salary of the governor to \$12,000. Fixed salaries were abandoned and the present language adopted in 1954.

Explanation

This section guarantees the governor a salary, to be fixed by the legislature, and the use of the governor’s mansion. Not so obviously, the legislature’s power to fix the governor’s salary is not entirely unfettered. Section 61 of Article III provides that \$12,000, the amount fixed by the constitution prior to adoption of the present language, is a minimum below which the legislature may not go.

Another provision of the executive article limits the sources of the governor’s outside income. (See the *Explanation* of Art. IV, Sec. 6.)

Comparative Analysis

A large majority of states provide either that salaries be set by law or stipulate a sum subject to change by law. Very few states still specify salaries (and most of those are unrealistically low). Apparently only two states besides Texas require an executive mansion.

The recent Illinois Constitution provides that executive salaries are established by law but that any change does not take effect during an officer’s term. The new Montana Constitution provides only that salaries be provided by law. The *Model State Constitution* has no provision on compensation.

Author’s Comment

The experience with constitutionally fixed salaries prior to 1954 demonstrates the futility of that method of limiting expenditures. (See also the *Author’s Comment* on Art. III, Sec. 24.) It is unlikely that a specific salary will remain reasonable, thus necessitating periodic amendment. One hopes that this necessity was banished permanently in 1954.

Sec. 6. HOLDING OTHER OFFICES; PRACTICE OF PROFESSION; OTHER SALARY REWARD OR COMPENSATION. During the time he holds the office of Governor, he shall not hold any other office: civil, military or corporate; nor shall he practice any profession, and receive compensation, reward, fee, or the promise thereof

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for the same; nor receive any salary, reward or compensation or the promise thereof from any person or corporation, for any service rendered or performed during the time he is Governor, or to be thereafter rendered or performed.

History

The corresponding section in each of the prior Texas constitutions reads as follows: "No person holding the office of Governor, shall hold any other office or commission, civil or military." The prohibitions against holding corporate offices, practicing a profession, and receiving outside compensation were added by the Convention of 1875, apparently without debate. Delegates arguing for greater salaries pointed out that this section would prevent a governor from earning outside income, which several prior governors had been compelled to do to support their families (*Debates*, pp. 152-55).

Explanation

There are probably two explanations for the inclusion of this section. It tends to encourage a governor to devote all efforts to the duties of the office and to prohibit some activities that might create a conflict of interest. The dual-officeholding prohibition to some extent duplicates the general prohibition in Section 40 of Article XVI, which applies to the governor as well as other officers but is broader in that it covers all civil and military offices without exception. Like the other dual-officeholding prohibitions, this section does not prevent the legislature from requiring the governor to serve as an ex officio member of a board or commission. (*Arnold v. State*, 71 Tex. 239, 9 S.W. 120 (1888).)

The conflict of interest portion, which includes the prohibition against holding corporate office as well as the prohibition against practicing a profession or earning outside income, also limits a governor's sources of incomes. It does not prevent the governor from receiving income from investments or compensation for services rendered prior to taking office, however.

This section has caused no problems, probably because the governorship of a state as populous and diverse as Texas is a full-time job and leaves a governor no time to hold other offices or engage in outside employment.

Comparative Analysis

Dual-Officeholding. Only about half the states have dual-officeholding restrictions specifically applicable to the governor and several of those are applicable to constitutional executive officers generally. A few other states have general prohibitions against holding more than one office, which would apply to the governor. (See the *Comparative Analysis* of Sec. 40, Art. XVI.) Two states also prohibit the governor from holding another position or employment of profit under the state. In a few states the dual-officeholding restriction applies only to state offices or only to United States offices, and a couple enumerate specific offices that the governor may not hold. Two states have included a sanction declaring that the governor's acceptance of an office the governor is prohibited from holding creates a vacancy in the governorship. The constitution recently adopted in Montana provides that elected executive officers cannot hold other public offices or receive compensation from other governmental agencies during their terms. (Mont. Const. Art. VI, Sec. 5.) The new Illinois Constitution and the *Model State Constitution* have no provision on dual officeholding.

Outside Employment. No other state constitution prohibits nongovernmental employment or compensation or holding corporate office, and the *Model State Constitution* has no such provision.

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Author's Comment

It is, of course, desirable that a governor devote all his energy to the duties of his office and that he have as few outside interests that might affect his official judgment as possible. Conflict of interest regulations, however, are more appropriately the subject of a statute that can be more detailed and thus more effective and can be changed more readily to provide for new developments. Dual-officeholding regulations, on the other hand, are probably unnecessary. The governorship is so obviously a full-time job that there is little likelihood a governor would ever attempt to hold another job. It is noteworthy that the other executive officers are governed only by the general dual-officeholding provision (Art. XVI, Sec. 40).

Sec. 7. COMMANDER-IN-CHIEF OF MILITARY FORCES; CALLING FORTH MILITIA. He shall be Commander-in-Chief of the military forces of the State, except when they are called into actual service of the United States. He shall have power to call forth the militia to execute the laws of the State, to suppress insurrections, repel invasions, and protect the frontier from hostile incursions by Indians or other predatory bands.

History

The substance of Section 7 has appeared in every Texas constitution since statehood, but prior to the 1876 Constitution it was divided into two sections. The first sentence appeared in the executive article, and the second appeared in an article dealing with the militia. (Curiously, under the Constitution of the Republic of Texas the president was commander-in-chief of the army, navy, and militia, but the congress had the power to call out the militia "to execute the law, to suppress insurrection, and repel invasion.")

Except for the consolidation of the two provisions into one section that occurred in 1876, changes since 1845 have been minor. Instead of "military forces," the 1845, 1861, and 1866 Constitutions gave the governor command of the army, navy, and militia, and the 1861 Constitution recognized that the state's military forces could be called into service by the Confederate States of America rather than the United States.

The Convention of 1875, after extensive debate, added the clause permitting use of the militia to protect the frontier because some of the delegates from the southern part of the state feared that "invasion" implied an organized military force acting under authority of a foreign government and would not include the outlaws that had been raiding out of Mexico. (*Debates*, pp. 156-61.)

Explanation

This is a traditional statement that supports the fundamental subordination of military power to civilian power. (See Art. I, Sec. 24.) It recognizes that the President of the United States commands the state's armed forces when they are called into the service of the United States. (See U.S. Const. Art. II, Sec. 2.)

The courts have ruled that this section does not prevent the state from establishing other statewide, as opposed to local, law enforcement agencies (*Neff v. Elgin*, 270 S.W. 873 (Tex. Civ. App.—San Antonio 1925, *writ ref'd*)), and the attorney general has ruled that it does not require all state law enforcement agencies to be under the direct command of the governor (Tex. Att'y Gen. Op. No. 0-2262 (1940)).

Art. IV, § 8

Comparative Analysis

Every state except Connecticut makes the governor the "commander-in-chief" of the state's military forces. In Connecticut the governor is the "captain-general" of the militia. The title used for the military forces varies from state to state. Some refer to "armed forces," some to the "army, navy, and militia," and some simply to the "militia." Thirty states join Texas in acknowledging that the governor's command is not applicable when the state's armed forces are under the control of the United States. Four states warn the governor not to take personal command unless the legislature or, in one state, the senate consents.

As justification for calling out the armed forces, approximately 20 states set forth the following grounds: the execution of laws, the suppression of insurrection, and the repulsion of invasion. Eight states, including Texas, add an additional ground such as suppression of riots, preservation of the public peace, or protection of the public health. The new Montana Constitution adds the protection of "life and property in natural disasters." No other state, however, refers to frontiers and predatory bands. About five states have some variation on the traditional terminology, and California permits calling out the armed forces only to execute the laws. One state prohibits calling out the armed forces without a legislative declaration that the public safety requires it. Apparently, some 12 state constitutions are silent on this subject. The *Model State Constitution* makes the governor "commander-in-chief of the armed forces of the state" and authorizes the governor to call them out "to execute the laws, to preserve order, to suppress insurrection, or to repel invasion."

Author's Comment

"Execution of the law," alone, is probably sufficient justification for calling forth the state's armed forces in any emergency. It includes, but is broader than, the remaining justifications in the present constitution and all those added in other state constitutions.

Sec. 8. CONVENING LEGISLATURE ON EXTRAORDINARY OCCASIONS.

The Governor may, on extraordinary occasions, convene the Legislature at the seat of Government, or at a different place, in case that should be in possession of the public enemy or in case of the prevalence of disease thereat. His proclamation therefor shall state specifically the purpose for which the Legislature is convened.

History

The Constitution of the Republic stated that the president could "upon extraordinary occasions, convene both Houses, or either of them" and empowered him to adjourn the Congress if the two houses could not agree to a time for adjournment.

Every constitution since statehood also has authorized the governor to convene the legislature in special session "on extraordinary occasions," and each has authorized him to convene them elsewhere than the seat of government in some emergencies. Under the 1845 and 1861 Constitutions the capital had to be "in the actual possession of the public enemy"; the 1866 Constitution required that the capital be dangerous "by reason of disease or the public enemy"; and the 1869 Constitution required another place to be "necessary" because of "the prevalence of dangerous disease, or the presence of the public enemy."

The early constitutions also authorized the governor to adjourn the legislature "to such time as he shall think proper, not beyond the day of the next regular

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meeting of the Legislature,” if the two houses were unable to agree to a time of adjournment, but that provision was omitted from the 1869 Constitution. The last sentence of Section 8 first appeared in the present constitution.

Explanation

The meaning of this section is reasonably clear and consequently it has been the subject of little litigation. The governor's judgment of what constitutes an “extraordinary occasion” justifying a special session has never been questioned.

The supreme court has held that this section vests the power to convene special sessions solely in the governor, and therefore, the senate cannot convene itself to consider recess appointments (*Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946)). Another case has intimated, however, that the house and senate may convene themselves solely for impeachment purposes (*Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924)). A statute enacted during the Ferguson impeachment sets out the procedures for doing so (Tex. Rev. Civ. Stat. Ann. arts. 5962, 5963), and the houses have convened themselves under the statutes on two separate occasions. (See Tex. H. Jour., 42d Leg., 1st Called Sess., 364, 368 *et seq.* (1931); Tex. Sen. Jour., 42d Leg., 281 *et seq.* (1931); Tex. H. Jour., 64th Leg., Impeachment Sess. (1975); Tex. Sen. Jour., 64th Leg., Impeachment Sess. (1975).)

The number of special sessions a governor may call is unlimited, but Section 40 of Article III limits the duration of each to 30 days and restricts the scope of the session to consideration of legislation concerning the subjects in the governor's proclamation. A 1972 amendment of Article XVII, Section 1, also authorizes consideration of constitutional amendments during a special session. Section 58 of Article III fixes the seat of government in Austin and declares that the legislature shall hold its sessions there. It includes no exception for emergencies that might make meeting in the capital impracticable. Thus, there is no authorization for meeting elsewhere in emergencies except in special sessions.

Comparative Analysis

All 50 states authorize the governor to call special sessions, and only one state imposes a formal limitation on that power. In North Carolina the governor must have approval of the “Council of State,” which consists of named constitutional elected officers. In a dozen or so states the governor also may call the senate alone into session, and in Alaska the governor may convene either house in special session. About 12 states permit the legislature, sometimes by an extraordinary vote, to call itself into session or require the governor to do so. The new Illinois Constitution permits the presiding officers of the two houses to call a session by joint proclamation “issued as provided by law.” (Ill. Const. Art. IV, Sec. 5(b).) Hawaii provides a special procedure permitting the legislature to convene itself solely to consider bills vetoed after adjournment (Hawaii Const. Art. III, Sec. 17), and two states provide for automatic sessions to reconsider vetoes.

Only six states other than Texas mention the meeting place for special sessions. (Two of those, like Texas, appear to permit sessions outside the capital only in specified emergencies.) In the remaining states the meeting place is determined either by a general provision applicable to both special and regular sessions or by statute.

Approximately 23 states also authorize the governor to adjourn the legislature when the two houses cannot agree on adjournment. Six states require certification of disagreement by the house first moving adjournment (Oklahoma), the house last moving adjournment (Colorado), both houses moving adjournment (Arkansas), or either house moving adjournment (Alaska, Illinois, Rhode Island). Most states

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provide that the governor may not adjourn beyond the next regular meeting, but five states provide specific limits of from 90 days to four months.

Under the *Model State Constitution* either the governor or the presiding officer (or officers in a bicameral legislature), on the written request of a majority of the legislature, may convene special sessions. It contains no provision on adjournment or meeting places, leaving those matters to be governed by statute or legislative rule.

Author's Comment

Most contemporary discussion of special sessions concerns whether the legislature should be authorized to convene itself in special session. In a state that has only a biennial regular session of limited duration, special sessions are more likely to be necessary and the governor's exclusive control of whether and when one should be called becomes a significant power. The legislature, however, is responsible for enacting laws and it seems only appropriate to give that body some control over its own meetings. Automatic sessions to reconsider postadjournment vetoes or some mechanism to permit the legislature to convene itself for that purpose are additional possibilities with an entirely different impact on the governor's legislative powers. (See the *Author's Comment* on Section 14 of this article.)

Although less important than the preceding issues, it seems desirable to delete mention of the meeting place for sessions and let it be prescribed by law. It is inconceivable that the legislature would meet outside the capital except when necessary, and a statute may provide more flexibly for the exigencies that would justify meeting elsewhere.

Sec. 9. GOVERNOR'S MESSAGE AND RECOMMENDATIONS; ACCOUNTING FOR PUBLIC MONEY; ESTIMATES OF MONEY REQUIRED. The Governor shall, at the commencement of each session of the Legislature, and at the close of his term of office, give to the Legislature information, by message, of the condition of the State; and he shall recommend to the Legislature such measures as he may deem expedient. He shall account to the Legislature for all public moneys received and paid out by him, from any funds subject to his order, with vouchers; and shall accompany his message with a statement of the same. And at the commencement of each regular session, he shall present estimates of the amount of money required to be raised by taxation for all purposes.

History

The Constitution of the Republic simply required the president to give information on the state of government, from time to time, and to recommend measures he deemed necessary. The early state constitutions retained that provision but required the messages to be written. The 1876 Constitution specified times for messages, including a farewell message; deleted the requirement that they be written; and added the details about accounting for funds and estimating revenues.

Explanation

In addition to the traditional "state of the state" message by the governor, this section requires a farewell message, an accounting to the legislature at the close of the governor's term, and an estimate of revenues needed to operate the state. Although this section speaks only of messages at the beginning of each session and at the end of the governor's term, Section 5 of Article III mentions that the

governor may submit "emergency matters . . . in special messages," and in practice, the governor usually submits several messages during the course of a session.

The estimate of revenues required by this section has become a full-blown budget message since 1931, when a statute required the governor to do so and gave him some assistance in preparing the budget. (Tex. Laws 1931, ch. 206, at 339-49.) He did not control the preparation of the budget, however, until 1951. (Tex. Rev. Civ. Stat. Ann. arts. 688, 689.) Indeed, without a budget as a guide, it is doubtful that a governor could make a realistic estimate of the revenues needed.

Comparative Analysis

Almost every state constitution requires the governor to deliver messages and recommendations to the legislature. The only exceptions are Vermont, which calls for recommendations but no message; Georgia, which requires only a budget message; and Massachusetts, New Hampshire, Rhode Island, and New Mexico, which say nothing about messages. About half the states make it clear that the governor can deliver a message any time he wants, sometimes in addition to a required message at the beginning of each session and sometimes with no mention of timing. Only six states, besides Texas, clearly restrict the timing of messages to the beginning of each session, and only one of those joins Texas in requiring a farewell message. Five other states require a farewell message.

Two states authorize the legislature to require the governor to deliver a message. Four other states require an accounting by the governor, and three require estimates of revenue needed. About 15 state constitutions, including the new constitutions in Illinois, Montana, and Pennsylvania, require the governor to provide a detailed budget message.

The *Model State Constitution* commands the governor to give information and recommendations to the legislature at the beginning of each session and permits him to do so at other times. It also provides for a budget message:

The Budget. The governor shall submit to the legislature, at a time fixed by law, a budget estimate for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments and agencies of the state, as well as a general appropriation bill to authorize the proposed expenditures and a bill or bills covering recommendations in the budget for new or additional revenues. (Sec. 7.02.)

Author's Comment

Three of the four requirements of this section accomplish little constitutional purpose. Another provision of the constitution requires an annual accounting of expenditures (Art. XVI, Sec. 6); the estimate of revenues has been supplanted by the budget message discussed in the *Explanation*; and the farewell message of a lame-duck governor is usually little more than a touting of the accomplishments of that governor's administration.

Many of the recently drafted constitutions have required a comprehensive budget message by the governor as part of the budget initiative and execution authority. (See, e.g., Illinois Const. Art. VIII, Sec. 2; Montana Const. Art. VI, Sec. 9.) Fiscal decisions are the most important of governmental decisions, and budget preparation is the most important part of the fiscal process. The governor, as chief executive, is the most logical repository of budget-making powers. A constitutional provision such as that quoted above from the *Model* would ensure that the governor has that responsibility, which in turn would enable the governor to develop a comprehensive fiscal program for the state. (See Kresky, "Taxation

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and Finance," *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961), p. 147.) Of course, a provision like that in the *Model* would not ensure that the legislature would consider the governor's budget, particularly if they have a competing budget as the Texas Legislature has. In practice the budget considered in Texas is the one prepared by the Legislative Budget Board, a legislative body governed by legislative leaders. (See Tex. Rev. Civ. Stat. Ann. art. 5429c.) To ensure that the governor's budget-making power has substance, a provision should require the legislature to consider a budget submitted by the governor.

Execution of the budget, too, poses peculiar problems in Texas. Legislative appropriations are seldom specific. An agency's appropriation usually lists a lump sum for each of several general purposes and the guidelines for specific expenditures are nonexistent. Unless a single officer or body has authority to approve specific expenditures under a broad appropriations authorization for an executive branch consisting of scores of separate, independent agencies it is impossible to have rational, comprehensive fiscal administration. Several recent attorney general opinions, however, have obstructed the legislature's piecemeal efforts to lodge some budget execution authority in the governor. According to the attorney general, a statute requiring gubernatorial approval of specific expenditures within a general item of appropriation confers a veto power in addition to that conferred in Article IV, Section 14, of the constitution, and since the power to veto or disapprove a bill is a legislative power, a grant of such power without express constitutional support for it violates the separation of powers statement of the constitution (Art. II, Sec. 1). (See Tex. Att'y Gen. Op. Nos. M-1199, M-1141 (1972).) Similarly, a provision authorizing transfers of appropriated funds between agencies at the governor's request was held to be a delegation to the governor of the legislature's power to determine how much may be expended, for what, and by whom and also was held to be in violation of the separation of powers provision. (See Tex. Att'y Gen. Op. No. M-1191 (1972).) Curiously, an earlier opinion found budget execution authority to be an executive power, so that the separation of powers section prevented the legislature from placing the authority in the Legislative Budget Board, a legislative body. (See Tex. Att'y Gen. Op. No. V-1254 (1951).)

Of course, there are constitutional problems involved in granting the governor authority to prevent expenditures for a program of which he disapproves (and which may even have passed over his veto) or to change the character of a program by preventing expenditure of a substantial part of the amount appropriated for it. Every agency head must supervise specific expenditures and usually does so without, in effect, "vetoing" or reducing an appropriation. Also, the practice of requiring gubernatorial approval of specific expenditures in some situations is a longstanding one in Texas and has continued since 1972 despite the rulings of the attorney general discussed above. Because of the uncertainties raised by those opinions, however, a constitutional provision is needed that authorizes the governor, as the *chief* executive officer, to exercise some of the controls over overall spending in the executive branch that the head of an executive agency has over spending in the agency.

Sec. 10. EXECUTION OF LAWS; CONDUCT OF BUSINESS WITH OTHER STATES AND UNITED STATES. He shall cause the laws to be faithfully executed and shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the State with other States and with the United States.

Art. IV, § 10

History

The Constitution of the Republic of Texas enjoined the president to “see that the laws be faithfully executed.” The framers of the 1845 Constitution made one minor change, substituting “take care” for “see,” and that language survived until this section substituted “cause” for “take care” in 1876. The remainder of the section first appeared in 1876.

Explanation

The first part of this section is traditional and is related to the statement in Section 1 that the governor is the chief executive officer. It is a responsibility that the governor apparently lacks tools for, however, since no governor appears to have asserted any authority that might be derived from it. No judicial or attorney general opinions have construed it.

The second part of the section is rare among state constitutions. The only decision applying it concluded that this language makes it mandatory that the governor conduct relations with other states and the federal government. Statutes authorizing interstate negotiations may require other state officials or agencies to represent the state and need not even mention the governor’s role, but the final product of any negotiations must have the governor’s approval to be effective, whether or not the statute requires it. (*Highway Commission v. Vaughn*, 288 S.W. 875 (Tex. Civ. App.—Austin 1926, writ *ref’d*.) The attorney general recently issued rulings to the same effect. (Tex. Att’y Gen. Op. Nos. M-891 (1971), M-312 (1968).)

Comparative Analysis

Execution of the Laws. Only two state constitutions—New Hampshire and Massachusetts—do not contain a statement that the governor shall take care that the laws be faithfully executed. Some recent constitutions, *e.g.*, Illinois, Alaska, and Hawaii, state that the governor is “responsible” for the faithful execution of the laws. South Carolina requires the governor to take care that the laws are “faithfully executed in mercy.” Alaska, Michigan, and New Jersey have attempted to give the injunction some meaning by adding an authorization for the governor to institute court action against officials of the executive branch and local governments to enforce the law. Nebraska adds that the governor shall take care that the affairs of state are efficiently and economically administered, and six states add that the governor is to expedite matters resolved on by the legislature. The *Model State Constitution* uses the same language as Illinois, Alaska, and Hawaii and adds enforcement authority similar to that in Alaska, Michigan, and New Jersey.

Intercourse with Other States. Two other states—Oklahoma and Virginia—have provisions almost identical with Section 10’s provision on state business with other governments. Vermont provides that the governor is to correspond with other states. The other states and the *Model State Constitution* have no similar provision.

Author’s Comment

The *Model State Constitution* section that seeks to implement the governor’s responsibility for faithful execution of the laws provides:

The governor shall be responsible for the faithful execution of the laws. He may, by appropriate action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitu-

Art. IV, § 11

tional or legislative power, duty or right by an officer, department or agency of the state or any of its civil divisions. This authority shall not authorize any action or proceeding against the legislature. (Sec. 5.04(a).)

Of course, the governor is the only elected executive officer under the *Model* and other executive officers may be removed by him. Such a provision in a state like Texas, with many executive officers who are otherwise legally independent, would enhance the governor's executive powers and give him some authority to "cause the laws to be faithfully executed," which is totally absent under this constitution.

Sec. 11. REPRIEVES, COMMUTATIONS AND PARDONS; REMISSION OF FINES AND FORFEITURES. There is hereby created a Board of Pardons and Paroles, to be composed of three members, who shall have been resident citizens of the State of Texas for a period of not less than two years immediately preceding such appointment, each of whom shall hold office for a term of six years; provided that of the members of the first board appointed, one shall serve for two years, one for four years and one for six years from the first day of February, 1937, and they shall cast lots for their respective terms. One member of said Board shall be appointed by the Governor, one member by the Chief Justice of the Supreme Court of the State of Texas, and one member by the presiding Justice of the Court of Criminal Appeals; the appointments of all members of said Board shall be made with the advice and consent of two-thirds of the Senate present. Each vacancy shall be filled by the respective appointing power that theretofore made the appointment to such position and the appointive powers shall have the authority to make recess appointments until the convening of the Senate.

In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke paroles and conditional pardons. With the advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason.

The Legislature shall have power to regulate procedure before the Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons therefor, and shall have authority to enact parole laws.

History

The Constitution of the Republic stated simply that the president had the power "to remit fines and forfeitures, and to grant reprieves and pardons, except in cases of impeachment." The 1845 Constitution specified that the power applied only in criminal cases and only after conviction; authorized the legislature to enact rules for the remission of fines and forfeitures; and required concurrence of the senate for clemency in cases of treason, with a provision for preventing execution of sentence until the senate convened and acted. The 1869 Constitution required the governor to file in the secretary of state's office the reason for granting clemency, but otherwise made no change in the original 1845 provision. The 1876 Constitution adopted the 1869 language, adding only that the governor could also grant commutations of punishments.

In 1893 a statute established a board of pardon advisors, composed of two members who served at the pleasure of the governor, to assist the governor in evaluating the large volume of applications for executive clemency. In 1929, amid