

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

Art. IV, § 11

rumors of bribery and other abuses of clemency power, that board was replaced by a statutory Board of Pardons and Paroles composed of three members appointed by the governor to six-year staggered terms. Neither board restricted the governor's constitutional prerogatives in granting clemency, however, as both performed only duties assigned by the governor. (See MacCorkle, "Pardoning Power in Texas," 15 *Southwestern Social Science Quarterly* 218, 222-23 (1934); F. Gantt, *The Chief Executive in Texas* (Austin: The University of Texas Press, 1964), pp. 150-52.) In 1936 the present clemency language was adopted. It gave the old board constitutional status and dispersed the power of appointment. The amendment retained the original 1876 provision in paragraph two but added the language restricting the grant of clemency to cases approved by the board, the provision on reprieves in capital cases, and the provision on revocations. It required approval by both houses of the legislature for clemency in cases of treason and omitted a provision for respite of sentence execution during recess of the legislature.

Explanation

This section has three principal functions: (1) it empowers the governor to grant and revoke clemency in certain cases, (2) it creates a board whose recommendation is necessary before clemency may be extended in most cases, and (3) it purports to authorize the legislature to enact parole laws.

The various kinds of clemency have been defined as follows: A "reprieve" postpones the execution of a sentence. It is usually associated with delays in carrying out the death penalty, but it may also work a delay in putting a convicted person behind bars. A "commutation" is a reduction of punishment. A death sentence may be commuted to life imprisonment; a life sentence may be commuted to, say, ten years. A "pardon" absolves a person of most of the consequences of the crime. It restores the right to vote and to serve on juries and removes any other civil disabilities imposed on persons convicted of crimes. If there is any time on the sentence left when the pardon is granted, it frees that person of that punishment. A pardon does not remove all the consequences of the conviction, however. Texas courts long ago concluded that the conviction of a pardoned offender may be introduced in court to discredit that person's credibility as a witness, notwithstanding the "accepted doctrine" that a pardon "makes the offender a new man . . . blots out his offense, and gives him a new credit and capacity; and even so far extinguishes his guilt as that, in the eye of the law, the offender is as innocent as if he had never committed the offense." (*Bennett v. State*, 24 Tex. Crim. 73, 81, 5 S.W. 527, 529 (1887). See also *Sipanek v. State*, 100 Tex. Crim. 489, 272 S.W. 141 (1925).) More recently, the Texas Court of Criminal Appeals has restricted the regenerative effect of a pardon even further. In *Jones v. State* (141 Tex. Crim. 70, 147 S.W.2d 508 (1941)), the court overruled an earlier conclusion, in *Scrivnor v. State* (113 Tex. Crim. 194, 20 S.W.2d 416 (1928)), and held that a pardoned conviction may be used on subsequent conviction of another offense to enhance the penalty for the second conviction under Texas statutes providing greater punishment for repeat offenders. The final type of clemency, "remission of fines," involves restoration of the amount paid. (*Easterwood v. State*, 34 Tex. Crim. 400, 31 S.W. 294 (1895); *Snodgrass v. State*, 67 Tex. Crim. 615, 150 S.W. 162 (1912).)

The courts have ruled that this grant of clemency powers is exclusive; no other official or agency may be authorized to grant any form of clemency reserved to the governor. (See *Snodgrass, supra*; *Goss v. State*, 107 Tex. Crim. 659, 298 S.W. 585 (1927).) The *Snodgrass* case involved a statute authorizing the courts to suspend imposition of sentence in certain circumstances and, at the end of a specified

Art. IV, § 11

period, to set aside the judgment of conviction. The court of criminal appeals ruled that the authorization amounted to an unconstitutional grant of clemency powers to the courts since the exercise of the authority removed the consequences of conviction. Another case held that a statute restricting the law making convicted felons incompetent to be witnesses in judicial proceedings could not apply to persons convicted before the statute took effect. Otherwise, it would have been a legislative restoration of a civil disability accompanying a conviction, in effect a partial pardon, which authority this section grants to the governor exclusively. (*Underwood v. State*, 111 Tex. Crim. 124, 12 S.W.2d 206 (1927).) Presumably, then, a statute reducing the circumstances in which a felony conviction disenfranchises a person or prevents him from obtaining a license to engage in a business or profession applies only to convictions occurring after the statute takes effect.

The legislature subsequently devised a scheme to circumvent the burdensome restriction on the corrections process adopted resulting from the *Snodgrass* construction of this section. In effect, the next statute defined a suspended sentence as an alternative *punishment* but also provided that when a suspended sentence was imposed, it be imposed as an *alternative* to conviction and imprisonment. The court accepted the fiction that there was no conviction and thus upheld the provision for setting aside the "nonfinal" conviction if the defendant violated no law during the period of the suspension. (*Baker v. State*, 70 Tex. Crim. 618, 158 S.W. 998 (1913); *King v. State*, 72 Tex. Crim. 394, 162 S.W. 890 (1914).) In 1935 an amendment adding Section 11A authorized statutes like that involved in *Snodgrass*.

In more recent years, the court of criminal appeals has retreated a few steps from the *Snodgrass* position. For example, in *Ex parte Anderson* (149 Tex. Crim. 139, 192 S.W.2d 280 (1946)), the court upheld statutes extending credit to prisoners for good behavior without approval by the governor and the Board of Pardons and Paroles on the ground that the credit (or commutation) must be earned while executive clemency need not be. Despite the more lenient application of this section in *Anderson*, the ruling in *Snodgrass* that clemency is exclusively in the hands of the governor (and the Board of Pardons and Paroles) by virtue of the grant in this section still obstructs the capacity of the legislature to provide flexibility in the corrections process and to ameliorate some of the consequences of a conviction. For example, in 1973 the legislature drastically reduced the penalties for possession of small amounts of marijuana from a felony punishable by a maximum of imprisonment for life to a misdemeanor punishable by a maximum of six month imprisonment and a \$1,000 fine and attempted to apply the reduced penalties to persons convicted under the prior law. The court had no difficulty in invalidating the application of the newer, more lenient penalties to prior offenders because under *Snodgrass* it infringed on the governor's power to pardon and commute. (*Smith v. Blackwell*, 500 S.W.2d 97 (Tex. Crim. App. 1973).)

There are some limits on the governor's clemency power. The governor may not act except on the recommendation of the Board of Pardons and Paroles, and while the governor may grant less clemency than the board recommends, the governor may not grant greater. (*Ex parte Lefors*, 165 Tex. Crim. 51, 303 S.W.2d 394 (1957).) The governor may grant clemency only in criminal cases; the governor may not pardon for contempt of court (*Taylor v. Goodrich*, 40 S.W. 515 (Tex. Civ. App. 1897, *no writ*); *Ex parte Green*, 116 Tex. 515, 295 S.W. 910 (1927)); and a pardon does not restore a disbarred attorney's license to practice law (*Hankamer v. Templin*, 143 Tex. 572, 187 S.W.2d 549 (1945)). Finally, the governor's power applies only after conviction. Consequently, the legislature may provide for grants

Art. IV, § 11

of immunity or amnesty before conviction. (Ex parte *Muncy*, 72 Tex. Crim. 541, 163 S.W. 29 (1914); *Camron v. State*, 32 Tex. Crim. 180, 22 S.W. 682 (1893).)

Aside from the question of exclusivity of the governor's clemency power, this section has caused few problems. One case concluded that the exception of impeachment from the governor's clemency power means that no one may grant clemency in those instances. (*Ferguson v. Wilcox*, 119 Tex. 280, 28 S.W.2d 526 (1930).) Another case suggested that the failure to require a recommendation by the board for the governor to revoke paroles and conditional pardons means that he may do so on his own initiative. (Ex parte *Ferdin*, 147 Tex. Crim. 590, 183 S.W.2d 466 (1944).) A recent decision by the United States Supreme Court requiring a hearing and other due process protections to parole revocations seems to foreclose that possibility, however. (See *Morrissey v. Brewer*, 408 U.S. 471 (1972).)

Comparative Analysis

Almost all states give the governor the power to grant pardons and reprieves, and usually, commutation or remission of penalties or both are included. In all but a handful of states the power clearly applies only after conviction. A majority of states deny clemency powers in cases of impeachment and most require approval of the legislature or the senate for clemency in cases of treason.

Approximately 11 states leave the power unrestricted, six permit the legislature to prescribe rules only for applications for clemency, and several permit the legislature to prescribe rules for the exercise of gubernatorial clemency powers. Of the remaining states, about eight join Texas in creating a board that either recommends clemency to the governor or approves the governor's grant of clemency. Some six states make the governor a member of a board that extends clemency by a majority vote, four place the power in a board independent of the governor, one permits the legislature to provide for clemency, and one permits the governor to grant clemency with the advice and consent of the senate. Several of the states that restrict or remove most clemency powers from the governor do permit him to grant reprieves with few or no restrictions. About 11 states have provisions specifically authorizing the legislature to enact parole laws and a few have similar provisions for probation.

The *Model State Constitution* states that "the governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law." (Sec. 5.05.) The commentary to the *Model* section resolves the ambiguity about the legislature's power making it clear that the power to prescribe procedures applies to the delegation and not to the exercise of clemency powers.

Author's Comment

Although it may be desirable or even imperative that the governor be given assistance and guidance in making clemency decisions, particularly since clemency has become an important correctional tool, it is unwise for the constitution to establish permanently the existence and organization of that assistance and the form of clemency decisions. A simple statement that gubernatorial clemency decisions shall be made as prescribed by law would accomplish a similar result but with the flexibility to take advantage of new corrections techniques or changes in the organizational needs of the corrections system.

As the *Explanation* of this section emphasizes, the section, as construed in *Snodgrass* and its progeny, has obstructed the legislature in its efforts to provide greater flexibility in the corrections process. Perhaps a statement authorizing the

Art. IV, § 11A

legislature to extend clemency to classes of offenders, as opposed to the individual offenders with which the governor is concerned, would permit desirable legislative action without interfering with the governor's prerogatives. The governor is not even equipped to make determinations of eligibility that are necessary to deal fairly with a category or class of offender.

Finally, the distinctions between parole and clemency should be clarified. Confusion between the two grew out of the use of "conditional pardons," which do not restore the rights of citizenship, in order to release prisoners on the condition that they violate no law. Conditional pardons were a common practice prior to the development of the concept of parole. (See *Carr v. State*, 19 Tex. Ct. App. 635 (1885).) Later, when parole developed, the legislature, probably as a precaution against invalidation under a *Snodgrass*-type challenge, vested the parole decision in the governor. Parole, however, is not clemency but is clearly an alternative punishment—supervision outside prison walls. Involvement of the governor in granting and revoking paroles merely enhances the opportunity for political influence in what should be a purely correctional decision. Moreover, parole revocations no longer may be made without affording the convict some minimum protections of due process (*Morrissey v. Brewer*, 408 U.S. 471 (1972)). Under *Morrissey* if the governor disapproves a Board of Pardons and Paroles recommendation, he presumably must have reviewed a record of the revocation hearing and found some legal or factual insufficiency. His ruling might even be subject to appeal to the courts. Such judicial-type activity should not be imposed on or expected of the governor.

Sec. 11A. SUSPENSION OF SENTENCE AND PROBATION. The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.

History

This section is the product of some of the most remarkable jurisprudence in Texas. In 1912 the court of criminal appeals held unconstitutional a statute permitting courts to suspend sentences. The court reasoned that suspension of sentence was really a form of clemency, and that under Section 11 of Article IV, only the governor has power to grant clemency. (*Snodgrass v. State*, 67 Tex. Crim. 615, 150 S.W. 162 (1912).) Both of those conclusions are questionable. Since Section 11 speaks only of "reprieves, and commutations of punishment and pardons," the court could have held that suspension of sentence simply was not covered by Section 11. Moreover, even if suspension of sentence is considered a form of clemency covered by Section 11, nothing in Section 11 says that the governor's clemency power is exclusive; the court therefore could have held that the legislature had power to provide for suspension of sentences, even if the subject also is within the governor's power. The court, however, ignored both of these opportunities to uphold the legislation and instead seemed to go out of its way to invalidate the act.

The very next year, the court leaned far in the other direction to uphold an act that was functionally equivalent to the one struck down in *Snodgrass v. State*. The statute in the *Snodgrass* case provided for suspension of sentence *after* conviction. The subsequent statute was characterized not as a law permitting the jury to suspend punishment after conviction, but as a provision allowing the jury to suspend the sentence as an alternative to convicting the defendant. Seizing upon

Art. IV, § 11A

this distinction, the court of criminal appeals upheld the second statute, stating that because it did not purport to relieve the defendant of punishment after conviction, it did not conflict with the clemency power of the governor, which the court still assumed to be exclusive. (*Baker v. State*, 70 Tex. Crim. 618, 158 S.W. 998 (1913).)

This decision permitted the courts to use the device of the suspended sentence, but since it rested on such a fine distinction, it obviously was not a very satisfactory basis for a system of probation. Section 11A therefore was added in 1935 to make clear the courts' power to suspend sentences and place defendants on probation.

Explanation

Despite the adoption of Section 11A, the courts do not yet have full power to suspend sentences and place defendants on probation. Although the section seems to be clearly an outright grant of power to the courts subject to regulation by the legislature, the court of criminal appeals has said that the courts have no such power until the legislature confers it. (*State v. Klein*, 154 Tex. Crim. 31, 224 S.W.2d 250 (1949).) This question is no longer of major importance, however, because the legislature in 1947 enacted a general Adult Probation and Parole Law, now codified as Article 42.12 of the Code of Criminal Procedure.

Snodgrass v. State still casts its shadow over the matter of probation and suspension of sentence. The courts' power to grant probation in misdemeanor cases is not clear. In *Ex parte Hayden* (152 Tex. Crim. 517, 215 S.W.2d 620 (1948)), for example, the court of criminal appeals suggested that Section 11A did not apply to misdemeanors. The court's reasoning was as follows: Section 11A mentions "sentences," but not "judgments" or "convictions"; felonies come within the section because in a felony there is a formal "sentence" which is distinct from the judgment of conviction; but in misdemeanors there is no formal sentence because the punishment is simply part of the judgment of conviction. Therefore language authorizing suspension of "sentences" does not authorize suspension of punishment in misdemeanors. Actually, it was not necessary to decide in *Hayden* whether Section 11A covered misdemeanors, because the statute also used the term "sentence" rather than "judgment" or "conviction" and the court held as a matter of statutory construction that probation was not authorized in a misdemeanor case. Nevertheless, citing *Hayden*, the court subsequently held that Section 11A does not authorize the legislature to provide for probation in misdemeanor cases. (*Waggoner v. State*, 161 Tex. Crim. 242, 275 S.W.2d 821 (1955).)

The legislature has taken the position that it does have power to permit probation in misdemeanor cases; it has retained the misdemeanor probation act as Article 42.13 of the Code of Criminal Procedure. The attorney general, relying not on Section 11A but on the old distinction drawn in *Baker v. State* between clemency before and after conviction, ruled the statute constitutional. (Tex. Att'y Gen. Op. No. C-492 (1965).) The court of criminal appeals has relied upon this distinction, and at the same time illustrated its fictitiousness. The court held that a judge in a misdemeanor cannot probate a portion of a jail term while requiring the defendant to serve the remaining portion of the term; to do so "would result in the appellant's incarceration without a judgment," because there is no judgment when probation is granted. Yet the court applied a provision in the statute which permits a fine to be imposed even though probation is granted. (*Lee v. State*, 516 S.W.2d 151, 152 (Tex. Crim. App. 1974).)

Art. IV, § 11A

Comparative Analysis

Although nearly all states permit either the governor or a board to grant pardons or some other form of executive clemency, only about ten state constitutions mention suspension of sentence or probation. About half of those provide that the legislature may authorize the courts to suspend sentences or grant probation. Three authorize the governor to suspend sentences and two give the power to a board.

Neither the federal constitution nor the *Model State Constitution* mentions the subject.

Author's Comment

Section 11A should never have been necessary. Probation and suspension of sentence are in no way inconsistent with the concept of executive clemency; they are simply additional tools that may be used to adjust punishment to individual cases. As the preceding *Comparative Analysis* indicates, most states utilize all three methods, even though their constitutions do not specifically authorize probation or suspension of sentence. The federal constitution gives the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. II, Sec. 2.) The courts have held that this power is exclusive and cannot be subjected to congressional control. (Ex parte *Garland*, 71 U.S. (4 Wall.) 333 (1867).) Yet the president's clemency power, though exclusive, does not prevent the congress from providing for probation, nor does it prevent the courts from suspending sentence. (See *United States v. Benz*, 282 U.S. 304 (1931); *The Laura*, 114 U.S. 411 (1885); *Nix v. James*, 7 F.2d 590 (9th Cir. 1925).)

A series of recent decisions by the court of criminal appeals make it clear that that court still considers the governor's clemency power to be exclusive. In *Smith v. Blackwell* (500 S.W.2d 97 (Tex. Crim. App. 1973)), the court stated that the clemency power given to the governor by Section 11 of Article IV is exclusive, and that an attempt by the legislature to permit district courts to resentence certain persons previously convicted of offenses involving marijuana is therefore unconstitutional, because resentencing is a form of clemency. The court extended that reasoning even further in Ex parte *Giles* (502 S.W.2d 774 (Tex. Crim. App. 1973)) holding that the legislature had no power to provide for resentencing even in cases pending on appeal on the effective date of the statute. The court held that once the trial court has imposed sentence, the governor's power to reduce the sentence is exclusive. Judge Douglas, dissenting, would have held, with respect to cases on appeal on the effective date of the statute, "that the executive and judicial powers may co-exist and complement each other in promoting the public welfare, assisting in the reformation of one convicted, and promoting justice." (502 S.W.2d, at 794.) The Supreme Court of Texas deferred to the decision of the court of criminal appeals. (*State ex rel. Pettit v. Thurmond*, 516 S.W.2d 119 (Tex. 1974).)

If the Texas courts could consider the question today as one of first impression, they might well hold that there is no inconsistency between executive clemency and the courts' power to suspend sentences and grant probation. Unfortunately, however, the cases described above are now embedded in the jurisprudence of the state, and it is still possible that in the absence of Section 11A the courts would hold probation and suspended sentence legislation unconstitutional.

There is, however, no need to retain Section 11A as a separate section. Section 11 could simply be amended to make it clear that the governor's clemency power does not preclude the exercise of power by the courts to suspend sentences and

Art. IV, § 12

grant probation. To avoid the problem created by Ex parte *Hayden*, the amendment should be clearly written to include misdemeanors as well as felonies.

Sec. 12, VACANCIES IN STATE OR DISTRICT OFFICES. All vacancies in State or district offices, except members of the Legislature, shall be filled unless otherwise provided by law, by appointment of the Governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the Senate present. If made during the recess of the Senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the Senate, the Governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate; but may appoint some other person to fill the vacancy until the next session of the Senate or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter.

History

Provision in a single section for filling vacancies in both elective and appointive offices originated in the Constitution of 1876. All previous constitutions covered vacancies in elective offices in the sections that created the offices. As to vacancies in appointive offices, all the earlier constitutions contained a section, similar to the second sentence of this section, requiring gubernatorial appointments to fill vacancies that occurred during an interim between legislative sessions in offices normally filled by appointment by the governor with advice and consent of the senate to be submitted for senate confirmation after the legislature convened. In effect, it permitted vacancies to be filled in an interim, yet preserved the senate's power of confirmation in those instances.

The method of filling vacancies in elective offices (and in those offices elected by the legislature under the Constitutions of the Republic and of 1845) varied significantly under prior constitutions. Until 1850, no officers were elective but the chief executive, the chief executive's successor, and the legislators; and vacancies in those offices were always and still are filled by succession or special election. (See Art. IV, Sec. 16, and Art. III, Sec. 13.) Thus, only recess vacancies in offices elected by the legislature needed consideration, and the Constitution of 1845 authorized the governor to fill them "until the close of the next session of the legislature," by which time the legislature would have elected permanent occupants.

In 1850 a constitutional amendment required public election of all officers previously elected by the legislature and of most officers previously appointed by the governor with senate confirmation. The wording of the amendment was confusing but it apparently provided for filling vacancies in the offices it covered by special election. It clearly did not provide for any other method of filling vacancies. (See Tex. Laws 1850, ch. 40, 3 *Gammel's Laws* p. 474.)

The next change came in the 1866 Constitution, which empowered the governor to fill vacancies in elective offices until the next election. The 1869 Constitution was the first to provide that vacancies in elective offices be filled by gubernatorial appointment with senate confirmation. (Curiously, the 1869 provision applied only to vacancies in elective offices that occurred during recess of the legislature. Vacancies occurring during a session were overlooked.)

Every prior constitution contained some restriction on renomination of reject-

Art. IV, § 12

ed nominees where appointive officers were concerned, but the details in the third and fourth sentences of this section originated in 1876. The Constitution of the Republic simply stated that the president could not renominate a rejected nominee to the same office. The 1845, 1861, and 1866 Constitutions prohibited renomination only during the session in which the rejection occurred and also prohibited filling vacancies during a recess if no nominee was submitted during the session. Apparently, if the senate rejected the governor's nominee the governor could hold off and install the nominee after adjournment; but if the governor submitted no nomination he could install no one after adjournment. The 1869 provision omitted the restriction on filling vacancies when no nominee was submitted but otherwise was similar to its predecessors.

The last sentence of this section and the clause in the first sentence authorizing the legislature to provide alternative methods of filling vacancies first appeared in 1876. Prior constitutions did not mention the tenure of appointees to vacancies or authorize legislative alteration of the vacancy-filling provision.

Although the Convention of 1875 made some significant changes and added a lot of detail in this section, no debate on the subject was reported. (See *Debates*, pp. 151-67, 257-58.)

Explanation

The primary function of this section is to provide the method by which a new officeholder is selected in the event an incumbent dies, resigns, is removed from office, or otherwise legally becomes incapable of performing the duties of the office before the term of the office expires. In the ordinary legal sense, that is what constitutes a vacancy in an office. The normal selection procedures are designed to have a successor ready to assume office when a term expires, and if for some reason a successor does not assume an office when the successor is supposed to, Article XVI, Section 17, requires the prior occupant to continue in the office until a successor does assume it. Thus expiration of a term cannot, in the ordinary legal sense, create a vacancy in an office. The section also preserves the senate's power of confirmation in the case of vacancies occurring while the senate is not in session and ensures that the requirement of confirmation is effective by preventing reappointment of a rejected nominee after the senate adjourns. Finally, it requires a mid-term election to fill a vacancy in an elective office the term of which extends past the next general election.

An additional function of this section is hidden in a few sentences in judicial opinions that grew out of a dispute over the senate's refusal to confirm Governor Miriam A. Ferguson's nominee to fill the statutory office of chairman of the highway commission. The incumbent chairman's term was about to expire and Governor Ferguson submitted her nominee for senate confirmation for the next full term, as the statute creating the office required. The senate twice considered the candidate in executive session and both times reported to the governor that it refused to confirm. Governor Ferguson installed her nominee in the office without confirmation, and the attorney general brought an action challenging her nominee's right to the office. Apparently, Governor Ferguson and her nominee had proof that a majority but not two-thirds of the senators present had voted to confirm, so they argued that since the statute was silent about the number of senators required to confirm only a majority was necessary. Both the court of civil appeals and the supreme court rejected that contention, stating that, in the case of *appointive* offices, a vacancy occurs on expiration of the term. Thus unless a statute provides otherwise, Article IV, Section 12, requires *all* gubernatorial nominees, whether they are to fill an unexpired term or an entire term, to be confirmed by two-thirds of

Art. IV, § 12

the senators present. (*Denison v. State*, 61 S.W.2d 1017 (Tex. Civ. App.—Austin), writ *ref'd n.r.e. per curiam*, 122 Tex. 459, 61 S.W.2d 1022 (1933).) Apparently, the possibility that, if a vacancy exists when the term expires, the prior occupant may hold over until a successor qualifies has not caused any problems.

Of course, Section 12 permits the legislature to alter the procedures for filling “vacancies” in both elective and appointive offices (“vacancy” still has its ordinary meaning in the case of elective offices), but the court of civil appeals also stated in *Denison* that the phrase “unless otherwise provided by law” in Section 12 refers to the nominating authority but not to senate confirmation. Section 12, then, has an additional hidden meaning. If the legislature creates an office to be filled by appointment, the appointing authority can be given to anyone but the governor without the necessity for senate confirmation. In fact, the attorney general has ruled that a statute requiring senate confirmation of an officer appointed by someone other than the governor violates the separation of powers statement (Art. II, Sec. 1), since appointment of executive officers is an executive function in which the senate, a legislative body, may not participate without express constitutional authorization. (Tex. Att’y Gen. Op. No. WW-324 (1957).) If the governor is to appoint an official, however, the court of civil appeals said in *Denison* that Section 12 requires senate confirmation; the governor may not be given the sole authority to appoint to any state or district executive office. (That part of *Denison* may not be valid. The statement was not necessary for the court’s holding, and the legislature, in a few statutes, has authorized the governor to appoint to an office without senate confirmation. Apparently, none of those statutes has been questioned.)

The attorney general’s ruling on senate confirmation may explain the *Denison* court’s insistence on finding more in Section 12 than is immediately apparent. The court could have ruled as a matter of statutory construction that senate confirmation meant approval by two-thirds of the senators. In that event, however, the court might have had to consider whether the widespread Texas practice of requiring senate confirmation of gubernatorial appointees to statutory offices is in violation of separation of powers. The decision, by finding a constitutional *requirement* of senate confirmation, eliminated the issue.

The statement that appointments made “during the recess of the Senate” are to be nominated to it “during the first ten days of its session,” which is probably a holdover from the provision in the Constitution of the Republic authorizing the president to convene the senate alone, once led the senate to attempt to convene itself during an interim between regular sessions solely to consider gubernatorial appointments. The court ruled that the senate could not do so, that recess appointments may be considered only in biennial regular sessions or in special legislative sessions called by the governor under Section 8 of Article IV. (*Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946).)

Section 12 applies only to state and district offices. Vacancies in county and precinct offices and in offices of other political subdivisions are not subject to this section. (Tex. Att’y Gen. Op. No. 0-5153 (1943).) Also, Section 12 applies only to vacancies in *executive* offices for which the constitution does not contain an express provision, as it does, for example, for railroad commissioner (Article XVI, Section 30) and lieutenant governor (Article III, Section 9). Section 12 does not apply to vacancies in legislative offices, which are governed by Article III, Section 13, or to judicial vacancies, which are governed by Article V, Section 28, in the case of constitutional courts (*State ex rel. Peden v. Valentine*, 198 S.W. 1006 (Tex. Civ. App.—Fort Worth 1917, writ *ref’d*) or by statute in the case of statutory courts (*cf. Sterrett v. Morgan*, 294 S.W.2d 201 (Tex. Civ. App.—Dallas 1956, no writ.)).

During a session an appointment under Section 12 consists of two acts:

Art. IV, § 12

nomination by the governor and confirmation by the senate. If the senate fails to act on a proposed appointee named during a session, the appointee may not qualify for the office. (Tex. Att'y Gen. Op. No. 0-4864 (1942).) The attorney general has ruled that a different result follows senate inaction if the appointee is named during an interim and nominated to the senate after it convenes. In that event, according to the attorney general, senate inaction is not tantamount to rejection; the senate must affirmatively reject the nominee or he continues in the office until the next session, even though the prohibition in Section 12 on appointment of a rejected nominee following a session appears to consider failure to confirm as rejection. (Tex. Att'y Gen. Op. No. M-267 (1968).)

Comparative Analysis

The provisions for filling vacancies in executive offices vary greatly from state to state. In general, if the office is elective the governor fills a vacancy — sometimes on his own, sometimes with the advice and consent of the senate. Several states permit the legislature to prescribe another method of filling vacancies. A number of states also specifically call for filling the vacancy only until the next general election, some having exceptions for vacancies that occur shortly before an election.

Approximately ten states appear to have no constitutional provision for filling vacancies in appointive offices. Of the remaining states, about 17 have provisions comparable to Section 12 in that they are designed in one way or another to preserve any legislative power to confirm or reject recess appointments, and about half of those specifically prohibit subsequent appointment of rejected nominees during recess.

The vote required for senate confirmation of gubernatorial appointees occasionally is specified as a majority, a majority of those elected, two-thirds, or two-thirds of those elected. Usually, however, the vote is not specified. Two states require confirmation of appointees to some offices by both houses. The new Michigan Constitution contains an unusual provision on senate confirmation, which provides as follows:

Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed. (Mich. Const. Art. V, Sec. 6.)

A number of state constitutions also have provisions governing appointments generally in addition to a temporary vacancy provision. Many of those are modeled after Article II, Section 2, of the United States Constitution and require the governor to nominate and, “by and with the advice and consent” of the senate, appoint all nonelective officers. Others do not require confirmation of gubernatorial appointees. Several, however, make the constitutional provision on selection of officers operative only if a statute does not provide another method of selection.

About a dozen states have provisions giving the governor the power to remove persons in appointive executive offices, but there are many variations in the stated reasons for removal and the offices covered. Several others provide that removal from some offices shall be provided by law.

The *Model State Constitution* has no elected executives, other than the governor, and gives the governor unrestricted power to appoint and remove heads of departments. Obviously, under the *Model* the governor may fill vacancies, and

Art. IV, § 13

no provision like Section 12 is needed.

Author's Comment

A provision covering temporary vacancies may be desirable to ensure that vacancies in constitutional appointive offices for which senate confirmation is required may be filled temporarily while the legislature is not in session. Provision for temporarily filling vacancies in constitutional elective offices may also prevent confusion in the absence of a statute covering the situation. Finally, limitations on reappointment of rejected nominees make certain that the governor does not circumvent any power of confirmation given the senate by reappointing rejected nominees after adjournment. Temporary vacancy provisions, however, do not determine the power of the governor (or any other official or body) to any major extent.

A general appointment provision, which the *Denison* case made of Section 12, is more important in defining the governor's power. Appointment without the necessity of senate confirmation gives the appointing authority more freedom in selecting subordinates. A requirement of senate confirmation reduces that freedom (with the degree of the reduction growing as the number of senators necessary to confirm increases), and the reduction is even greater in a state in which, like Texas, the tradition of "senatorial courtesy" permits any senator to block an appointee from the senator's district by objecting to the confirmation. Somewhere in between is the Michigan provision quoted in the *Comparative Analysis*, which eliminates the requirement of affirmative action by the senate to confirm and requires affirmative action only to disapprove an appointee. A general appointment provision is necessary in a constitution, however, only if the drafters want to prevent the legislature from making some offices elective or from lodging appointive powers in some official or body other than the one named. If the drafters want senate confirmation of appointive officials, a general provision is also necessary to prevent the legislature from excluding it and may be necessary to avoid the separation of powers objections made in the attorney general's opinion on senate confirmation discussed in the *Explanation*.

Removal powers, too, are not constitutional necessities but, when covered, determine the power of the appointing authority to influence the official actions of the appointees. An appointing authority with no removal power, like the Texas governor (see Art. XV for the Texas Constitution's provisions on removal), has few tools with which to influence the appointees, even though the appointing authority may be responsible politically for their official conduct.

Sec. 13. RESIDENCE OF GOVERNOR. During the session of the Legislature the Governor shall reside where its sessions are held, and at all other times at the seat of Government, except when by act of the Legislature, he may be required or authorized to reside elsewhere.

History

The requirement that the governor reside where legislative sessions are held dates to the 1845 Constitution. Under the early constitutions, when the legislature was not in session the governor resided "wherever, in their opinion, the public good may require."

The 1869 Constitution required the governor to reside at the capital when the legislature was not in session unless, "in the opinion of the legislature, the public good may otherwise require." That provision was revised in 1875, to specify the

Art. IV, § 14

manner in which the legislature must express its opinion (by law) and to permit it to authorize, as well as require, residence elsewhere.

Explanation

The first part of this section is necessary because, although legislative sessions ordinarily are required to be at the seat of government, in extraordinary circumstances the sessions may have to be held elsewhere. (See Art. IV, Sec. 8.) Otherwise the section is self-explanatory; it has caused no problems.

Comparative Analysis

Only 17 states, besides Texas, have constitutional residence requirements for the governor while in office. One requires only that the governor reside in the state during the term of office. The others require the governor to reside at the seat of government. Two include exceptions for periods during wartime emergencies or epidemics. No other state empowers the legislature to require the governor to reside somewhere. The *Model State Constitution* does not mention the governor's residence during the term of office.

Author's Comment

Obviously the official and political duties of the governor of a large and populous state demand that the governor stay close to the center of official and political activity. It is doubtful that a residence requirement is necessary to keep the governor in the capital, however, and in any event the state provides an official residence.

Sec. 14. APPROVAL OR DISAPPROVAL OF BILLS; RETURN AND RECONSIDERATION; FAILURE TO RETURN; DISAPPROVAL OF ITEMS OF APPROPRIATION. Every bill which shall have passed both houses of the Legislature shall be presented to the Governor for his approval. If he approve he shall sign it; but if he disapprove it, he shall return it, with his objections, to the House in which it originated, which House shall enter the objections at large upon its journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members present agree to pass the bill, it shall be sent, with the objections, to the other House, by which likewise it shall be reconsidered; and, if approved by two-thirds of the members of that House, it shall become a law; but in such cases the votes of both Houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the Governor with his objections within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent its return, in which case it shall be a law, unless he shall file the same, with his objections, in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment. If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect. If the Legislature be in session, he shall transmit to the House in which the bill originated a copy of such statement and the items objected to shall be separately considered. If, on reconsideration, one or more of such items be approved by two-thirds of the members present of each House, the same shall be part of the law, notwithstanding the objections of the Governor. If any such bill, containing several items of appropriation, not having been presented to the Governor ten days (Sundays excepted) prior to adjournment, be in the hands of the Governor at the time of adjournment, he shall have twenty days from such adjournment within which to file

Art. IV, § 14

objections to any items thereof and make proclamation of the same, and such item or items shall not take effect.

History

The general veto provisions of this section originated in the Constitution of the Republic, which closely followed the veto provision of the United States Constitution (Art. I, Sec. 7). The statehood constitution made the changes necessitated by the change from nation to state, and that version has appeared in every subsequent state constitution with only two substantive changes. First, until adoption of the present constitution, the chief executive had only five days to return objectionable bills to the house of origin. Second, under the Republic the president could veto bills presented to him within the last five days by refusing to sign them – the pocket veto. No constitution since statehood has permitted the pocket veto, and the Constitutions of 1845, 1861, 1866, and 1869 provided that the governor could not even veto bills after adjournment. The Constitutional Convention of 1875 increased the time to return objectionable bills to ten days and permitted vetoes of bills after adjournment.

The 1875 Convention made one additional change. It neglected to specify whether two-thirds of those present or those elected is necessary to override a veto of a bill in the second house. All previous state constitutions clearly required only two-thirds of those present in each house – the Constitution of the Republic only specified “a vote of two-thirds of both Houses” – and there is no indication in the journal of the convention or its reported debates that the omission in 1875 was intentional. In fact, the draft by the Committee on the Executive Department to the 1875 Convention expressly included the term “present” for the second house, and the convention journal records no amendment to delete it. It apparently was omitted inadvertently in the enrolling process. (*Journal*, pp. 231, 283-304, 371-74.) Intentional omission would be inconsistent with retention of two-thirds of those present in *each* house, which is clearly the requirement to override *item* vetoes. The omission, therefore, should be disregarded. The two houses have disagreed, however. The senate requires two-thirds of those elected to override vetoes of house bills. (See Tex. S. Rule 31(b) (1975).) The senate rules deal only with vetoed bills and do not mention the vote required to override a veto of an item of appropriation; presumably, only two-thirds of the senators present suffice to override a vetoed item in a house appropriations bill, since Section 14 is clear on that point. The house requires only two-thirds of those present to override vetoes of senate bills. (Annotation of Tex. H. Rule 32 (1975) in Texas Legislative Council, “Rules of the House” *Texas Legislative Manual* (Austin, Supp. 1975), p. 139.)

The item veto in appropriation bills first appeared in the 1866 Constitution. It was an innovation of the Confederate constitutions and proved to be a major contribution to American government. (See J. Burkhead, *Government Budgeting* (New York: Wiley, 1956), p. 416.) Curiously, in 1866 the governor could veto items of appropriation after adjournment. Postadjournment item vetoes were submitted to the next session of the legislature for reconsideration. In 1875 the Convention, having permitted post adjournment vetoes of bills, omitted provision for reconsideration of item vetoes at the next session.

Explanation

By authorizing the governor to prevent any bill or, in the case of a general appropriations bill, any item of appropriation from becoming law by objecting in the proper manner (assuming the legislature does not muster the votes necessary to override), Section 14 grants the governor a substantial role in the legislative

Art. IV, § 14

process. In fact, the veto power repeatedly is referred to as a legislative, not an executive, power, and because it is a legislative power, its scope is limited strictly to the terms of the constitutional grant and may not be enlarged, even by statute. (See *Fulmore v. Lane*, 104 Tex. 499, 140 S.W. 405, *aff'd on rehearing*, 104 Tex. 499, 140 S.W. 1082 (1911); *Pickle v. McCall*, 86 Tex. 212, 24 S.W. 265 (1893); Tex. Att'y Gen. Op. Nos. M-1199, M-1141 (1972).)

The scope of the power represented by the general veto and the item veto is immeasurably increased by existence of the postadjournment veto, which the legislature gets no opportunity to override. The great majority of bills that pass each session of the legislature, including the general appropriations bill and most other major bills, pass during the last ten days of the session. On all those passed during that period, the legislature will not have an opportunity to override a veto if the governor, because he wants to avoid the possibility of an override or because he is unable to determine which of the great volume of bills he may find objectionable, waits until after adjournment to veto a bill.

Few questions have arisen about the governor's power to veto bills, but the power to veto items of appropriation has generated a number of major disputes. The major source of confusion has involved the meaning of "items of appropriation," and the most important case on that question is *Fulmore v. Lane* (*supra*). In 1911 the legislature's appropriation to the attorney general's department was as follows:

Attorney General's Department.
For the Years Ending –
August 31, 1912 – August 31, 1913.

For the support and maintenance of the Attorney General's department, including postage, stationery, telegrams, telephones, furniture, repairs, express, typewriters and fittings, contingent expenses, costs in civil cases in which the state of Texas or any head of a department is a party; for the actual traveling expenses and hotel bills incurred by the Attorney General or any of his assistants or employes in giving attention to the business of the state elsewhere than in the city of Austin; for depositions and procuring evidence and documents to be used in civil suits or contemplated suits wherein the state is a party; for law books and periodicals; for the payment of any and all expenses incident to and connected with the administration of the duties of the Attorney General's office; for the enforcement of any and all laws, wherein such duty devolves upon the Attorney General; for the payment of any and all expenses in bringing, prosecuting and defending suits; for the payment of the salary and maximum fees provided by the Constitution for the Attorney General, and for the payment of the salaries and compensation of his assistants and employes and other help deemed by the Attorney General to be necessary to carry on the work of the Attorney General's department, there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty (\$83,160.00) dollars, to be expended during the two fiscal years ending August 31st, 1912, and August 31st, 1913, to be paid by the Treasurer on warrants drawn by the Comptroller upon vouchers approved by the Attorney General . . . \$41,580.00 \$41, 580.00

A lengthy "rider," detailing exactly how much could be spent for each purpose (*e.g.*, the salary of the attorney general, the number and salaries of his assistants, the number and salaries of clerical and other personnel, the amount available for postage, stationery, etc.) followed the appropriation. In contrast, the appropriations for all other executive departments in the bill resembled that for the treasury department, which follows:

Art. IV, § 14

Treasury Department.	For the Years Ending –	
	Aug. 31, 1912	Aug. 31, 1913
Salary of Treasurer	\$2,500 00	\$2,500 00
Salary of chief clerk	2,000 00	2,000 00
Salaries of three assistant clerks	4,500 00	4,500 00
Salary of stenographer and general assistant clerk	1,200 00	1,200 00
Salary of night watchman	800 00	800 00
Salary of porter	480 00	480 00
Books, stationery, furniture and postage	1,200 00	1,200 00
Keeping in repair time locks, combinations, vaults, and office furniture and files	150 00	150 00
Contingent expenses	300 00	300 00
To pay express charges and to pay the charges on postoffice and express money orders upon money due the State as interest or principal due on bonds held by the State where the bonds are payable at any other point than Austin, Texas, and to pay express charges to place money in the city of New York for payment of interest on State bonds payable in said city and to pay exchange to and from depositories	300 00	300 00
Total	\$13,430 00	\$13,430 00

The governor objected to the appropriation to the attorney general's department and, in his veto message to the legislature, stated:

I regret that the Legislature felt it incumbent upon itself to seek to deprive the Governor of the constitutional prerogative of vetoing any item for any department where in his judgment such appropriation was excessive or unnecessary. In the bill as filed with the Secretary of State I have exercised this prerogative, nevertheless, and vetoed the lump sum of \$83,160.00 appropriated to the Attorney General's department. After making this lump appropriation in one item, the Legislature divided the same into two items of \$41,580.00 each for the fiscal years ending August 31, 1912 and 1913, respectively. By striking out the lump appropriation and the words describing the same, and the appropriation of \$41,580.00 for the second year, the sum of \$41,580.00 is left subject to the use of the Attorney General for the maintenance of his department for the two fiscal years named, any portion of which can be used, under the language of the bill, for any purpose in carrying on the duties of his office The paragraph containing the items which follow the appropriations for the respective years named [the rider] is vetoed, because it is out of harmony with the remainder of the appropriation after the objection already noted and the items named were disapproved.

In September 1911, the first month of the biennium covered by the bill, the comptroller refused to issue warrants for the department contending that the governor, by striking the lump sum of \$83,160, had vetoed the department's appropriation for both years of the biennium. A clerk in the department filed suit to compel the comptroller to issue a warrant to pay for his services in September. (Thus none of the disputants in an apparently major political controversy were actual parties to the suit. The underlying source of the dispute is unclear, but the dissent in the original opinion intimated that the governor did not believe the state's antitrust efforts should be as extensive as the legislature wanted. *Fulmore v. Lane*, 140 S.W. 405, at 425.)

Art. IV, § 14

The principal question was whether the appropriation consisted of two items, one for each year, or one item covering both years. The court ultimately held that the governor had vetoed only the second year's appropriation. Each of the three justices sitting on the court at that time wrote an opinion, however, and two of them wrote two opinions. For that reason, the case provides little guidance for the future. It simply illustrates the problems of statutory construction created when the legislature seeks to prevent an item veto of a particular project. (One opinion points out that the appropriations for the department resembled those of other departments when the bill was introduced in the legislature and that the change probably was made expressly to prevent an item veto of a sum added during the legislature's deliberations for a particular purpose opposed by the governor.) In reaching the final resolution of the case, the court did establish that an item of appropriation is an appropriation of a sum of money and that the governor may not reduce an item but must veto the entire item. If the governor vetoes an item, he vetoes the provisions governing its expenditure, but he may not veto a "rider" or provision governing expenditure of several separate items without vetoing each item to which it applies. (See also *Jessen Associates, Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975) on the governor's inability to veto an appropriations rider.) Thus the legislature, by adept use of riders or by lumping many purposes of expenditure for a single item, can curtail the effect of the item veto. The only limitation is the requirement of "specific" appropriation. (See the Annotation for Art. VIII, Sec. 6.) Usually, an agency's appropriation consists of a total sum subdivided into several secondary sums, which may also be subdivided, as follows:

AIR CONTROL BOARD

	For the Years Ending	
	August 31, 1976	August 31, 1977
1. Administrative Services:		
a. Per Diem of Board Members	\$6,000	\$6,000
b. Executive Director	31,400	33,200
c. Executive Administration	115,859	123,447
d. Fiscal & Personnel	307,575	328,404
e. General Services	783,473	797,630
f. Data Processing	465,715	485,425
g. Public Information & Training	146,441	158,369
Total, Administrative Services	\$1,856,463	\$1,932,475
2. Control and Prevention:		
a. Deputy Director Control & Prevention ..	\$ 25,500	\$ 27,000
b. Compliance	324,802	353,429
c. Legal	133,305	143,213
d. Prevention	730,547	790,727
e. Regional Operations	2,189,745	2,346,406
f. Contingency for Workload Increase	136,652	140,616
Total, Control and Prevention	\$3,540,551	\$3,801,391
3. Measurements and Analysis:		
a. Deputy Director Measurements and Analysis	\$ 25,500	\$ 27,000
b. Air Quality Evaluation	935,300	969,694
c. Laboratory	342,893	364,985

Art. IV, § 14

d. Source Sampling	473,217	505,494
e. Meteorology	64,478	69,665
Total, Measurements and Analysis	<u>\$1,841,388</u>	<u>\$1,936,838</u>
4. For Administration of Senage Bill No. 41, Acts of the 64th Legislature, Regular Session, 1975		
	\$ 30,000	\$ 30,000
<hr/>		
GRAND TOTAL, AIR CONTROL BOARD	<u>\$7,268,402</u>	<u>\$7,700,704</u>

SOURCE: Tex. Laws 1975, ch. 743, art. III, at pp. 2541-42.

Neither the *Fulmore* case discussed previously nor any other reported opinion has decided whether the item veto applies only to the total or may be used to strike a secondary sum or even a subdivision of a secondary sum. In practice, governors frequently veto subdivisions of secondary sums, even though the effect is to reduce the secondary sum and the total. For example, in the foregoing agency's appropriation, the governor vetoed item 2.f. (See Tex. Laws 1975, veto proclamation, at p. 2878.)

The *Fulmore* opinions refused to decide whether the attorney general would have money to operate in the second year of the biennium and thus left open the extent of the governor's power to destroy another constitutional office. The possibility is yet to be determined judicially, but six years after *Fulmore*, Governor James Ferguson was impeached following an item veto of the entire appropriation (except the salary of one official) for The University of Texas, an institution mandated by Article VII, Section 10. (See Tex. S. Jour., 35th Leg., 3d Called Sess. (1917), at p. 15.) Although the article of impeachment recognized the legality of the veto, it stated that he had an obligation to call a special session to appropriate for the university and that his refusal to do so would destroy an entity mandated by the constitution. Possibly because he subsequently did call a special session to appropriate for the university, the senate acquitted him of that particular charge. (Id. at pp. 897-99.) Recently, Governor Preston Smith vetoed all appropriations for the second year of a biennium and called a special session later to enact a one-year appropriations bill. (See Tex. Laws 1971, at p. 3823.)

Most of the other disputes over the veto power have involved minor questions, primarily involving procedures under Section 14. In one case, the supreme court ruled that Sundays are included in the 20 days that the governor has after adjournment to consider bills. (*Minor v. McDonald*, 104 Tex. 461, 140 S.W. 401 (1911).) In another case, the governor had filed a bill after adjournment in the secretary of state's office with a statement criticizing some of its provisions. Because the governor's statement clearly indicated that he intended to permit it to become law, the court rejected the contention he had vetoed the bill. (*Jackson v. Walker*, 121 Tex. 303, 49 S.W.2d 693 (1932).) The attorney general has ruled that when a bill is filed in the secretary of state's office, even though the governor's time to consider it has not elapsed, he may not recall it to change his action. (Tex. Att'y Gen. Op. No. O-5310 (1943).) Until it is filed, however, it may be recalled by the legislature for additional action. (*Teem v. State*, 79 Tex. Crim. 285, 183 S.W. 1144 (1916).) When only items are vetoed, the statement of the items the governor returns to the legislature is conclusive even though he neglects to sign the bill in strict compliance with the procedure for item vetoes. Thus, he may not veto an additional item he had inadvertently overlooked when he later signs the bill after legislative recon-

Art. IV, § 14

sideration. (*Pickle v. McCall*, 86 Tex. 212, 24 S.W. 265 (1893).)

Two uncertainties in the language of Section 14 have not caused any problems. First, the adjournment that frees the governor from returning a vetoed bill apparently has been construed to be adjournment *sine die*; at least it appears that no governor has attempted to circumvent the legislature's power to override by filing a bill with objections and issuing a veto proclamation during a mid-session adjournment or recess. Second, the ambiguity about the number of votes to override a general veto in the second house, which is discussed in the *History* to this section, has never arisen in court.

Comparative Analysis

General Veto. North Carolina is the only state that has no gubernatorial veto of any kind. All other states require the governor to return a vetoed bill within a specified number of days after presentation to him (three days, nine states; five days, 22 states; six days, four states; ten days, ten states; 12 days, one state; 15 days, one state) usually excepting Sundays and sometimes excepting holidays. Under the 1964 Michigan Constitution the governor has 14 days "measured in hours and minutes" from the time of presentation. The new Illinois Constitution gives the governor 60 days to return a vetoed bill.

Overriding a veto requires a vote of two-thirds of the elected members in 16 states, of those present in ten states, and of those voting in two states. Seven states require a two-thirds vote without specifying the members to be counted. Six states require a vote of three-fifths of the elected members and one requires three-fifths of those present. A simple majority of elected members suffices in six states. In Alaska, the required two-thirds of elected members rises to three-fourths for revenue and appropriation measures, including item vetoes. Three states increase the vote required to override vetoes of emergency matters.

In some 18 states the intervention of adjournment permits a governor to veto a bill by doing nothing—a "pocket veto." In the other states he must specifically veto a bill. Approximately 30 states give the governor a longer time to consider bills following adjournment than during a session. In some cases the increase may be only from three to five days, or from five to ten days. In other cases the period is lengthy, frequently 30 days, and in a few cases 45 days. Like Texas, the question of whether or not adjournment refers to final adjournment is not answered by the wording of most constitutions. A few states, however, have separate provisions for recess and final adjournment. Presumably bills vetoed after final adjournment are permanently dead in all states that do not provide a special procedure for reconsideration of postadjournment vetoes. A few state constitutions provide for a special session to reconsider postadjournment vetoes, either automatically or under a procedure by which the legislature may call itself into session. An additional two or three constitutions clearly provide that bills vetoed after adjournment may be returned for reconsideration at the beginning of the next regular session. In two states, the legislature in practice delays adjournment until the governor has acted on all bills.

The new Montana and Illinois Constitutions include an innovation authorizing the governor to return a bill with recommendations for amendments. If his suggestions are accepted, the bill is again presented for his approval. (Mont. Const. Art. VI, Sec. 10 (2); Ill. Const. Art. IV, Sec. 9 (e).)

The *Model State Constitution* provides for a general veto as follows:

When a bill has passed the legislature, it shall be presented to the governor and, if the legislature is in session, it shall become law if the governor either signs or fails to veto it within fifteen days of presentation. If the legislature is in recess or, if the session

Art. IV, § 14

of the legislature has expired during such fifteen-day period, it shall become law if he signs it within thirty days after such adjournment or expiration. If the governor does not approve a bill, he shall veto it and return it to the legislature either within fifteen days of presentation if the legislature is in session or upon the reconvening of the legislature from its recess. Any bill so returned by the governor shall be reconsidered by each house of the legislature and, if upon reconsideration two-thirds of all the members shall agree to pass the bill, it shall become law. (Sec. 4.16(a).)

Note that the *Model* clearly distinguishes between recess and adjournment *sine die* (expiration) and permits a pocket veto, but only in the case of adjournment *sine die*.

Item Veto. Approximately 42 states grant the governor power to veto appropriation items, but there are limitations in some states. In one state, Missouri, the item veto may not be used in the case of appropriations for public schools or for payment of principal and interest on public debt. In Nebraska appropriations in excess of the governor's budget request require a three-fifths vote, but such items may not then be vetoed. In West Virginia, the legislature may not increase items in the governor's budget and, consequently, the bill does not require the governor's approval; his item veto applies only to supplemental appropriations. Six states permit the governor to reduce an item rather than veto it. The *Model* also permits reduction as follows:

The governor may strike out or reduce items in appropriation bills passed by the legislature and the procedure in such cases shall be the same as in case of the disapproval of an entire bill by the governor. (Sec. 4.16 (b).)

Author's Comment

The veto, particularly the item veto, is perhaps the most significant of the Texas governor's constitutional powers. Its availability and the threat of its use provides the governor with an effective tool by which to influence any legislative enactment, and because he has no significant budgetary powers (see the *Author's Comment* on Art. IV, Sec. 9), the item veto is the primary method by which he exercises some control over the amounts and purposes of state expenditures. As the *Comparative Analysis* reveals, the veto and item veto are almost universally accepted, and debate over their desirability is almost nonexistent.

The impact of the veto in practice, however, indicates that some adjustment may be in order. The legislature has not overridden a veto since 1941, which does not necessarily indicate an imbalance, but the likelihood of an override diminishes each year. The modern demands on the legislature make it increasingly more difficult for the members to consider adequately in 140 days every two years the many bills, both important and unimportant, presented to them. More and more, final action on bills is crowded into the closing hours of the session so that most of them, particularly the important ones, pass during the last ten days (Sundays excepted) of the legislature. Thus most vetoes are made in the 20 days after adjournment. For example, 210 of the 229 bills vetoed (not including item vetoes) from 1961 through 1975 have been after adjournment and not subject to an override. All item vetoes during that span have been after adjournment. Perhaps the figures on the numbers of bills considered after adjournment, whether vetoed, approved, or filed to become law without approval, are even more indicative of the significance of the veto. During this same period, the legislature passed 6,147 bills. Of that number, 3,725 or 60.6 percent were not considered by the governor until after adjournment. (In addition, governors have approved a significant number of bills passed during the last ten days (Sundays excepted) prior to adjournment.)

Art. IV, § 15

This imbalance will undoubtedly continue as long as the legislature is limited to one regular session of limited duration per biennium and probably will continue if regular sessions, however frequently they are permitted, are limited in duration. If that is to be the case, serious consideration should be given to an automatic session to reconsider vetoes only or to a legislatively called (*e.g.*, on petition of so many members of each house) veto session. The former, of course, would shift more legislative power back to the legislature than would the latter.

On the other hand, the inability of the governor to veto appropriations riders and the freedom the legislature has to lump several purposes under a single appropriations item has hampered the governor's use of the item veto. Of course, if the governor's budget powers were greater and particularly if the legislature's powers to alter his budget were limited as in the West Virginia Constitution, the item veto would be less important. If the legislative budget prevails, however, the power to reduce as well as veto appropriations items, which several states have adopted recently, would increase the governor's control over state expenditures, and if sessions are unlimited or a veto session is authorized or required, the likelihood of abuse would be diminished.

In the event of an effort to revise the constitution, the experience of the 1875 Constitutional Convention with the following section (see the *Author's Comment* on Art. IV, Sec. 15) illustrates the kinds of problems that can arise if the veto provisions are placed in the executive article. It is a legislative power and should be considered together with other legislative issues. Location of the veto section in the legislative article would be more likely to ensure that the entire constitutional legislative process is coordinated.

Sec. 15. APPROVAL OR DISAPPROVAL OF ORDERS, RESOLUTIONS OR VOTES. Every order, resolution or vote to which the concurrence of both Houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and, before it shall take effect, shall be approved by him; or, being disapproved, shall be repassed by both Houses, and all the rules, provisions and limitations shall apply thereto as prescribed in the last preceding section in the case of a bill.

History

The Constitution of the Republic lifted a provision almost identical with this section from Article I, Section 7, of the United States Constitution. The language has been carried forward in every subsequent constitution.

Explanation

Neither the house rules, the senate rules, nor the joint rules of the Texas Legislature recognize an "order" as a legislative document, and apparently no one has ever suggested that any vote preliminary to final passage of a bill or resolution is subject to gubernatorial veto. (Indeed, such a requirement would pose an almost insurmountable obstruction to the legislative process.) Thus Section 15 in practice applies only to resolutions. Resolutions requiring concurrence of both houses are of two types: joint resolutions, which propose amendments to this constitution and ratify proposed amendments to the United States Constitution (Tex. H. Rule 17 (1975)); and concurrent resolutions, which most frequently are used to adopt or suspend joint rules, to create joint committees, to recall bills and resolutions from the governor, to direct the appropriate enrolling clerk to make corrections in bills and resolutions, to confer permission to sue the state, to express legislative

Art. IV, § 15

opinion, and to adjourn *sine die* or beyond the constitutional three-day limit. (See Art. III, Sec. 17.)

Of course, adjournment resolutions are excepted from veto by the express terms of Section 15, but all others literally are subject to veto. In practice, the section is not applied that broadly. The attorney general recently ruled that a resolution requesting the United States Congress to call a constitutional convention pursuant to Article V of the United States Constitution is not subject to veto, because the federal provision mentions only requests by the *legislatures* of the states. (Tex. Att'y Gen. Op. No. M-1167 (1972).) The attorney general's reasoning applies as well to joint resolutions ratifying proposed amendments to the United States Constitution, since only legislatures are mentioned in the Article V ratification process. An early attorney general's opinion ruled that proposed amendments to the state constitution are not subject to veto. (Tex. Att'y Gen. Op. (To Honorable F. O. Fuller, Feb. 13, 1917), 1917-1918 Tex. Att'y Gen. Bien. Rep. 760, which is discussed in detail in Tex. Att'y Gen. Op. No. M-1167 (1972).) Finally, resolutions dealing with the rules of proceedings of the two houses are, in practice, given effect without gubernatorial approval. (See *Annotation of Tex. H. Rule 17, Sec. 13* (1975), in Texas Legislative Council, "Rules of the House," *Texas Legislative Manual* (Austin, 1971), p. 100.)

A supreme court justice has suggested that, unlike the section on veto of bills, this section requires the governor to approve a resolution (or have his veto overridden) for it to take effect. See *Fulmore v. Lane*, 104 Tex. 499, 140 S.W. 405, at 420 (1911) (dissenting opinion). As noted in the *History* of this section, its language has not been changed since the Constitution of the Republic, although the 1845 Constitution eliminated the pocket veto in the predecessor of Section 14 and this constitution added the postadjournment veto to that section. It seems more likely that the statement "all rules, provisions and limitations [prescribed in Section 14] shall apply thereto" means that the governor must actually disapprove to prevent effectiveness of a resolution, just as is required in the case of a bill.

Comparative Analysis

Approximately 20 other state constitutions authorize a gubernatorial veto of an "order, resolution or vote" (in a few instances, a resolution only) requiring concurrence of both houses. Almost all expressly except adjournment. Several, however, include other exceptions as well. Almost half except resolutions relating to the transaction of legislative business (a few expressly mention legislative investigations), and a similar number exclude proposals of constitutional amendments. Two states exclude resolutions relating to elections (probably referenda) from veto.

Author's Comment

As the *History* of this section noted, it is derived from the United States Constitution. The congressional view of the model for Section 15 is as follows:

The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention the creation of other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two

Art. IV, § 16

Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action, or to directing the expenditure of money appropriated to the use of the two Houses.

... Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course [citing *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)]. (Library of Congress Congressional Research Service, *The Constitution of the United States of America—Analysis and Interpretation*, rev. ed. (Washington, D.C.: Government Printing Office, 1973), pp. 127-28 (footnotes omitted).)

As in the case of the federal constitution, the power to veto resolutions was necessary to ensure effectiveness of the veto under the Constitution of the Republic and under the prior state constitutions. Otherwise, laws enacted by resolution rather than bill might have escaped executive scrutiny. Since its adoption, the present constitution has prohibited the enactment of laws by resolution (see the *Annotation* of Art. III, Sec. 30), and the probable original reason for Section 15 no longer exists. As is the case in the federal constitution, about one-half of the states with a similar provision have no constitutional requirement that laws be enacted only by bill. It is probable that the lack of coordination between the 1875 Convention's Committees on the Legislative Department and the Executive Department (and the failure to include the veto in the legislative article, where it belongs, and thus under the jurisdiction of the Committee on the Legislative Department) let Section 15 slip through unnoticed.

The congressional experience suggests that Section 15 was too broadly worded even when it was necessary under the prior constitutions, and there is no justification under the present constitution for its retention. If not eliminated, it should be narrowed to preclude gubernatorial involvement in legislative operations as well as to remove the burden on the governor of having to consider every resolution memorializing or congratulating a citizen or otherwise expressing legislative opinion.

Sec. 16. LIEUTENANT GOVERNOR. There shall also be a Lieutenant Governor, who shall be chosen at every election for Governor by the same electors, in the same manner, continue in office for the same time, and possess the same qualifications. The electors shall distinguish for whom they vote as Governor and for whom as Lieutenant Governor. The Lieutenant Governor, shall by virtue of his office, be President of the Senate, and shall have, when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election, and be duly qualified; or until the Governor impeached, absent or disabled, shall be acquitted, return, or his disability be removed.

History

This section originated in the 1845 Constitution and has appeared virtually unchanged in every subsequent constitution. During the 1875 Convention there