POWER OF THE GOVERNOR: DID THE COURT UNCONSTITUTIONALLY TELL THE GOVERNOR TO SHUT UP?

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I. PUBLIC CONTROVERSY AND PUBLIC OUTCRY

A. Governor's Order RP 49

On October 27, 2005, Governor Rick Perry issued Executive Order RP 49 that mandated the Texas Commission on Environmental Quality (TCEQ) to prioritize and expedite the processing of environmental permit applications to generate electrical power.[1] He ordered the State Office of Administrative Hearings (SOAH) to conduct hearings on the applications referred by TCEQ no later than six consecutive months from the date of referral.[2] Upon SOAH's issuance of a proposal for decision (PFD), Perry ordered TCEQ to give priority to these PFDs at its earliest agenda meeting as required by law.[3] Finally, the Governor mandated TCEQ and SOAH to explain any delays that may result in a failure to comply with the order on a monthly basis.[4]

Two Austin attorneys, described as authorities on Texas constitutional and statutory law, Buck Wood and Steve Bickerstaff, described the Governor's order as "an executive request" and "an expression of the governor's belief of what should be done."[5] "Outside of disasters or emergencies of that nature, the governor has virtually no authority to do anything other than veto bills or make appointments," stated Wood.[6] Governor Perry's spokesman responded, "To say the governor cannot direct a state agency to go in a certain direction is tantamount to saying the governor cannot lead."[7]

Citizens Organizing for Resources and Environment (Citizens) sued Governor Perry, TCEQ, and SOAH asking the court to declare Executive Order RP 49 void and that TCEQ and SOAH were not required to comply with Executive Order RP 49.[8] Judge Stephen Yelenosky of the 345th District Court, Travis County, issued a letter opinion that would issue a

[1] Tex. Gov. Exec. Order No. RP 49, 30 Tex. Reg. 7797, 7798 (2005).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Mary Alice Robbins, *Suits Pose Rare Challenge to Governor's Executive Orders*, TEX. LAW., Mar. 5, 2007, at 2.

[6] *Id.*

[7] *Id.*

[8] *See* Petition at 22–24, Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007).

temporary injunction precluding the Chief Administrative Law Judge of SOAH and the two administrative law judges assigned to the consolidated hearings from giving effect to the Executive Order.[9] Judge Yelenosky concluded that the plaintiffs would likely prevail on their allegations that the Governor lacked authority to issue the Executive Order and that the plaintiffs would be irreparably harmed if SOAH adhered to the Executive Order.[10]

B. Governor's Order RP 65

On February 2, 2007, Governor Perry ordered the Texas Department of State Health Services (HHS) to adopt rules that mandate the age-appropriate vaccination of all female children for human papillomavirus (HPV) prior to admission to the sixth grade.[11] Judge F. Scott McCown, a highly respected retired Travis County judge who is considered an expert on administrative law,[12] wrote an Op-Ed. Commentary in the *Austin American-Statesman* declaring that Governor Perry's HPV order was unconstitutional.[13] McCown noted that under the Texas Constitution, the Governor administers the law; he does not make the law.[14] Even though a state agency has been delegated the power to adopt rules, a Governor cannot lawfully order it to adopt a particular rule.[15] McCown stated:

> If the governor thinks we should have a new rule, he should ask the appropriate state agency to consider it, but he should not use his muscle to mandate it.
>
> Asking instead of telling is not merely a matter of form. When the governor asks a state agency to consider a rule, he allows the rulemaking process to work. When the governor orders a state agency to adopt a rule, he short-

[9] Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007) (unpublished letter opinion issued by Judge Stephen Yelenosky on Feb. 20, 2007).

[10] *Id.*

[11] Tex. Gov. Exec. Order No. RP 65, 32 Tex. Reg. 599, 599 (2007).

[12] Judge F. Scott McCown, a retired judge, is the Executive Director of the Center for Public Policy Priorities.

[13] F. Scott McCown, Op-Ed., *Governor's HPV Order Is Unconstitutional*, AUSTIN AM.-STATESMAN, Feb. 7, 2007, at 10.

[14] *Id.*

[15] *See id.*

circuits the process.

> A state agency subject to an executive order will go through the charade of complying with the law, but it will only be a charade. When the governor issues an order, agency heads will comply, or agency heads will roll. That is why it is so important for a governor to restrain himself and follow the law. . . . Texans are governed by law, not by executive whims.[16]

Governor Perry was sued by John and Jane Does 1–3 requesting that the Travis County District Court declare that Perry's order on the HPV vaccination was unconstitutional and unauthorized by Texas statute.[17] That lawsuit did not proceed to fruition due to the fact that the sitting Legislature enacted the following provision:

> Immunization against human papillomavirus is not required for a person's admission to any elementary or secondary school; however, by using existing resources, the Health and Human Services Commission shall provide educational material about the human papillomavirus vaccine that is unbiased, medically and scientifically accurate, and peer reviewed, available to parents or legal guardians at the appropriate time in the immunization schedule by the appropriate school. This subsection preempts any contrary executive order issued by the governor. This subsection expires January 11, 2011.[18]

A defiant Governor Perry accused legislators of sacrificing women's lives to score political points, but he conceded defeat and withheld his veto of the bill due to the fact that the Senate and House adopted the bill by veto-proof margins.[19] Perry laid blame for future cervical deaths at the feet of the lawmakers who supported the bill: "I challenge legislators to look these women in the eye and tell them, 'We could have prevented this disease for your daughters and your granddaughters, but we just didn't have the

[16] *Id.*

[17] Robbins, *supra* note 5, at 2.

[18] Tex. Educ. Code Ann. § 38.001(b-1) (Vernon 2009); Act of Mar. 14, 2007, 80th Leg., R.S., ch. 43, § 1, 2007 Tex. Gen. Laws 41, 42.

[19] *See* Corrie MacLaggan, *Perry Bows to Vaccine Order's Foes*, AUSTIN AM.-STATESMAN, May 9, 2007, at B-01.

gumption to address all the misguided and misleading political rhetoric.'"[20]

This Article will first survey the historical development of the power of the Governor, or lack thereof, back to the Republic of Texas. It will next explore whether the Governor has the constitutional power to issue executive orders to inferior executive branch officers, and if so, the legal effect of such an order. The subsequent litigation and Judge Yelenosky's order enjoining SOAH officials from complying with the Governor's order will be analyzed by specifically focusing on the judiciary's power, if any, to so order state officials. The controversy surrounding Governor Perry's order for HHS to adopt a rule will be explored as to whether Governor Perry could lawfully issue such an order and whether a bona fide rulemaking proceeding can in fact occur after the Governor has so ordered. Finally, the Article will discuss the need and ability of a modern Texas Governor to lead the fifty-plus independent regulatory agencies of the State of Texas.

II. THE CONSTITUTIONAL AND FACTUAL HISTORY OF THE POWER OF THE GOVERNOR IN TEXAS

In the Constitution of the Republic of Texas, a central or national government was created.[21] The Governor or more appropriately, the "President of the Republic of Texas," was elected to a three-year term and he was prohibited from being his own successor.[22] He was directed to see that the laws were "faithfully executed," and he appointed other officers by and with the consent of the Senate.[23] However, he could not remove the heads of the executive branch without the approval of the Senate.[24] Therefore, at our earliest time in our history, Texas evidenced a fear and mistrust of executive power, which still persists in Texas and most other states today.[25]

When seeking admittance into the United States as a state, Texas held a convention to determine if it would formally seek annexation, which it did.

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[20] *Id.*

[21] CORNELIUS D. JUDD & CLAUDE V. HALL, THE TEXAS CONSTITUTION: EXPLAINED AND ANALYZED 12 (1932).

[22] *Id.* at 13.

[23] *See id.*

[24] *Id.* at 12–13.

[25] J. Alton Burdine & Tom Reavley, *Toward a More Effective Administration*, 35 TEX. L. REV., 939, 939–40 (1957).

The delegates drew up the constitution of 1845, and it was approved by Congress on February 16, 1846.[26] The Governor, Lieutenant Governor, and members of the state legislature were elected by popular vote. However, the Secretary of State, Attorney General, and the judges of the supreme court were appointed by the Governor.[27] The State Treasurer and Comptroller were chosen by a joint ballot of the legislature.[28] In 1850, the Texas Constitution was amended to allow the direct election of the Attorney General, State Comptroller, judges, and district attorneys.[29] Thus, even this second Texas Constitution significantly limited the powers of a Governor over those officers that directly interpreted and applied the law. It was a conservative document wherein the delegates looked for guidance to the constitutions of states that had already navigated passage into the Union.[30]

After the Civil War, during Reconstruction, the Texas government stood for oppression, corruption, and blackmail.[31] It centralized government by investing extraordinary powers in the Governor, complete with his own police force and the unilateral power to declare martial law.[32] The Governor and his police force became an emblem of despotic authority akin to military commanders.[33] Literally, the liberty and life of every citizen was in the Governor's hands.[34] The Constitutional Convention of 1875 was determined to include as many safeguards as possible to forever prevent such a reoccurrence[35] ever again in Texas:

> The authors were experienced enough and shrewd enough and disillusioned enough to recognize that no government could be based on a theory of the generosity or goodness of men. Therefore they wrote into the constitution as many limitations on potential temptations toward evil and selfish

[26] JUDD & HALL, *supra* note 21, at 16.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 17.

[30] John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1193–94 (1995).

[31] A.J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 912 (1956).

[32] *See id.* at 912–13.

[33] *Id.* at 913.

[34] *Id.* at 912–13; *see also* JUDD & HALL, *supra* note 21, at 18; Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1339 (1990).

[35] Thomas & Thomas, *supra* note 31, at 913.

> ends as they deemed necessary to maintain a reasonable amount of honesty and justice and a moderate amount of efficiency in state government. The main effort of the Constitutional Convention of 1875, without question, was devoted to the restraining of individuals in governmental roles from wrongdoing.[36]

However, the Texas Constitution of 1876 looked and appeared remarkably similar to the allegedly benign 1845 Texas Constitution. The executive branch was composed of a Governor, who was the chief executive officer, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, and Attorney General.[37] Each officer, except the Secretary of State, was elected by the people.[38] The genesis for this constitutional framework was in fact the 1845 constitution and its subsequent amendments in 1850, which provided that virtually all major offices of the executive branch would be independent in that their only dependence as to their continuation in office would be a vote of the people.[39]

The 1845 constitution provided that the Governor was commanded to "take care that the laws to be faithfully executed."[40] The 1876 constitution provided that the Governor shall "cause the laws to be faithfully executed."[41] The Governor was also only provided a two-year term.[42] This was due to the framers' intent to weaken state government and their belief that long terms were conducive to tyranny.[43] However, amazingly, the framers failed to follow the 1845 constitution[44] by neglecting to provide that the Governor could serve no more than two terms.[45] In 1972, the constitution was amended to provide for a four-year term.[46]

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[36] *Id.* at 917.

[37] Tex. Const. art. IV, § 1.

[38] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 304 (1977).

[39] *Id.*

[40] Tex. Const. of 1845, art. V, § 10; *see also* Cornyn, *supra* note 30, at 1206.

[41] Tex. Const. art. IV, § 10.

[42] *Id.* § 4 interp. commentary (Vernon 2007).

[43] *Id.*

[44] Tex. Const. of 1845, art. V, § 4; *see also* Cornyn, *supra* note 30, at 1206.

[45] Tex. Const. art. IV, § 4 interp. commentary (Vernon 2007).

[46] Tex. Const. art. IV, § 4 (amended 1972); *see also* Tex. S.J. Res. 1, 62d Leg., R.S., 1971 Tex. Gen. Laws 4123.

As to the state officers of the executive branch who were not elected, all vacancies were to be filled by the appointment of the Governor[47] with the advice and consent of two-thirds of the Senate.[48] Once again, such officers were restricted to a maximum term of two years.[49] The framers' intent was to prevent any official from being entrenched in a government position so as to pose a serious threat to the rights of citizens generally.[50] However, such short terms caused capable and efficient administrators to be uninterested in government service.[51] In 1912, the constitution was amended to provide for, among others, six-year staggered terms for boards of agencies created by statute.[52]

As to state officers whose removal was not specifically provided for within the constitution, the constitution provided that the legislature shall provide by law for their removal by trial.[53] The Legislature responded by adopting a statute providing that the Governor may remove an appointed officer for "good and sufficient cause."[54] Even though such a situation never occurred, it was thought that this provision did not provide the Governor any independent power of removal since the constitution specifically provided for trial and removal by the legislature.[55] However, the statutory provision was repealed in 1993.[56] Thus, the Governor currently has no power to remove an official during his or her set term of either two or six years.

The powers of the Governor of the State of Texas can be summarized as follows:

> Customarily the executive branch of American government is thought of as being endowed with mobility. One leader, the governor, is constantly on hand to guide the ship of state; seeing need—within the constitution and

[47] Tex. Const. art. IV, § 12(a).

[48] *Id.* § 12(c).

[49] *Id.* art. XVI, § 30(a).

[50] *Id.* interp. commentary (Vernon 2007).

[51] *Id.*

[52] *Id.*

[53] *Id.* art. XV, § 7.

[54] *See* Tex. Rev. Civ. Stat. Ann. art. 5967 (Vernon 1962), *repealed by* Act of May 31, 1993, 73d Leg., R.S., ch. 268, § 46(1), 1993 Tex. Gen. Laws 986.

[55] Tex. Const. art. XV, § 7 interp. commentary (Vernon 1993).

[56] Act of May 31, 1993, 73d Leg., R.S., ch. 268, § 46(1), 1993 Tex. Gen. Laws 986.

> under the laws of the legislature, checked by the courts and the legislature—he moves the facilities of government to build or to plan against that need. This is not an accurate understanding of the present situation of the chief executive of the state. He may be called king, but his is a feudal kingdom. The governor is not free to move in his own house.[57]

However, all scholars and practitioners acknowledge that the Governor is named the "Chief Executive Officer"[58] and that he or she is vested with the powers to "cause the laws to be faithfully executed."[59] Even though the Governor is surrounded by officers who are directly elected by the people[60] and not accountable to his or her wishes, he or she has the power of appointment of all statutory officers vested with the power to faithfully execute the laws.[61] Even though he or she has no direct power to remove said officers,[62] he or she has the power to choose men and women who support his or her version of state government and public policy. As to those officers who serve two-year terms, due to the constitutional amendment extending the Governor's term to four years,[63] the Governor has significant authority to persuade due to the power to reappoint the officer or not.

It is true that the Governor's power is merely a general grant to "cause the laws to be faithfully executed."[64] The Interpretive Commentary is bold enough to state that this law enforcement power is more fiction than reality.[65] It asserts without citation that the Governor has no particular power unless it is granted to him or her, expressly or impliedly.[66] Again without citation, it refutes that this grant of power which is so similar to that of the President of the United States, does not confer actual, general power

[57] Burdine & Reavley, *supra* note 25, at 941.

[58] *See* Tex. Const. art. IV, § 1. Under the 1845 Constitution, the governor was labeled the "Chief Magistrate." *See* Tex. Const. of 1845, art. V, § 1; *see also* Cornyn, *supra* note 30, at 1206.

[59] Tex. Const. art. IV, § 10.

[60] *Id.* §§ 1–2.

[61] *Id.* § 12(a).

[62] *Id.* art. XV, § 7.

[63] *Id.* art. IV, § 4.

[64] *Id.* § 10.

[65] *Id.* interp. commentary (Vernon 2007).

[66] *Id.*

to faithfully execute the laws.[67] Others have noted that the Governor lacks enforcement power because executive responsibility is not fixed.[68]

Yet, still others have noted that the constitution does in fact vest the Governor with the power to cause the laws to be faithfully executed, but past governors have simply never perceived it as a grant of power to assert vigorous oversight of his or her appointed officers.[69] In essence, past governors have lacked the tools to exercise such power, not because it wholly lacked substance, but because no Governor appeared to have believed and asserted that he or she actually might have had powers derived from it.[70]

Therefore, is the election of a Texas Governor a mere beauty pageant? Is the office all show and no go? Is the conference of express power by the Texas Constitution simply a nullity and thereby merely a fiction?

III. THE POWER OF THE GOVERNOR OF THE STATE OF TEXAS

The Governor of Texas is named the "Chief Executive Officer of the State"[71] and is commanded to "cause the laws to be faithfully executed."[72] Neither of these phrases is defined within the constitution. The legal definition of "chief" is: "A person who is put above the rest; the leader" or "[t]he principal or most important part or position."[73] The legal definition of the verb "cause" as used in the constitution is: "To bring about or effect."[74] Finally, the legal definition of the verb "executed" as used in the constitution is: "To perform or complete" a duty.[75] Thus, the constitution provides that the Governor is the leader who has the most important role in bringing about the duty to apply the law.

There is a paucity of judicial interpretation of this provision. However, the Texas Supreme Court construed the virtually identical provision in the 1845 Texas Constitution, as amended in 1850, as the blueprint for the 1876

[67] *See id.*

[68] JUDD & HALL, *supra* note 21, at 90.

[69] BRADEN ET AL., *supra* note 38, at 319; Bruff, *supra* note 34, at 1347.

[70] BRADEN ET AL., *supra* note 38, at 319.

[71] Tex. Const. art. IV, § 1.

[72] *Id.* § 10.

[73] BLACK'S LAW DICTIONARY 270 (9th ed. 2009).

[74] *Id.* at 251.

[75] *See id.* at 649.

constitution.[76] The court held:

> It is evidently contemplated, that [the Governor] shall give direction to the management of affairs, in all the branches of the executive department. Otherwise he has very little to do. Where he has the power of removal, he can assume authoritative control absolutely, in all of the departments. This being the case in the United States government, results in the entire unity of its executive department. The absence of that absolute power of the chief executive in this state, must occasionally produce a want of harmony in the executive administration, by the inferior officers of that department, declining to comply with the wishes, or to follow the judgment of the governor. That is an inherent difficulty in the organization of that department, and the conflicts arising out of it, cannot be adjudicated or settled by the judiciary. The fact that there is no remedy for an injury growing out of such conflict, cannot justify another department, to wit, the judiciary, in overstepping the boundary of its prescribed authority, for the purpose of furnishing a remedy. The other department, the legislative, may be able to furnish a remedy. The judiciary acts on past facts. The legislature acts by devising for the future. It is the peculiar province of the legislative department, to shape future events, so as to obviate and remedy, the jars and difficulties of the past.[77]

Despite the statements in the Interpretive Commentary and others,[78] the court held that the phrase "take care that the laws be faithfully executed" was in fact a grant of power to the Governor so that he or she had the power to give direction to the management of affairs of the executive branch.[79] Coupled with the label of "Chief Executive Officer"[80] that denotes him or her as the leader of the executive branch, the only conclusion that can be drawn is that the Governor has the constitutional power and duty to tell the subordinate state officers how he or she believes the law should be

[76] *See* BRADEN ET AL., *supra* note 38, at 304.

[77] Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 344–45 (1859).

[78] *See supra* text accompanying notes 64–66.

[79] *Houston Tap & Brazoria Ry. Co.*, 24 Tex. at 344.

[80] *See* Tex. Const. art. IV, § 1.

interpreted and applied and how they should perform or complete their duty for him or her as the head of the executive branch.

Critical to this analysis is that the court acknowledged that this power is absolute when he or she has the power of removal; the officer must comply with the wishes of the Governor or face removal.[81] However, the court noted that without absolute power, it would "occasionally produce a want of harmony" when inferior officers declined to comply with his or her wishes or refused to follow the judgment of the Governor.[82] The vital part of this holding is the express or implied statement of the Court that the Governor has the power to order independent inferior officers on how to exercise their authority.[83] Otherwise, there would be no need for such officers to decline to comply or refuse the Governor if the Governor had not ordered or spoken at all.[84] Obviously, the Governor has the power to order such inferior officers to act in accordance with his or her wishes.

In fact, the court contemplated that not only would the governor as leader of the executive branch do so, but that in most circumstances those inferior officers would in fact comply with his or her wishes.[85] The court noted that only "occasionally" would this produce a "want of harmony."[86] "Occasional" is defined as: "encountered, occurring, appearing, or taken at irregular or infrequent intervals." "Occasionally" is defined as: "now and then."[87] Thus, if such officer would on an irregular or infrequent interval or now and then decline or refuse to comply, that clearly implies that the governor has the power to so order and the inferior officer will most of the time comply with his or her wishes.[88]

The interpretation is a reasonable construction of a constitution that creates an office labeled as the superior officer of an entire branch of the government.[89] With such office, the Governor is vested with the power to "take care that the laws be faithfully executed."[90] Arguably, this power of the office of the Governor has been augmented by the use of the phrase

[81] *Houston Tap & Brazoria Ry. Co.*, 24 Tex. at 344.

[82] *Id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 858 (11th ed. 2006)

[88] *See Houston Tap & Brazoria Ry. Co.*, 24 Tex. at 344.

[89] *Id.*

[90] *Id.*

"cause the laws to be faithfully executed,"[91] versus "take care" in that he or she is now commanded to "bring about" or "to effect" that such laws be faithfully executed.[92] Therefore, clearly the Governor has the power to order his or her subordinate officers as to how the laws should be interpreted, applied, or both and such inferior officers have the right to comply with his or her wishes.

The court observed that if the constitution vests sole removal power of an officer in the Governor, then his or her power to direct the government's officer is absolute.[93] Therefore, in the court's analysis, the power to remove at will combined with the power to direct the interpretation and implementation of the law equals absolute power.[94] The original version of the 1876 constitution gave the Governor no absolute power because his or her inferior officers were either directly elected for a set term or appointed by him or her with the advice and consent of the Senate for the same two-year term as the Governor.[95] Yet, with the 1992 amendment increasing the term of the Governor to four years[96] and many state appointed officers who only have a two-year term,[97] the Governor's power to remove is not automatic and absolute. However, if a dispute occurs early in the first two-year term, the Governor has the power to fail to reappoint the officer. Even with agencies wherein the constitution has provided six-year staggered terms,[98] two of the three commissioners of the board will be up for reappointment during the Governor's four-year term. Further, since the Governor is not prohibited from running for re-election as many times as he or she wishes or desires,[99] it will often be unclear whether an officer with a six-year term will be subject to the judgment of the now-sitting Governor when his or her term finally expires. Even though the potential to remove does not give the Governor power to remove at will, i.e., an absolute power, clearly an officer who may legally follow a Governor's order may decide to do so to avoid a future consequence of being denied reappointment. This potential is real as acknowledged by Judge McCown, who stated, "When

[91] Tex. Const. art. IV, § 10.

[92] *See* BLACK'S LAW DICTIONARY 250 (9th ed. 2009).

[93] *Houston Tap & Brazoria Ry. Co.*, 24 Tex. at 344.

[94] *See id.*

[95] *See supra* text accompanying notes 47–49.

[96] *See supra* text accompanying note 63.

[97] *See supra* text accompanying notes 47–49.

[98] *See supra* text accompanying note 52.

[99] *See* Tex. Const. art. IV, § 4.

the Governor issues an order, agency heads will comply or agency heads will roll."[100]

Finally, this does not even take into consideration that all two-year appointees and many six-year appointees have in fact been nominated by the sitting Governor. Assuming that the Governor chose competent persons, but ones with similar viewpoints as to the goals of effective state government, many of these inferior officers may consciously desire to follow the orders of the Governor, assuming that they have the statutory power to do so. It can be argued that this is in fact what was contemplated by the framers in creating a representative form of government where those directly elected would appoint technocrats with the same approach to government as the sitting Governor. Therefore, just as the court noted, if the Governor has the absolute power to remove an officer, his or her authority to direct the officers of government is absolute.[101] The same is true that when a Governor with a four-year term holds the power to appoint and reappoint many inferior officers, the power to persuade by executive order is enhanced.

This analysis is also consistent with the judicial canons of constitutional construction. When interpreting the constitution, the court relies heavily on its literal text and must give effect to its plain language.[102] "Rules of constitutional interpretation dictate that all clauses must be given effect."[103] The court strives to avoid a construction that renders any provision meaningless or inoperative,[104] that would render such language to be meaningless or nugatory,[105] and thereby render it idle or inoperative.[106] Therefore, to follow the Interpretive Commentary that the grant of executive power is more fiction than reality runs counter to the basic rules of construction.[107] More appropriately, it appears that past governors have

[100] McCown, *supra* note 13, at 10.

[101] Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 344 (1859).

[102] LaSalle Bank Nat'l Ass'n v. White, 246 S.W.3d 616, 619 (Tex. 2007); Doody v. Ameriquest Mortgage Co., 49 S.W.3d 342, 344 (Tex. 2001); Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 580 (Tex. 2000); Republican Party v. Dietz, 940 S.W.2d 86, 89 (Tex. 1997); Tilton v. Marshall, 925 S.W.2d 672, 677 (Tex. 1996); Cramer v. Sheppard, 140 Tex. 271, 281, 167 S.W.2d 147, 152 (1944).

[103] Bell v. Low Income Women, 95 S.W.3d 253, 262 (Tex. 2002).

[104] *Doody*, 49 S.W.3d at 344.

[105] *Spradlin*, 34 S.W.3d at 580.

[106] *Id.*

[107] *See supra* text accompanying notes 64–68.

wholly failed to realize and exercise the power given them to affirmatively and vigorously participate in the interpretation and application of the law.[108] Further, "no provision in the constitution should be read or construed in isolation."[109] As the Texas Supreme Court noted, the extent of the power to direct the management of the executive branch is inextricably tied to whether or not the Governor has the power to remove at will or only for cause or not at all.[110] Thus, the power to direct, as set forth above, must be construed in light of the constitutional provision of the Governor to appoint officers or fail to reappoint.[111] Thereby, the constitution vests in the Governor a quasi-absolute power over officers whose terms expire before that of the Governor and some persuasive power over those who have longer terms but believe the Governor may be re-elected.[112]

A counter-argument can be asserted that the phrase "cause the laws to be faithfully executed" is woefully general, vague, and ambiguous.[113] Accepted judicial canons direct that the courts must then consider the intent of the framers and the people who adopted the constitution.[114] The argument can also be made that if the language leaves its intent obscure, the courts must then resort to certain aids in construction, such as the purpose sought to be accomplished; the history of the legislation; or public policy of the state in regard thereto.[115] Finally, the court should always consider such things as the purpose of the provision; the historical context in which it was written; the collective intent of the framers and the people who adopted it; the court's prior decisions; the interpretations of analogous constitutional provisions by other jurisdictions; and constitutional theory.[116]

It has been established that the Constitutional Convention of 1875 was filled with representatives who determined that they would never experience again an all-powerful Governor vested with extraordinary powers, including his own police force and the power to declare martial law, which allowed said Governor to threaten the liberty and life of any

[108] Bruff, *supra* note 34, at 1347; BRADEN ET AL., *supra* note 38, at 319.

[109] Vinson v. Burgess, 773 S.W.2d 263, 265 (Tex. 1989).

[110] *See supra* text accompanying notes 76–101.

[111] *See* Tex. Const. art. IV, § 12(a), (d).

[112] *See id.*

[113] *See id.* § 10.

[114] Wentworth v. Meyer, 839 S.W.2d 766, 767 (Tex. 1992).

[115] Harris v. City of Fort Worth, 142 Tex. 600, 604, 180 S.W.2d 131, 133 (1944).

[116] Republican Party v. Dietz, 940 S.W.2d 86, 89 (Tex. 1997); Tilton v. Marshall, 925 S.W.2d 672, 677 (Tex. 1996).

citizen of the State of Texas.[117] Therefore, the Interpretive Commentary and former governors were all correct to conclude that the Governor was the leader of the executive branch without portfolio, and this grant of power was meaningless without legislative conference of specific statutory power.[118] Thus, "[the Governor] may be called king, but his is a feudal kingdom. The Governor is not free to move in his own house."[119]

However, the abusive and oppressive behavior did not occur under the 1845 Texas Constitution but during the post-1865 Reconstruction Military Rule, and the 1869 constitution drafted primarily by the radicals of the Republican Party.[120] After the election in 1873 of Governor Richard Coke and the Democrats, the Coke administration prepared for the making of a state constitution that would meet the social and political needs of the state.[121] A constitution with many and significant changes from that of the 1869 constitution was ratified by the people of Texas on February 15, 1876.[122]

It has been established that the genesis of the 1876 constitution as to the setup of the executive branch was the 1845 Texas Constitution along with the 1850 amendments, which established that all constitutional officers were directly elected by the people.[123] It was in construing that constitution that the Texas Supreme Court held that the Governor was in fact vested with the power to direct the affairs of the officers of the executive branch.[124] Therefore, it was not the intent of the framers and people to establish a mere beauty-pageant race for an office with absolutely no power, but to return to the pre-Civil War intent that the Governor's power was significantly weakened by the fact that all officers of his or her cabinet were either directly elected by the people or appointed by the Governor with set terms and providing him or her no legal basis to remove them. Hence, by viewing the prior constitutional history, the horrific conditions of the post-Civil War

[117] *See supra* text accompanying notes 31–36.

[118] *See supra* text accompanying notes 64–70.

[119] Burdine & Reavley, *supra* note 25, at 941.

[120] *See* Thomas & Thomas, *supra* note 31, at 912–13.

[121] *See* James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 403 (1993).

[122] Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction and "Redemption" (1866–1882)*, 40 ST. MARY'S L.J. 17, 144 (2008).

[123] *See supra* text accompanying notes 26–30.

[124] Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317 (1859). *See supra* text accompanying notes 38–46.

period, and adoption of the 1869 constitution, the judicial opinion construing the power of the Governor under the 1845 constitution, which was the genesis of the 1876 constitution, is clear that the framers and the people had an adamant desire to return to the status quo of a weak-Governor system.

Yet, that history establishes that the office of the Governor was not fiction or an office for the incompetent to do nothing but wear a hat bearing the label of "Chief Executive Officer."[125] It was a meaningful position with limited powers to be the leader among equals to give direction as to the interpretation, implementation, and enforcement of state laws. The mere fact that those coming before the recent Governor have not recognized and acted upon that inherent power provides no legal basis to render the express constitutional provision to be a nullity lacking all power and legal effect. As analyzed, the Governor has the inherent, lawful power to order executive officers who are elected and appointed to comply with his or her view of how the law is to be interpreted, implemented, and applied.[126] It is also true that all such officers have the legal right and duty to refuse to agree and comply with the Governor's order. However, such officers also have the power to agree with the Governor and to heed his or her order. Due to the limitations on his or her power to lead, a Governor should choose his or her battles with care, and it would be highly recommended that he or she consult those he or she orders before he or she does so. But, he or she has the clear power to order and use his or her "bully pulpit"[127] as chief executive officer, as well as public opinion to force other officers to act in compliance with his or her will.

IV. ARTICLE II, SECTION 2: SEPARATION OF POWERS AND ARTICLE I, SECTION 28: SUSPENSION OF LAWS: JUDICIAL INTERFERENCE WITH THE EXERCISE OF EXECUTIVE DISCRETION

The Texas Constitution dedicates the entirety of Article II to an express separation of powers provision that prohibits any person or collection of persons, being of one of three departments, from exercising any power properly attached to either of the others.[128] This provision ensures that

[125] *See* Tex. Const. art. IV, § 1.

[126] *See supra* text accompanying notes 89–93.

[127] *See* Texas Politics, The Executive Branch, http://texaspolitics.laits.utexas.edu/1_2_0.html (last visited Jan. 2, 2010).

[128] Tex. Const. art. II, § 1.

discretionary functions delegated to an administrative agency by the legislature are not usurped by the judicial branch.[129] Even though courts have the authority to hold that an agency erred and must correct its error, they cannot dictate how to correct the error if so doing would effectively usurp the authority and discretion of the agency.[130] Even if a court wanted to clarify that a Governor's executive order was not legally binding on an agency, the court cannot effectively tell the agency to disregard the order.[131] It has been established that a Governor has the legal authority to issue such an order, but discretion remains in the agency to heed or disregard it—either of which is within the agency's power to so decide.[132]

Second, the Texas Constitution's Bill of Rights expressly states, "No power of suspending laws in this state shall be exercised except by the Legislature."[133] This prohibition has been held to mean in part that the judiciary may not supervise or direct the manner and method of the enforcement of a statute by the officers of the executive branch who are charged with its enforcement.[134] It has been long held that this principle is basic in our system of government.[135] For where the statute is valid, the judicial branch has no power to direct the manner and method of its enforcement, but the executive department alone is charged with the duty of enforcement.[136] Thereby, once again, for the judiciary to assert the power of ordering an agency to wholly disregard a Governor's executive order related to the enforcement of its statutory scheme, the court lacks the power to supervise and direct the manner and method chosen by the agency to exercise its lawful authority.

[129] Davis v. City of Lubbock, 160 Tex. 38, 60, 326 S.W.2d 699, 714 (1959); Tex. Dep't of Transp. v. T. Brown Constructors, Inc., 947 S.W.2d 655, 659 (Tex. App.—Austin 1997, writ denied).

[130] Geeslan v. State Farm Lloyds, 255 S.W.3d 786, 806 (Tex. App.—Austin 2008, no pet.); Sterling Truck Corp. v. Motor Vehicle Bd. of the Tex. Dep't of Transp., 255 S.W.3d 368, 380 (Tex. App.—Austin 2008, pet. denied); Freightliner Corp. v. Motor Vehicle Bd. of the Tex. Dep't of Transp., 255 S.W.3d 356, 367 (Tex. App.—Austin 2008, pet. denied).

[131] *See Sterling Truck Corp.*, 255 S.W.3d at 380.

[132] *See supra* text accompanying notes 82–88.

[133] TEX. CONST. art. I, § 28.

[134] Houston Chronicle Publ'g Co. v. Mattox, 767 S.W.2d 695, 698 (Tex. 1989).

[135] State v. Ferguson, 133 Tex. 60, 66, 125 S.W.2d 272, 276 (1939).

[136] Rayburn v. Richardson, 131 S.W.2d 1000, 1001 (Tex. Civ. App.—Dallas 1939, writ ref'd).

V. DID THE COURT HAVE THE POWER TO ORDER SOAH TO DISREGARD EXECUTIVE ORDER RP 49?

A. Challenges Asserted as to the Invalidity of RP 49

As set forth above, Governor Perry issued Executive Order RP 49 that mandated the three commissioners of TCEQ to prioritize and expedite the processing of environmental permit applications for generating electrical power.[137] He ordered SOAH to conduct hearings on the applications referred by TCEQ no later than six consecutive months from the date of referral.[138] Finally, he ordered TCEQ to act upon SOAH's PFDs as to any particular application at its earliest agenda meeting permitted by law.[139] Upon the commencement of a lawsuit challenging the validity of the order,[140] District Court Judge Stephen Yelenosky of the 345th District Court issued a letter opinion that would issue a temporary injunction preventing the Chief Administrative Law Judge (ALJ) and the two ALJs assigned to the consolidated hearings from giving effect to the Executive Order.[141]

The Governor, under his constitutional power of appointment,[142] has the power to appoint the three commissioners of the statutorily created TCEQ.[143] The members are officers of the State[144] who serve staggered terms of six years.[145] A commissioner may only be removed for cause, which does not include refusing to follow an order of the Governor.[146] There is no provision as to who may remove such officer, but based on the analysis above,[147] it would be the legislature.

The Governor, pursuant to his constitutional authority to fill vacancies of state officers,[148] has the power to appoint the Chief ALJ to a two-year

[137] *See* Tex. Gov. Exec. Order No. RP 49, 30 Tex. Reg. 7797, 7798 (2005).

[138] *Id.*

[139] *Id.*

[140] Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007) (unpublished letter opinion issued by Judge Stephen Yelenosky on Feb. 20, 2007).

[141] *Id.*

[142] *See* Tex. Const. art. IV, § 12.

[143] Tex. Water Code Ann. § 5.052(a)–(b) (Vernon 2008).

[144] *Id.* § 5.055.

[145] *Id.* § 5.056(b).

[146] *Id.* § 5.054(a)(1)–(4).

[147] *See supra* text accompanying notes 53–56.

[148] Tex. Const. art. IV, § 12(a).

term.[149] The Chief ALJ is expressly allowed to be eligible for reappointment with no limitations.[150] The Chief ALJ may only be removed for cause and that does not include refusing to follow an order of the Governor.[151] The Chief ALJ has the power to employ ALJs who are solely and wholly responsible to the supervision and direction of the Chief ALJ.[152] The Chief ALJ and ALJs have the power and discretion to hear and decide all contested cases referred by such state agencies required by law or contract to so refer.[153] In order to determine and issue either a proposal for decision[154] or a final decision,[155] the Chief ALJ has the express authority to adopt all rules governing the procedures utilized in the referred contested cases and such rules supersede all others unless expressly incorporated by reference.[156]

In the lawsuit commenced to enjoin TCEQ's and SOAH's orders to comply with Executive Order RP 49,[157] the plaintiffs did not dispute, but admitted, that TCEQ and SOAH had the statutory authority to act upon the applications for air pollution permits that are required to build and operate a new power plant.[158] They also admitted that in their discretion to process these applications, both TCEQ and SOAH took the position that they were willing to comply with the Governor's order within the scope of their statutory authority.[159] In fact, the plaintiffs admitted that SOAH's Chief ALJ, Shelia Bailey Taylor, issued a standing order to effectuate the Governor's order.[160] Therefore, the state officers who were lawfully vested with the statutory authority to act upon these applications affirmatively concluded that they would exercise their lawful discretion to prioritize these applications on their dockets. There was no question and no objection to the validity of the statutes relied upon or that the officers involved lacked

[149] Tex. Gov't Code Ann. § 2003.022(a) (Vernon 2008).

[150] *Id.*

[151] *Id.* § 2003.0221(1)–(5).

[152] *Id.* § 2003.041(a), (c).

[153] *Id.* § 2003.021(a).

[154] *Id.* § 2003.042(a)(6).

[155] *Id.* § 2003.042(a)(7).

[156] *Id.* § 2003.050(a).

[157] *See generally* Petition, Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007).

[158] *See id.* at 6–7.

[159] *Id.* at 13.

[160] *Id.* at 11.

the legal authority to exercise such discretion. The plaintiff simply asserted that the Governor's order was void or it somehow violated separation of powers,[161] and the Chief ALJ's order directing her own ALJs was void for it somehow violated separation of powers. Judge Yelenosky then determined that the court was not violating separation of powers by holding that the Governor's order was void in his order for SOAH to wholly disregard the order of the Governor.[162]

B. RP 49 Did Not Violate Separation of Powers

It has been established that RP 49 did not violate separation of powers but, in fact, comported with separation of powers.[163] The Governor has the power and duty to cause the laws administered by state officers to be faithfully executed.[164] He or she has the express authority under Article IV, Section 10[165] of the Texas Constitution to "give direction to the management of affairs, in all the branches of the executive department."[166] He or she is the chief executive officer of the state,[167] which entitles him or her to act as a leader as to how the laws of the state shall be interpreted and applied.[168]

Agencies acting in an adjudicative capacity are not Article V constitutional courts but are solely creatures of statute.[169] The power to act in an adjudicative capacity is not predicated on the judicial power of Article V of the Texas Constitution[170] but an agency's grant of power from the legislature.[171] The judiciary has consistently held that the legislative grant of law applying power to enforce the provisions of a regulatory scheme does not transform an executive agency into an Article V constitutional court.[172] Simply, hearings or contested cases conducted by an ALJ are not

[161] *Id.* at 20.

[162] *Id.* (letter opinion issued by Judge Stephen Yelenosky on Feb. 20, 2007).

[163] *See supra* text accompanying notes 71–95.

[164] *See* Tex. Const. art. IV, § 10.

[165] *Id.*

[166] Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 344 (1859).

[167] Tex. Const. art. IV, § 1.

[168] *See supra* text accompanying notes 58–84.

[169] State v. Flag-Redfern Oil Co., 852 S.W.2d 480, 485 (Tex. 1993).

[170] *See* Tex. Const. art. V, § 1.

[171] Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 221 (Tex. 2002).

[172] *Flag-Redfern Oil Co.*, 852 S.W.2d at 485; Dudding v. Automatic Gas Co., 145 Tex. 1, 8, 193 S.W.2d 517, 521–22 (1946); Smith v. Houston Chem. Servs., Inc., 872 S.W.2d 252, 274

lawsuits in the ordinary legal meaning of the word.[173] Such an exercise of power by an agency should be characterized as an executive measure taken in the administration of the agency's statutory provisions.[174] This does not mean an executive agency is not exercising judicial power. As long ago as 1907, the Texas Supreme Court held that the generally understood meaning of judicial power is that power exercised by the Article V judiciary.[175] However, the term is also applied, without strict accuracy, to an act of an executive officer who in the exercise of his function is required to pass upon facts and to determine his action by the facts found.[176] The court recognized that this was sometimes called a "'quasi judicial' function," and such function was held to be constitutional.[177]

Thus, the acts involved within this context were performed by executive agencies through executive officers pursuant to a legislative grant of quasi-judicial adjudicative power.[178] Those officers exercised their discretion as to the interpretation and implementation of the statutory scheme and determined that they could comply with the order of the Governor within the structures, requirements, and procedures of that scheme. Thus, the acts taken were consistent with and in fulfillment of separation of powers.

Now, did these officers decide to expedite the hearing (1) solely because of the merits of the Governor's order in fulfilling the needs and public policy of the state; (2) solely because they were appointed by the Governor and desired to maintain their position with a soon-to-come need for reappointment; or (3) due in part to the Governor's order and other factors related to the administration or control of the docket of a major regulatory agency, such as TCEQ or SOAH (the primary hearing agency of the State of Texas)? It has been established that under any of these scenarios, the officers' actions were lawful.[179] They were not required to comply with the Governor's wishes, but they had the statutory authority and discretion to do

(Tex. App.—Austin 1994, writ denied).

[173] *Flag-Redfern Oil Co.*, 852 S.W.2d at 485; Pretzer v. Motor Vehicle Bd., 125 S.W.3d 23, 40 (Tex. App.—Austin 2003, pet. denied); Beyer v. Employees Ret. Sys., 808 S.W.2d 622, 627 (Tex. App.—Austin 1991, writ denied).

[174] *See* Mo., Kan. & Tex. Ry. Co. v. Shannon, 100 Tex. 379, 389, 100 S.W. 138, 141 (1907); *Pretzer*, 125 S.W.3d at 40; *Houston Chem. Servs.*, 872 S.W.2d at 274.

[175] *Mo., Kan. & Tex. Ry. Co*, 100 S.W. at 141.

[176] *Id.*

[177] *See id.*

[178] *Id.*

[179] *See supra* text accompanying notes 58–84.

so in light of the constitutional provision that vested the Governor with lawful power to give guidance to the administration of their statutory schemes.[180]

C. Did Judge Yelenosky Violate Separation of Powers by Ordering TCEQ and SOAH to Wholly Disregard the Governor's Order?

There is no general, inherent right of a person to challenge an agency order in the Article V district courts.[181] The major exception to this holding is that the judiciary has the inherent or implied power to hear, and a citizen has the right to challenge, an action on the basis that an executive agency violated one's constitutional rights or violated a constitutional limitation upon executive power.[182] For without the implied power to ensure that agencies are acting in compliance with the constitutional provisions, the judiciary would be forced to strike down any statute as a whole as unconstitutional.[183] However, one must establish that the agency action violated a specific constitutional protection or limitation.[184]

Even if it was unconstitutional for Governor Perry to order TCEQ and SOAH to act pursuant to the conditions he set forth, there is no cognizable constitutional claim to the actions of TCEQ and SOAH. It was uncontested that both agencies had the power to act and were vested with discretion as to how to prioritize their dockets and the timing of a particular action or contested case. There is simply no bona fide basis that either agency violated the constitution by ordering that particular contested cases be placed on a fast-track.[185] That is simply within the discretion of the agency. There is literally no standard, constitutional or otherwise, that dictates the scope of an agency's discretion in dictating when an action will be heard.

However, it has been established[186] that the Bill of Rights prevents the judiciary from supervising or directing the manner and method of the

[180] *See supra* text accompanying notes 64–70.

[181] Houston Mun. Employees' Pension Sys. v. Ferrell, 248 S.W.3d 151, 157–58 (Tex. 2007); Stone v. Tex. Liquor Control Bd., 417 S.W.2d 385, 385–86 (Tex. 1967).

[182] *Ferrell*, 248 S.W.3d at 158.

[183] Brazos Sport Sav. & Loan Ass'n v. Am. Sav. & Loan Ass'n, 161 Tex 543, 549, 342 S.W.2d 747, 751 (1961); City of Amarillo v. Hancock, 150 Tex. 231, 234–35, 239 S.W.2d 788, 790–91 (1951).

[184] *Stone*, 417 S.W.2d at 385–86.

[185] Petition at 5, Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007).

[186] *See supra* text accompanying notes 122–129.

enforcement of a statute by the officers of the executive branch who are charged with its enforcement.[187] Therefore, it was unconstitutional for Judge Yelenosky to attempt to dictate to TCEQ and SOAH how to exercise their lawfully delegated authority to conduct contested case proceedings related to the air permit applications.

The Texas Supreme Court has held that it has the power to hear and decide an ultra vires challenge to agency proceedings when the agency is exercising authority beyond its statutorily conferred powers.[188] However, in this dispute, the plaintiffs did not challenge that TCEQ and SOAH lacked the power and discretion to determine the timing of a particular case proceeding. In addition, the judiciary must start with the presumption that agencies are entitled to, and have the power to, exercise the duties and functions conferred by statute without interference from the judiciary.[189] Consequently, the agency is not acting ultra vires if it commits a procedural error or rules on preliminary or interlocutory issues of law.[190] If a person is a party to a pending proceeding, a declaratory judgment action will not lie if it would resolve the exact issues raised in the pending action.[191] As a rule, a party to an administrative proceeding is not entitled to judicial review until the party has pursued correction through the prescribed administrative proceeding, i.e., exhaustion of administrative remedies.[192] For if the agency has the power to determine the legal issues, even if it is possible, the agency officials may exceed their jurisdiction in the manner they interpret such authority, as declaratory relief is inappropriate.[193]

The issue challenged here was a mere interlocutory order related to procedure, and it was unquestioned that both agencies were vested with the

[187] Houston Chronicle Publ'g Co. v. Mattox, 767 S.W.2d 695, 698 (Tex. 1989); State v. Ferguson, 133 Tex. 60, 67, 125 S.W.2d 272, 276 (1939).

[188] City of El Paso v. Heinrich, 284 S.W.3d 366, 370 (Tex. 2009); Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 441–42 (Tex. 1994).

[189] *See* Tex. Water Comm'n v. Dellana, 849 S.W.2d 808, 810 (Tex. 1993); *see* Tex. Educ. Agency v. Cypress-Fairbanks I.S.D., 830 S.W.2d 88, 90 (Tex. 1992).

[190] Tex. State Bd. of Exam'rs in Optometry v. Carp, 162 Tex. 1, 7, 343 S.W.2d 242, 246 (1961); *see also* Tex. Liquor Control Bd. v. Canyon Creek Land Corp., 456 S.W.2d 891, 895–96 (Tex. 1970).

[191] Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 253 S.W.3d 184, 200 (Tex. 2007); BHP Petroleum Co. v. Millard, 800 S.W.2d 838, 841 (Tex. 1990); *Canyon Creek Land Corp.*, 456 S.W.2d at 895.

[192] *Cypress-Fairbanks I.S.D.*, 830 S.W.2d at 90; *see Carp*, 343 S.W.2d at 246–47.

[193] *See Cypress-Fairbanks I.S.D.*, 830 S.W.2d at 91; *see also* Williams v. Houston Fireman's Relief & Ret. Fund, 121 S.W.3d 415, 430 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

specific authority to make such determination.[194] Intervention by the judiciary to review the process of formulating the order and to direct the agency in the exercise of their discretion not only violates the Bill of Rights as set forth above,[195] but the court simply lacked subject matter jurisdiction to so order.

It has been demonstrated[196] that the court generally lacks subject matter jurisdiction to hear and decide a challenge to an agency order.[197] The plaintiffs admitted that the applications subject to the executive order and the subsequent order of the Chief ALJ were subject to contested case proceedings at SOAH pursuant to the Administrative Procedure Act (APA).[198] The APA provides that a person is entitled to judicial review if aggrieved by final decision in a contested case and has exhausted all administrative remedies.[199] The first condition precedent to activating the jurisdiction of the district court is that the agency order must be final and appealable.[200] For an order to be final and appealable: (1) the order must be substantively final by resolving all issues of law and fact as far as practicable under the particular regulatory scheme;[201] (2) the appellant must have timely[202] and properly[203] filed a motion for rehearing; and (3) the motion for rehearing must ultimately be denied in all respects.[204] It is undisputed that the failure to perfect a final and appealable contested case order deprives the district court of subject matter jurisdiction.[205] Prior to the adoption of the APA, the Texas Supreme Court had long held that the courts are without authority to interfere with an agency of government in

[194] Petition at 5, Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007).

[195] *See supra* text accompanying notes 122–129.

[196] *See supra* text accompanying notes 169–173.

[197] Houston Mun. Employees' Pension Sys. v. Ferrell, 248 S.W.3d 151, 157 (Tex. 2007).

[198] Petition at 12, Citizens Org. for Res. & Env't v. Perry, No. D-1-GN-07-000129 (345th Dist. Ct., Travis County, Tex. Jan. 18, 2007).

[199] Tex. Gov't Code Ann. § 2001.171 (Vernon 2008).

[200] *Id.* §§ 2001.171, 2001.176(a).

[201] Tex.-N.M. Power Co. v. Tex. Indus. Energy Consumers, 806 S.W.2d 230, 232 (Tex. 1991).

[202] Lindsay v. Sterling, 690 S.W.2d 560, 563 (Tex. 1985).

[203] Suburban Util. Corp. v. Pub. Util. Comm'n of Tex., 652 S.W.2d 358, 364–65 (Tex. 1983).

[204] *Lindsay*, 690 S.W.2d at 563.

[205] Temple I.S.D. v. English, 896 S.W.2d 167, 169 (Tex. 1995); Marble Falls I.S.D. v. Scott, 275 S.W.3d 558, 566 (Tex. App.—Austin 2008, pet. denied).

the lawful exercise of its duties and functions committed to it by law.[206] Judicial interference in the administrative process before the adoption of a final order was not warranted merely because it appeared that an erroneous conclusion had been reached.[207] Any other rule would afford an opportunity for constant delays in contested case proceedings.[208] The Texas Supreme Court has held that the motion for rehearing process of the APA is a statutory codification of the requirement of exhaustion of administrative remedies.[209]

Simply put, the plaintiffs had no power to activate the subject matter jurisdiction of the court in challenging a mere scheduling order. That challenge may be properly preserved and asserted after the agency has issued a final and appealable order as established above.[210] If there is a plain and adequate remedy at law, a party is not entitled to an injunction.[211] Further, it is simply unknown if the fast-track order would have deprived the parties of their procedural rights to be heard. The Governor's order anticipated that SOAH may have had to slow down due to the procedural protections, for the order provided that SOAH was required to notify the Governor on a monthly basis of why there was a delay in complying with his order.[212] All potential alleged harm was merely speculative in nature, and there was no basis to establish that SOAH or TCEQ would fail to comply with existing statutory procedure. Therefore, Judge Yelenosky lacked jurisdiction to hear the plaintiff's challenge and lacked authority to enjoin an interlocutory order which would properly be subject to appeal within the forthcoming final and appealable order.

[206] *See* Tex. State Bd. of Exam'rs in Optometry v. Carp, 162 Tex. 1, 7, 343 S.W.2d 242, 246 (Tex. 1961).

[207] *See id.*

[208] *See id.*

[209] *See Lindsay*, 690 S.W.2d at 563.

[210] *See id.*

[211] McGlothin v. Kliebert, 672 S.W.2d 231, 232 (Tex. 1984).

[212] Tex. Gov. Exec. Order No. RP 49, 30 Tex. Reg. 7797, 7798 (2005).

VI. IS IT UNLAWFUL FOR THE GOVERNOR TO ORDER AND AN AGENCY TO AGREE TO UTILIZE ITS RULEMAKING POWER TO ADOPT A SPECIFIC RULE?

A. Adoption of Rules Requested by the Governor Is Consistent with the Constitution and the APA

It has been established[213] that Governor Perry issued Executive Order RP 65 which stated the HHS commissioner shall adopt rules that mandate the age-appropriate vaccination for all female children for HPV prior to admission to the sixth grade.[214] Former Judge F. Scott McCown publicly proclaimed that RP 65 was unconstitutional, that the Governor had no power to make law, and that the Governor should have asked the HHS commissioner to consider it; however, he should not have used his muscle to mandate it because that would short-circuit the process.[215] There was also the publication of a hearsay statement that the Texas Attorney General orally informed a state representative that RP 65 did not carry the weight of law.[216]

The HHS commissioner is appointed by the Governor with the advice and consent of the Texas Senate.[217] The commissioner serves a two-year term.[218] Among other powers, the HHS commissioner has broad powers to adopt rules.[219] At the time of the issuance of RP 65, the current HHS commissioner's, Albert Hawkins, term was expiring, and Governor Perry had determined that he would reappoint him for an additional term.[220]

First, it is undisputed that the Texas Legislature may delegate rulemaking authority to executive branch officers.[221] Part of their statutory mandate to faithfully execute the laws is to adopt, when necessary, rules

[213] *See supra* text accompanying notes 11–20.

[214] Tex. Gov. Exec. Order No. RP 65, 32 Tex. Reg. 599, 599 (2007).

[215] McCown, *supra* note 13, at 10.

[216] Corrie MacLaggan, *Lawmaker: HPV Order 'Suggestion'*, AUSTIN AM.-STATESMAN, Mar. 13, 2007, at A01.

[217] Tex. Gov't Code Ann. § 531.005(a) (Vernon 2004).

[218] *Id.* § 531.007.

[219] *Id.* § 531.0055(e), (i), (*l*).

[220] Corrie MacLaggan, *Panel Challenges Hawkins on HPV*, AUSTIN AM.-STATESMAN, Mar. 1, 2007, at B01.

[221] Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643, 654 (Tex. 2004).

that fulfill the purposes of the statute.[222] It has been established that the Governor is vested with the powers to faithfully execute the laws, and he or she may lawfully give direction to inferior officers as to how that power should be examined consistent with their statutory authority and the public welfare of the State of Texas.[223] The power is absolute if the officer serves at the pleasure of the Governor and is merely a strong suggestion that may be ignored if the officer is not dependent upon the Governor for the length of the officer's term.[224] In the middle of this continuum, it has been established that the Governor's order may be more than a suggestion by virtue of the fact that the Texas Constitution vests in the Governor the power to appoint and to decide whether to reappoint an officer to an additional term.[225] As circumstances would have it, the HHS commissioner's term was expiring at the time of the issuance of RP 49.[226] Conceivably, the HHS commissioner's unwillingness to follow the order would allow the Governor absolute power to fail to reappoint him.[227] Therefore, consistent with the sole decision of the Texas Supreme Court, Governor Perry had a constitutional right to so order, and a constitutional right to fail to reappoint the HHS commissioner if he believed the HHS commissioner was acting inconsistently with the law or the public policy of the State of Texas.[228]

The APA provides that any interested person may request an agency to adopt a rule.[229] The agency is statutorily compelled, no later than 60 days after such request, to deny the request in writing by stating its reasons for denial or to initiate a rulemaking proceeding.[230] It is undisputed that the Governor has the right or privilege to exercise this statutory provision to request a rule to be adopted as well as the right to exercise his or her constitutional authority to give direction to state officers in faithfully executing the law.[231] The HHS commissioner had the statutory authority to

[222] Tex. Boll Weevil Eradication Found., Inc. v. LeWellen, 952 S.W.2d 454, 466–67 (Tex. 1997).

[223] *See supra* text accompanying notes 71–79.

[224] *See* Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 344 (1859).

[225] *See supra* text accompanying notes 93–100.

[226] *See* MacLaggan, *supra* note 220, at B01.

[227] *See* Tex. Const. art. IV, § 12(a).

[228] *See supra* text accompanying notes 71–79.

[229] Tex. Gov't Code Ann. § 2001.021(a) (Vernon 2008).

[230] *Id.* § 2001.021(c)(1)–(2).

[231] *See* Tex. Const. art. IV, § 10.

reject the Governor's order since it has been established it is merely a powerful request, and in addition, the APA does not provide a statutory right of appeal of such decision to the constitutional courts.[232] This conclusion is fortified by the Texas Supreme Court's long-held rationale that merely because an agency has been delegated rulemaking authority, there is no legal obligation for the agency to adopt any particular rule.[233]

The Governor's order was legally a mere request to the HHS commissioner and therefore not legally binding. However, if, due to the reappointment process, the HHS commissioner viewed it as closer to an order, that was merely his decision for he still maintained the power until the end of his current term to reject RP 49.

In fact, the decision to move forward on rules related to the HPV vaccine was made during pre-issuance discussions between the Governor's office and HHS.[234] Freedom of information requests produced emails establishing that HHS employees actually drafted the Governor's order.[235] An HHS spokesman was quoted as saying that it was not surprising that the agency drafted the order because they knew the language necessary to implement the vision laid out by the Governor's office.[236] Therefore, consistent with the Texas Supreme Court's analysis of the power distribution in Article IV of Texas Constitution's executive branch,[237] the Governor simply gave direction as to the use of HHS's rulemaking power. HHS determined it had the lawful authority to do so, and HHS agreed with the Governor that it was consistent with the public welfare of Texas to exercise its discretion in this manner. HHS, therefore, joined and participated in the issuance of the Governor's order.[238]

As indicated, Judge McCown labeled this scenario as an unconstitutional act of the Governor.[239] Yet, the Governor was fulfilling his

[232] RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE §§ 3-5 to -6 (2009).

[233] Jordan v. State Bd. of Ins., 160 Tex. 506, 510, 334 S.W.2d 278, 280 (1960); Sw. Sav. & Loan Ass'n v. Falkner, 160 Tex. 417, 422–25, 331 S.W.2d 917, 920–23 (1960).

[234] Corrie MacLaggan, *Furor over HPV Vaccination Shocked Perry*, AUSTIN AM.-STATESMAN, Feb. 23, 2007, at A01.

[235] *Id.*

[236] *Id.*

[237] *See supra* text accompanying notes 71–79.

[238] *See* Tex. Gov. Exec. Order No. RP 65, 32 Tex. Reg. 599, 599 (2007).

[239] McCown, *supra* note 13, at 10.

constitutional duty to give direction to the officers of the state.[240] The state officer listened and determined the order could be lawfully complied with, and the HHS commissioner agreed that the exercise of the statutory authority would benefit the citizens of Texas.[241] However, the HHS commissioner did exercise his discretion not to implement Governor Perry's order to adopt a rule until the current legislative session was completed to allow the legislature to act if it so desired.[242] Even when the legislature acted, it did not amend the rulemaking authority to prohibit the adoption of a rule mandating HPV vaccinations for young women, but it merely delayed the HHS commissioner's authority to do so until January 11, 2011.[243] This statutory provision thereby impliedly acknowledges that the legislature agreed with the Governor's and HHS's interpretation of its statutory authority to adopt the HPV rule. The Legislature merely concluded more time and education was needed before HHS acted.

Judge McCown asserted, however, that if the decision to adopt the rule is made by the HHS commissioner based on an order of the Governor, then the rulemaking process is short-circuited:

> Any state agency subjected to one of these executive orders will of course go through the charade of complying with the law, but it will only be a charade. When the governor issues an order, agency heads will comply, or agency heads will roll. That is why it is so important for a governor to restrain himself and follow the law.[244]

Arguably, it is Judge McCown who wants to short-circuit the process. The constitution allows the Governor to participate, and if at the time (or later) heads may roll because the Governor is unwilling to reappointment an officer; that is exactly what the constitution provides for.[245] The chief executive officer of the executive branch has every right and a mandate that he should cause the laws to be faithfully executed.[246]

In addition, every agency that adopts any rule makes the decision before

[240] *See* Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 344 (1859).

[241] MacLaggan, *supra* note 220, at B01.

[242] *Id.*

[243] Tex. Educ. Code Ann. § 38.001(b-1) (Vernon Supp. 2009); Act of Mar. 14, 2007, 80th Leg., R.S., ch. 43, § 1, 2007 Tex. Gen. Laws 41, 42.

[244] McCown, *supra* note 13, at 10.

[245] McCown, *supra* note 13, at 10; *see supra* text accompanying notes 93–100.

[246] TEX. CONST. art. IV § 10.

the rulemaking process to obviously adopt a specific rule. The APA mandates that during the rulemaking process, in the first notice, the agency must set forth: (1) the text of the proposed rule; (2) a statement of its statutory authority to adopt it; (3) a certification by legal counsel that the rules are within the scope of the agency's delegated power; and (4) a brief explanation of the rule itself.[247] Thus, the agency has obviously decided ahead of time that it has the power, authority, and need to adopt the specific rule. This pre-judgment is an inherent part of the rulemaking process, and whether it is motivated by a request of the citizen, agency staff, the HHS commissioner, or the Governor, how has the rulemaking process been rendered a farce? Does the Governor, elected by the people, based on the policies he or she believes should be implemented by state government, pollute the rulemaking process by voicing his or her opinion or wielding his or her power that the office inherently provides him or her? It is suggested that the process is simply representative government at work. Do we not want our elected representatives voicing the majority opinion of the people to our non-elected agency experts who will never be subject to the judgment of the people? Judge McCown's views are an interesting twist on the workings of a representative form of government.

Further, this mere pre-judgment does not determine whether the rule is valid or whether the actual rule adopted will be the same. The HHS commissioner acknowledged that the rule must go through the rulemaking process.[248]

The APA mandates that executive officers may not adopt rules by fiat. The citizens of Texas are entitled to a first notice in the Texas Register giving them timely notice of a proposed rule.[249] This notice is timely for it is before the rule becomes law and it is before the agency invites all citizens a reasonable opportunity to submit data, views, or arguments, orally or in writing.[250] The agency must then formally adopt the rule and contemporaneously set forth: (1) an express statement of why the governing statute authorizes and requires the rule; (2) a summary of the comments of all citizens; (3) the reasons why the agency disagreed with the citizens' submissions and proposals; and (4) a summary of the factual basis for the rule adopted, which demonstrates a rational connection between the factual

[247] Tex. Gov't Code Ann. § 2001.024(1)–(3) (Vernon 2008).

[248] MacLaggan, *supra* note 220, at B01.

[249] Tex. Gov't Code Ann. §§ 2001.024–.025.

[250] *Id.* § 2001.029(a).

basis for the rule and the rule adopted.[251]

The Texas Supreme Court has held the final notice was designed to compel an agency to articulate its reasoning and, in the process, more thoroughly analyze its rule.[252] "Requiring an agency to demonstrate a rational connection between the facts before it and the agency's rule promotes public accountability and facilitates judicial review."[253] "It also fosters public participation in the rulemaking process and allows interested parties to better formulate 'specific, concrete challenges' to a rule."[254] The court noted:

> Judicial review of administrative rulemaking is especially important because, although the executive and legislative branches may serve as political checks on the consequences of administrative rulemaking, the judiciary is assigned the task of policing the *process* of rulemaking. . . . [J]udicial oversight of the rulemaking process represents an important check on government power that might otherwise exist without meaningful limits.[255]

That scrupulous review is insured by the court insisting that the agency statements do not: (1) omit from consideration a statutory factor the legislature intended it to consider under the circumstances; (2) include in its consideration an irrelevant factor; or (3) reach a completely unreasonable result after weighing only the relevant factors.[256] This type of review is guaranteed for every rule adopted because the APA allows any person to commence a declaratory judgment action in Travis County District Court to challenge the validity of a rule if the rule or its threatened application interferes with or impairs a legal right or privilege of the party.[257] It is a very cynical view expressed by Judge McCown that this mandatory, meaningful rulemaking process, reviewed by the judiciary who have neither

[251] *Id.* § 2001.033(a)(1)(A)–(C), (2).

[252] Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d 667, 669 (Tex. 1996).

[253] *Id.*; *see also* Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643, 648 (Tex. 2004).

[254] *Nat'l Ass'n of Indep. Insurers*, 925 S.W.2d at 669 (citation omitted).

[255] *Id.* at 670.

[256] Reliant Energy, Inc. v. Pub. Util. Comm'n of Tex., 62 S.W.3d 833, 841 (Tex. App.—Austin 2001, no pet.).

[257] Tex. Gov't Code Ann. § 2001.038(a)–(b) (Vernon 2008).

allegiance to nor control of the Governor, would constitute a charade by the mere issuance of a Governor's order.[258] Alternatively, to say that a Governor's order issued by an officer of the state who is directly subject to the citizen's power at the ballot box constitutes an irrelevant factor for an executive branch agency to consider when adopting a rule when such office is constitutionally designated the leader of the executive branch is simply illogical and without legal justification.

B. Could Judge Yelenosky Have Forbidden the HHS Commissioner from Proceeding with a Rulemaking Proceeding upon His Willingness to Follow the Governor's Order?

Judge McCown was quoted as saying that Judge Yelenosky's order related to Executive Order RP 49 can be used as precedent to challenge other executive orders.[259] Even though this analysis has established that Judge Yelenosky's order was itself invalid,[260] could a district judge enjoin the HHS commissioner from proceeding with a rulemaking proceeding based in whole or in part on a Governor's executive order? The answer is simply in the negative.

It has been established[261] that the APA provides a personal right to petition an agency for the adoption of the rule, and an agency has 60 days to either deny the petition in writing or initiate a rulemaking proceeding.[262] However, the APA is silent as to any judicial review of the refusal to proceed with the rulemaking.

The Texas Supreme Court has long held that a person has no general, inherent right to challenge an agency order in an Article V district court.[263] However, in 1949, the Texas Supreme Court held that the power of the legislature to statutorily provide for judicial review of agency action had been upheld so often that the issue was no longer open to question.[264] Yet, the power of the legislature to grant jurisdiction does not allow the legislature to vest the judiciary with the power to substitute judgment for

[258] McCown, *supra* note 13, at 10.

[259] *Id.*

[260] *See supra* text accompanying notes 130–156.

[261] *See supra* text accompanying notes 213–224.

[262] Tex. Gov't Code Ann. § 2001.021(a)–(c).

[263] *See* Houston Mun. Employees' Pension Sys. v. Ferrell, 248 S.W.3d 151, 157 (Tex. 2007); *see also* City of Amarillo v. Hancock, 150 Tex. 231, 234, 239 S.W.2d 788, 790 (1951).

[264] Fire Dep't v. City of Fort Worth, 147 Tex. 505, 509, 217 S.W.2d 664, 666 (1949).

that of an agency on issues that call for the determination of public policy, for to vest the judiciary such power would violate separation of powers.[265] Nor may the court, on its own volition, attempt to act under its inherent power to issue an order that they thought that the agency should have issued.[266]

The judicial scope of review must be restricted to determining the lawfulness of the agency action.[267] If the statutory right of review has been granted, its conditions are mandatory and exclusive and must be complied with in all respects or the action is not maintainable.[268] Finally, when an act is either silent on the question of appeal or expressly denies a right of appeal, a party may appeal only if the administrative action complains of a violation of a constitutional provision.[269]

The judiciary may not legislate.[270] Courts may not adopt rules, but they have the sole authority to review the validity of a rule as to whether it is constitutional within the granted power and promulgated pursuant to proper procedure.[271] By the APA provision allowing an agency to accept or refuse a petition to adopt a rule, the legislature has acknowledged that an integral part of the delegated rulemaking power is the power to decide to make a rule at all.[272] However, it also impliedly prohibits judicial supervision of the agency decision of whether or not to adopt a rule.[273]

Legislative silence precludes judicial review of an agency decision not to make a rule and thereby deprives the district court of subject matter jurisdiction.[274] This conclusion is fortified by the Texas Supreme Court's long-held rationale that merely because an agency has been delegated

[265] Chem. Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 432–33 (Tex. 1963); Davis v. City of Lubbock, 160 Tex. 38, 60, 326 S.W.2d 699, 714 (1959).

[266] *Fire Dep't of Fort Worth*, 147 Tex. at 509, 217 S.W.2d at 666.

[267] *Hancock*, 150 Tex. at 234, 239 S.W.2d at 790; *Fire Dep't of Fort Worth*, 147 Tex. at 509, 217 S.W.2d at 666.

[268] Tex. Catastrophe Prop. Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condo. Ass'n, 706 S.W.2d 644, 646 (Tex. 1986).

[269] Houston Mun. Employees' Pension Sys. v. Ferrell, 248 S.W.3d 151, 158 (Tex. 2007); *Hancock*, 150 Tex. at 234, 239 S.W.2d at 790.

[270] *See* Garcia v. Tex. Instruments, Inc., 610 S.W.2d 456, 462 (Tex. 1980); R.R. Comm'n v. Miller, 434 S.W.2d 670, 672 (Tex. 1968).

[271] Helle v. Hightower, 735 S.W.2d 650, 654 (Tex. App.—Austin 1987, writ denied).

[272] Tex. Gov't Code Ann. § 2001.021(a)–(c) (Vernon 2009).

[273] *See Houston Mun. Employees' Pension Sys.*, 248 S.W.3d at 158.

[274] *Id.*

rulemaking authority, there is no legal obligation for the agency to adopt any particular rule.[275] If the Governor orders an agency to adopt a rule and the agency commences rulemaking proceedings, this discretion is vested solely within the executive branch and not the judiciary. For the court may only review the validity of a rule actually adopted.[276] Whether public policy demands the adoption of a particular rule or not, the decision to proceed or not and on what basis cannot be reviewed by the courts due to a lack of subject matter jurisdiction, and it would constitute a violation of separation of powers.[277] Thus, there would be no legal basis for a court to enjoin an agency from commencing the notice and comment process to adopt a rule, even if such judgment was made solely based on the order of the Governor.

VII. THE POWER OF A GOVERNOR TO DIRECT AGENCIES IN THE FAITHFUL EXECUTION OF THE LAWS

It has been established that a Texas Governor's executive order to an inferior executive branch official as to how to interpret and apply the law does not legally compel that officer to comply with the Governor's wishes.[278] But, the Governor has the constitutional power to so order, and the inferior officer has the lawful right in his or her discretion to comply with the orders or wishes of the Governor. Of course, any such final order issued by the inferior officer, whether it be a contested case order or rule, if the legislature so desires, is subject to independent review by the judiciary to determine the order's validity. Yet, if such order was issued based in whole or in part on the order of the Governor, which the inferior officer chose to obey in his or her discretion, that fact alone does not invalidate the order. The judiciary has no power to entertain an action solely challenging or attempting to enjoin the mere issuance of a Governor's order. The judiciary has no authority to direct the exercise of discretion by an inferior officer as to whether he or she should comply with that order.[279] The judiciary may simply determine the validity of an agency order based on the

[275] Jordan v. State Bd. of Ins., 160 Tex. 506, 510, 334 S.W.2d 278, 280 (1960); Sw. Sav. & Loan Ass'n v. Falkner, 160 Tex. 417, 422–25, 331 S.W.2d 917, 920–23 (1960).

[276] *See* Tex. Gov't Code Ann. § 2001.038(a); R.R. Comm'n of Tex. v. Arco Oil & Gas Co., 876 S.W.2d 473, 478 (Tex. App.—Austin 1994, writ denied).

[277] *See Arco Oil & Gas*, 876 S.W.2d at 478.

[278] *See supra* text accompanying notes 79–100.

[279] *See supra* text accompanying notes 130–156.

applicable law, and it is irrelevant whether the actions were motivated or not by an executive order.[280]

Even though past Texas governors have failed to realize or exercise this power vested in their office,[281] such power remains a part of the constitution and is awaiting the proactive, assertive Governor such as evidenced by Governor Perry's Executive Orders RP 49 and RP 65.[282] This contemporary recognition should in fact be applauded by those who believe, erroneously, that it is an affront to our constitutional framers for our Governor to act in such a manner.

It goes without citation that it is more likely than not true that prior governors have in fact realized that they had such power, which was bolstered by their power to appoint and either reappoint or fail to do so, and they simply failed to issue such orders in a formal manner. Thereby, such orders were delivered outside the public domain and communicated by private conversation or a phone call. Assuming that the inferior officer had the power and discretion to act, he or she could act upon the Governor's order without fanfare and take the heat, if any, if a public outcry occurred. In fact, it has been noted by scholars that this perception that the Governor has no power and that all agencies are administered by independent officers, in fact provides a safeguard for the Governor and offers him or her political protection or a buffer.[283] It should be obvious that this is so for, despite the fact that the Governor does not have the ultimate power of removal, all of these independent officers were wholly dependent on the Governor to obtain their job and wholly dependent upon the Governor to maintain their job after their term had expired. Also, assuming that the Governor chose and persons sought such offices due to an identical or similar political view as to the business of government, most if not all were and are willing to do the private bidding of the sitting Governor.[284]

By the Governor taking the action by the public issuance of an Executive Order, we have transparency. For all branches of government and the people are aware of the formal position of the Governor as to the effective administration of the laws. The inferior officers will be subject to

[280] *Id.*

[281] Bruff, *supra* note 34, at 1347.

[282] Even though one could seriously disagree with the merits of one or both of the orders issued by the Governor, he clearly had the authority to so order.

[283] Burdine & Reavley, *supra* note 25, at 944.

[284] *See, e.g.*, *supra* text accompanying notes 234–238.

public scrutiny as to how they react to such orders. The legislative branch will be fully aware of how the executive branch is interpreting and administering its laws.

The response can be: "Furor Over HPV Vaccine Shocked Perry,"[285] "Panel Challenges Hawkins on HPV,"[286] and "Perry Bows to Vaccine Order Foes."[287] And it is possible, as it did occur with Governor Perry's order regarding HPV vaccines, that it motivates a legislative response to override the Governor's intent.[288] The question can be fairly posed that by the Governor publicly exercising his actual power over his or her inferior officers by the issuance of an executive order he fulfilled the desire of all for open government, public participation in the issues of government, and public accountability of its chief executive officer for the management of the state affairs.

A further benefit found is that even if one believes governors do not issue private orders, independent officers act independently of the Governor. As noted experts have stated, "Administration is the business end of government," and this large operation "touch[es] the lives of its citizens in manifold ways."[289] The already weak Governor's office has been further maligned by the overuse of boards or commission-type agencies whose members serve overlapping terms longer than that of the Governor.[290] The result is a sprawling, disorganized administrative machine that lacks any focal point of responsibility.[291] This fragmentation of the executive branch has wide effect by the consequent disorganization.[292] Further, the lack of legal control from the top may not prevent a particular agency from doing a stellar job, but neither does it provide any medicine for the delinquent and inert.[293] Simply, the use of boards and commissions for purely administrative work is almost

[285] *See generally* MacLaggan, *supra* note 234.

[286] *See generally* MacLaggan, *supra* note 220.

[287] *See generally* MacLaggan, *supra* note 19.

[288] Corrie MacLaggan & W. Gardner Selby, *HPV Order Returned to Perry in Shreds*, AUSTIN AM.-STATESMAN, Aug. 26, 2007, at B01; *see* Tex. Educ. Code Ann. § 38.001(b-1) (Vernon 2009); *see also* Act of Mar. 14, 2007, 80th Leg., R.S., ch. 43, § 1, 2007 Tex. Gen. Laws 41, 42.

[289] Burdine & Reavley, *supra* note 25, at 939.

[290] *See id.* at 940.

[291] *Id.*

[292] *Id.*

[293] *Id.* at 944.

universally condemned by students of public administration.[294]

Absent amending the Texas Constitution to vest the Governor with absolute control, which many would not be willing to do, Texas government has the ability to act in a more unified, efficient, and open manner, if the Governor exercises the power to direct in a public forum by the use of executive orders which will thereby force our Governor and his or her unelected technocrats to be subject to ongoing public and legislative scrutiny. By realizing and recognizing the power vested in the office of the Governor of the State of Texas, the election will no longer be one of a beauty pageant. The election will be a serious choice of the leader of the executive branch and his or her policies, power of administration, and selection or retention of appointed state officers. The cloud of the Reconstruction Period should be blown away by the winds of the actual wording and meaning of our Texas Constitution. The judicial proclamation by Judge Yelenosky to force the Governor to shut up and for inferior state officers to ignore him renders a gross disservice to the citizens of Texas and to the proper interpretation of the Texas Constitution.

[294] *Id.* at 952.