



## Center for Public Policy Priorities

February 12, 2007

The Honorable Greg Abbott  
Attorney General of Texas  
Price Daniel, Sr. Building  
Austin, TX 78701

Re: Pending Opinion Request Regarding Executive Orders

Dear General Abbott:

### Introduction

Chairman Nelson and Chairman Keffer have asked for your opinion regarding the power of the governor to make executive orders and the power of the governor to compel the expenditure of public funds. They ask these questions in the context of Executive Order RP-65, February 2, 2007, relating to the immunization of young women from the cancer-causing Human Papillomavirus.<sup>1</sup>

The Center for Public Policy Priorities submits this letter brief regarding this opinion request. The center is a nonpartisan, nonprofit research organization committed to improving public policies to better the economic and social conditions of low- and moderate-income Texans. We have a general interest in compliance with the constitution, and a particular interest in the process of making rules about health and human services.

In Executive Order RP-65, the governor orders the executive commissioner of the Texas Health and Human Services Commission to "adopt rules that mandate the age appropriate vaccination of all female children for HPV prior to admission to the sixth grade." The governor reasons that 1) state law gives the executive commissioner the authority to adopt such a rule; 2) the governor is the chief executive officer of the state; 3) therefore, the governor has the authority to order the executive commissioner to adopt such a rule.

The governor is wrong for two reasons. First, when the legislature gives authority to an executive officer, unless the legislature provides otherwise, the governor cannot compel the executive officer to exercise that authority in a particular way. Second, even when the governor has power over an executive officer, the governor cannot order that executive officer to proceed in a way contrary to the law. This letter will explain these two points, as well as discuss the law regarding the expenditure of public funds.

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<sup>1</sup> <http://www.governor.state.tx.us/divisions/press/exorders/rp65>

## Texas Has a Plural Executive Department with Independent Officers

Texas became a state in 1845. The Texas Constitution of 1845, modeled upon the United States Constitution, created a unitary executive department and vested executive power in the governor. From 1861-1865, Texas went through the Civil War. Our post-war Constitution of 1869, inspired by other post-Jacksonian era state constitutions, decentralized the executive department and distributed power among independent executive officers. Texas moved from a unitary executive department with a strong governor to a plural executive department with a weak governor. Just as the constitution separates power among the legislative, judicial, and executive departments, it separates power within the executive department.

From 1865-1874, Texas went through Reconstruction, an experience that convinced Texans they wanted an even weaker governor. Thus, the Constitution of 1876, our present constitution, continued a plural executive department and reduced the governor's powers even further.<sup>2</sup>

Our plural executive department consists of many boards, commissions, and independent officers who administer the law as set forth in the constitution or enacted by the legislature. Some executive officers are constitutional officers and some are statutory officers, but they are all independent from the governor except when constitutional or statutory provisions expressly provide otherwise.

The governor ignores our constitutional history, structure, and text when he claims that he holds all the executive power of the state. This is an extraordinary claim made by no previous governor. The governor reasons, however, that because Article 4, Section 1, names the governor "Chief Executive Officer of the State," he can compel any other executive officer to do as he says.

By naming the governor chief executive officer, the constitution does designate the governor as the highest-ranking executive officer. From this designation flows certain privileges of rank and rules of protocol, but this designation confers no power, particularly not the power to direct other executive officers how to discharge duties assigned to them by the constitution or the legislature.

For example, the attorney general is an executive officer. Yet, as you will readily agree, the governor has no authority to make an executive order that compels you to answer an opinion request a particular way. Legal opinions are within your sole authority.

The comptroller is an executive officer. Yet, as you will again readily agree, the governor has no authority to make an executive order that compels the comptroller to certify a particular

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<sup>2</sup> This brief constitutional history is drawn from the Interpretive Commentary, Texas Constitution, Article 4, Section 1 (Vernon 1997), and Professor Braden's authoritative treatise, *The Constitution of the State of Texas: An Annotated Comparative Analysis* (1977), which the State Law Library makes available on-line at <http://www.sll.state.tx.us/const/braden.html>.



amount of revenue as available for appropriation. Revenue estimates are within the comptroller's sole authority.

The board of regents of Texas A & M is an executive body. The regents have the authority to abolish the Corp of Cadets or alternatively require all students to belong to the Corp of Cadets, but the governor has no authority to issue an order to the regents to do either.

Merely being "chief" does not give the governor the power to order others to bend to his will. Consider this parallel in the judicial department: The constitution names a chief justice, but the chief justice cannot compel other judges to vote or rule as the chief instructs.

By design, our constitution strictly limits the power of all executive officers to what the people have expressly provided in the constitution or the legislature has expressly provided in statute. Contrast the legislative and judicial articles with the executive article. Article 3, Section 1 of the constitution vests legislative power in the Senate and House. Article 5, Section 1 of the constitution vests judicial power in the courts. The constitution, however, does not vest executive power at all. In Texas, no executive officer has inherent power.<sup>3</sup>

The executive commissioner of the Texas Health and Human Services Commission is a statutory executive officer. Government Code, Section 531.005 provides that the governor appoint the executive commissioner with the advice and consent of the Senate for a term of two years to govern the health and human services commission. Texas does not have cabinet-style government, and the executive commissioner no more works for the governor than does the attorney general, the comptroller, or the board of regents of Texas A & M.

Indeed, under Texas Constitution, Article 15, Section 19, the executive commissioner does not serve at the pleasure of the governor; rather the governor may only remove the executive commissioner from office with the advice and consent of two-thirds of the members of the Senate present. In short, the governor has no authority to direct the executive commissioner how to exercise the authority assigned him by the legislature.<sup>4</sup>

### **Governor Cannot Order Executive Officers to Violate the Law**

Even when the governor has authority over another executive officer, the governor cannot order that officer to proceed in a way that violates the constitution or a statute. In RP-65, however, the governor has ordered the executive commissioner to do something that the executive commissioner cannot do under the law—conduct a sham rulemaking proceeding with a predetermined outcome.

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<sup>3</sup> See Professor Braden, *The Constitution of the State of Texas: An Annotated Comparative Analysis* at 302 (1977) on-line at <http://www.sll.state.tx.us/const/braden.html>.

<sup>4</sup> Under the Texas Disaster Act of 1975, Government Code, Chapter 418, the legislature has given the governor the authority to make executive orders for emergency management to meet the dangers presented by sudden disasters and energy emergencies. However, this grant of authority is limited to a narrow class of emergencies affecting public order and does not apply here. Indeed, in RP-65, the governor did not invoke the Texas Disaster Act and made none of the findings required by Section 418.014(d). By its own terms, RP-65 has an implementation date of 2008, hardly an emergency response. Moreover, chronic problems, however serious, do not provide an excuse for using emergency authority as a way to evade the regular processes of government. See McCown, *Opinion on Temporary Injunction*, 1 Texas Administrative Law Journal 16 (1992).



To make a rule, the executive commissioner must follow the rulemaking process required by the legislature in the Administrative Procedures Act, Government Code, Chapter 2001.<sup>5</sup> In this act, the legislature declares the public policy of this state to be—and the purpose of the act to provide—public participation in rulemaking. Subchapter B sets out the requirements for rulemaking, which include 1) careful agency analysis of the proposed rule and its impact; 2) detailed public notice about the proposed rule; and 3) an opportunity for public comment.

In addition, Government Code, Section 2001.032 provides for legislative review and gives the appropriate standing Senate and House committees an opportunity to comment on the proposed rule. If a state agency adopts a rule, Government Code, Section 2001.033 requires the agency to provide a reasoned justification for the rule.

The easiest way to understand why the governor's order is unlawful is to imagine a court's response to the following scenario: Assume the governor never ordered anything, but that the executive commissioner announced that he would promulgate a new rule requiring immunization of all females for HPV before starting the sixth grade. Further, the executive commissioner said that while he would hold a rulemaking proceeding for form's sake, nothing the public or legislative committees said mattered—he would write the rule as he had predetermined.

Such a predetermined rulemaking proceeding would be as invalid as a judicial proceeding in which the judge announced his judgment before hearing the evidence. Under Government Code, Section 2001.035, any rule resulting from such a proceeding would be voidable by a court because the state agency would not have adopted the rule in substantial compliance with rulemaking procedures.<sup>6</sup>

### Ask, Don't Tell

When the governor thinks we should have a new rule, he can ask the appropriate state agency to consider it, but he cannot mandate it. In Government Code, Section 2001.021, the legislature sets out the process for a petition to request the adoption of a rule. When the governor petitions 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, however, he short-circuits the process.

Given the enormous formal and informal power of a governor, some skeptics may question the difference between a gubernatorial command and request. However, asking is different from telling. If state officers mistakenly think the governor has the authority to order a

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<sup>5</sup> For commentary on the APA, see Beal, Texas Administrative Practice and Procedure (1997 and Supp.).

<sup>6</sup> Under Government Code, Section 2001.003(6), the very announcement of the intention to adopt a predetermined rule would itself be a rule made in violation of the Administrative Procedure Act. This reasoning gets a bit fancy, but is sound: By the very act of beginning rulemaking under the governor's order, the executive commissioner has adopted a rule as defined by Section 2001.003(6) without complying with the APA. Under Government Code, Section 2001.038, a court could then render a declaratory judgment that the executive commissioner's acquiescence to the governor's executive order was by itself an invalid rule and enjoin further rulemaking proceedings pursuant to this invalid rule.



specific rule, they will comply, believing the law requires them to do so. If state officers correctly understand, however, that the governor can only ask for consideration of a rule, they may begin a rulemaking proceeding to consider a rule, but they will be able to comply genuinely with the law. State officers will even tell the governor “no” when necessary.

### Appropriated Funds

The pharmaceutical company Merck sells the HPV vaccine under the name Gardasil. Three shots over six months are required at a cost of \$360. The total cost of the governor’s executive order may be \$50 million a year. To put this amount in context, last year, after devastating cuts, the budget for the state’s entire Children’s Health Insurance Program (CHIP), including federal and state dollars, was \$372 million.

The governor has ordered the Department of State Health Services to make the HPV vaccine available through the Texas Vaccines for Children Program for eligible young females up to age 18, and ordered the Health and Human Services Commission to make the vaccine available to Medicaid-eligible young females from age 19 to 21. By its terms, the order is effective until rescinded.

Under Texas Constitution, Article 8, Section 6, however, “No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years.” The legislature does appropriate funds for vaccines. If total funds are limited, however, forcing a choice between spending for one health program over another or one vaccine over another, acting alone, the governor has no authority to dictate that choice.<sup>7</sup>

### Other Invalid Executive Orders

We are concerned about the governor’s profound misunderstanding of his authority and his increasingly expansive use of executive orders.<sup>8</sup> For example, in RP-47, the governor ordered the commissioner of education to exercise rulemaking authority in a particular way (the so-called 65 percent rule). That order violates the law in the identical way as RP-65, as well as in several other ways.

In RP-49, the governor ordered the Texas Commission on Environmental Quality to exercise its permit authority in a particular way (to expedite permits for coal plants). That order too violates the law in the identical way as RP-65.

In RP-49, the governor also improperly interfered with administrative law hearings, ordering administrative law judges to exercise their discretion in a particular way despite express statutes designed to protect from such interference. Government Code, Section 2003.021 provides that the state office of administrative hearings (commonly called SOHA) is “to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government.” Government Code, Section 2003.022(d) provides that the chief

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<sup>7</sup> The governor has a role in budget execution, but must follow the procedures outlined in the statute. See Government Code, Chapter 317.

<sup>8</sup> All the governor’s executive orders are posted at <http://www.governor.state.tx.us/divisions/press/exorders/>.

administrative law judge must "protect and ensure the decisional independence of each administrative law judge." Yet, the governor told SOHA what to do and when to do it as if the administrative law judges were mere clerks in the governor's office.

### Conclusion

The legislature has given executive officers broad power to administer the law, including spending money, making rules, issuing permits, and conducting administrative hearings. The governor is mistakenly claiming all that power as his own. We urge you to restore the proper understanding of our constitution.

Respectfully submitted,



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Executive Director

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