HOUSE STUDY GROUP • TEXAS HOUSE OF REPRESENTATIVES
Room 315-B, Capitol Building, Austin, Texas 78769

REP. JOHN BRYANT, Chairman (512) 475-6011

HOUSE STUDY GROUP special legislative report

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Constitutional Amendments

The 66th Legislature approved twelve proposed amendments to the Texas Constitution. Three will be on the ballot November 6th; the other nine in 1980. Attached are analyses of this year's measures:

#1 HJR 108 Notaries

#2 HJR 133 Review of agency rules

#3 SJR 13 Family farm and ranch security loans

Next summer the study group will publish analyses of the 1980 amendments.

John Bryant
Chairman

SUBJECT: Jurisdiction and terms of notaries public

BACKGROUND: Article 4, Section 26, of the constitution requires the Secretary of State to appoint notaries "for each county." In the past, part of the application process has been handled by the Secretary of State, and part by the county clerks. Notaries have practiced only in the county where they were originally appointed.

A 1977 Attorney General's opinion (LA-123) stated that Article 4, Section 26, does not place any limit on the geographic jurisdiction of a notary. Subsequently, the 65th Legislature passed HB 128, which gave all notaries statewide jurisdiction. However, they are still appointed for the particular county in which they live or work. County clerks still participate in the application and appointment process.

The Attorney General's opinion also said that Article 16, Section 30, of the constitution limits notaries' terms of office to two years.

DIGEST: This proposed constitutional amendment would specify that notaries are appointed "for the state" rather than for a particular county. It would also permit the Legislature to set notaries' terms at between two and four years.

PRO: The current system for appointing notaries is cumbersome, expensive, and possibly unconstitutional. Notaries who move from one county to another now lose their positions. Despite the Attorney General's opinion, HB 128 could be overturned in court and notaries would lose the power to act in more than one county. The system is also needlessly expensive and time-consuming. The appointments must be renewed every two years and when they are renewed, the paperwork must travel back and forth from the county clerks to the Secretary of State.

Appointing notaries for the entire state would save trouble for the county clerks, make it easier to track down notaries when old documents need to be verified, and cost less money. Giving notaries four year terms would eliminate still more unnecessary paperwork. This amendment and its implementing legislation would greatly improve our system for appointing notaries.

CON: Giving the Secretary of State sole power to appoint notaries is unlikely to save any money, and it may cause some problems. The change may cost more. While few county clerks will be able to lay off any workers, certainly the Secretary of State will need more employees to handle the increased workload.

Problems may arise if the application process gets bogged down in the growing bureaucracy of the Secretary of State's office. It may be harder for applicants to get information and clear up problems if they have to deal with Austin rather than with local officials. The current system works fine. Let's leave it alone.

ALTERNATE CON: This entire section of the constitution is unnecessary. According to the annotated Texas constitution prepared by George D. Braden and other legal scholars, only five other states bother to deal with notaries in their constitutions. The other states leave the matter entirely to the Legislature. The Braden commentary concludes, "There is no need to make notaries public constitutional officers." This entire article of the constitution should be repealed.

COMMENTARY: HB 1474 is implementing legislation for HJR 108. It removes the counties from the procedure for appointing notaries. Further, it deletes the rule that removes from office a notary who moves from one county to another. Finally, it sets a four-year term for all notaries.

SUBJECT: Legislative review of rulemaking by executive agencies

BACKGROUND: The current system in Texas was established by amendments in 1977 to the Administrative Procedure and Texas Register Act. Standing committees of each house of the Legislature may review proposed rules of executive agencies. There is no provision for review of existing rules.

Standing committees in Texas have the right to support or oppose any rule proposed by state agencies, but they rarely exercise that right. The opinions of the committees, in any case, are only advisory. The Legislature can change rules by statute but cannot now delegate the power to suspend or repeal agency rules.

DIGEST: This amendment would permit the Legislature to delegate that power by statute. The authority to review and suspend or repeal rules could be delegated to either or both houses. The law could also provide conditions for rules to take effect.

PRO: In recent years, more and more state legislatures have decided that the rules of government are too important to be left entirely to bureaucrats who answer only indirectly, if at all, to the people. Thirty-four states now have some form of legislative review of agency rules.

Rules adopted by agencies often affect the lives of large numbers of people. Some rules have enormous political implications as well.

A rule proposed recently by the Texas Department of Corrections, for example, would bar prison inmates from joining "unauthorized activities" or "unapproved organizations" or from preparing "petitions for the redress of grievances." The statute cited as authority for the rule is vague. It gives the Board of Corrections, whose members are all appointed, responsibility for "management and control" of the prisons and for "the proper care, treatment, feeding, clothing and management" of the prisoners.

Other agency rules affect large numbers of people:

The Texas Air Control Board makes the rules that govern permits for polluting activities like petrochemical processes, solid waste burning, and construction work.

The Public Utilities Commission makes rules that affect utility rates and services.

The Department of Human Resources writes the rules that govern eligibility for Aid to Families with Dependent Children, Medicaid and Food Stamps.

The Department of Human Resources also makes the rules that govern granting and revoking licenses for child care institutions.

Rules of the Railroad Commission govern strip mining permits and the operations of gas utilities.

These are not questions we want decided by bureaucrats whose names we do not know. This amendment will allow elected representatives to hear the concerns of citizens and act when necessary. Legislators can determine whether the rules are within the scope of the agencies' powers, are fair, and are in the public interest.

Some will say that the Legislature would do better to exercise its authority when the laws are drafted that give rulemaking power to the agencies. It is true that the Legislature can be as detailed as it chooses in setting standards for rulemaking. But it is not always desirable to legislate in detail. Executive agencies need flexibility in their operations. The agencies need to make the rules and the Legislature needs to review them.

For example, many citizens' groups and individuals take a strong interest in the work of certain agencies. They want the right to try to influence the decisions of those agencies. In such cases, it is the proper responsibility of the agency to draw up appropriate procedures for citizen involvement. The Legislature, on the other hand, should have a mechanism for insuring that agencies do not try to exclude or unduly limit citizen involvement.

The Legislature also has an interest in making sure that agencies do not use rules to circumvent legislative intent. The mere knowledge that the Legislature will review the rules may prevent such attempts.

This amendment would not give new powers to the Legislature. It would only give the Legislature a practical way to exercise the power it already has. Any power that the Legislature can delegate, it can certainly review, restrict, alter or repeal.

All in all, the amendment can only increase the accountability of government to the people.

CON: If the Legislature is going to review every rule made by every agency in the State of Texas, we may as well close down the executive branch and let the Legislature take on the other executive functions as well.

Of course, that will not happen. What will happen is that a small committee of the Legislature will become a "superboss" of the executive branch, multiplying the political considerations that already hamper the orderly conduct of state government.

The Legislature cannot review all the rules. Instead, a committee of the Legislature will have the privilege of selecting a number of them for review. The potential for abuse is monstrous. Even if there were no abuse, the committee would be forced to make an arbitrary selection of times and occasions to exercise this new power.

It is certainly not what the framers had in mind when they called for three branches of government.

If the Legislature is writing vague statutes that give the agencies too much discretion, the solution is better laws, not a perversion of the separation of powers. Rulemaking is an executive, not a legislative, power. The Legislature already has oversight of agencies through the appropriations process. It does not need separate oversight of the details of rulemaking.

State agencies have generally done a good job in Texas. They must do their work without political interference or uncertainty about what public policy is. At best, administrative flexibility will be reduced. At worst, legislative conflict could make it impossible for the executive branch to function.

COMMENTARY: In December 1978, the House Committee on Constitutional Amendments issued an interim report entitled Executive Rulemaking and the State Legislature. The committee recommended creation of a joint committee on administrative rules review. The report did not recommend anything beyond advisory authority for the joint committee.

Two related bills considered during the 66th Legislature would have changed the rulemaking process. HB 1382 by Von Dohlen created a Joint Committee on Administrative Rules Review to review proposed and existing rules. The committee could have suspended any proposed rule under certain conditions. The suspension would have expired unless a concurrent resolution in the Legislature upheld it.

The Legislature passed HB 1382 but the Governor vetoed it. The Governor's veto proclamation indicated no quarrel with the purposes of the bill, but noted that the language of the bill did not anticipate the passage of a proposed constitutional amendment giving the Legislature this authority. Rep. Von Dohlen has indicated that he will try to pass a similar measure next session.

Under HB 594 by Wright, proposed agency rules would be referred to standing committees in the same manner as bills or agency budgets. Any legislator could request that an existing rule be reviewed by a standing committee. A standing committee could suspend a rule by a two-thirds vote of the membership. The suspension would remain in effect unless overturned by the house of which the committee is a part. This bill passed the House but died in the Senate.

SUBJECT: Family farm and ranch security loans

BACKGROUND: One of the biggest obstacles faced by Texans who want to get into the farm or ranch business is the high cost of land. Most lenders require a large down payment (current average is 29 percent) and charge fairly high interest rates. As a result, many persons who want to farm or ranch, particularly the young, can't raise the money to get started.

The state of Minnesota has attacked the problem with a program of loan guarantees for new farmers. Up to 90 percent of a loan for the purchase of farmland can be guaranteed by a state loan fund.

Such a program is prohibited in Texas by Article 3, Section 49, of the constitution, which bans the issuance of state bonds. A number of other programs, including water development and student loans, have been financed by state bonds. Each has required a constitutional amendment.

DIGEST: This amendment would permit state bonds for farm and ranch loan guarantees. The Legislature could authorize the Commissioner of Agriculture to issue up to $10 million in general obligation bonds. A Farm and Ranch Loan Security Fund would be created.

The amendment would also permit the state to help some farmers pay back their loans. Any assistance from the state would be repaid at an interest rate of at least six percent.

PRO: Farms should be owned by farmers, not by corporations with headquarters far removed from the land. But it is often impossible for an individual to raise the money to buy farm or ranch land.

This amendment would help the individual farmer or rancher to compete with foreigners and out-of-state corporations for ownership of Texas farmland. When state guarantees are available, private lenders will make more loans to individuals and will make them at lower down payments.

The enabling legislation provides further assistance to young or beginning farmers who have state-guaranteed loans. In the first 10, or sometimes 20, years of the loan, some borrowers could receive payments from the state each year to help pay off their private loans. The state payments would be repaid at six percent, when the farm or ranch is well-established.

The program has worked very well in Minnesota, where there

have been no defaults in two years of operation. The enabling legislation sets qualifications for participation, insuring a minimal risk of default. Should default occur, the state could sell the land to recoup its losses.

Family farmers will conserve the land and use it. Corporations and foreign investors often exploit the land, deplete it, and then sell it at large profits for non-farm uses.

Texas should put its farm and ranch land back within the reach of farmers and ranchers.

CON: The state should not be in the business of guaranteeing loans for anybody, even farmers. We have a free market system that works very well when it is left alone. Interfering with the system would be risky and unfair. If a would-be farmer cannot raise the capital to get started, it will not help much to pile up loans that can only come due one day. When there are defaults on the loans, the state could lose more than its initial investment.

Why take such risks for one group? The farmers are no worse off than other small business owners, but the state is not spending $10 million to help the others. Over and over again, the state has to bail out the farmer. It's time to put sentiment aside and turn our attention to more crucial problems, like crime and poverty in the cities.

In addition to guaranteeing the loan, in some cases the state could help pay off the loan. During the first ten years of the loan, the farmer or rancher could receive "payment adjustments" of four percent of the outstanding balance.

In the eleventh year of the loan, the borrower would begin to pay back the payment adjustments, plus six percent interest. The payments could be extended for another ten years, in which case all payment adjustments would be repaid beginning 21 years after the loan was granted. The borrower and the borrower's spouse and dependents would be required to submit an annual statement of net worth; if it exceeded $150,000 for any year, the borrower would be ineligible for payment adjustments in that year.