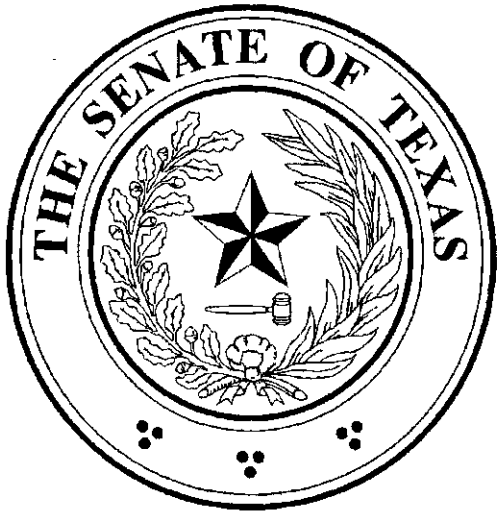
Senate Committee on State Affairs

Interim Report
to the
85th Legislature



November 2016

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SENATOR JUDITH ZAFFIRINI

SENATE COMMITTEE ON STATE AFFAIRS

The Honorable Dan Patrick
Lieutenant Governor of Texas
Texas State Capitol
Austin, Texas 78701

Dear Lieutenant Governor Patrick:

The Senate Committee on State Affairs of the Eighty-Fourth Legislature hereby submits its interim report including findings and recommendations for consideration by the Eighty-Fifth Legislature.

Respectfully submitted,

Senator Joan Huffman, Chair

Senator Rodney Ellis, Vice-Chair

Senator Brian Birdwell

Senator Brandon Creighton

Senator Craig Estes

Senator Troy Fraser

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Senator Charles Schwertner

Senator Judith Zaffirini

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and Rural Affairs
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Judith Zaffirini
State Senator, District 21
President Pro Tempore, 1997

Committees
Health and Human Services
Natural Resources
and Economic Development
State Affairs

October 27, 2016

Senator Joan Huffman, Chair
Senate Committee on State Affairs
Sam Houston Building 380
209 West 14th Street
Austin, Texas 78701

Dear Chair Huffman:

Thank you for your leadership as Chair of the Senate Committee on State Affairs. It is my privilege to serve with you, and I appreciate the opportunity to share my perspective regarding the Committee's interim report. Because the report includes many fine recommendations, I am delighted to sign it. I submit this letter to be included in the report, however, as a record of some of my concerns.

By far my most serious concern pertains to the report's discussion of religious liberty. The report recommends that the Legislature enact statewide religious liberty "protections" whose effect and apparent purpose would be to preempt local ordinances that may be more protective than current state law of persons in the LGBT community. Should such a preemptive statute be enacted, a local ordinance prohibiting a merchant from refusing to serve a person solely on the ground that the person is, for example, transgendered, would be rendered ineffective.

Such legislation understandably would be seen as a symbolic rebuke to a large number of our fellow Texans and, as we have seen in the nation's reactions to comparable laws in other states, it would damage our reputation at great potential cost to our relationships with national corporate citizens and others in the business community. If "religious liberty" means a liberty to discriminate against gays and lesbians, it ironically can be seen as infringing *their* religious liberty, insofar as their religions obviously do not condemn their sexual orientations or gender identities. Such legislation, then, would offend the very principles of religious tolerance that its proponents purport to extoll, while simultaneously offending principals of local control.

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In addressing the second charge, regarding union dues, the report in essence recommends legislation similar to Senate Bill 1968 from last session, which, among other things, would have repealed a statute that allows voluntary withholding from public employees' salaries for payment of association dues. I take this opportunity to register my disagreement, and to note that the Senate passed the bill on a straight party-line vote. My disagreement stems from my belief that the withholding option not only benefits public employees by providing a safe and convenient means to remit membership dues, but does so at no cost to the state or other governmental entity. What's more, because Texas is a right-to-work state, and because the withholding is strictly voluntary, withholding does not adversely affect public employees. Finally, because the withholding is for *public* employees, I remain unconvinced by assertions that it harms *private* employers in their relationships with labor.

In its discussion of the fifth charge, regarding eminent domain, the report recommends (among other things) that property owners should "have legal recourse to recover all, or at least a portion, of any attorney's and professional fees incurred challenging [a condemnor's] offer when a court rewards damages well above the...offer." Like many Texans, I believe strongly in private property rights, but I am concerned that such a measure would strike the wrong balance between private rights and the public good. Such a bill would increase needlessly the cost of public right-of-way acquisitions—a cost ultimately borne by the taxpayers—at a time when our state scarcely can afford to take measures that would make transportation infrastructure even costlier. That is why, in 2015, I opposed SB 474, which would have enacted such a fee-shifting provision, and why I must respectfully disagree with the report's recommendation on this charge.

In the section regarding campus carry, the report rightly recommends monitoring and safeguarding the rights of license holders but does not address the potential for unintended consequences that may yet result from this nascent law, which had not even taken effect at the time this issue was considered in committee. Accordingly, I would have supplemented this recommendation to propose other issues that warrant monitoring as the law actually is implemented, for example, the possible effects of campus carry on academic freedom and the free exchange of ideas in the classroom, on students' sense of security and psychological well-being, or on the incidence and prevalence of handgun-related injury or death on our campuses.

Finally, in the discussion of House Bill 39, the guardianship reform bill I sponsored, the report states that "some judges have expressed concerns that the burden of proof to find clear and convincing evidence that alternatives to guardianship are not feasible is too high of a standard," and that "[m]any judges suggest that a preponderance of the evidence standard is a [sic] more reasonable." While it is true that some judges have expressed this concern, I would like to point out that this issue was considered thoroughly by the Texas Judicial Council (TJC) Elders Committee, which ultimately determined that the higher standard was appropriate. Accordingly, TJC is not recommending any changes to this provision next session.

Thank you for your dedication to these important issues. I look forward to continuing to work with you and other members of the committee during the forthcoming legislative session.

May God bless you.

Very truly yours,

Judith Zaffirini

Judith Zaffirini

JZ/tjs

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Interim Charges

The Senate State Affairs Committee is charged with conducting a thorough and detailed study of the following issues, and preparing recommendations to address problems or issues that are identified.

1. **Religious Liberty:** Examine measures to affirm 1st Amendment religious liberty protections in Texas, along with the relationship between local ordinances and state and federal law. Make recommendations to ensure that the government does not force individuals, organizations or businesses to violate their sincerely held religious beliefs.

2. **Union Dues:** Examine the practice of using public funds and employees for the payment processing of union dues. Make recommendations on whether Texas should end this practice.

3. **Chief Law Enforcement Officers:** Examine whether there are chief law enforcement officers within the state who deny NFA applications without any cause. Examine the application and certification process and recommend ways to eliminate no-cause denials.

4. **Judicial Matters:** Examine the need to adjust Texas judicial salaries to attract, maintain, and support a qualified judiciary capable of meeting the current and future needs of Texas and its citizens. Study and recommend whether Texas should delink legislators' standard service retirement annuities from district judge salaries. Examine the effect of eliminating straight-party voting for candidates for judicial office and make recommendations to ensure candidates are given individual consideration by voters.

5. **Eminent Domain:** Gather and review data on the compensation provided to private property owners for property purchased or taken by entities with eminent domain authority. Examine the variance, if any, between the offers and the fair market values of properties taken through eminent domain. Make recommendations to ensure property owners are fairly compensated.

6. **Ethics:** Review current ethics laws governing public officials and employees and recommend changes necessary to inspire the public's confidence in a transparent and ethically principled government. Review public officials' reporting requirements to the Texas Ethics Commission. Examine the categorization of ethics reporting violations and make recommendations to encourage accurate reporting and timely correction to inadvertent clerical errors.

7. **Monitoring Charge:** Monitor the implementation of legislation addressed by the Senate Committee on State Affairs during the 84th Legislature, Regular Session and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following: 1) Implementation of open and campus carry legislation and determine if the current laws regulating the places that handguns can be carried are easily understood or if clarification is needed to ensure the average citizen understands when, where, and under what circumstances it is lawful to carry a weapon, versus when it is a criminal offense for which there may be a defense; 2) Requirements for guardianships; 3) The electronic voting program for certain military members serving overseas; 4) Changes made to the Employees Retirement System of Texas regarding member contributions and proposed reforms to the Teacher Retirement System of Texas; and 5) The establishment of a public integrity unit under the authority of Texas Rangers.

Senate Committee on State Affairs Interim Hearings

January 26, 2016, *Senate Chamber*
The Committee took invited testimony on Charge No. 7(1).

February 17, 2016, *Senate Chamber*
The Committee took invited and public testimony on Charge No. 1.

February 18, 2016, *Capitol Extension Room E1.016*
The Committee took invited and public testimony on Charge No. 4.

March 29, 2016, *Senate Chamber*
The Committee took invited and public testimony on Charge No. 5.

April 13, 2016, *Senate Chamber*
The Committee took invited testimony on Charge Nos. 7(3) & 7(4).

September 14, 2016, *Senate Chamber*
The Committee took invited and public testimony on Charge Nos. 2, 7(2) & 7(5).

October 5, 2016, *Senate Chamber*
The Committee took invited and public testimony on Charge No. 6.

Interim Charge Discussions and Recommendations

Charge No. 1

Religious Liberty: *Examine measures to affirm 1st Amendment religious liberty protections in Texas, along with the relationship between local ordinances and state and federal law. Make recommendations to ensure that the government does not force individuals, organizations or businesses to violate their sincerely held religious beliefs.*

Background

Religious liberties form the first freedom in the United States Bill of Rights. The First Amendment prevents government from infringing on the free exercise of religion or establishing a religion. The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] The First Amendment protects religious liberty in two ways. The first protection is known as the Establishment Clause, which states "Congress shall make no law respecting an establishment of religion." This clause enshrines the principle typically referred to as "separation of church and state."[2] By prohibiting our government from establishing an official state religion, the Establishment Clause ensures that we have the absolute right to decide for ourselves which faith to follow. The Establishment Clause also guards against the civic divisiveness that arises when the government takes sides in religious debates because religious strife of this nature can threaten the viability of a democratic society.[3] The second religious liberty protection found in the First Amendment is known as the Free Exercise Clause. It reads, "Congress shall make no law...prohibiting the free exercise thereof..." This clause enshrines the principle referred to as "liberty of conscience"; the right to choose what one believes in matters of religion.[4] The Free Exercise Clause also limits the power of government to interfere with religious practice by compelling the affirmation of favored religious beliefs, punishing the expression of disfavored religious doctrines, or imposing special disabilities on the basis of religious views or religious status.[5]

In Texas, we have a proud tradition of ensuring the right of every person to follow his or her conscience without fear of government intrusion. The Texas Constitution proclaims that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences," and provides that "[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship."[6]

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[1] U.S. CONST. amend. I.
[2] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Joshua Houston, Texas Impact).
[3] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Rebecca Robertson, ACLU of Texas).
[4] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 2.
[5] *Id.*
[6] TEX. CONST. art. I, § 6.

In 1993, United States Congress passed the Religious Freedom Restoration Act (RFRA), which ensures that interests in religious freedom are protected.[7] Specifically, RFRA prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[8] At the time, RFRA was noncontroversial and passed the House of Representatives on a voice vote and the Senate 97-3.[9]

However, RFRA was held unconstitutional by the United States Supreme Court, as applied to the states in the *City of Boerne v. Flores* decision in 1997, which ruled that RFRA is not a proper exercise of Congress' enforcement power.[10] In the *City of Boerne v. Flores* decision, a majority found that Congress had exceeded its constitutional powers by enacting RFRA because Congress could not determine the way in which states enforce RFRA's restrictions. Regardless of that ruling, RFRA continues to be applied to the federal government. In response to *City of Boerne v. Flores* and other related RFRA issues, twenty-one individual states have passed RFRAs that apply to state governments and local municipalities.[11]

Texas passed its RFRA, the Texas Religious Freedom Restoration Act (Texas RFRA), in 1999 as Senate Bill 138. Like the RFRA of 1993, Texas RFRA had broad support across the political spectrum. Senate Bill 138 was adopted on a voice vote in the House of Representatives and passed unanimously in the Senate.[12] The Texas law passed with overwhelming bipartisan support because conservatives and progressives agreed on the premise that religious accommodation is appropriate where the rights of others are not impinged. The Texas RFRA strikes a careful balance between protecting people's ability to practice their faiths freely and ensuring that laws needed to protect everyone apply to all persons equally, regardless of personal beliefs.

Discussion

Recently, certain courts and governmental bodies have made laws and rulings that undermine Americans' religious liberties. These challenges to religious liberty harm not only those of religious faith, but are a potential threat to the freedom of conscience for all Americans. As a result, thirty-two states have created some form of RFRA protection. Twenty-one of those states enacted RFRA legislation, with RFRA protections in the other eleven states being imposed by court decisions.[13] Furthermore, in seven of the states that have enacted RFRA legislation, the law requires that the burden on religion be essential to the compelling government interest. Thus, because of the recent challenges on religious liberty, states are taking the necessary steps to ensure that the government does not force individuals, organizations, or businesses to violate

[7] H.R. 1308, 103rd Cong. (1993-1994) (enacted).
[8] *Id.*
[9] H.R. 1308, *supra* note 7.
[10] *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).
[11] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Brantley Starr, Deputy First Assistant Att'y Gen., Office of the Tex. Att'y Gen.).
[12] S.B. 138, 1999 Leg., 76th Reg. Sess. (Tex. 1999).
[13] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 11.

their sincerely held religious beliefs.

The Texas Legislature has taken steps to protect the religious liberties of all Texans. In 2015, the 84th Legislature passed Senate Bill 2065, which specifies that (1) clergy members should not be liable for refusing to solemnize a wedding that would violate their religious beliefs and (2) religious organizations should not be liable for refusing to host a wedding that violates its religious beliefs.[14] That legislation was a significant step in the effort to clarify the specific rights of religious liberty and freedoms of conscience that are protected by the United States and Texas constitutions and the RFRAs. While courts can only address cases brought before them, legislatures are not so burdened. The United States Supreme Court has held that a person cannot use religious liberty to harm others. In passing Senate Bill 2065, the Texas Legislature decided that clarifying that a pastor was not required to officiate at a wedding that violated his or her religious beliefs did not impose harm on others, as they were still free to marry.[15] Senate Bill 2065 is just one example of the state affirming the First Amendment religious liberty protections for all Texans.

Even though the Texas Legislature has already acted to protect religious liberties, there are other areas where the legislature may consider enacting legislation to clarify and ensure that the government does not violate sincerely held religious beliefs of any individual, organization, or business. In a letter issued in October 2015, Attorney General Ken Paxton set forth several such topics:

1. Religious organizations should not be forced to compromise their religious beliefs when making staffing and housing decisions.

2. Faith-based adoption and foster care agencies should be free from discrimination based on their religious beliefs.

3. The accreditation of religious schools should not be revoked due to the school's sincerely held religious beliefs.

4. Tax assessors should not revoke religious tax accommodations based on religious beliefs.

5. Religious beliefs when providing counseling should be protected.

6. Small businesses and closely held corporations should not be required to provide goods or services for weddings that violate their sincerely held religious beliefs.

7. Judges and other officiants should not be forced to perform weddings that violate their sincerely held religious beliefs.

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[14] TEX. FAM. CODE § 2.601.

[15] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 11.

8. The State does not, in the process of complying with the United States Supreme Court's ruling in *Obergefell v. Hodges*, needlessly trample the religious liberties of State and local government employees.

9. Public school, college or university students' retain their constitutional freedom to speak their religious beliefs, to associate with others of similar religious beliefs, and to not be compelled to participate in religious practices contrary to their religious beliefs.

10. Discrimination laws and ordinances should be uniform across the State.[16]

These are just a few specific areas that the Texas Attorney General has pointed out as possibly needing clarification from the legislature to avoid future litigation and ensure religious liberty protections are affirmed. Constitutional law and federal and state RFRA laws provide generic protections, often requiring a lengthy court battle to determine whether the government has unconstitutionally burdened religious expression.[17] Because of this, the Legislature may wish to enact more specific protections, similar to Senate Bill 2065 from the 84th Legislature, in order to avoid lengthy and expensive legal battles.

Several municipalities in Texas have enacted ordinances that grant protection beyond federal and state law. In state law, protected classes include race, color, disability, religion, sex, national origin, and age. Protected classes do not include sexual orientation, military status, marital status, or gender identity. These local ordinances are starting to draw more legal challenges and attention statewide. Many assert that these ordinances are costly to taxpayers and are divisive local initiatives. Because these local ordinances protect classes beyond state law, many religious organizations, like the Texas Pastor Council, believe that the legislature should require that any local discrimination ordinance conform to the protected classes set forth in state law.[18] Certain religious organizations assert that such ordinances infringe on religious liberty and personal safety.[19] Further, Steve Washburn, Pastor, Texas Pastor Council, asserted in the committee's February 17, 2016 hearing that the definitions of "sexual orientation" and "gender identity" are vague and vary from city to city creating confusion for individuals, businesses, and religious organizations. According to Jonathan Saenz, President, Texas Values, some of these local ordinances even impose criminal penalties and fines on citizens and businesses for practicing their sincerely held religious beliefs and provide weak protections for churches.[20]

In 2000, Fort Worth became the first Texas city to pass an ordinance to protect all individuals from discrimination based on sexual orientation. There are now twelve Texas cities with populations of more than 100,000 that have some rules or laws in place to protect residents or

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[16] *Id.*
[17] *Id.*
[18] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Steve Washburn, Tex. Pastor Council).
[19] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Jonathan Saenz, Tex. Values).
[20] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 18.

city employees based on sexual orientation or gender identity.[21] Houston is the only city in Texas with a population over one million that has no explicit protections against discrimination based on sexual orientation or gender identity. Gender identity or sexual orientation protections are not protections under state law. Because local governments have enacted ordinances granting more or less protection than in state or federal law, the legislature may consider providing uniformity because each ordinance interacts with the Texas RFRA differently and presents legal conflicts that must be resolved by the courts.

Other states are seeking to address infringement on religious liberty by enacting targeted protections to provide uniformity in state law. Michigan has passed laws protecting the rights of faith-based adoption and foster care providers to place children in homes with a married mother and father who practice the religion of the birth mother or foster child.[22] Furthermore, North Carolina has enacted a law that protects the rights of clerks, deputy clerks, and magistrates who decline to solemnize all marriages based on sincere religious beliefs. Other states such as Nebraska, Virginia, Georgia, Washington, Illinois, Kansas, and South Carolina are also considering similar bills in their state legislatures.[23] Legal authorities, like the Texas Attorney General, assert that targeted legislation provides the clearest protection of religious liberty, reduces uncertainty, and prevents litigation.

In the committee's February 17, 2016 hearing, Bill Hammond, Chief Executive Officer of the Texas Association of Business, asserted that considering broad, expansive religious liberty laws may have a negative impact on business, capital expansion, and employee recruitment.[24] Hammond further asserted that Arizona, Louisiana, and Indiana, which have passed or considered such expansive laws, have seen negative economic consequences.[25] However, others, like Texas Values, contend that religious liberty protections are not intended to promote discrimination, but merely protect individual religious liberty rights. Further, there appears to be no evidence that the repeal of the Houston Equal Rights Ordinance (HERO) has negatively impacted the city of Houston's economy from a business perspective. In fact, seven of Forbes' top ten states for business do not have discrimination laws protecting persons based on sexual orientation.[26] Accordingly, groups such as Texas Values assert that it is becoming more difficult for businesses to operate across the state as more local municipalities enact nondiscrimination ordinances that go beyond state law.[27] This lack of uniformity may create difficulties for many businesses that operate in different areas of the state. Many businesses prefer laws that are uniform across the state and understand that religious freedom is a fundamental value that their employees cherish. Other states like Tennessee and Arkansas have enacted laws requiring nondiscrimination ordinances to be uniform across the state.[28]

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[21] Alexa Ura, Edgar Walters & Jolie McCullough, *Comparing Nondiscrimination Protections in Texas Cities*, TEX. TRIBUNE (June 9, 2016), *available at* www.texastribune.org/2016/06/09/comparing-nondiscrimination-ordinances-texas/.
[22] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Justin Butterfield, Liberty Inst.).
[23] *Id.*
[24] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Bill Hammond, Tex. Assoc. of Bus.).
[25] *Id.*
[26] *Religious Liberty Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 19.
[27] *Id.*
[28] *Id.*

Recommendations

The legislature must continue to ensure that the government does not force individuals, organizations, or businesses to violate their sincerely held religious beliefs. The First Amendment rights of all Texans must be protected. In order to avoid lengthy and costly litigation, the legislature should enact targeted religious liberty protections designed to address specific violations of an individual, business, or organization's sincerely held religious belief.

Charge No. 2

Union Dues: *Examine the practice of using public funds and employees for the payment processing of union dues. Make recommendations on whether Texas should end this practice.*

Background

Texas' economic success over the last decade has been driven by low taxes and spending, less regulation, a sound civil justice system, and strong public school performance. Texas has been a magnet for both high-skilled and low-skilled workers. For instance, from 2007 to 2013, the population of Texans aged 25 to 64 with at least a bachelor's degree increased by nearly 19 percent, almost 9 percent above the national average.[29] Furthermore, Texas' college-educated, working-age population grew by 122,000 more than California's from 2007 to 2013, even though there had been 81 percent more college graduates, pre-retirement age, in California in 2007.[30] But census data also shows that Texas is a land of opportunity for lesser-educated employees. Texas' working-age population with only a high school diploma grew by 10 percent from 2007 to 2013; nearly quadruple the national average increase of 2.7 percent.[31] Texas has led the nation in job creation for an extended period of time because businesses have created both high paying and low paying jobs to meet the needs of workers and boost the economy.

One significant factor for Texas' economic success is being a Right-to-Work state in which Texans cannot be forced to join a labor union to get a job. Unlike those states that don't have this employee protection, Texas employees and employers have not seen control of wages, work standards, and other labor-management policy shift almost entirely to unions.[32] Therefore, both in the public and private sectors, employers have had more flexibility to innovate, generate better levels of production, and pay productive employees more.

Even though Texas is a Right-to-Work state, public employees may currently authorize one or more monthly deductions from their salary or wages to pay membership fees to eligible employee organizations which may include an association, union, or other organization that advocates the interests of employees concerning grievances, compensation, hours of work, or other conditions or benefits of employment.[33] However, no public employer may state or imply that an employee is required to authorize a payroll deduction. Participation must be completely voluntary.

For example, according to Section 403.0165 of the Government Code, to be certified by the Texas Comptroller of Public Accounts (the "comptroller"), a state employee organization must have a current dues structure for state employees in place and operating in this state for a period of at least 18 months.[34] Additionally, any organization requesting certification shall demonstrate

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[29] STANLEY GREER, TEX. PUB. POL'Y FOUND., STATE LABOR-MANAGEMENT POLICY AND THE TEXAS MODEL 4 (2015).
[30] *Id.*
[31] *Id.*
[32] *See* GREER, *supra* note 29.
[33] *Union Dues Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Rob Coleman, Tex. Comptroller of Pub. Accts.).
[34] TEX. GOV'T CODE § 403.0165.

that the fee structure proposed from state employees is equal to an average of not less than one-half of the fees for that organization nationwide.[35] The comptroller may also charge an administrative fee to cover the costs incurred as a result of administering this service.[36] The administrative fees charged by the comptroller shall be paid by each qualifying state employee organization on a pro rata basis to be determined by the comptroller. However, any state employee organization that has a membership of at least 4,000 state employee members on April 1, 1991, shall be certified by the comptroller as an eligible state employee organization.[37] Such an organization may not be required to meet any other eligibility requirements for certification. In fiscal year (FY) 2016, the comptroller made payroll deductions for 45,513 state employees totaling $6,000,709.95.[38]

The comptroller is not the only public employer that makes payroll deductions that go towards an association, union, or other similar organization. In fact many other governmental entities, such as school districts, municipalities, counties, and others, provide this service to their employees. Most, if not all of the time, the governmental entity does not charge the employee a fee for providing this service.

Public employee payroll deduction has recently sparked much debate nationwide. In recent years, several other states have prohibited the automatic deduction of union dues from public workers' paychecks. States likes Wisconsin, North Carolina, Michigan, and Alabama do not limit in any way the ability of members of government unions and other public employees to pay dues to their labor organization or to contribute to union political action committees (PACs). However, these states do require public union officials to make their own arrangements with union members regarding dues collections, rather than rely on the public employer to deduct union dues automatically out of employee paychecks.

Discussion

To address the practice of using public funds and employees for the payment processing of union dues, the 84th Legislature introduced Senate Bill 1968. Although Senate Bill 1968 successfully passed the Senate, it did not ultimately pass the House of Representatives to become law. However, Senate Bill 1968 illustrates recent attempts to eliminate this practice in Texas. Specifically, Senate Bill 1968 would have (1) prohibited governmental entities from collecting dues/membership fees from any public employee on behalf of a trade union, labor union, employees' association, or professional association, except in the case of municipal, county, and state fire, police, and emergency medical services (EMS) department members; (2) prevented union representatives from participating in government inspections of non-union worksites without employer consent; and (3) clarified that a person may not picket on or near the premises of an employer with whom a labor dispute does not exist, regardless of whether the premises are temporarily or permanently occupied by the employees of another employer with whom a labor dispute does exist.

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Union Dues Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 33.

There is nothing wrong with public or private sector employees voluntarily joining unions to engage in collective bargaining and discuss employment concerns. However, federal and state labor laws have created an uneven playing field for many businesses, even in Texas. Unfortunately, many employees never receive the benefits they expect from unionization due to the fact that benefits are allocated according to union standards, such as seniority or level of education.[39] In fact, there is usually no feasible solution for businesses, small or large, to sharply raise the pay and benefits of their employees without eliminating jobs or raising consumer prices.

Senate Bill 1968 was designed to help restore the balance and benefit Texans of all walks of life, along with the Texas economy. Senate Bill 1968 would not have prohibited any public employee from forming or joining a trade union, labor union, employees' association, or professional association. Furthermore, Senate Bill 1968 would not restrict any employees' freedom of speech or freedom of association. Texas is only one of a handful of states that still collects union dues from the paychecks of its public employees. Most states have chosen to eliminate this practice largely in part because state government should have no role in the affairs of any trade union, labor union, employees' association, or professional association. Texas Republican voters also agreed with this sentiment during the 2016 Republican primary election. A resounding 82.95%, or 2,126, 533, Republican voters voted to prohibit governmental entities from collecting dues for labor unions through deductions from public employee paychecks. Accordingly, many Texans believe that the government should have no official role in the operation of unions or similar organizations.

Recommendations

Texas has led the nation in economic growth by protecting employer and employee rights to communicate directly and create mutually beneficial arrangements. Because Texas is a Right-to-Work state, employers in the public and private sectors have had more flexibility to innovate, generate better levels of production, and pay productive employees more. The legislature should continue to ensure that businesses across the state are given the freedom to sustain economic and income growth.

As more states act to curtail union special privileges and protect the freedom to work, Texas cannot afford to remain complacent. Texans must do everything they can to hold union officials accountable under the same laws as other citizens and end all labor-relations policies that set up barriers to the efficient and effective provision of public services. Therefore, the legislature should enact legislation similar to Senate Bill 1968 from the 84th Legislative Session.

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[39] Bill Peacock, *Bill Analysis: The Texas Miracle and Labor Policy*, TEX. PUB. POL'Y FOUND. (April 2015), *available at* www.texaspolicy.com/content/detail/bill-analysis-the-texas-miracle-and-labor-policy.

Charge No. 3

Chief Law Enforcement Officers: *Examine whether there are chief law enforcement officers within the state who deny NFA applications without any cause. Examine the application and certification process and recommend ways to eliminate no-cause denials.*

The committee took no action relating to this charge.

Charge No. 4

Judicial Matters: *Examine the need to adjust Texas judicial salaries to attract, maintain, and support a qualified judiciary capable of meeting the current and future needs of Texas and its citizens. Study and recommend whether Texas should delink legislators' standard service retirement annuities from district judge salaries. Examine the effect of eliminating straight-party voting for candidates for judicial office and make recommendations to ensure candidates are given individual consideration by voters.*

Judicial Salaries

Texas is the second largest state in our nation, in both area and population. The judiciary of a state of the size and stature of Texas must be equipped to handle not only the number of cases filed, but also the complexity and importance of the cases needing adjudication. The Texas judiciary leads the nation on many issues, such as access to justice, human trafficking, juvenile justice, and specialty courts. Additionally, Texas is the only large state that has implemented an e-filing system for the judiciary. Thus, it is critical for Texas to continue its strong judiciary record and maintain a qualified and stable judiciary to effectively meet the current and future needs of the state and its citizens. Many factors contribute to supporting a judiciary that can competently address the needs of its citizens. One of those factors is judicial compensation.

The state salary of justices and judges of the Supreme Court, the Court of Criminal Appeals, the courts of appeals, and the district courts are set by the legislature in the General Appropriations Act. Section 659.012 of the Texas Government Code provides the salary minimums that must be paid by the state and provides salary differentials that must be maintained between the three levels of the judiciary paid by the state—the highest appellate courts, the intermediate appellate courts, and the district courts.[40] In addition, Sections 31.001 and 32.001 of the Government Code authorize counties to supplement the salaries of the courts of appeals justices and the district court judges that have jurisdiction in their counties.[41]

Statutory salary for district judges is currently set at $140,000; previously set at $125,000.[42] The total annual salary including county supplements for a district judge is limited to $158,000, which is $5,000 less than the combined salary from state and county sources provided for a justice of a court of appeals.[43] In counties with more than five district courts, local administrative district judges are entitled to an additional $5,000 from the state. Of the 457 district court judges in the state, only nine do not receive a county salary supplement. The average supplemental salary for district judges is $16,120.[44] Forty-four percent (201 judges) receive the maximum salary allowed by law.[45]

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[40] TEX. GOV'T CODE § 659.012.
[41] TEX. GOV'T CODE § 31.001.
[42] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of David Slayton, Office of Ct. Admin.).
[43] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of William Strawn, Jud. Comp. Comm.).
[44] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 43.
[45] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 44.

The annual salary of a justice of a court of appeals is 110 percent of the state salary of a district judge, which is currently $154,000. The total annual salary including supplements for a court of appeals justice, other than a chief justice, is limited to $5,000 less than the salary of a justice on the Supreme Court, for a current maximum of $163,000.[46] Chief justices of the courts of appeals are entitled to an additional $2,500 from the state for their administrative duties. All 80 of the justices of the 14 courts of appeals in Texas receive county supplements averaging $8,915, but only 34 (42.5 percent) of the justices receive the maximum salary allowed by law.[47]

A justice or judge on the highest appellate courts, the Supreme Court and the Court of Criminal Appeals, is entitled to an annual salary from the state that is equal to 120 percent of the annual state salary of a district court judge, for a current salary of $168,000. The chief justice of the Supreme Court and the presiding judge of the Court of Criminal Appeals are entitled to an additional $2,500 from the state for their administrative duties. None of the justices or judges sitting on the highest courts of Texas are entitled to receive any county supplements.[48]

Judges who have completed at least 16 years of service also receive longevity pay in an amount equal to 3.1 percent of the judge's current monthly state salary (approximately $362 per month, or $4,340 per year for district judges; $398 per month for intermediate appellate court judges; $434 per month for high court justices and judges).[49] Longevity pay is not dependent on whether a judge serves on a district, intermediate appellate, or high court.

Since 1991, compensation of state judges has generally not kept up with inflation. Under the current structure, there is little predictability regarding when increases in compensation will occur. Prior to 2000, Texas judges generally received raises every fiscal year, but since 2000, judges have only received salary increases in 2005 and 2013.[50] In 2013, the legislature granted the judiciary a 12 percent increase in compensation.

Texas judicial salaries are the lowest among the six most populous states, with the exception of the supreme court justices in Florida.[51] When comparing the average compensation of Texas judges and justices to the average judicial salaries in the other five most populous states, the compensation is almost 33 percent lower for Texas district court judges, 26 percent lower for Texas justices of the courts of appeals, and 25 percent lower for the justices and judges of Texas' two high courts.[52] The average salary of the five most populous states for district judges is $185,586, $194,184 for justices of the courts of appeals, and $209,882 for justices and judges of the high courts.[53] In four of the other five most populous states, the judiciary has received raises from 2013 through 2015, while Texas judges last received an increase in 2013. Comparing Texas judicial salaries to states of similar size is usually the most effective comparison technique because the caseload and complexity of the dockets are similar.

In rankings for judicial compensation nationwide, Texas district judges' rank 24th, justices of the

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 43.
[51] *Id.*
[52] *Id.*
[53] *Id.*

courts of appeals rank 21st, and high court justices and judges rank 23rd.[54] Furthermore, federal judicial salaries are significantly higher than those for comparable Texas judges. Specifically, federal district court judges receive salaries that are 42 percent higher, federal courts of appeals judges receive salaries that are 37 percent higher, and justices of the United States Supreme Court receive salaries that are 31 percent higher overall.[55] However, when comparing Texas judicial salaries with those in other states and federal judges, local salary supplements were not considered.

Experience is considered to be a key factor when attempting to maintain a qualified judiciary. The average experience for judges on all court levels in Texas is over 30 years. By law, district court judges, courts of appeals justices, and justices and judges of the high courts are required to be attorneys; district judges must have at least four years of practicing experience; and the other courts require at least ten years.[56] The salary for judges is approximately 23 percent lower than the median salary for lawyers with approximately the same level of experience. For all lawyers in Texas, the median salary is approximately $124,000 and the average salary is approximately $162,000.[57] Partially due to this salary difference, the rate of voluntary judicial turnover is increasing. During the last biennium, 40 percent of departing judges did not seek reelection and 31 percent resigned. The top three reasons given for leaving are retirement, the election process, and compensation. When a judge voluntarily leaves the bench, it affects the entire judicial system by delaying trials and increasing litigation costs. Thus, it remains critical for the effectiveness of the judicial system to maintain a stable judiciary.

Not only is judicial turnover increasing but the judiciary is aging at all state court levels. In 2003, over 46 percent of the district court judges were between 45 and 54 years of age and just fewer than 33 percent were between the ages of 55 and 64.[58] However, recently, this demographic has flipped and the majority of judges are now 55 years of age or older. As more judges and justices seek retirement in the near future, the judiciary must be capable of attracting qualified candidates.

The Judicial Compensation Commission (the "Commission") was created by the 80th Legislature, effective September 1, 2007.[59] It is composed of nine members who are appointed by the Governor with the advice and consent of the Senate to serve six-year terms. No more than three members serving on the Commission may be licensed to practice law.

The Commission is responsible for making a report to the legislature no later than December 1 of each even-numbered year recommending the proper salaries to be paid by the state for all justices and judges of the Supreme Court of Texas, the Court of Criminal Appeals of Texas, the courts of appeals, and the district courts. In recommending the proper salaries for the justices and judges, the Commission is required to consider the factors listed in Section 35.102(b) of the Texas Government Code: (1) the skill and experience required of the particular judgeship at issue; (2) the value of compensable service performed by justices and judges, as determined by reference to judicial compensation in other states and the federal government; (3) the value of comparable

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] H.B. 3199, 2007 Leg., 80th Reg. Sess. (Tex. 2007).

service performed in the private sector, including private judging, arbitration, and mediation; (4) the compensation of attorneys in the private sector; (5) the cost of living and changes in the cost of living; (6) the compensation from the state presently received by other public officials in the state, including: (A) state constitutional officeholders; (B) deans, presidents, and chancellors of the public university systems; and (C) city attorneys in major metropolitan areas for which that information is readily available; (7) other factors that are normally or traditionally taken into consideration in the determination of judicial compensation; and (8) most importantly, the level of overall compensation adequate to attract the most highly qualified individuals in the state, from a diversity of life and professional experiences, to serve in the judiciary without unreasonable economic hardship and with judicial independence unaffected by financial concerns.[60]

In the Commission's November 21, 2014 report, the Commission made the following findings:

- In order to maintain a strong, qualified and independent judiciary, and in order to attract qualified candidates and retain experienced judges, appropriate judicial compensation is essential.
- The last judicial salary increase effective September 1, 2014, increased the salaries of the state's judges by 12% and brought them to a level that is consistent with the pace of inflation based on the judicial salaries in effect in 1991.
- By the end of the 2014-2015 biennium, judicial salaries will again begin to lag behind the rate of inflation and will be lower than salaries paid in 1991 when factoring inflation.
- While maintaining a 1991 level of compensation should be a goal so that real compensation does not decrease with inflation, the 1991 level of compensation in the 2016-2017 biennium is inadequate to recruit and retain the best judges for Texas.
- The age of judges serving in the Texas judiciary is increasing, and it is anticipated that many may retire in the near future making it more important than ever to set compensation at a level adequate to recruit a future generation of judges to the bench.
- Regular, systematic increases make judicial compensation more predictable and are essential to ensure that judicial compensation remains at a level that is sufficient to attract a competent and well-qualified judiciary.
- The state-paid associate judges for child protection courts and child support courts, who hear a significant portion of the cases that would otherwise be heard by additional district judges, perform a critical state service, have not received a merit-based increase in compensation in over 15 years and are inadequately compensated for their service.
- The ability of the Commission to ensure its recommendations are brought before the legislature is hampered by the fact that there is no formal mechanism for legislators to consider the recommendation.[61]

As a result of its findings, the Commission recommended that salaries of the justices and judges of the Supreme Court, the Court of Criminal Appeals, the 14 courts of appeals, and the district courts be increased by 5 percent for the 2016-2017 biennium. The state fiscal impact of the judicial salary increases recommended by the Commission was estimated to be approximately

[60] TEX. GOV'T CODE § 35.102.
[61] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 44.

$19,056,512 for the 2016-2017 biennium.[62] However, the legislature made no adjustment last session.

In addition to the judicial compensation recommendations in the report, the Commission also recommended that the legislature make regular adjustments to judicial salaries in order to avoid lengthy periods between pay increases which may be a barrier to attracting and maintaining a strong, qualified, and independent judiciary. In the committee's February 18, 2016 hearing, Nathan Hecht, Chief Justice of the Texas Supreme Court, asserted that current judicial compensation does not reflect the quality of the state's judiciary.[63] Chief Justice Hecht, along with the Commission, asserted that gradual, biennial adjustments based on cost of living increases due to inflation are essential in order to maintain and attract top talent to the bench. The majority of the judiciary also asserts that it is important that individuals considering judicial service know that salary increases will be considered regularly rather than in 8-12 year windows.

Finally, the Commission recommended that legislation be passed requiring the Commission's salary recommendations published in its report to the legislature be listed as the salary for the judges in the Comptroller Judiciary Section's appropriation patterns in the introduced versions of the General Appropriations Acts filed in the House of Representatives and Senate.[64] Twenty-two other states have commissions that address judicial salaries, and in 15 of those states, the commission's report is presumptive, unless changed by the legislature or governor.[65] Although this will not guarantee adequate regular adjustments, the Commission asserts that it will ensure that legislators are given an opportunity to review the Commission's recommendations regarding the level of overall compensation that the Commission finds to be adequate to attract the most highly qualified individuals in the state, from a diversity of life and professional experiences, to serve in the judiciary without unreasonable economic hardship and with judicial independence unaffected by financial concerns.[66] Because the state's budget varies widely from biennium to biennium, there remain structural and financial challenges to making the Commission's salary recommendations published in its report to the legislature presumptive, unless changed by the legislature or governor.

Recommendations

As the state's population continues to grow, maintaining a qualified and stable judiciary to effectively meet the current and future needs of the state and its citizens is essential. Therefore, the legislature should continue to examine the need to adjust Texas judicial salaries to attract, maintain, and support a qualified judiciary. To ensure that proper salaries are paid by the state for all justices and judges of the Supreme Court of Texas, the Court of Criminal Appeals of Texas, the courts of appeals, and the district courts, the legislature should review and consider the recommendations from the most recent Judicial Compensation Commission report.

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[62] *Id.*
[63] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Nathan Hecht, Tex. Sup. Ct.).
[64] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 44.
[65] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 43.
[66] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 44.

Legislators' Standard Service Retirement Annuities

In 1947, the 50th Legislature established the Employees Retirement System of Texas (ERS). However, ERS membership specifically excluded legislators, and thus, no retirement system existed for legislators.[67] It was not until 1963 when the 58th Legislature amended ERS provisions to include legislators in office on January 1, 1963, on an opt-in basis. Now, there are four main pension systems: (1) the regular state retirement system (ERS), which includes law enforcement and custodial officers and elected officials; (2) the Law Enforcement Custodial Officers System, which provides supplemental retirement to law enforcement and custodial officers; (3) the Judicial Retirement System 1, a legacy retirement plan for persons who were elected or appointed as judges before fiscal year 1986; and (4) the Judicial Retirement System 2, which serves persons who became judges during or after fiscal year 1986.[68]

Statewide elected officials, members of the legislature, and district attorneys and criminal district attorneys are all eligible for elected class membership. Unlike state employees and judges, elected class membership is optional. Members of the elected class currently contribute 9.5 percent of their paychecks and the state and agency contribute 10 percent of payroll to their retirement annuity. Members of the elected class are eligible to retire at (1) the age of 60 with at least eight years of service credit; or (2) the age of 50 with at least 12 years of service credit.[69]

The elected class annuity has changed over time. Prior to 1975, the elected class annuity was calculated based on a flat amount or an amount based on the elected official's salary. From 1975 to 1983, the annuity was based on a district judge's salary, capped at 60 percent of that salary. From 1983 to 1991, it was amended to be capped at 80 percent of a district judge's salary. Finally, from 1991 to present day, the elected class annuity is based on the salary of a district judge (currently $140,000), capped at 100 percent.[70] The annuity for the elected class is calculated the same way for all ERS members, at 2.3 percent for every year of service multiplied by the final average salary.[71] For legislators in the elected class, the salary used is based on the salary for district judges, as adjusted from time to time. Therefore, changing the salary of a district judge in turn affects the calculation of the annuity for the elected class. In the committee's February 18, 2016 hearing, Porter Wilson, Executive Director of ERS, asserted that this link creates tension because when the legislature increases the salary for district judges, it also increases the annuity of all elected class annuitants. Legislators are often subjected to unfair criticism when deciding to increase judicial compensation because it also increases some of the legislators' own benefits. Due to these political challenges, linking legislative retirement benefits to the district judge salary may actually inhibit the legislature from granting judicial pay increases.

When comparing state legislator retirement systems nationwide, states' legislator salary and retirement structure vary greatly. Part of the variance may be due to each state's legislative

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[67] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 43.
[68] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Porter Wilson, Emp. Ret. Sys. of Tex.).
[69] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Porter Wilson, Emp. Ret. Sys. of Tex.).
[70] *Id.*
[71] *Id.*

session schedule. States with the highest paid legislators are those with continuous legislative sessions. The Texas legislature receives the second-lowest salary in the country at $7,200 per year. The salary for Texas legislators has not been raised since 1975. South Dakota has the lowest at $6,000 annually, while California's annual salary is around $100,000.[72] The variance for legislator's retirement structure is no different. The majority of states have legislative retirement systems that are the same as or similar to that for state employees, although there may be different compensation formulas or ages for retirement. Eleven states offer no retirement for legislators and four states have a completely separate retirement system. Furthermore, Texas is the only state that ties its legislative pensions to judicial salaries.[73]

There are many alternatives to linking retirement benefits of the elected class to the salary of a district judge. For example, delinking could be achieved by statutorily setting a dollar amount to be used in calculating the elected class annuity. Additionally, the annuity could be linked to the governor's salary, the Consumer Price Index, or endless other alternatives.

Recommendations

As the need to maintain a qualified and stable judiciary to effectively meet the current and future needs of the state and its citizens remains critical, the legislature should agree on a reasonable alternative to delink legislators' standard service retirement annuities from district judge salaries. Delinking legislators' annuities from the salary of district judges is one way to prevent potential criticism of the legislature for improving its own benefits by increasing the compensation of district judges.

Straight-Party Voting for Candidates for Judicial Office

Straight-ticket voting, also called straight-party voting, allows voters to choose a party's entire slate of candidates with just a single ballot marking. Voters make one punch or mark on the ballot in order to vote for every candidate of that party for each office on the ballot. A total of nine states allow or offer straight-party voting: Alabama, Indiana, Iowa, Kentucky, Oklahoma, Pennsylvania, South Carolina, Texas, and Utah.[74] With a few exceptions, the straight-party option is available in all general elections, and applies to all offices on the ticket, including federal, state, and local races. However, the number of states offering straight-party voting has been declining. Since 2006, New Mexico, West Virginia, Michigan, Missouri, New Hampshire, North Carolina, and Rhode Island have abolished the straight-party voting option.[75] Additionally, Wisconsin only permits it for its overseas and military voters. Thus, the nationwide trend is moving away from offering the straight-party voting option.

In practice, straight-party voting may allow a voter to quickly cast votes in a situation in which the voter does not want to consider candidates of the other party. Thus, straight-party voting may lessen the time the voter spends interacting with the voting machine, which in turn, makes the

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[72] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 43.
[73] *Id.*
[74] NAT'L CONF. OF STATE LEG., STRAIGHT TICKET VOTING STATES (2016), *available at* www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx.
[75] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Keith Ingram, Tex. Sec. of State).

voting booth available more quickly for the next person in line. Because of the convenience and simplicity of this option, straight-party voting has increased in every election cycle over the past few decades.[76] For example, in 2014, 68 percent of the voters in Harris County utilized the straight-party voting option.[77]

However, straight-party voting may also result in under-voting in nonpartisan elections located at the bottom of the ballot. There may be certain elections, which straight-party voting may not apply, that the voter is not aware of, such as propositions. Specifically, when other elections are held concurrently with the election of federal, state, and county officers, it is difficult to educate the voters to continue down the ballot to vote in the nonpartisan elections. As a result, some voters may not cast a vote in certain elections unknowingly. In Texas, however, electronic voting machines notify voters using the straight-party option that there are other elections further down the ballot in which they may wish to participate.[78]

Additionally, straight-party voting may lessen the opportunity for a voter to individually consider candidates in races. Utilizing the straight-party voting option does not require a voter to carefully consider the individual candidates for each election. However, under the current system in Texas, a voter can still go down the ballot and emphasize a vote for a candidate of their party in a particular race. The voter can also vote for an individual candidate of another party, without upsetting the straight-party preference for the remainder of the races on the ballot.

Currently, there are many different methods of selecting judges across the country, including appointment by the governor or a commission, a partisan election followed by a nonpartisan retention election, and nonpartisan or partisan retention elections. Before 1830, most states provided for lifetime judicial appointments.[79] Beginning in 1940, many states started to favor electing judges. Texas is one of at least seven states which elect all of its supreme, appellate, and trial court judges in partisan elections, at least for their initial terms.[80] Of these seven states, two other states besides Texas, Alabama and Pennsylvania, elect all of their judges in partisan elections and allow straight-party voting.[81]

If the straight-party voting option for judicial elections was no longer available, voters would have to choose to vote in judicial elections. Voters would be required to go down the ballot to manually choose their judicial selections, regardless of whether they chose the straight-party voting option for the other elections on the ballot.

Eliminating straight-party voting for candidates for judicial office may result in more time needed to vote, resulting in longer wait times at the polls. With a potential increase in wait times at polling locations, more voting machines and personnel may be needed resulting in higher expenses for the counties. Additionally, eliminating the straight-party voting option for judicial elections may decrease voter participation in judicial races. A 2013 study found that when nonpartisan judicial races are separated from the straight-party voting option, fewer voters vote in

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[76] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Glen Maxey, Tex. Democratic Party).
[77] Wallace B. Jefferson, *Reform the Partisan System*, 79 TEX. BAR J. 90, 90 (Feb. 2016).
[78] *Id.*
[79] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 64.
[80] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 76.
[81] *Id.*

the judicial elections.[82]

Senate Bill 1702 from the 84th Legislature sought to eliminate the straight-party voting option for judicial races. Although Senate Bill 1702 was laid out in the Senate Committee on State Affairs during the 84th Legislative Session, it did not ultimately pass. Glen Maxey, Texas Democratic Party, and Bill Fairbrother, Texas Republican County Chairs Association, asserted in the committee's February 18, 2016 hearing, that if partisan labels for judicial candidates are retained while the straight-party option is eliminated, voters that decide to vote in the judicial elections will still vote by party label and not be any more informed about the candidates.[83] Thus, some contend that eliminating straight-party voting for judicial candidates will not alter voting behavior nor encourage voters to become more informed about the candidates.

Others, however, assert that eliminating the straight-party voting option for judicial candidates will result in more informed selections of judicial candidates. Former Chief Justice of the Texas Supreme Court, Wallace Jefferson, claims that the judicial selection process in Texas is broken.[84] Jefferson asserts that judges are fundamentally different than legislators, but that distinction is rendered meaningless by partisan elections.[85] Because there are so many judges in Texas, even the most well-intentioned voter may struggle to make an informed choice. Judicial values have always included honesty, integrity, independence, and accountability, but because of the current election system for judicial candidates, Jefferson asserts that these values take a back seat to partisanship and fundraising. Nathan Hecht, Chief Justice of the Texas Supreme Court, concurs with Jefferson, along with many other members of the judiciary. In the committee's February 18, 2016 hearing, Chief Justice Hecht asserted that elections are not delivering on the promise of providing accountability because voters have no way to review a judge's qualifications or performance.[86] Even considering the current judicial selection process, most judges do an admirable job of trying to divorce political concerns from decision making, but that pressure is enormous.

Additionally, in every election cycle, many qualified and experienced judges of all political affiliations are swept out of office not as a judgment on their record but as a consequence of the state's political mood. Opinion polling also demonstrates that voters believe that campaign contributions influence judicial decision-making.[87] The result is a loss of qualified judges and a decrease in public confidence.

Recommendations

The legislature needs to ensure that partisanship and fundraising do not overshadow traditional judicial values such as honesty, integrity, independence, and accountability. Ideally, judicial candidates must be given individual consideration by voters to preserve the public's confidence in the judicial system and to preserve a stable, qualified judiciary.

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[82] *Id.*
[83] *Id.*
[84] Jefferson, *supra* note 78.
[85] *Id.*
[86] *Judicial Matters Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 64.
[87] Jefferson, *supra* note 78.

Charge No. 5

Eminent Domain: *Gather and review data on the compensation provided to private property owners for property purchased or taken by entities with eminent domain authority. Examine the variance, if any, between the offers and the fair market values of properties taken through eminent domain. Make recommendations to ensure property owners are fairly compensated.*

Background

While the terms "eminent domain" and "condemnation" are often used interchangeably, there is an important legal distinction between the two. Eminent domain is defined as the power of the sovereign, or government, to take private property for a public use. Condemnation is the procedure by which the taking or appropriation occurs. Thus, the former is the power and the latter is the process. Only those entities on which the power of eminent domain has been bestowed may put in motion the procedure for condemning private property.[88]

While the power of eminent domain is not explicitly granted in either the United States or Texas Constitutions, it has long been held by the United States Supreme Court to appertain to every independent government. "It requires no constitutional recognition; it is an attribute of sovereignty."[89] Certain limitations on the process of eminent domain, however, are enumerated in both constitutions. For example, there is a requirement that "just" or "adequate compensation" be paid to the private property owner, as stated in the United States and Texas constitutions, respectively.[90]

The means for determining just or adequate compensation are directly related to the fair market value of the property, which is defined in Texas case law as "the price the property will bring when offered for sale by the one who desires to sell, but is not obligated to sell, and is bought by one who desires to buy, but is under no necessity of buying."[91] According to the Texas Property Code, if the entire property is condemned, damages to the property owner consist of the local market value of the property at the time of the special commissioner's hearing.[92] If only a portion of the owner's property is condemned, then damages shall include the local market value of the condemned portion as well as the effect of the condemnation on the value of the property owner's remaining property.[93]

In 2011, the 82nd Regular Legislature passed Senate Bill 18, which made sweeping changes to Texas' condemnation process.[94] Part of that legislation directly related to the means by which a condemning authority makes an offer to a private property owner in efforts to ensure that the owner is fairly compensated. Specifically, Senate Bill 18 added Section 21.0113 to the Texas

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[88] JUDON FAMBROUGH, TEX. A&M U. REAL ESTATE CTR., UNDERSTANDING THE CONDEMNATION PROCESS IN TEXAS 1 (2015).
[89] Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).
[90] FAMBROUGH, *supra* note 89, at 2.
[91] *Id.*
[92] TEX. PROP. CODE § 21.042.
[93] *Id.*
[94] S.B. 18, 2011 Leg., 82nd Reg. Sess. (Tex. 2011).

Property Code requiring an entity with eminent domain authority to submit a "bona fide offer" to the private property owner. An entity is deemed to have made a bona fide offer if:

(1) an initial offer is made in writing to a property owner;
(2) a final offer is made in writing to the property owner;
(3) the final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;
(4) before making a final offer, the entity obtains a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property;
(5) the final offer is equal to or greater than the amount of the written appraisal obtained by the entity;
(6) the following items are included with the final offer or have been previously provided to the owner by the entity: (A) a copy of the written appraisal; (B) a copy of the deed, easement, or other instrument conveying the property sought to be acquired; and (C) the landowner's bill of rights statement (prescribed by Section 21.0112 of the Property Code); and
(7) the entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.[95]

Senate Bill 18 further stipulated that if the condemnor fails to comply with Section 21.0113 of the Property Code, and the condemnation case reaches the judicial system, the condemnor shall be ordered by the court to pay the property owner's attorney's fees and abate the suit.[96] Under current law, this is the only scenario in which a condemnor may be required to pay a property owner's attorney's fees.

Discussion

While the 82nd Legislature made great strides to ensure private property owners receive just compensation for the condemnation of their property, further protections were offered in recent legislative sessions. During the 84th Legislature, for example, Senate Bill 474 was introduced, which would have required condemnors to reimburse property owners for attorney's fees and other professional fees in eminent domain proceedings where it was determined that the condemnor's final offer for the property was at least 20 percent lower than the amount of damages assessed by the special commissioners or other court.[97] The cost of attorney's fees and other professional services needed to successfully navigate a condemnation case can make litigation unaffordable for many property owners or greatly diminish any final award. Additionally, Senate Bill 474 sought to provide an incentive for condemnors to offer property owners a more substantial initial offer in hopes to avoid contentious and costly condemnation proceedings. While Senate Bill 474 ultimately did not pass to become law, the intent was clearly to provide further protections to property owners.

[95] TEX. PROP. CODE § 21.0113.
[96] TEX. PROP. CODE § 21.047(d).
[97] S.B. 474, 2015 Leg., 84th Reg. Sess. (Tex. 2015).

Similar to Senate Bill 474, eleven other states have statutory provisions that require a condemnor to reimburse a property owner's attorney's fees if the final award is a certain percentage higher than the condemnor's offer.[98] Furthermore, a total of 46 states have laws that provide some method for a property owner to be compensated for attorney's and/or professional fees.[99] For example, in Florida, the condemning authority is required to pay the property owner's attorney and professional fees in accordance with a formula relative to the amount of "benefits" received by the property owner.[100] Florida law defines "benefits" as the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the property owner hires an attorney.[101] Attorney's fees are then awarded in accordance with the following schedule:

(1) Thirty-three percent of any benefit up to $250,000; plus
(2) Twenty-five percent of any portion of the benefit between $250,000 and $1 million; plus
(3) Twenty percent of any portion of the benefit exceeding $1 million.[102]

As a result, some claim that eminent domain-related litigation in Florida has decreased since the implementation of this law.[103] However, entities with condemning authority maintain that allegation is unsubstantiated, and in fact, assert that if Texas enacted a similar law, it would actually increase litigation in condemnation proceedings across the state.[104]

Other states, like Louisiana[105], North Dakota[106], Nebraska[107], and California[108] allow for judicial discretion with regard to the payment of attorney's fees. Thus, in those states, the presiding authority determines whether the payment of attorney's fees is warranted. Although many states enable the property owner to collect attorney's fees in certain circumstances, most states have limitations on the amount of attorney's fees that can be collected.

The condemnation process in Texas consists of three phases. The first phase involves negotiations solely between the property owner and the entity with eminent domain authority. In this phase, the entity with eminent domain authority must submit a "bona fide offer" to the property owner.[109] As previously stated, one of the requirements of a bona fide offer is that the condemnor provide the property owner with a copy of the landowner's bill of rights statement. This statement, as prepared by the Office of the Attorney General, states:

(b) [...] must notify each property owner that the property owner has the right to:

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[98] S.B. 474, 2015 Leg., 84th Reg. Sess. (Tex. 2015) (S. RES. CTR., BILL ANALYSIS, *available at* www.legis.state.tx.us/tlodocs/84R/analysis/pdf/SB00474I.pdf#navpanes=0).
[99] *Id.*
[100] FL. CIV. PRAC. & PROC. CODE § 73.092(1)(a).
[101] *Id.*
[102] FL. CIV. PRAC. & PROC. CODE § 73.092(1)(c).
[103] *Eminent Domain Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Russell Boening, Tex. Farm Bureau).
[104] *Eminent Domain Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Tom Zabel, Tex. Pipeline Assoc. & testimony of Tom Forestier, Assoc. of Elec. Co. of Tex.).
[105] LA. REV. STAT. ANN. § 19:8.
[106] N.D. CENT. CODE § 32-15-32.
[107] NEB. REV. STATE. ANN. § 76-720.
[108] CAL. CIV. PROC. CODE §§ 1273.010 - 12732.050.
[109] TEX. PROP. CODE § 21.0113.

(1) notice of the proposed acquisition of the owner's property;
(2) a bona fide good faith effort to negotiate by the entity proposing to acquire the property;
(3) an assessment of damages to the owner that will result from the taking of the property;
(4) a hearing under Chapter 21, Property Code, including a hearing on the assessment of damages; and
(5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages.

(c) The statement must include:
(1) the title, "Landowner's Bill of Rights"; and
(2) a description of:
(A) the condemnation procedure provided by Chapter 21, Property Code;
(B) the condemning entity's obligations to the property owner; and
(C) the property owner's options during a condemnation, including the property owner's right to object to and appeal an amount of damages awarded.[110]

Another requirement of a bona fide offer is that the condmenor fully convey to the property owner the easement or property it seeks to acquire. However, in 2004, the Texas Supreme Court held that the condemnor is not required to inform the landowner that the offer may include more property than the condemnor can legally acquire under eminent domain. [111] Therefore, the burden is on the property owner to limit the condemnor to the property that is reasonably needed for the project. This can be quite burdensome for many landowners, especially when they may not fully understand their rights and responsibilities pertaining to condemnation proceedings.

The bona fide offer requirement further stipulates that a written initial offer, as well as a written final offer, based on an appraisal by a certified appraiser, be made to the property owner. In the event the appraisal comes back lower than the initial offer, a condemning authority may choose to reduce their final offer to as low as the amount of the appraisal. The property owner then has 14 days to respond to the final offer. In practice, a condemnor will often submit a final offer lower than the initial offer to get the attention of a landowner who is not responsive.[112] However, these types of tactics by condemnors can be counterproductive to good faith negotiations and potentially harmful to property owners.

Section 21.0111 of the Property Code also requires an entity with eminent domain authority to disclose to the owner at the time the initial offer is made, all appraisals produced or acquired during the preceding ten years relating to the determination of the amount of the offer. Furthermore, the initial offer must be sent by certified mail, return receipt requested. However, there are currently no penalties specified in law for a condemnor failing to comply with this requirement.[113]

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[110] TEX. GOV'T. CODE § 402.031.
[111] Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172 (Tex. 2004).
[112] *Eminent Domain Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Tom Zabel, Tex. Pipeline Assoc.).
[113] FAMBROUGH, *supra* note 89, at 4.

If the condemnor and property owner are unable to reach an agreement through phase 1, the condemnor may initiate phase 2 to contest the taking by filing a petition in the proper judicial forum. After the petition is filed with the appropriate court, a judge appoints three disinterested real property owners who reside in the county as special commissioners to assess the damages to the property owner. The judge appointing the special commissioners shall give preference to persons agreed upon by the parties and shall provide each party a reasonable time period to reject one of the three commissioners appointed by the judge. If an appointee of the court fails to serve as a special commissioner, or is struck by a party to the suit, the judge shall appoint a replacement.[114] Once appointed, the special commissioners will set a time and place for a hearing. At that hearing, the special commissioners will assess actual damages and admit evidence relating to:

(1) the value of the property being condemned;
(2) the injury to the property owner;
(3) the benefit to the property owner's remaining property; and
(4) the use of the property for the purpose of the condemnation.[115]

After the hearing, the special commissioners will issue an assessment stating the value of adequate compensation that shall be paid to the property owner. However, the special commissioners have no authority to consider whether condemnation is proper or if a bona fide offer was properly made to the property owner.[116] Once the special commissioners have issued their assessment, the condemnor may take possession of the property, pending results of further litigation, if the condemnor pays the required amount of damages to the property owner or court, or posts a bond to secure the payment of damages.[117]

Should the condemnation proceeding continue to remain contested by either party, phase 3 begins with an appeal of the special commissioners' assessment of damages. The appealing party must file a written statement of the objections with the proper court. Unlike with the special commissioners' hearing, the Texas Rules of Civil Procedure apply in phase 3 and an attorney may be needed to represent both parties.[118] An appeal in condemnation proceedings is de novo, meaning that a completely new trial will transpire. No evidence of the special commissioners' hearing, including the final award, is admissible.[119] Also, in this phase of a condemnation proceeding, challenges to the legality of the taking may be raised. Thus, the property owner may contest that the condemnor failed to meet the condemnation requirements regarding whether the property is actually being condemned for public use or whether a bona fide offer was properly made. Because of the litigious nature of this phase, many property owners are forced to settle prior to this step because appealing the special commissioners' decision can be expensive and time consuming. Therefore, it may not be fiscally responsible for a property owner to contest the special commissioners' assessment unless the amount in controversy exceeds $500,000.[120]

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[114] TEX. PROP. CODE § 21.014.
[115] TEX. PROP. CODE § 21.041.
[116] *Eminent Domain Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Judon Fambrough).
[117] TEX. PROP. CODE § 21.021.
[118] FAMBROUGH, *supra* note 89, at 7.
[119] *Id.*
[120] *Eminent Domain Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 117.

Appraisals in a condemnation proceeding are prepared by licensed real estate appraisers, who must be impartial and comply with the state rules of appraisal. However, appraisals only value the real property and do not consider any sentimental value. For example, current appraisal rules do not require appraisers to add a value for such things as trees or length of time the property owner has held the contested property.[121] Thus, many property owners often contest the appraisal value asserting that all aspects of the property should truly be considered.

Unlike private entities, governmental entities with the power of eminent domain are generally constrained to offer property owners only the appraised value. Governmental entities have restraints in most cases because they use taxpayer dollars to acquire or lease the property in question. Furthermore, governmental entities are forced to balance adequate compensation for property owners and the cost to taxpayers. Private entities with eminent domain authority do not have the same fiscal limitations. In fact, a private entity will often offer more than the appraised value of the property to encourage the owner the sell or lease the land, avoid litigation, and start the proposed project as soon as possible.

The Texas Department of Transportation (TxDOT) is one of the largest governmental entities with eminent domain authority in Texas. Below, the table consists of data regarding TxDOT's right-of-way acquisitions for fiscal years 2011-2015. This table illustrates that most initial offers were accepted by the property owner, with TxDOT only being forced to invoke their eminent domain authority 27.4 percent of the time. The next table lists TxDOT's recent acquisitions that went through the contested condemnation process. Of those 25 cases, the initial offers totaled $3,170,324, while the final awards totaled $4,005,861. Therefore, the final offers were 26.3 percent higher than the initial offers. Although just a representative sample, this data demonstrates that governmental entities do not invoke their eminent domain authority often, but when they do, property owners are usually paid more than the initial offers.

[121] *Eminent Domain Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Tom Forestier, Assoc. of Elec. Co. of Tex.).

Texas Department of Transportation Right-of-Way Acquisition Data

Fiscal Year	Initial Offers Made	Condemnation Proceedings to Special Commissioners' Hearing (contested)	Percent of Property Acquired through Eminent Domain
FY 2011	1,063	275	25.8%
FY 2012	897	251	27.9%
FY 2013	985	295	29.9%
FY 2014	1,388	363	26%
FY 2015	1,017	282	27.7%
Average	1,070	293	27.4%

Texas Department of Transportation's 25 Most Recent Condemnation Proceedings

	County	Property Type	Initial Offer	Special Commissioner
1	Collin	Residential	$76,334	$85,800
2	Ellis	Rural Residential	$2,060	$2,060
3	McLennan	Commercial	$11,043	$12,620
4	Harris	Vacant Acreage	$445,489	$620,646
5	Lee	Rural Residential	$23,476	$46,000
6	Collin	Residential	$29,224	$35,000
7	McLennan	Commercial	$3,186	$3,619
8	McLennan	Commercial	$258,335	$374,538
9	Collin	Residential	$25,009	$41,900
10	Collin	Multi-use	$18,090	$20,809
11	Bexar	Commercial	$666,502	$799,000
12	McLennan	Industrial	$206,176	$373,352
13	Collin	Residential	$26,742	$36,198
14	Comal	Light Industrial	$641,641	$700,000
15	Tarrant	Commercial	$7,100	$8,250
16	Collin	Residential	$11,303	$17,050
17	McLennan	Commercial	$385,000	$450,000
18	Denton	Commercial	$17,069	$19,332
19	Hill	Commercial	$10,005	$36,163
20	Collin	Agriculture	$7,902	$12,500
21	Bastrop	Vacant Acreage	$700	$3,600
22	Ellis	Rural Residential	$4,829	$10,000
23	Dallas	Commercial	$98,800	$98,800
24	McLennan	Residential	$67,685	$72,000
25	McLennan	Special Use	$126,624	$126,624
	Total		$3,170,324	$4,005,861

Recommendations

As Texas continues to grow and expand its infrastructure, this growth must be balanced with the rights of private property owners. The legislature must continue to ensure that private property owners are fairly compensated for any property purchased or taken by entities with eminent domain authority. Too often property owners receive unfair and below-market value offers from condemnors. Thus, property owners must have legal recourse to recover all, or at least a portion, of any attorney's and professional fees incurred challenging the offer when a court rewards damages well above the condemnor's offer.

Furthermore, the legislature should ensure that property owners clearly understand a condemnor's legal restrictions. To protect the interests of property owners, the Landowner's Bill of Rights should be amended to advise property owners that an offer may include additional property that is not necessary for the condemnation and that the condemnor may not have legal authority to condemn under state law. An alternative method to ensure property owners are protected is to require the condemnor to make two separate offers to the property owner: (1) for property reasonably necessary to complete the proposed project, which the condemnor has the legal authority to condemn; and (2) for any additional property the condemnor seeks to purchase.

Finally, Section 21.0111 of the Property Code requires a condemnor to disclose all appraisals produced or acquired the preceding ten years at the time an initial offer is made to property owners. However, there is currently no penalty in law for noncompliance. Thus, the legislature should ensure condemnors abide by this law by crafting a penalty for noncompliance.

These additional protections will further inform property owners of their legal rights and ensure they are fairly compensated for any property purchased or taken by entities with eminent domain authority.

Charge No. 6

Ethics: *Review current ethics laws governing public officials and employees and recommend changes necessary to inspire the public's confidence in a transparent and ethically principled government. Review public officials' reporting requirements to the Texas Ethics Commission. Examine the categorization of ethics reporting violations and make recommendations to encourage accurate reporting and timely correction to inadvertent clerical errors.*

Background

In 1991, the 72nd Legislature passed Senate Joint Resolution 8 proposing a constitutional amendment to establish the Texas Ethics Commission (the "Commission") and to authorize the Commission to recommend the salary of members of the legislature and the lieutenant governor, subject to voter approval, and to set the per diem for those officials, subject to a limit.[122] On November 5, 1991, the constitutional amendment was approved by Texas voters with 1,040,731 votes.[123]

The Commission administers and enforces the state's campaign finance and ethics laws that govern the conduct of state officers and employees, candidates for and officeholders of state and local offices, political committees, political parties, and lobbyists. The Commission's major functions include: (1) maintaining financial disclosure reports and making them available to the public; (2) investigating ethics and campaign finance complaints and assessing penalties when warranted; (3) issuing advisory opinions interpreting laws under the Commission's jurisdiction; (4) providing information and assistance to stakeholders to help them understand their obligations under campaign finance and ethics laws; and (5) registering persons engaged in lobbying at the state level and requiring periodic lobby activity reports.[124]

The Texas Constitution establishes the Commission as a state agency, consisting of a bipartisan eight-member Commission: four appointed by the Governor from a list submitted by members of each political party of the House and Senate; two appointed by the Speaker of the House from a list submitted by members of each political party of the House; and two appointed by the Lieutenant Governor from a list submitted by members of each political party of the Senate. The Texas Constitution requires these appointing authorities to split their appointments between each political party required to hold a primary, so the Commission is evenly divided between Republicans and Democrats.

As part of the Commission's statutory duties set out in Chapter 571 of the Government Code, candidates and officeholders, certain state officers and employees, certain local officers, political committees, political parties, and lobbyists are required to submit periodic reports to the Commission disclosing their expenditures and contributions, as well as personal financial information. The Commission assists filers in fulfilling disclosure reporting requirements,

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[122] S.J.R. 8, 1991 Leg., 72nd Reg. Sess., (Tex. 1991).
[123] LEG. REFERENCE LIBR. OF TEX., S.J.R. 8, *available at* www.lrl.texas.gov/legis/billsearch/amendmentdetails.cfm?legSession=72-0&billtypeDetail=SJR&billNumberDetail=8&billSuffixDetail=&amendmentID=500 (showing vote totals).
[124] S.B. 1, 1991 Leg., 72nd Reg. Sess., (Tex. 1991).

organizes and archives reports, and makes reports available to the public. The Commission does not evaluate or audit these reports though. In fiscal year 2015, the Commission received 31,789 reports.[125] However, in fiscal year 2016, 85,480 reports were filed.[126] This significant increase was largely due to legislation that was passed during the 84th Legislature.

Additionally, persons who engage in certain lobbying efforts with the legislative and executive branches must register with the Commission and file lobbying activity reports. With some exceptions, persons must register as lobbyists if they receive more than $1,000 in a calendar quarter as compensation or reimbursement to lobby, or if they spend more than $500 in a calendar quarter for certain purposes. There are currently 1,613 Commission-registered lobbyists.[127]

The Commission also investigates and rules on complaints against candidates, political committees, state officers and employees, officers and employees of political subdivisions, and lobbyists. Any Texas resident or individual owning real property in the state may file a sworn complaint of an alleged violation with the Commission. Furthermore, the Commission may initiate a complaint with an affirmative record vote of at least six Commissioners. The most common type of complaints allege violations of campaign finance and political advertising laws. The number of sworn complaints has been increasing recently. In fiscal year 2016, the Commission received 224 complaints.[128]

The Commission may enforce all laws under its jurisdiction except those in the Penal Code, such as bribery, improper influence, and abuse of office.[129] The Commission's enforcement authority extends to candidates, officeholders, and their supporters filing with local filing authorities, as well as those filing with the Commission. The Commission is authorized to investigate complaints, hold enforcement hearings, issue orders, impose civil penalties, refer issues for criminal prosecution, and take action against a lobbyist's registration. The Commission may also impose an administrative fine on late filers of certain reports. In fiscal year 2016, the Commission assessed $246,266 in fines through the sworn complaint process and through the late filing administrative process.[130]

In addition to handling complaints and reports, the Commission also issues advisory opinions about relevant laws, including campaign finance, political advertising, lobbyist activities, financial disclosure, standards of conduct of government officials, bribery of public servants, and the misuse of public resources. An advisory opinion provides a defense to prosecution or imposition of civil penalty for a person who has relied on such opinion in a substantially similar fact situation. Since 1992, the Commission has issued over 500 advisory opinions.[131] In fiscal year 2016, the Commission issued ten advisory opinions.[132]

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[125] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Natalia Luna Ashley, Tex. Ethics Comm.).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] SUNSET ADVISORY COMM., FINAL REPORT WITH LEGISLATIVE ACTION: TEXAS ETHICS COMMISSION 8 (July 2013).
[130] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 126.
[131] SUNSET ADVISORY COMM., *supra* note 130, at 9.
[132] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 126.

Finally, the Commission provides ethics training for new and returning members of the legislature at the start of the legislative session. Additionally, the Commission may provide information and documents about laws within its jurisdiction to anyone who contacts it. Thus, the Commission serves as a resource to elected officials, state employees, and the public.

Discussion

Discussions surrounding potential ethics reform have increased significantly the last few legislative sessions. In fact, in 2015, Governor Greg Abbott even declared ethics reform an emergency item for the 84th Legislature.[133] Accordingly, there has been a strong push to improve and strengthen the state's ethics laws. During the 84th Legislature, dozens of ethics reform bills were filed by members of the legislature. Although some bills did not ultimately pass, several bills were signed into law and have improved the state's ethics laws to move towards a more transparent and ethically principled government.

For example, Senate Bill 20, 84th legislative session, related to state agency contracting. Specifically, Senate Bill 20 prohibits officers or employees of a state agency who, during the period of state service or employment, participate on behalf of a state agency in a procurement or contract negotiation involving a person (individual or business entity), from accepting employment from that person for a period of two years after the date the former officer's or former employee's service or employment with the agency ceases. Senate Bill 20 was designed to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process.

Another ethics reform included House Bill 1295, a transparency bill that prohibits a governmental entity or state agency from entering into certain contracts unless the business entity submits a disclosure of interested parties form at the time the business entity submits the contract to the governmental body. Specifically, House Bill 1295 sought to increase government transparency by requiring all contracts with government entities, including municipalities, counties, school districts, or special purpose districts, to include a Certificate of Interested Parties, which is to be filed with the Commission. As required, the Commission adopted rules and a form to be used by business entities to disclose interested parties. Additionally, the Commission created an electronic filing application and a rule requiring that the disclosure of interested parties' forms be filed electronically. The disclosures are now available and searchable on the Commission's website. Approximately 67,000 disclosure forms have been filed thus far.[134]

Another reform was from House Bill 23, 84th Legislature. House Bill 23 related to the disclosure of certain relationships with local government officers and vendors. Although current law requires disclosure of information concerning certain local government officers and vendors when engaged in procurement activities, House Bill 23 went further to require more detailed disclosure to ensure local government officers and vendors are completely transparent in these types of dealings.

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[133] Letter from Governor Greg Abbott, Feb. 19, 2015, *available at* http://gov.texas.gov/files/press-office/Ethics_Reform.pdf.
[134] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Natalia Luna Ashley, Tex. Ethics Comm.).

During the committee's October 5, 2016 hearing, interested parties recommended that the legislature address conflicts of interest laws. Section 572.005 of the Government Code states that an individual has a substantial interest in a business entity if the individual: (1) has a controlling interest in the business entity; (2) owns more than 10 percent of the voting interest in the business entity; (3) owns more than $25,000 of the fair market value of the business entity; (4) has a direct or indirect participating interest by shares, stock, or otherwise, regardless of whether voting rights are included, in more than 10 percent of the profits, proceeds, or capital gains of the business entity; (5) is a member of the board of directors or other governing board of the business entity; (6) serves as an elected officer of the business entity; or (7) is an employee of the business entity.[135] Furthermore, Article 3, Section 22 of the Texas Constitution states that a member who has a personal or private interest in any measure or bill, proposed, or pending before the legislature, shall disclose the fact, and shall not vote thereon.[136] Most other states have similar conflicts of interest provisions; however; some have more stringent standards. For example, Kentucky standards state that a public official cannot act or vote on a measure if he or she, his or her family, or business associates will receive direct monetary gain and sets a 5% or $10,000 standard.[137] Other states like Alabama, West Virginia, and Indiana also have similar standards.[138] Accordingly, Tom Smith, Public Citizen, asserts that clearly established thresholds for recusal are appropriate.[139]

Additionally, there has been confusion among filers, the public, and even the Commission, regarding Personal Financial Statements (PFS). Because the current version of the PFS lacks clarity in certain sections, many questions have been raised by filers and legal authorities. In fact, several legal authorities asserted in the October 5, 2016 hearing, that certain ethics laws are subjective, resulting in different interpretations. Consequently, Trey Blocker, The Blocker Group, LLC, asserted in the committee's hearing that the PFS should be amended to prevent confusion among filers about what income must be reported.[140] Blocker suggested that all sources of income should be reported under the PFS to eliminate any confusion about what needs to be reported. It appears that the overwhelming majority of filers wish to fully comply with the PFS requirements; however, because parts of the PFS are vague or unclear, it often results in unintended reporting errors.

Many interested parties also asserted that the Commission's sworn complaint process needs to be reviewed. A sworn complaint sets in motion a process that may include a preliminary review as well as informal or formal hearings. A sworn complaint may be resolved at several points in the process. The Commission may ultimately resolve a sworn complaint by dismissal or imposition of a civil penalty. The Commission is authorized to undertake civil enforcement actions on its own motion or in response to a sworn complaint, hold enforcement hearings, issue orders, impose civil penalties, and refer matters for criminal prosecution. A respondent may appeal a

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[135] TEX. GOV'T CODE § 572.005.
[136] TEX. CONST. art. 3, § 22.
[137] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Tom Smith, Pub. Citizen).
[138] *Id.*
[139] *Id.*
[140] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Trey Blocker, The Blocker Group, LLC).

final decision of the Commission to a district court for a trial de novo.[141] During most stages of the process the Commissioners and Commission staff are required to keep the complaint confidential.

Several witnesses testified at the committee's October 5, 2016 hearing stressing that pending complaints were taking far too long to adjudicate. In fact, dozens of sworn complaints have taken several years for the Commission to finally dispose. Except under limited circumstances, the Commission's process to adjudicate these complaints should not take that long. The United States Constitution calls for fair and speedy trials and the Commission's sworn complaint process should be no different. Astonishingly, the Commission currently has approximately 160 pending sworn complaints.[142] Because the Commission only addresses 15 to 30 complaints per meeting, several witnesses at the October 5, 2016 hearing suggested that the Commissioners may consider meeting more frequently to properly dispose of the massive backlog of complaints, while still maintaining due process.[143]

Recommendations

Ethics reform must retain the core values that Texas voters originally instilled in the Commission: (1) control and reduce costs of elections; (2) eliminate opportunities for undue influence in elections and government; (3) disclose campaign and lobbying expenditures; (4) enhance participation in elections and government; and (5) ensure confidence and trust in government.

Because the PFS is a critical tool to enhance transparency, the Commission needs to promptly notify filers and the public regarding any Commission rule change that directly affects the PFS. Without sufficient and timely notice, filers and the public may not become aware of such changes, which may lead to unintended reporting errors. Thus, it is critical that the Commission effectively communicate rule changes to filers and the public.

The Commission must also ensure the sworn complaint process maintains due process. Both respondents and complainants have the right to due process. If the Commission cannot adequately address sworn complaints in a speedy manner while maintaining due process, the legislature may consider streamlining the process through alternative means to ensure the process is fair to the respondent, complainant, and the public.

Due to strongly held values, divergent public and individual interests, and a sometimes ruthless political environment, crafting and enacting workable solutions in ethics matters has been a struggle. Furthermore, many areas of ethics laws are subjective, making them difficult to understand, much less fix. Even amongst the top ethics lawyers in the state, there is disagreement among interpretations. Despite the obstacles, the legislature must continue to look closely at the state's ethics laws in an open, deliberative, and transparent way, so that all voices are heard and all proposals are thoroughly discussed. The state's ethics laws governing public officials and employees must inspire the public's confidence in a transparent and ethically principled government.

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[141] *Ethics Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 126.
[142] *Id.*
[143] *Id.*

Charge No. 7

Monitoring Charge: *Monitor the implementation of legislation addressed by the Senate Committee on State Affairs during the 84th Legislature, Regular Session and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following: 1) Implementation of open and campus carry legislation and determine if the current laws regulating the places that handguns can be carried are easily understood or if clarification is needed to ensure the average citizen understands when, where, and under what circumstances it is lawful to carry a weapon, versus when it is a criminal offense for which there may be a defense; 2) Requirements for guardianships; 3) The electronic voting program for certain military members serving overseas; 4) Changes made to the Employment Retirement System regarding member contributions and proposed reforms to the Teacher Retirement System of Texas; and 5) The establishment of a public integrity unit under the authority of Texas Rangers.*

Implementation of Campus Carry Legislation

Background

Prior to September 1, 1995, Texas citizens were not permitted to carry concealed handguns in public places. Now, all 50 states allow citizens to carry concealed weapons if they meet certain state requirements. In Texas, license to carry (LTC) applicants must be at least 21 years of age (unless active duty military), have not been convicted of a felony, meet Federal qualifications to purchase a handgun, complete a firearms proficiency test, pay the required fees, and complete a Texas Department of Public Safety (DPS) mandated training and education course.[144] In Texas, a number of factors may make individuals ineligible to obtain a license, such as: felony convictions; some misdemeanor convictions, including charges that resulted in probation or deferred adjudication; certain pending criminal charges; chemical or alcohol dependency; certain types of psychological diagnoses; and protective or restraining orders.[145]

The 74th Legislature passed Senate Bill 60 which authorized a person to complete a specified training and receive certification by DPS in order to obtain a license granting the ability to carry a concealed handgun.[146] Since implementation of Senate Bill 60 in 1995, LTC holders have been permitted by law to carry concealed handguns on public walkways, streets, and parking lots located on public institutions of higher education campuses; however, license holders have not been permitted to carry on "the premises of an institution of higher education."[147]

In 23 states the decision to ban or allow concealed carry weapons on campuses is made by each college or university individually: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West

[144] TEX. GOV'T CODE § 411.172.
[145] TEX. DEPT. OF PUB. SAFETY, HANDGUN LICENSING, FREQUENTLY ASKED QUESTIONS (2016), *available at* www.txdps.state.tx.us/rsd/chl/faqs/index.htm.
[146] S.B. 60, 1995 Leg., 74th Reg. Sess. (Tex. 1995).
[147] TEX. PENAL CODE § 46.035.

Virginia.[148] Eight states now have provisions allowing the carrying of concealed weapons on public postsecondary campuses: Colorado, Idaho, Kansas, Mississippi, Oregon, Texas, Utah, and Wisconsin.[149]

The 84th Legislature passed Senate Bill 11 which provides that a LTC holder "may carry a concealed handgun on or about the license holder's person while the license holder is on the campus of an institution of higher education or private or independent institution of higher education in this state."[150] "Campus" has the meaning of all land and buildings owned or leased by an institution of higher education.[151] However, openly carrying handguns is still prohibited at these locations. The provisions of Senate Bill 11 went into effect on August 1, 2016 for public institutions of higher education, and will become effective for community colleges on August 1, 2017.[152]

Senate Bill 11 did grant institutions of higher education some discretion in the matter though. Accordingly, an institution of higher education or private or independent institution of higher education "may establish rules, regulations, or other provisions concerning the storage of handguns in dormitories or other residential facilities that are owned or leased and operated by the institution and located on the campus of the institution."[153] Additionally, "after consulting with students, staff, and faculty of the institution regarding the nature of the student population, specific safety considerations, and the uniqueness of the campus environment, the president or other chief executive officer of an institution of higher education in this state shall establish reasonable rules, regulations, or other provisions regarding the carrying of concealed handguns by license holders on the campus of the institution or on premises located on the campus of the institution."[154] However, the president or other officer may not establish provisions that "generally prohibit or have the effect of generally prohibiting license holders from carrying concealed handguns on the campus of the institution."[155] The campus rules or regulations take effect as determined by the president or other officer unless subsequently amended by the board of regents.

The institution must give effective notice under Section 30.06 of the Texas Penal Code with respect to any portion of a premise on which license holders may not carry. Section 30.06 of the Penal Code describes the parameters for trespass by a LTC holder with a concealed handgun. Specifically, a license holder commits an offense if the license holder carries a concealed handgun on the property of another without effective consent and received notice that entry on the property by a license holder with a concealed handgun was forbidden.[156]

Finally, Senate Bill 11 enabled private or independent institutions of higher education, after consulting with students, staff, and faculty, to establish rules, regulations or other provisions prohibiting license holders from carrying handguns on campus, any grounds or building on which an activity sponsored by the institution is being conducted, or a passenger transportation vehicle

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[148] NAT'L CONF. OF STATE LEG., GUNS ON CAMPUS: OVERVIEW (Oct. 2015), *available at* www.ncsl.org/research/education/guns-on-campus-overview.aspx.
[149] *Id.*
[150] TEX. GOV'T CODE § 411.2031.
[151] *Id.*
[152] S.B. 11, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[153] TEX. GOV'T CODE § 411.2031.
[154] *Id.*
[155] *Id.*
[156] TEX. PENAL CODE § 30.06.

owned by the institution.[157] Thus, private or independent institutions had the option to prohibit LTC holders from carrying concealed handguns on the entire campus. The 84th Legislature deemed it prudent to protect Second Amendment rights parallel to private property rights, and not protect one instead of the other.

Discussion

In passage of Senate Bill 11, the 84th Legislature sought to strike a balance between constitutional rights, private property rights, and public safety. Once the Governor signed Senate Bill 11 into law, institutions of higher education started to prepare for implementation: August 1, 2016 for universities, and August 1, 2017 for community colleges. As illustrated by the chancellors that testified at the January 26, 2016 hearing, institutions followed a collaborative and deliberative process in developing campus-specific rules and regulations.

Institutions of higher education around the state formed work groups with representation from the faculty, students, university staff, and campus police. These work groups analyzed the law, solicited input, and considered how other states have implemented similar laws. In developing campus plans, special significance was often given to creating exclusion zones to ensure campus safety while complying with Senate Bill 11, which bars policies that effectively prohibit LTC holders from carrying concealed handguns on campus. Because campuses across the state are vastly different, each institution developed policies and regulations designed to fit their distinct campus environment. For example, some campuses have no residential halls, while others conduct significant scientific research or clinical activity; so not all situations apply to each campus. Work groups also considered existing federal or state law which may prohibit firearms in certain areas including child care facilities, mental health counseling centers, sporting events, certain biosafety laboratories, and research laboratories where the discharge of firearms could create a significant risk to health and safety, and nuclear facilities.[158]

Once these work groups developed draft plans and recommendations, the institution's president or other chief executive officer then assumed responsibility to finalize a campus-wide plan. As mentioned previously, Senate Bill 11 provided that "the president or other chief executive officer of an institution of higher education in this state shall establish reasonable rules, regulations, or other provisions regarding the carrying of concealed handguns by license holders on the campus of the institution or on premises located on the campus of the institution."[159] Although Senate Bill 11 did not grant the president or other officer authority to "establish provisions that generally prohibit or have the effect of generally prohibiting license holders from carrying concealed handguns on campus", Senate Bill 11 did allow the president or other officer to "amend the provisions as necessary for campus safety."[160] As we heard from testimony at the January 26, 2016 hearing, the presidents' goal was to establish a campus plan that strived for a campus environment in which students, staff, and faculty can continue to focus on their studies, research, and work with minimal distraction.[161] After final review and consideration, the president or other chief executive officer submitted a final campus-specific plan for implementation. Senate Bill 11

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[157] TEX. GOV'T CODE § 411.2031.
[158] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of John Sharp, Tex. A&M U. Sys.).
[159] TEX. GOV'T CODE § 411.2031.
[160] *Id.*
[161] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of William McRaven, U. of Tex. Sys.).

did grant the board of regents or other governing board authority to amend the campus carry plans submitted by the president or other officer, if deemed appropriate.[162] As these campus-specific plans are still in the early stages of implementation, it is difficult to determine the outcomes or affect that Senate Bill 11 and the campus-specific rules or regulations will have on the higher education landscape in this state.

Recommendations

The legislature should continue to monitor the campus carry rules and regulations set forth by institutions of higher education to ensure each institution complies with the spirit and intent of the law. Additionally, the legislature should monitor LTC holders that wish to lawfully carry concealed handguns on campus to ensure that they are not ostracized or treated differently for merely exercising their legal and constitutional right.

Implementation of Open Carry Legislation

Background

Prior to January 1, 2016, Chapter 46 of the Texas Penal Code prohibited the carrying of a handgun in plain view. Thus, handguns could not be openly discernible to the ordinary observation of a reasonable person and license holders may have been subject to criminal charges for carrying a handgun in plain view.[163] However, the 84th Legislature passed House Bill 910, which enables LTC holders to carry handguns partially or wholly visible in a shoulder or belt holster.[164] House Bill 910 went into effect January 1, 2016.

Under House Bill 910, a license holder cannot openly carry a handgun in any location that the person could not carry a concealed handgun prior to January 1, 2016.[165] The Texas Penal Code specifically prohibits the carrying of handguns and other weapons (1) on the physical premises of a school, grounds or buildings on which an activity sponsored by a school is being conducted, or in a school transportation vehicle; (2) on the premises of a polling place on the day of an election or while early voting is in progress; (3) on the premises of any government court or court offices; (4) on the premises of a racetrack; (5) in or into a secured area of an airport; or (6) within 1,000 feet of premises designated as a place of execution on the day a sentence of death is set to be imposed.[166] Additionally, the Penal Code prohibits the carrying of handguns and other weapons (1) on the premises of a business that derives 51% or more of its income from the sale or service or alcoholic beverages for on-premises consumption; (2) on the premises where a high school, collegiate, or professional sporting or interscholastic event is taking place; (3) on the premises of a correctional facility; (4) on the premises of a hospital or nursing home if effective notice of prohibition is given per Penal Code Chapter 30; (5) in an amusement park if effective notice of prohibition is given per Penal Code Chapter 30; (6) on the premises of a church, synagogue, or other place of worship if effective notice is given per Penal Code Chapter 30; or (7) at any meeting of a governmental entity (if the meeting is subject to the Texas Open Meetings Act) if

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[162] TEX. GOV'T CODE § 411.2031.
[163] TEX. DEPT. OF PUB. SAFETY, *supra* note 144.
[164] H.B. 910, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[165] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Justin Wood, Harris County Dist. Att'y's Office).
[166] TEX. PENAL CODE §46.03.

effective notice of prohibition is given per Penal Code Chapter 30.[167] Penal Code Section 46.035 also prohibits a license holder from openly carrying a handgun "(1) on the premises of an institution of higher education or private or independent institution of higher education; or (2) on any public or private driveway, street, sidewalk or walkway, parking lot, parking garage, or other parking area of an institution of higher education or private or independent institution of higher education."[168]

The places named in statute are not the only places where LTC holders are prohibited from carrying handguns though. Sections 30.06 and 30.07 of the Penal Code describe the parameters for trespass by license holders with a concealed or openly carried handgun. These sections of the Penal Code enable private property owners and private business owners to prohibit the carrying of handguns on their property if certain statutory requirements are met. Section 30.07 of the Penal Code states that a license holder commits an offense if the license holder openly carries a handgun on property of another without effective consent and received notice that entry on the property by a license holder openly carrying a handgun was forbidden.[169]

Discussion

Beginning January 1, 2016, law enforcement officers through the course of their regular duties may come in contact with LTC holders who choose to wear their handgun in plain sight in a belt or shoulder holster as authorized by House Bill 910. DPS has provided its officers with written guidance advising that members of the public who lawfully carry handguns are exercising a legal and constitutional right.[170] Further, DPS has educated its officers that Government Code Section 411.207 allows for a peace officer to disarm a license holder only if the officer reasonably believes it is necessary for the protection of the license holder, officer, or another individual.[171] However, this does not give peace officers the authority to disarm every person that openly carries a handgun through the course of their duties. DPS is also educating law enforcement across the state about this new law by developing a training curriculum that will be provided to all DPS officers and the Texas Commission on Law Enforcement. Since implementation, the impact of the open carry law on law enforcement has been minimal.[172] In fact, overall, implementation has been uneventful and LTC holders are overwhelmingly law abiding, with an offense rate of 0.3 percent.[173]

As of December 31, 2015, there were 937,419 active Texas LTC holders and 3,458 certified instructors.[174] Since implementation of House Bill 910, DPS has redesigned its licensing process and modified all references to concealed carry. Additionally, DPS had updated its website to provide links to relevant Office of the Attorney General (OAG) Opinions, information regarding the safe storage of handguns, and information on the newly passed laws. DPS has also provided LTC certified instructors updated course materials, including information on securing openly

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[167] TEX. PENAL CODE § 46.035.
[168] *Id.*
[169] TEX. PENAL CODE § 30.07.
[170] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Luis Gonzalez, Tex. Dept. of Pub. Safety).
[171] TEX. GOV'T CODE § 411.207.
[172] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 169.
[173] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Richard Briscoe, Open Carry Tex.).
[174] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of RenEarl Bowie, Tex. Dept. of Pub. Safety).

carried handguns. Finally, DPS issued a press release to provide information to the public regarding how to access the DPS website and receive more updated information related to the new gun laws.[175]

A first-time LTC applicant must complete classroom training, pass a written examination, and pass a proficiency demonstration. All classroom and proficiency must be conducted by an LTC instructor certified by DPS. The classroom instruction may be a four to six hour course and must cover four statutory required topics: (1) laws that relate to weapons and the use of deadly force; (2) handgun use and safety, including use of restraint holsters and methods to ensure the secure carrying of openly carried handguns; (3) non-violent dispute resolution; and (4) proper storage practices for handguns with an emphasis on storage practices that eliminate the possibility of accidental injury to a child.[176]

Although license holders that obtained their license prior to implementation of House Bill 910 did not receive training regarding the use of restraint holsters and methods to ensure the secure carrying of openly carried handguns, DPS has posted this training material on their website. Texas no longer requires continuing education for LTC renewal; however, license holders would be well served to become informed on new issues related to openly carrying a handgun. It is the LTC holder's responsibility to remain informed and knowledgeable of changes in law.[177]

Under state law, the carrying of handguns on government-owned premises generally cannot be banned, unless otherwise provided by law. Per Senate Bill 273, 84th Legislature, state agencies and political subdivisions cannot use Section 30.06 of the Texas Penal Code to exclude concealed handguns from their government property.[178] In fact, if a state agency or political subdivision unlawfully posts a sign under Section 30.06, the state agency or political subdivision can be fined $1,000-$1,500 for the first violation and $10,000-$10,500 for each subsequent violation.[179] However, license holders are still prohibited from carrying their handguns on the premises listed in Sections 46.03 and 46.035 of the Penal Code and those places include some properties owned by state agencies and political subdivisions (e.g. courts). The Office of the Attorney General oversees the civil complaint process implemented under Senate Bill 273 regarding government entities wrongfully barring handguns from certain property.[180] Currently, however, there is no civil penalty regarding wrongfully posted signs under Section 30.07 of the Penal Code.

Posting 30.06 signage on government-owned properties has become a topic of much statewide debate since passage of Senate Bill 273. One issue pertains to the school drop-off and pick-up lines and whether these premises qualify as school property. Attorney General Opinion No. KP-0050 addressed the exclusion of handguns from school grounds, concluding that "subsection 46.03(a)(l) of the Penal Code prohibits handguns from places on which a school-sponsored activity is occurring, which places can include grounds otherwise excluded from the definition of "premises" such as public or private driveways, streets, sidewalks or walkways, parking lots, parking garages, or other parking areas."[181] The question whether, and where on school grounds, a school-sponsored activity is occurring involves a case-by-case determination. "For instance, if a

[175] *Id.*
[176] TEX. DEPT. OF PUB. SAFETY, *supra* note 144.
[177] *Id.*
[178] S.B. 273, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[179] TEX. GOV'T CODE § 411.209
[180] *Id.*
[181] *See* Tex. Op. Att'y Gen. KP-0050 (2015).

high school utilizes a school parking lot for a band rehearsal, that parking lot would likely fall within the scope of subsection 46.03(a)(l), prohibiting weapons during the time of the rehearsal. Yet, the other parking areas at the school where school activities are not occurring would not fall within subsection 46.03(a)(l) and would not be places where weapons are prohibited."[182]

Another government-owned property issue that has come to light with passage of Senate Bill 273 has revolved around the premises of a court or offices utilized by the court. Under subsection 46.03(a)(3) of the Penal Code, the carrying of a handgun is prohibited "on the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court."[183] Often times, a courthouse is a multipurpose building, containing courtrooms and other government offices. In Texas, there are over 80 multiuse courthouses.[184] Because of this, there has been confusion as to whether handguns can be prohibited from the entire building, or just the part of the building where the courtrooms and offices utilized by the court are located. For example, the Harris County criminal courthouse is a multipurpose building. Harris County asserts it is following well-established law by taking the position that the entire building is considered a courthouse and a person cannot legally carry a handgun into the building.[185] However, there may be conflicts between previous interpretations of the law and a recent Attorney General opinion. Attorney General Opinion No. KP-0047 addressed the issue regarding multiuse courthouses, finding that handguns can be excluded from courtrooms and offices "essential to the operation of the government court."[186] Specifically, Attorney General Opinion No. KP-0047 states that the phrase "premises of any government court" used in Penal Code subsection 46.03(a)(3) generally means either (1) a structure utilized by a court created by the Texas Constitution or the legislature, or (2) a portion of such a structure.[187] The premises of a "government court or office utilized by the court" mean a government courtroom or those offices essential to the operation of the government court. "The responsible authority that would notify license holders of their inability to carry on the respective premises must make the determination of which government courtrooms and offices are essential to the operation of the government court, in consultation with the government court."[188]

There are also issues in determining whether or not the premises in question is truly a "government-owned premises" for purposes of Section 411.209 of the Government Code (e.g. when a private entity leases property from a government entity or a government entity that leases property from a private entity).[189] This particular issue has arisen with city-owned property that houses a private entity, such as with a zoo or events center. Many government officials also seek clarity regarding when handguns are banned from school premises and what constitutes a "school-sponsored activity." Because of this uncertainty, school districts, municipalities, and other governmental entities across the state are taking different approaches in their policies to prohibit handguns on their premises.

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[182] *Id.*
[183] TEX. PENAL CODE § 46.03(a)(3).
[184] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Brantley Starr, Office of the Tex. Att'y Gen.).
[185] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Justin Wood, Harris County District Attorney's Office).
[186] *See* Tex. Op. Att'y Gen. KP-0047 (2015).
[187] *Id.*
[188] *Id.*
[189] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Brantley Starr, Office of the Tex. Att'y Gen.).

The Texas Alcoholic Beverage Code requires the posting of a sign stating that it is unlawful to carry a weapon on the premises where alcohol is sold unless the person is licensed to carry the weapon.[190] Subsection 11.61(e) of the Alcoholic Beverage Code states that a permittee's permit may be cancelled or suspended if the permittee knowingly allowed a person to possess a firearm in a building on the licensed premises, unless it was a (1) security officer; (2) peace officer; (3) permittee or employee if the person is supervising the operation of the premises; or (4) the person who possesses a handgun is licensed to carry under Subchapter H, Chapter 411, Government Code, unless the person is on the premises of a business described by Section 46.035(b)(1) of the Penal Code.[191] Section 46.035(b)(1) of the Penal Code states a license holder commits an offense if the license holder carries a handgun, regardless of whether the handgun is concealed or carried openly, on the premises of a business that derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption.[192] Thus, many business owners assert that House Bill 910 puts their business in jeopardy of losing its alcoholic beverage license.[193] Because Section 11.61 of the Alcoholic Beverage Code specifies "firearms" and not "handguns", current law does not differentiate between handguns and long-arms in this situation. Therefore, many businesses are interpreting the law to prohibit all firearms from these establishments except LTC holders with concealed handguns.[194] Al Flores, General Counsel, Gringo's Mexican Kitchen and Jimmy Changas, asserts that clarity may become necessary so businesses do not have their alcoholic beverage license suspended or cancelled merely because the law is unclear.[195]

Recommendations

Thus far, the passage of open carry legislation has not created major problems for law enforcement. As citizens and law enforcement continue to learn more about the recent changes in law, and further understand their rights and legal restrictions, the legislature is hopeful that open carry will continue to be a non-issue in Texas. Accordingly, the legislature should continue to monitor open carry laws to ensure the average citizen, business, and public entity understands when, where, and under what circumstances it is lawful to carry a firearm openly.

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[190] TEX. ALCO. BEV. CODE § 11.041.
[191] TEX. ALCO. BEV. CODE § 11.61(e).
[192] TEX. PENAL CODE § 46.035(b)(1).
[193] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Al Flores, Gringo's Mexican Kitchen and Jimmy Changas).
[194] *Id.*
[195] *Id.*

Requirements for Guardianships

Background

Texas has the third largest elderly population in the United States. The number of people living in Texas, who are aged 65 years and older, recently grew by 49.5 percent, from nearly 2.1 million in 2000 to almost 3.1 million in 2014.[196] Furthermore, the Texas Demographic Center projects that the elder population in Texas will more than double in size between 2010 and 2030 to nearly 6 million.[197] Many of these persons may become incapacitated as they grow older and require some form of assistance.

Texas law provides a legal system, known as guardianship, for assigning a person, or guardian, some degree of authority over an incapacitated person, or ward, and his or her affairs. The number of active guardianships in Texas has increased by 66 percent in the last five years with a current total of 54,492.[198] Thus, it is critical that Texas closely monitor the guardianship system to ensure that it is not overburdened and that the elderly and incapacitated are properly cared for.

The process for appointing a guardian in Texas is initiated by the filing of a written application by any person to the appropriate court.[199] In 102 counties in Texas, guardianship cases are heard in either statutory county courts at law or statutory probate courts. However, the majority of Texas counties hear these cases in constitutional county courts, which have no requirement that the presiding officer be a licensed attorney or possess any official legal training.[200] Therefore, these guardianship cases are often handled differently from county to county.

After the filing of the guardianship application, the court then notifies the affected parties and sets a hearing. During the initial hearing, the court will inquire into the ability of any allegedly incapacitated person to: (1) feed, clothe and shelter him or herself; (2) care for his or her own physical health; and (3) manage his or her property or financial affairs. The court will also inquire into the qualifications, abilities, and capabilities of the person seeking to be appointed guardian.[201]

In order for a guardianship to be established, the court must find by clear and convincing evidence that:

(1) the proposed ward is incapacitated;
(2) it is in the proposed ward's best interest to have a court-appointed guardian;
(3) the rights and interests of the proposed ward will be protected by the guardian; and
(4) alternatives to guardianship are not feasible for the proposed ward.

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[196] TEX. DEMOGRAPHIC CTR., AGING IN TEXAS: INTRODUCTION. (June 2016), *available at* http://demographics.texas.gov/Resources/publications/2016/2016_06_07_Aging.pdf.
[197] *Id.*
[198] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of David Slayton, Office of Ct. Admin.).
[199] TEX. EST. CODE § 1101.001.
[200] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 196.
[201] TEX. EST. CODE § 1101.051(a).

The court must also find by preponderance of the evidence that:

(1) the person to be appointed guardian is eligible and qualified; and
(2) the proposed ward:
    a. is totally without capacity to care for him or herself and to manage his or her property; or
    b. lacks the capacity to do some, but not all, of the tasks necessary to care for him or herself or to manage his or her property. [202]

Finally, to establish a guardianship, a physician's certificate of medical examination describing the nature, degree, and severity of the person's incapacity is required. The physician's certificate must be dated within 120 days from when the guardianship application was filed.[203] This certificate is critical for the court to determine the guardian's level of incapacity.

If the court determines that the person is in need of guardianship, it will issue an order appointing a guardian and grant the guardian either full or partial authority over the incapacitated person and/or his or her estate.[204] The guardian is typically granted legal rights to determine (1) the ward's residence; (2) consent to medical treatment; (3) whether the ward may possess a driver's license; (4) property and financial affairs management; (5) contractual or legal decisions; (6) the right to marry; and (7) the right to vote.

Once the guardian is appointed by a court, he or she is required to provide the court with a bond to cover one year's worth of revenue to the ward's estate, plus the value of the ward's personal property. This bond is mandatory under Texas law and may not be waived by the court. The guardian is also required by law to file an initial inventory with the court detailing the assets of the ward's estate.[205] Then, for the duration of the guardianship, the guardian is required to file an annual report with the court including detailed information regarding the ward's well-being and the state of his or her affairs.[206] Furthermore, the presiding judge shall examine the well-being of the ward and solvency of the guardian's bond on an annual basis.[207] To ensure the ward's physical and financial needs are being properly cared for by the guardian, it is critical that the court strictly abide by these requirements.

The Texas Estates Code outlines the prioritization and requirements for persons who are eligible to become a guardian. Specifically, the proposed ward's spouse is entitled to be the guardian over any other person. If there is no spouse, or if the spouse declines or is unqualified to serve as guardian, next of kin becomes the next eligible person to serve as guardian. If more than one person is entitled to serve as guardian in the same degree of kinship, the court determines the most suitable person. If there is no family member that is able, willing, or qualified to serve as guardian, the court may appoint someone who is not related to the ward, including an attorney, a private professional guardian, an employee of the Texas Department of Aging and Disability Services, a financial institution, or a guardianship program run by the county. When determining

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[202] TEX. EST. CODE § 1101.101(a).
[203] TEX. EST. CODE § 1101.103.
[204] TEX. EST. CODE §§ 1101.151 & 1101.152.
[205] TEX. EST. CODE § 1163.001.
[206] TEX. EST. CODE § 1163.
[207] TEX. EST. CODE § 1201.002.

the appropriate guardian, the court will consider the ward's best interest and give consideration to his or her preferences. Alternatively, a person may designate a guardian prior to incapacity by completing a "Declaration of Guardian" form.[208]

A court may cease a guardianship if:

(1) the court, after reviewing a temporary guardianship, determines that permanent guardianship is no longer necessary;
(2) the court restores the ward's rights; or
(3) the ward dies. [209]

Discussion

During the 84th Legislative Session, the legislature made significant improvements to guardianship laws and took important steps to further protect the state's most vulnerable citizens. One important step was to fund the Guardianship Compliance Pilot Project, which was included in the General Appropriations Act as Rider 20 to the Office of Court Administration (OCA).[210] As previously stated, guardians are required by law to file with the court: (1) a bond; (2) an initial inventory of the ward's assets; (3) an annual report of the ward's well-being; and (4) an annual accounting of financial transactions of the ward's estate. It is estimated that there is currently $5 billion in assets under court and guardian control in Texas.[211] Without comprehensive monitoring practices by the judicial system, there is a high risk for exploitation and neglect. Accordingly, it is imperative that OCA's pilot project provide additional oversight to guardianship cases.

Statutory probate courts are located in ten of the state's fifteen largest metropolitan areas. In Texas' remaining 244 counties, guardianship cases are either handled by the county judge or county court at law judge; the majority of which lack sufficient resources necessary to thoroughly monitor these cases. Over 18,400 of the state's active guardianships reside in these 244 counties. Due to concerns about guardianship cases in counties without statutory probate courts, the legislature established and funded the Guardianship Compliance Pilot Project in efforts to provide additional resources to these counties and ensure guardianship cases were being properly handled. Specifically, the pilot project run by the OCA seeks to protect those under guardianship by: (1) reviewing cases to identify reporting deficiencies by the guardian; (2) auditing annual accountings and reporting their findings back to the court; and (3) working with courts to develop best practices in managing guardianship cases moving forward.[212]

The OCA launched the pilot project in November 2015 and is currently targeting eight counties: Anderson, Bexar, Comal, Guadalupe, Hays, Montgomery, Orange, and Webb. Preliminary findings from these counties illustrate that there is a high risk of exploitation and neglect when guardianship cases are not closely monitored by the courts.

Initial Findings from the Guardianship Compliance Pilot Project (as of August 30, 2016):

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[208] TEX. EST. CODE § 1104.
[209] TEX. EST. CODE § 1202.001.
[210] H.B. 1, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[211] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 196.
[212] *Id.*

- 5,637 cases reviewed;
- 54% of cases should not have been active (i.e. deceased ward, temporary guardianship or minor emancipated);
- 49% guardianship of the person; 51% guardianship of the estate;
- 32% of cases were missing annual reports of the person;
- 45% of cases were missing initial inventory reports of assets;
- 47% of cases were missing annual accounting reports; and
- 25% of cases the presiding judge waived the bond.[213]

Additional Observations by the Guardianship Compliance Pilot Project:

- There were missing bank statements, receipts, check copies and invoices for the annual accountings;
- There were unauthorized or unexplained ATM withdrawals and purchases;
- There were unauthorized or unexplained bank transfers;
- There were unauthorized or unexplained gifts to family members;
- There were payments to credit card accounts not listed on annual accountings;
- Required criminal background checks were omitted; and
- Further delineated training and procedures are needed for the courts.[214]

The OCA will continue reviewing guardianship cases from across the state in hopes of expanding the project to additional counties before the end of the year and will submit their findings to the legislature. Based on initial review of guardianship cases, it is clear that the courts need to strictly abide by current guardianship law. For example, current law does not allow a presiding judge to waive the initial bond that is required of the guardian. However, review of current cases by OCA has demonstrated that judges are in fact waiving these bonds. Waiving these bonds is a violation of state law and is not acceptable. Accordingly, as OCA continues to review guardianship cases, it is imperative that it informs the legislature of any deficiencies in the current system. The priority and focus must remain on protecting the wards and their best interests.

The 84th Legislature also charged OCA to study the establishment of a central database containing information about persons under guardianship. Specifically, House Bill 3424, required the OCA to conduct a study on the feasibility of developing, implementing, and maintaining a computerized central database that contains the names of persons under guardianship, the name of the guardian appointed for each person under guardianship, and contact information for the guardian. This database would be extremely beneficial to law enforcement or other first responders who often interact with persons under guardianship. Emergency service providers need easy access to this information to effectively provide care and determine the person's identity. A statewide database would further enhance the speed and ability of these service providers to assess and address the needs of an incapacitated individual, and possibly, keep them out of the criminal justice system.

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[213] *Id.*

[214] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 196.

Another important piece of legislation passed during the 84th Legislature was House Bill 39.[215] House Bill 39 updated the Estates Code to require judges overseeing guardianship cases to determine by clear and convincing evidence that alternatives to guardianship are not feasible for a proposed ward prior to placing them under guardianship. Alternatives to guardianship are specified as:

(1) execution of a medical power of attorney under Chapter 166, Health and Safety Code;
(2) appointment of an attorney in fact or agent under a durable power of attorney as provided by Subtitle P, Title 2, Estates Code;
(3) execution of a declaration for mental health treatment under Chapter 137, Civil Practice and Remedies Code;
(4) appointment of a representative payee to manage public benefits;
(5) establishment of a joint bank account;
(6) creation of a management trust under Chapter 1301, Estates Code;
(7) creation of a special needs trust;
(8) designation of a guardian before the need arises under Subchapter E, Chapter 1104, Estates Code; and
(9) establishment of alternate forms of decision-making based on person-centered planning.[216]

By strengthening guardianship alternatives, the provisions of House Bill 39 improved the overall guardianship system. However, some judges have expressed concerns that the burden of proof to find clear and convincing evidence that alternatives to guardianship are not feasible is too high of a standard. Many judges suggest that a preponderance of the evidence standard is a more reasonable.[217]

[215] H.B. 39, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[216] TEX. EST. CODE § 1002.0015.
[217] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 196.

Recommendations

The legislature needs to continue to prioritize the needs of wards, especially as the number of guardianships rises across the state. It is critical that Texas closely monitor the guardianship system to ensure that it is not overburdened and that the wards are properly cared for.

Given the preliminary results of the Guardianship Compliance Pilot Project, the legislature should consider providing additional funding to the project. The pilot project has benefited thousands of wards and guardians, as well as provide a valuable resource to the courts. Additional funding would enable OCA to hire more auditors and staff so eventually all counties, including counties with statutory probate courts, can have their guardianship cases reviewed. No court should be exempt from additional oversight.

Currently, if a guardian fails to meet his or her statutory obligations as a legal guardian, the court must cite the guardian by personal service.[218] However, a court should be allowed to notify guardians by certified mail, instead of personal service. Personal service is an undue burden on many courts. Allowing personal service via certified mail would ensure that courts can promptly address guardianship deficiencies.

Finally, the legislature should consider creating a statewide central database that contains pertinent information about guardianships so that law enforcement and first responders can easily access this information. The more information that first responders can easily obtain regarding incapacitated persons, the better care first responders can provide.

[218] TEX. EST. CODE §1203.052.

Electronic Voting for Certain Military Members

Background

The Military and Overseas Voter Empowerment (MOVE) Act is a federal law designed to provide greater protection for the voting rights of members of the armed forces and Americans temporarily living overseas.[219] The MOVE Act was signed into law in 2009. The MOVE Act is an expansion of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) enacted in 1986.[220] Since implementation of the MOVE Act, the Texas legislature has also worked to further protect the voting rights of Americans overseas and members of the armed forces.

In 2012, 54,000 absentee ballots were requested by members of the military serving abroad. However, only around 32,000 were received and counted by the state's election officials. In fact, many ballots cast by overseas service members went uncounted due to problems with international mailing services.[221] While the law allows for any Federal Post Card Application (FPCA) voter, which are voters who are absent uniformed service members, their families, and citizens residing outside the United States, to receive their ballot electronically by email, current law does not permit the ballot to be returned electronically via email. Thus, many eligible overseas voters do not attempt to return their completed ballots.

In efforts to guarantee active-duty military service members their right to participate in an election, the 83rd Legislature passed House Bill 1129 in 2013.[222] This bill created a pilot program to allow a military voter, who is on active-duty overseas and is eligible for hostile fire pay, to cast a ballot electronically via email. Under the program created by House Bill 1129, eligible voters are required to (1) print and complete an election ballot; (2) print and sign a voter signature form; and (3) scan the documents to email to the appropriate election official. This pilot program was implemented by the Texas Secretary of State's office (SOS) and had an initial expiration date of September 1, 2015.

Furthermore, part of House Bill 1129 required SOS to select one county for participation in the pilot program. The county was to be selected based on (1) a desire to participate in the program; and (2) possess the appropriate technological capabilities. Because Bexar County met these requirements, has a large military population, and had potential funding through the Electronic Absentee Systems for Elections (EASE) Grant it received from the Federal Voting Assistance Program in the amount of $466,939, it was selected by the SOS to participate in the pilot program. Bexar County first implemented the requirements of the pilot program during the March 4, 2014 primary election. Bexar County also continued the program in the May 27, 2014 runoff primary election and the November 4, 2014 general election.[223]

As part of Bexar County's implementation of the pilot program, it worked with Election Systems & Software (ES&S) to utilize their "Ballot Online" program to email ballots to all FPCA voters

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[219] Military and Overseas Voter Empowerment (MOVE) Act, 156 Cong. Rec. S. 4513 (2009).
[220] Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 99 P.L. 410, 100 Stat. 924 (1986).
[221] H.B. 1129, 2013 Leg., 83rd Reg. Sess. (Tex. 2013) (H. RES. ORG., BILL ANALYSIS, *available at* http://www.hro.house.state.tx.us/pdf/ba83r/hb1129.pdf#navpanes=0).
[222] H.B. 1129, 2013 Leg., 83rd Reg. Sess. (Tex. 2013).
[223] TEX. SEC. OF STATE, REPORT TO THE 84TH LEGISLATURE ON HOUSE BILL 1129 (83RD LEGISLATURE) RELATING TO A PROGRAM ALLOWING CERTAIN MILITARY VOTERS ON ACTIVE DUTY OVERSEAS TO CAST A BALLOT ELECTRONICALLY (2015).

that requested to receive their ballot via email. To cover the costs of the ES&S program, Bexar County used a portion of their EASE grant. The "Ballot Online" program encodes the voter's choices into a "quick response", or QR code, which appears on the ballot when the voter prints the document. Upon return to Bexar County, the QR code is scanned to ensure accurate and efficient duplication of the ballot through tabulation equipment. However, the SOS did not allow the use of QR codes because of security issues related to transmission over the internet. Thus, SOS prescribed ES&S to create a way to generate the QR code locally on the voter's computer, without requiring an internet connection.[224]

Furthermore, to ensure ballot security, Bexar County established a return email address that would be used exclusively for the return of marked ballots under the pilot program. This ensured that only the appropriate employees had access to these ballots. Additionally, the appropriate Bexar County personnel were required to sign Non-Disclosure Agreements.[225] Thus, every effort was made by SOS and Bexar County to ensure the integrity of the process could not be violated.

For the March 4, 2014 primary election, Bexar County sent out 119 ballots via email to FPCA voters; 22 of which were overseas. However, only three ballots were returned via email. Furthermore, none of the ballots were returned via email to the unique email address. Instead, ballots were returned to the general Bexar County email address. For the May 27, 2014 primary runoff election, Bexar County sent out 52 ballots via email to overseas FPCA voters, but no ballots were returned via email. Due to the low response rate and failures in communication, SOS and Bexar County determined that the ballot submission instructions needed to be better delineated so voters clearly understood the electronic submission process.[226]

Attempting to eliminate further submission issues, in June 2014, ES&S changed the "Ballot Online" program to develop a QR code without an internet connection. As a result, the SOS approved full use of the "Ballot Online" program for the November 4, 2014 general election. For the November 4, 2014 general election, Bexar County sent out 865 ballots via email to FPCA voters; 365 of which were overseas voters. Regardless of the changes made to the program, only 45 ballots were returned via email. Furthermore, only eight of those ballots were from military voters serving overseas.[227]

Despite improvements made to the pilot program after the primary and primary runoff elections, problems still continued during the general election. For example, Bexar County reported user capability issues for voters who were using outdated web browsers. Additionally, returned ballots had missing information, including races or candidate names. Thus, ballots could not be properly processed.

Even though there were still some problematic issues to resolve, SOS reported that there were no security issues with the pilot program and deemed it beneficial for military voters. Although, in its infancy, the pilot program faced many implementation issues, the program still alleviates many obstacles to participate in the voting process for eligible individuals overseas. Therefore,

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[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*

SOS recommended to the legislature that due to limited participation in Bexar County, it should expand the program to other counties with large military populations.[228]

Discussion

The 84th Legislature passed Senate Bill 1115 in 2015, which expanded the option for the pilot program to be utilized in other counties besides Bexar County and extended the expiration date to September 1, 2017. Although the pilot program is still a work in progress, the legislature fully supports the program's goal of further protecting the voting rights of Americans overseas and members of the armed forces.

In order to address the pilot program's technical issues, security concerns and low participation rate, SOS wanted to use another vendor moving forward. Specifically, SOS requested bids from vendors for an electronic blank ballot delivery and a voted ballot return system. SOS hoped that contracting with a new vendor that utilized the most up-to-date voting system would resolve many of the issues Bexar County originally experienced. Newer systems use an interface that allows for electronic transmission without the use of email and the internet, thus limiting opportunities for security breaches. Similar systems are currently being used in Alabama, Arizona, Montana, and the District of Columbia.[229]

In efforts to expand the pilot program beyond Bexar County, SOS identified Bell and El Paso counties as possible targets for expansion based on the large population of military service members in those counties. Unfortunately, because SOS did not receive an appropriation from the state to pay for an electronic voting system for the pilot program, the program has not expanded outside of Bexar County. Without appropriate funding, SOS was unable to contract with a new vendor and expand the pilot program during the 2016 primary and primary runoff elections. However, SOS is currently attempting to negotiate with potential vendors in hopes of utilizing an existing electronic voting system that is less expensive.[230]

There may be other potential cost-cutting measures to explore. SOS believes that allowing the use of electronic signatures, rather than requiring the voter to scan the ballot for submission, may result in significant savings to the program. However, current law does not permit the use of electronic signatures. Thus, legislative changes would be required to enable the use of electronic signatures as a form of certification by the voter.[231]

Despite the authorized expansion of the pilot program in Senate Bill 1115, funding constraints limited participation during the 2016 primary election to Bexar County. For the 2016 primary election, Bexar County emailed 911 ballots to FPCA voters and received 420 back. Of those 420, 14 were returned via email under the pilot program. That is a 75% increase in participation in the pilot program since the November 2014 general election. As technological advancements in electronic voting are made and younger generations with greater literacy in technology enter the military, participation in the pilot program will likely continue to increase.[232]

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[228] *Id.*

[229] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Lindsey Wolf, Tex. Sec. of State).

[230] *Id.*

[231] *Id.*

[232] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Jacque Callanen, Bexar County).

Recommendations

To ensure our active military serving overseas continue to be afforded every opportunity to vote, the legislature should authorize the pilot program beyond its current sunset date of September 1, 2017. Furthermore, the legislature should continue to work with SOS to alleviate any additional obstacles military voters in combat zones may have when attempting to participate in the voting process. Every effort should be made to ensure military members have every opportunity to participate in the election process.

Employees Retirement System of Texas

Background

The Employees Retirement System of Texas (ERS) was created by the Texas legislature in 1947 and is administered in accordance with the Texas Constitution. ERS operates primarily under Vernon's Texas Codes Annotated (V.T.C.A.), Texas Government Code, Title 8, Subtitle B.[233] ERS has the powers, privileges, and immunities of a corporation. ERS is governed by a board of trustees (the "board"), which is made up of six members responsible for the general administration and operations of ERS.[234] The six member board is composed of three elected members and three members who are appointed respectively by the Governor, the Speaker of the Texas House of Representatives and the Chief Justice of the Supreme Court of Texas. The board appoints a person other than a member of the board to serve at the board's will as Executive Director to manage a staff of over 300 people to provide benefits to state and higher education employees, retirees, and beneficiaries.[235] The legislature has the authority to set the contribution rates for both employee and employer retirement contributions.

ERS provides a retirement and disability pension system for state employees, law enforcement and custodial officers, elected state officials, and two classes of judges.[236] Currently, the ERS pension fund has approximately 142,000 active contributing members.[237] ERS administers the trust funds, with a fiduciary obligation to the members and retirees of ERS who are its beneficiaries. The retirement programs complement the Social Security and Medicare programs by providing a retirement annuity with service, disability, and survivorship benefits. The ERS Plan, the Law Enforcement and Custodial Officer Supplemental Retirement Fund (LECOSRF), the Judicial Retirement System of Texas Plan One (JRS I), and Judicial Retirement System of Texas Plan Two (JRS II) are single employer defined benefit pension plans.[238] ERS, LECOSRF, and JRS II are administered through trust. Each plan provides service retirement, death, and disability benefits. ERS disburses approximately $2 billion in annuity payments annually.[239] Benefit and contribution provisions of each plan are authorized by state law and may be amended by the legislature. Member contribution rates of the ERS, LECOSRF, JRS I, and JRS II and state contribution rates of the ERS, LECOSRF, and JRS II are set by state law. The law prohibits any amendment to the plan that would cause the period required to amortize any unfunded actuarial accrued liability to equal or exceed 31 years.[240] Administrative expenses of the ERS, LECOSRF, and JRS II are financed through investment earnings, and the administrative expenses of the JRS I are financed by state appropriations.

There are two classes of membership within the ERS retirement plan: (1) the elected class and (2) the employee class. Membership in the elected class is limited to persons who hold state offices that are normally filled by statewide election (including legislators) and excludes officials covered by the JRS Plans One and Two. Membership in the employee class includes all employees and

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[233] EMP. RET. SYS. OF TEX., 2015 COMPREHENSIVE ANNUAL FINANCIAL REPORT (Nov. 2015).
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (testimony of Porter Wilson, Emp. Ret. Sys.).
[238] EMP. RET. SYS. OF TEX., *supra* note 231.
[239] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 235.
[240] EMP. RET. SYS. OF TEX., *supra* note 231.

appointed officers of the state and excludes independent contractors and their employees, and employees covered by the Teacher Retirement System of Texas.[241]

The LECOSRF plan covers custodial officers employed by the Department of Criminal Justice, including the Board of Pardons and Paroles, and certified by that department according to statutory requirements as having a normal job assignment that requires frequent or infrequent regularly planned contact with inmates of that institution. The plan also covers law enforcement officers who have been commissioned by the Department of Public Safety, the Alcoholic Beverage Commission, the Parks and Wildlife Department, or the State Board of Pharmacy who are recognized as commissioned law enforcement officers by the Commission on Law Enforcement Officer Standards and Education. The monthly benefit amount payable from this fund is equal to the excess of the total benefit over the regular benefit payable to the member from the ERS fund.[242]

The JRS I plan covers judges, justices, and commissioners of the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, District Courts, and certain commissions to a court who first became members before September 1, 1985. Members of JRS II are excluded from this plan. As a result of new judicial officers participating in JRS II, JRS I membership continues to decrease while the annuity payroll increases as members retire.[243]

The JRS II plan covers judges, justices, and commissioners of the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, District Courts, and certain commissions to a court who first become members after August 31, 1985. Members of JRS I are excluded from this plan.

Discussion

Prior to the 84th Legislative Session, the ERS pension fund was trending toward depletion, but the legislature took action to ensure financial stability for years to come. House Bill 9 and House Bill 1 (General Appropriations Bill), 84th Legislative Session, have turned funding around.[244] ERS is now set to be fully funded by 2048 and has a funding period of 33 years, a drastic improvement from previous levels.[245] Specifically, House Bill 9, which became effective September 1, 2015, increased contributions by active employees from 7.5 to 9.5 percent and eliminated the ninety day waiting period for participation in ERS and LECOSRF so that members begin contributing sooner. Furthermore, House Bill 1, which became effective September 1, 2015, increased the state contribution rate from 7.5 to 9.5 percent and maintained the half percent contribution rate for state agencies. With these legislative changes, the overall contribution rate increased to 19.5 percent for fiscal year (FY) 2016.

As of August 31, 2015, the actuarial value of the ERS Trust Fund was $25.9 billion, and it returned 0.49 percent for FY 2015.[246] Although the investment return for FY 2015 was extremely low, the three-year rate of return of 8.26 percent and the thirty-year rate of return of 8.29 percent outperformed the actuarially assumed rate of return of eight percent.[247] Unrecognized losses of

[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] H.B. 9, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[245] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, *supra* note 235.
[246] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Porter Wilson, Emp. Ret. Sys.).
[247] *Id.*

$1.9 billion in FY 2015 will need to be recognized in future years if not offset by future market returns in excess of eight percent. Despite that, the Trust Fund grew by $376 million in FY 2015 due to the outperformance of the short-term policy investment targets.[248] Further, ERS increased management of assets in-house resulting in a reduction of external advisor fees by $3 million.[249] Currently, the funding ratio for the ERS fund is at 76.3 percent.[250]

Created in 1979 as a supplemental retirement benefit for ERS members who complete twenty or more years of service as commissioned law enforcement officers, LECOSRF currently provides supplemental benefits to 10,845 retirees and beneficiaries.[251] The actuarial value of assets is $909 million.[252] With accrued liabilities of $1.3 billion, the fund currently has an unfunded liability of $353 million.[253] The result is a funded ratio of 72 percent, which is less than FY 2014 when it was 73.2 percent.[254] LECOSRF will likely require additional contributions to pay off the existing liability.

Judges and justices appointed or elected prior to September 1, 1985, receive their retirement benefits through JRS I, which had an unfunded actuarial accrued liability of $223.1 million at the end of the 2015 fiscal year.[255] JRS I is a pay-as-you-go plan and is not pre-funded. Instead, active members contribute a portion of their salary to the program during their first twenty years of service and may elect to continue contributing to accrue additional benefits. In FY 2015, active members contributed 6.9 percent of their salaries.[256] The contribution rate will increase to 7.2 percent in FY 2016 and 7.5 percent in FY 2017.[257] The state contributes all additional revenue necessary to cover ongoing costs of retirees. At the end of FY 2015, there were just ten active contributing members in JRS I.[258]

All judges and justices who took office after August 31, 1985, receive retirement benefits through JRS II. As of August 31, 2015, JRS II had a funding ratio of 92.2 percent, with actuarially valued assets of $373 million and an unfunded actuarial accrued liability of $31 million.[259] As with JRS I, active members contribute a portion of their salary to the program during their first twenty years of service and may elect to continue contributing to accrue additional benefits. In FY 2015, active members contributed 6.9 percent of their salaries while the state contributed 15.66 percent.[260] The active member contribution rate will increase to 7.2 percent in FY 2016 and 7.5 percent in FY 2017.[261] At the end of FY 2015, there were 563 active contributing members.[262] Similar to LECOSRF, JRS II will likely require additional contributions to pay off the existing liability.

The Employees Retirement System Employees Group Benefits Program (ERS-GBP), formerly the Texas Employees Uniform Group Insurance Program, began September 1, 1976. The ERS-GBP

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[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] EMP. RET. SYS. OF TEX., *supra* note 231.
[256] *Id.*
[257] *Id.*
[258] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 244.
[259] *Id.*
[260] EMP. RET. SYS. OF TEX., *supra* note 231.
[261] *Id.*
[262] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 244.

was implemented to meet the stated purposes of the Texas Employees Group Benefits Act, Chapter 1551 of the Insurance Code.[263] The Act requires uniformity in health, life, dental, and accident insurance benefits for all employees and retirees of state agencies and institutions of higher education. ERS-GBP provides health insurance to state employees, certain higher education entities, retirees, and their eligible dependents. Today, 541,584 people participate in ERS-GBP.[264] ERS-GBP health insurance plans cover about one of every 52 Texans. All participants receive access to the same benefits and coverage and are subject to the same contribution structure. ERS-GBP pays approximately $8 million a day in health care claims.[265]

Currently, ERS-GBP offers different options for health coverage. HealthSelect of Texas (HealthSelect), a self-funded, point-of-service plan is the largest, covering 95 percent of active employees and 50 percent of retirees.[266] As of August 31, 2015, HealthSelect had 436,430 participants.[267] Only three percent of overall expenditures go toward administration of the health plan which is far less than the twelve percent average for large, private health plans.[268] The plan offers three benefit levels – in-area network, in-area non-network, and out-of-area. The benefit level depends on where employees live or work, the doctors and providers they use, or their eligibility for Medicare. HealthSelect is administered by United Healthcare and provides both in-network and out-of-network benefits. Pharmacy benefits for the plan are currently administered by Caremark; however, effective January 1, 2017, Optum, Inc. will take over administration of the pharmacy benefits.

The second option offered under ERS-GBP includes three regional Health Maintenance Organizations (HMOs). These HMOs provide health coverage and prescription drug benefits to HMO participants and their eligible dependents. Current HMO providers are Community First Health Plans, Inc., Scott & White Health Plan, and KelseyCare. This coverage is provided through contracts with private HMOs in the Community First, Scott & White, and KelseyCare service areas. To be selected, an HMO must be able to provide benefits in each proposed service area at a lower cost than can otherwise be provided through the self-funded plan. Approximately 23,949 of ERS-GBP participants are enrolled in one of the HMO options.[269]

The third option is offered under Medicare Advantage, an HMO and preferred provider organization (PPO) plan, which provides health coverage to Medicare enrolled retirees, surviving spouses, and their dependents. Medicare eligible retirees are automatically enrolled in Medicare Advantage, and there are approximately 62,700 participants enrolled in the plan.[270]

House Bill 966, 84th Legislative Session, directed ERS to offer an optional consumer-directed health plan that combines a high-deductible health plan with a health savings account (HSA) as an alternative to HealthSelect.[271] This consumer-directed health plan became available as a health plan choice beginning September 1, 2016. The plan operates as a network PPO and there is no need for primary care referrals to specialists.[272] Still in its infancy, it is yet to be determined

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[263] TEX. INS. CODE § 1551.
[264] *Id.*
[265] *Id.*
[266] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 235.
[267] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 244.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] H.B. 966, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[272] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 244.

whether participants will elect to enroll in this plan over HealthSelect.

Recommendations

The legislature should continue to monitor the financial conditions of the pension and health care programs administered by ERS after the most recent 2016 data is released, and when necessary, take actions to ensure the affordability and sustainability of those programs.

Teacher Retirement System of Texas

Background

The Teacher Retirement System of Texas (TRS) was established in 1937. Article 16, Section 67, of the Texas Constitution charters TRS to provide retirement and related benefits for those employed by the public schools, colleges, and universities supported by the State of Texas. TRS is responsible for investing funds under its stewardship and for delivering benefits to members as authorized by the Texas legislature. TRS is the largest public retirement system in Texas in both membership and assets. The agency serves 1,459,243 participants – 1,081,505 are public and higher education members, and 377,738 are retirement recipients.[273]

TRS administers a defined benefit retirement plan that is a qualified pension trust under Section 401(a) of the Internal Revenue Code.[274] The pension trust fund provides service and disability retirement, as well as death and survivor benefits, to eligible Texas public education employees and their beneficiaries. Retirement benefits are financed by member and state contributions, employer contributions in some circumstances, and through investment earnings of the pension trust fund.

In addition, TRS administers a separate trust that provides health benefit coverage for TRS retirees and eligible dependents. Created in 1985, TRS-Care is the health care program for retired members.[275] The program offers a basic health care plan at no cost, as required by Chapter 1575 of the Insurance Code, and other optional plans, such as coverage for spouses and eligible dependents.[276] TRS-Care currently offers three plan options. TRS-Care 1 is the basic plan and provides catastrophic coverage.[277] TRS-Care 2 and TRS-Care 3 offer more comprehensive benefits, including a prescription drug benefit.[278]

TRS-Care is financed by investment income, a Medicare Part D drug subsidy, member premiums, and contributions by the state, school districts, and active public school employees.[279] The state contributes one percent of active employee payroll, while each school district contributes 0.55 percent, and active employees 0.65 percent.[280] Despite these funding sources, the program has experienced a shortfall the past two biennia. For the 2016-2017 biennium, TRS-Care experienced

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[273] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Brian Guthrie, Teacher Ret. Sys. of Tex.).
[274] 26 U.S. Code § 401.
[275] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 271.
[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*

about a $768 million shortfall. Furthermore, as of April 2016, the plan is projected to have a shortfall of $1.3 to $1.5 billion for the 2018-2019 biennium. Even more alarming, the shortfall for the following biennium is expected to range from $4 to $6 billion. In the past, the legislature has made supplemental appropriations to cover previous shortfalls. However, because the shortfalls continue to increase dramatically, providing supplemental funding to keep TRS-Care solvent is no longer feasible nor fiscally responsible. Currently, Aetna administers the medical benefits, while Express Scripts administers the pharmacy benefits.

TRS also administers TRS-ActiveCare, a statewide health benefit program for eligible public education employees of participating entities. It is financed by plan participant premium payments and investment income. TRS-ActiveCare benefits are administered by Aetna, while pharmacy benefits are administered by Caremark.

Finally, TRS administers an optional long-term care insurance program for eligible retirees and public school employees. Certain family members are also eligible. The plan is available on an enrollee-pay-all basis. The current group long-term care insurer is Genworth Life Insurance Company, a part of Genworth Financial.

Discussion

As of August 31, 2015, TRS net assets totaled $128.5 billion.[281] The average retirement payment in FY 2015 was $2,012 per month with $8.9 billion paid in retirement benefits.[282] These benefits were funded from a combination of cumulative investment income, member contributions, and state and employer contributions. The TRS pension trust fund earned a rate of return of -0.3 percent for FY 2015 compared to 16.9 percent for FY 2014.[283] Similar to ERS' return in FY 2015, this return is well below the actuarially assumed rate of return of eight percent. However, TRS' five-year return rate is 9.56 percent, which still outperforms the assumed rate of eight percent.[284] As of August 31, 2015, TRS has a funded ratio of 80.2 percent with an unfunded actuarial accrued liability of $33 billion.[285]

During the 84th Legislative Session, many statutory changes were made that directly impacted TRS. House Bill 2168 moved the annuity payment date from the first working day of the month following the month for which the annuity accrues to the last working day of the month the annuity accrues.[286] House Bill 2168 took effect Sept. 1, 2015 and resulted in both the August 2015 and September 2015 annuities being paid in September.

House Bill 2, a supplemental funding bill, provided biennial funding for TRS-Care in the amount of roughly $768 million.[287] This supplemental funding addressed the immediate shortfall of the plan and ensured all member retirees continued to have their benefits without disruption.

House Bill 1937 opened a window from Sept. 1, 2015 to Dec. 31, 2015 for members participating in the Deferred Retirement Option Plan (DROP) to revoke participation in the plan.[288] The

[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] H.B. 2168, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[287] H.B. 2, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[288] H.B. 1937, 2015 Leg., 84th Reg. Sess. (Tex. 2015).

member must not have retired on or before Dec. 31, 2015 and must revoke participation on a form prescribed and received by TRS no later than Dec. 31, 2015. A beneficiary of a member who dies after Sept. 1, 2015 but before retiring may also revoke the member's participation in DROP provided the beneficiary is eligible to receive both the distributions from DROP and the distributions from the pension plan.[289]

House Bill 2974 authorized TRS to establish the 12-month period for determining a member's annual compensation.[290] It also amended membership eligibility by requiring that eligibility be established through employment with a single employer. For members with fewer than five years of service credit, membership will no longer terminate due to failure to earn service credit for five years if the member remains employed with a TRS-covered employer but is not eligible for membership because the employment is less than one-half time. This change in the law prevents these members' accounts from escheating during a time when they are ineligible to withdraw their funds due to plan qualification requirements. House Bill 2974 also clarified that a member could not purchase more than five years of out-of-state service credit if the service credit is considered non-qualified under the Internal Revenue Code.

Finally, Senate Bill 1940, along with House Bill 2974, created a joint interim committee to study TRS-Care and TRS-ActiveCare.[291] The Joint Interim Committee to Study TRS Health Benefit Plans, which consists of three senators and three members of the House of Representatives, was tasked with reviewing the health benefit plans administered by TRS and propose reforms to address the financial soundness of the plans, cost and affordability of plan coverage, and sufficiency of access to physicians and health care providers. The joint interim committee is expected to submit a report to the legislature no later than January 15, 2017.

Recommendations

The legislature should continue to monitor the financial conditions of the pension and health care programs administered by TRS after the most recent 2016 data is released, and when necessary, take actions to ensure the affordability and sustainability of those programs. Furthermore, the legislature should embrace the recommendations of the Joint Committee to Study TRS Health Benefit Plans to ensure the long-term viability of both health care plans.

[289] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs, supra* note 271.
[290] H.B. 2974, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[291] S.B. 1940, 2015 Leg., 84th Reg. Sess. (Tex. 2015).

Establishment of a Public Integrity Unit under the Authority of the Texas Rangers

Background

Prior to December 1, 2015, certain criminal investigations of public officials were conducted by a single agency located in Travis County, the Travis County Public Integrity Unit, even though the public official under investigation may have been elected to office, or the alleged acts occurred, outside of Travis County. Because all investigations were being conducted by the Travis County Public Integrity Unit which typically is run by an elected official from the Democratic Party, many parties asserted that transferring the responsibility for investigations of alleged criminal conduct of a public official to a law enforcement agency with statewide jurisdiction would mitigate any potential for political intervention or influence.

Thus, during the 84th Legislative Session, the legislature passed House Bill 1690.[292] House Bill 1690 established a Public Integrity Unit (PIU) within the Texas Ranger Division at the Texas Department of Public Safety (DPS) beginning December 1, 2015. Specifically, the new law requires investigations of allegations against public officials be conducted by the Texas Rangers. The Texas Rangers are required to refer the complaint to the appropriate prosecutor of the county in which venue is proper if reasonable suspicion of the alleged offense is established. Further, House Bill 1690 explicitly defined state officers, state employees, and the offenses against public administration to include select statutes from the Texas Penal Code, Government Code and Election Code.

Historically, the Texas Rangers have been utilized to investigate corruption by elected officials and other public servants holding positions of public trust. For example, in 2015 prior to House Bill 1690 taking effect, the Texas Rangers worked 191 corruption investigations covering public official oppression, theft, abuse of official capacity, and capital murder.[293] These investigations resulted in 99 arrests and 74 convictions.[294] Thus, the Texas Rangers have proven to be capable of handling these types of investigations in a professional and efficient manner.

Discussion

House Bill 1690 authorized the Texas Rangers to investigate certain offenses against public administration but does not impede other law enforcement agencies from investigating similar crimes within their jurisdiction. To handle the increased workload, two full-time Rangers, an attorney from the DPS Office of General Counsel, and a financial crimes analyst were assigned to the Texas Ranger PIU.

After consulting with prosecutors from across the state, the Texas District & County Attorneys Association, the Texas Ethics Commission, and the State Commission on Judicial Conduct, the Texas Ranger PIU developed a formal intake process to receive formal and informal complaints against public administration. Upon receipt of a formal or informal complaint, the Texas Ranger

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[292] H.B. 1690, 2015 Leg., 84th Reg. Sess. (Tex. 2015).
[293] *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, 2016 Leg., 84th Interim (Tex. 2016) (written testimony of Steve McCraw, Tex. Dept. of Pub. Safety).
[294] *Id.*

PIU determines whether an initial investigation is warranted. Since December 1, 2015, the Texas Ranger PIU has already received complaints that are unsupported based on subjective impressions with no specific facts; complaints with facts that do not allege violations of law; and complaints that bear a reasonable suspicion that a crime has been committed with sufficient articulable facts to show criminal activity. The Texas Ranger PIU determines reasonable suspicion based on specific articulable facts and the totality of the circumstances, and not mere inchoate suspicion or speculation.

If an initial investigation demonstrates reasonable suspicion that an offense against public administration occurred, then the matter shall be referred to the prosecuting attorney of the county in which venue is proper. The venue for prosecution of an offense against public administration was changed in House Bill 1690 to the county in which the defendant resided at the time the offense was committed. On the request of the prosecuting attorney, the law mandates that the Texas Rangers assist in the investigation. Thus, the Texas Ranger PIU works closely with the prosecutor of jurisdiction during the process of these investigations.

Further, to ensure proper transition and transparency, DPS published a Texas Register notice of commencement and created multiple avenues of communication to garner a complaint. A formal or informal complaint can be received in the form of written correspondence, telephone calls, electronic communication, or in person. The most common sources of information include law enforcement, government officials, prosecutors, and members of the public.

Under House Bill 1690, the Texas Ranger PIU was granted subpoena authority to compel the production, inspection or copying of relevant evidence, and permit the DPS Office of General Counsel to file suit in court for subpoena non-compliance. However, the Texas Ranger PIU will still communicate with the prosecutor of jurisdiction for use of subpoena authority to ensure a coordinated investigative effort.

Since December 1, 2015, the Texas Ranger PIU has initiated 12 criminal investigations into allegations against three state officers and nine state employees.[295] In addition, the Texas Ranger PIU has processed numerous complaints that did not provide sufficient articulable facts to justify an investigation; complaints that were outside their jurisdiction; or complaints that were transferred to state or local agencies with original jurisdiction.

Recommendations

The legislature should continue to monitor the public integrity unit under the authority of the Texas Rangers. Furthermore, the legislature should continue to support the Texas Ranger PIU to ensure it has the necessary resources to conduct thorough and proficient investigations.

[295] *Id.*

Appendix

Written testimony from the committee's interim hearings is available upon request.