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Ethical Choices: Contested Case Procedures and Judicial Review Applicable to Politicians Versus Other Regulated Actors

Amy Bresnen

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ETHICAL CHOICES: CONTESTED CASE PROCEDURES AND JUDICIAL REVIEW APPLICABLE TO POLITICIANS VERSUS OTHER REGULATED ACTORS

Amy Bresnen¹

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I. INTRODUCTION

The State of Texas imposes a broad array of regulations, overseeing everything from its massive oil and gas industry² to the application of eyelash extensions.³ The field includes ethics regulations governing politicians, lobbyists and other actors in state and local politics. Although most if not all law schools offer courses in administrative law, there are very few textbooks that specifically address Texas Administrative Law or any state's administrative law. This is intriguing because the federal Administrative Procedure Act⁴ does not govern state agencies, although there are clear similarities. A state's own administrative procedure laws control state agency actions, notwithstanding the manner in which the federal act would address a given issue.

Many disputes within the regulatory system are resolved through contested case proceedings in connection with ratemaking, licensing, permitting and other means of executive branch enforcement of statutes and rules, including Texas ethics laws. The Texas Administrative Procedure Act (APA) defines a contested case as “a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”⁵ The outcome of a contested case proceeding may be subject to judicial review, a critical component of due process, should an affected party wish to appeal that decision.

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² See TEX. CONST. art. X, § 2; TEX. CONST. art. XVI, § 30 (Creation of the Railroad Commission of Texas).

³ See TEX. OCC. CODE ANN. § 1602.002(C)(12) (stating the application of eyelash extensions is included in the definition of ‘Cosmetology’ for regulation purposes).

⁴ See generally The Administrative Procedure Act § 1, 5 U.S.C. § 551 (2012) (improving the administration of justice by prescribing fair administrative procedures federally).

⁵ TEX. GOV'T CODE ANN. § 2001.003(1) (West, 2013).

The general purpose of this paper is to provide law students and young lawyers with an overview for accessing, in the context of Texas agencies, these legislatively-delegated adjudicative, or quasi-judicial, powers and explain how agency contested case decisions are reviewed by the courts. This is important for lawyers to understand in representing a client, be it an individual or entity, whose interests are affected by administrative proceedings within regulatory agencies. To accomplish this goal, the paper discusses the two most common methods of judicial review and contrasts the standard proceedings for contested cases at the State Office of Administrative Hearings⁶ (SOAH) with those of the Texas Ethics Commission⁷ (TEC or “Commission”). Describing the two agencies’ governance, jurisdiction, and overall purposes will provide insight into how agencies use administrative and judicial resources while dealing with different subject matters and employing substantially different procedures for contested cases.

Concerns regarding due process, separation of powers, and the efficient use of both judicial and administrative resources provide the foundation for considering how an agency should execute contested case proceedings and what type of judicial review is appropriate for contested case decisions. But, these issues take on a heightened interest when the regulatory state impinges upon First Amendment rights. Thus the paper will also examine questions regarding the standard lawmakers have chosen for judicial review of their compliance with Texas ethics laws versus the standard lawmakers have applied to other regulated activities. As will be seen, lawmakers have “concentrated wonderfully” on the issue—and made their choice quite explicit.

The TEC has jurisdiction over matters that directly affect First Amendment activities, enforcing statutes intended to balance the protection of such activities with concerns about public corruption and the public’s right to certain information about the conduct of public affairs. Furthermore, the issues the TEC addresses are at the heart of important current debates about how our political system should function.⁸ Recent headline-making cases at the TEC⁹ have underlined

⁶ See generally TEX. GOV’T CODE ANN. §§ 2003.01-2003.914.

⁷ See generally TEX. GOV’T CODE ANN. §§ 571.01-571.177.

⁸ See e.g., Texas Ethics Commission, Proposed Rule 20.68 (Tex. 2014), http://ethics.state.tx.us/rules/proposed_Feb_2014.html. (regarding disclosure of

the importance of differences between the typical administrative procedure for contested cases employed by SOAH and those of the TEC. Therefore, it is appropriate to discuss the differences between the two agencies' treatment of contested cases while evaluating whether due process, separation of powers, and the efficient use of administrative and judicial resources are given adequate consideration.

Although judicial review follows the application of agencies' contested case procedures, the paper will start with a review of the two most common standards of judicial review—substantial evidence and *de novo*—because in many ways an agency's contested case processes foreshadow the means of judicial review. It is necessary to address some Texas history, including the most recent regular legislative session, concerning judicial review of agency decisions in order to grasp the policies that determine when and how these two types of judicial review are employed. Both SOAH and TEC employ, to one extent or another, the Texas APA provisions relating to fact-finding in contested cases, which makes it appropriate to briefly discuss how the APA applies the Texas Rules of Evidence (TRE) in the proceedings.

Generally speaking, one must assess the relevant provisions of the APA and the enabling statutes and administrative rules of both SOAH and each applicable regulatory agency to determine how a contested case proceeding will be conducted in any given situation. Once it is determined that an issue is reviewable, it is necessary to consider the type of review authorized by the agency's enabling statutes. Because a lawyer earns her fee partly by predicting the likelihood of success for her client in pursuing an appeal at the more expensive level of judicial review, it is important for a lawyer to gauge the degree of deference a court will give to an agency's decision.

campaign contributions, note: the proposed rule is now dead due to agency inaction).

⁹ See David Saleh Rauf, *Activist Fined \$10,000 for Not Registering as Lobbyist* HOUSTON CHRONICLE (July 21, 2014), <http://www.houstonchronicle.com/news/politics/texas/article/Activist-fined-10-000-for-not-registering-as-5636511.php>; see also John Council, *Group Seeks to Remove Abbott from Hecht Case* TEXAS LAWYER (October 21, 2014), <http://www.texaslawyer.com/home/id=1202674131082/Group-Seeks-to-Remove-Abbott-from-Hecht-Fine-Case?mcode=1202616608548&curindex=4>.

II. JUDICIAL REVIEW OF ADMINISTRATIVE CONTESTED CASES

There are, generally speaking, two types of judicial review of agency contested-case decisions employed by courts. The principle differences are often described in terms of judicial deference to agency decision-making, but also entail variances in procedure on appeal. If the agency's enabling statute authorizes trial *de novo*, in some ways it can be said that there is no review.¹⁰ The court simply substitutes judicial processes in all respects for those of the agency and gives no deference to the agency's decision.¹¹ If the statute does not mandate *de novo* review, the review will be based on the agency's record developed during the contested case.¹² This standard is usually referred to as the "substantial evidence" rule and gives significant deference to the agency's decision.¹³ If there is substantial evidence to support the agency's determination of the facts, a court will not second guess the agency or re-weigh the evidence.¹⁴

A. *De Novo* Review

Before the New Deal, federal courts often required *de novo* appeals of state and federal agency decisions.¹⁵ However, as the number of regulatory agencies grew, the number of cases appealing agency decisions in courts also grew.¹⁶ This proved burdensome on judicial resources and efficiency.¹⁷ Some federal courts began to

¹⁰ *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 423 (2d Cir. 2004).

¹¹ *Id.*

¹² *Hawkins v. Cmty. Health Choice, Inc.*, 127 S.W.3d 322, 324 (Tex. App. 2004).

¹³ *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 955 (Tex. 1984).

¹⁴ *Id.*

¹⁵ For a general discussion on federal and Texas history of *de novo* judicial review, see Pieter M. Schenkkan, *When and How Should Texas Courts Review Agency Rules*, 47 BAYLOR L. REV. 989 (1995).

¹⁶ *See id.*

¹⁷ *See id.*

withdraw under the banner of the abstention doctrine;¹⁸ others relied on a newly developed alternative *de novo* review written by the United States Supreme Court and Congress.¹⁹ Nonetheless, it was clear that the Court still had misgivings about giving up *de novo* review.²⁰ The new *de novo* review went only half way to abandonment, stating that Congress could not constitutionally withdraw from the courts the final determination of those facts upon which constitutional rights or the agency's jurisdiction depend.²¹ The majority emphasized this rule by indicating that to allow final agency determination of such constitutional and jurisdictional facts would be to "sap the judicial power" and "establish a government of a bureaucratic character alien to our system."²² Justice Brandeis, dissenting, argued that the rule would "gravely hamper the effective administration" of an agency's statutory responsibilities.²³

As New Deal economic and political crises continued, appeals of agency decisions also continued to congest the court system. Congress began testing the Court's commitment to the slightly

¹⁸ For a recent discussion on the "abstention" doctrine, see *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention requires that federal courts decline to exercise jurisdiction over lawsuits when three conditions are met: (1) the federal proceeding would interfere with "an ongoing state judicial proceeding;" (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has "an adequate opportunity to the state proceedings to raise constitutional challenges." See also *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013) (clarifying that abstention should be exercised only in three types of state judicial proceedings such as 'civil enforcement proceedings' involving important state interests, quasi-criminal proceedings, and in proceedings where the state itself is usually a party). State administrative proceeding appeals would seem to fit this description. See *Empower Texans, Inc. v. Texas Ethics Comm'n*, 2014 WL 1666389 (W.D. Tex.) (holding that under the *Younger* abstention doctrine, plaintiff could seek legal remedy in a state court rather than federal court).

¹⁹ See generally *Crowell v. Benson*, 285 U.S. 22 (1932) (ruling that so long as courts retained the power to make independent determinations of constitutional or jurisdictional facts, Congress could without violation of separation of powers bestow judicial power to adjudicate workmen's compensation awards upon an administrative agency).

²⁰ See *id.*

²¹ *Id.* at 64.

²² *Id.* at 57.

²³ *Id.* at 85-88, 94.

diluted *de novo* judicial review approach by conferring on agencies the power to decide all *fact* issues, subject only to review for *substantial evidence* on the agency record. The Court quietly surrendered.²⁴ In 1946, Congress passed the Administrative Procedure Act, which declared that the scope of judicial review for federal agency decisions would be limited to the agency record, and the standard would be whether the fact findings were “unsupported by substantial evidence” when the courts reviewed the “whole record.”²⁵

Back in Texas, plaintiffs were left with the question of whether they could still rely on their state courts to use *de novo* review when hearing appeals to agency decisions. Austin, unlike Washington, had not yet become captivated with systematic and orderly governance. Austin was a very small town²⁶ and agency commissioners relied heavily on information and views solicited outside an administrative hearing.²⁷ Most Austin government lawyers and law professors scoffed at any judicial review that deviated from *de novo* review.²⁸ It was well known in the political community that decisions were made in bruising, arm-twisting political brawls; it was simply inevitable.²⁹ Therefore, plaintiffs needed a neutral and apolitical place to freshly litigate the facts and relevant law pertaining to their contested cases, such as a court of law.

Until the 1960s, those in the legislature favoring *de novo* review had the upper hand.³⁰ But, the Texas Supreme Court continuously construed the statutes to mean “substantial evidence” and wrote that if the legislature wanted review by trial *de novo*, it could have said

²⁴ *See id.*

²⁵ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231-32 (1994).

²⁶ The 1940 population of Austin was 87,930. AUSTIN TEXAS GOV, https://www.austintexas.gov/sites/default/files/files/Planning/Demographics/population_history_pub.pdf (last visited October 8, 2014).

²⁷ Perry O. Barber, Jr., *Judicial Review of Administrative Agency Action—A Need for Texas Reform?*, 40 TEX. L. REV. 992, 996 (1962).

²⁸ Various syllabi and examination records from the University of Texas School of Law administrative class are on file with the Tarleton Law Library in Austin, Texas.

²⁹ Barber, *supra* note 29 at 1004.

³⁰ *Id.* at 1007.

so, but it would be ill advised.³¹ The legislature passed statute after statute, clarifying that it plainly and unequivocally meant *de novo* judicial review.³² Finally, the legislature found words that no court could possibly misconstrue. In response, the Texas Supreme Court finally said what it meant and declared “de novo judicial review of . . . [agency] decision[s] would clearly involve the exercise by the courts of nonjudicial powers” reversing its 1897 and 1903 precedents.³³ Legislative or public policy decisions “cannot be lawfully delegated directly to the judiciary by the Legislature”³⁴ without violating separation of powers; likewise, they “cannot be conferred upon the courts by means of a *de novo* trial after an administrative hearing.”³⁵ The legislature then took the issue to the Texas voters in 1961 by placing a proposition on the ballot, which, if passed, would become a state constitutional amendment authorizing the legislature to confer that power on the courts.³⁶ The proposition failed.³⁷

B. Substantial Evidence Review

Once a referring agency has given notice to the respondent of its decision relating to a contested case, the respondent may appeal that decision in district court.³⁸ Unless the agency’s enabling statutes dictate otherwise, the respondent will be restricted to a district in court in Travis County.³⁹ If an agency’s own statutes do not prescribe a type of judicial review for the reviewing court, the court will use the “substantial evidence rule” to decide the appeal of a contested case.⁴⁰

³¹ S. Canal Co. v. State Bd. of Water Engineers, 318 S.W.2d 619, 625 (1958).

³² Barber, at 1007-08.

³³ Key Western Life Ins. Co. v. State Bd. of Ins., 350 S.W. 2d 839, 848 (1961), (citing Davis v. City of Lubbock, 326 S.W. 2d 699, 714 (1959)).

³⁴ See Key Western Life Ins. Co., 350 S.W. 2d. at 847.

³⁵ *Id.*

³⁶ Barber, *supra* note 29, at 1007-08.

³⁷ Barber, *supra* note 29, at 1008.

³⁸ TEX GOV’T CODE ANN. §§ 2001.175-2001.176(b)(1) (West 2015).

³⁹ TEX GOV’T CODE ANN. § 2001.176(b)(1) (West 2015); Tex. Dep’t of Prot. & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W. 3d 170 (Tex. 2002).

⁴⁰ Tex. Dep’t of Prot. & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W. 3d 170, 183 (Tex. 2002).

Under the substantial evidence rule, a reviewing court may not substitute its judgment for the judgment of the agency on the weight of the evidence on questions committed to agency discretion.⁴¹ The evidence may even preponderate against the agency's finding, but the court must still uphold the finding if enough evidence suggests that the agency's decision was reasonable under the circumstances.⁴² The issue is not whether the agency reached the correct conclusion, but whether the agency's decision was, in fact, *reasonable*.

Substantial evidence, in essence, means more than a scintilla.⁴³ The relevant evidence is such that "a reasonable mind might accept as adequate to support a conclusion."⁴⁴ The court reviews the record as a whole, including opposing evidence offered during the agency's formal hearing.⁴⁵ When taken as a whole, the evidence must do more than a create a suspicion of the existence of the fact to be established.⁴⁶

Although the primary difference between *de novo* and substantial evidence review is whether the court tries the case all over again, it should be noted that the APA does allow, under limited circumstances, for the introduction of new evidence in an appeal based on substantial evidence review.⁴⁷ Section 2001.175(c), Government Code, provides:

(c) A party may apply to the court to present additional evidence. If the court is satisfied that the additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the state agency, the court may order that the additional evidence be taken before the agency on conditions determined by

⁴¹ Tex GOV'T CODE ANN § 2001.174.

⁴² *See id.*; § 2001.174(2)(E).

⁴³ For a general discussion on the "substantial evidence rule," *see* James R. Eissinger, *Judicial Review of Findings of Fact in Contested Cases under APTRA*, 42 BAYLOR L. REV.1 (Winter 1990); *See also* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1939) (holding that such evidence is what a reasonable mind might consider to as adequate to support a conclusion).

⁴⁴ *See* Eissinger, *supra* note 45 at 38.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See* Tex GOV'T CODE ANN § 2001.175(c).

the court. The agency may change its findings and decision by reason of the additional evidence and shall file the additional evidence and any changes, new findings, or decisions with the reviewing court.⁴⁸

The quality of the evidence, quantity of the evidence, and the rules of evidence are major influences in Texas in determining whether the substantial evidence test has been satisfied.⁴⁹ The APA establishes a basic format for “fact” review by stating that findings, inferences, conclusions or decisions must be reasonably supported by substantial evidence looking at “reliable and probative evidence in the record as a whole.”⁵⁰ The “administrative findings, inferences, conclusions, or decisions” may not be “arbitrary” or “capricious.”⁵¹ If this standard has been met, the reviewing court should not reverse and render or reverse and remand the action.⁵² But even if the action is not supported by that standard, the APA requires that “substantial rights” be “prejudiced” before a reversal or remand is justified.⁵³

Although this standard of review is highly deferential to agency decision-making powers, there have been many occasions when the agency has failed to meet its light burden.⁵⁴ One obvious scenario illustrating when a court may limit agency action would be where the agency engaged in illegal conduct. In *City of Stephenville v. Texas Parks and Wildlife Department*, the plaintiffs alleged that the applicants, whose water permits were granted by the Water Commission, participated in bribery and improper influence.⁵⁵ The trial court agreed that the Commission engaged in bribery and also violated the Open Meetings Act.⁵⁶ The court reversed the

⁴⁸ Tex. Gov't Code Ann. § 2001.175 (West 2015).

⁴⁹ See R. Pierce, S. Shapiro & P. Verkuil, *Administrative Law and Process* § 7.3.1 (1985).

⁵⁰ TEX. GOV'T CODE ANN. § 2001.174(2)(E) (West 2015).

⁵¹ See *id.* § 2001.174(2)(F).

⁵² See *id.*

⁵³ See *id.* § 2001.174(2).

⁵⁴ See *City of Stephenville v. Texas Parks & Wildlife Dep't*, 940 S.W.2d 667 (Tex. App. 1996), writ denied (June 12, 1997).

⁵⁵ *Id.* at 671.

⁵⁶ *Id.* at 680.

Commission's decision and ordered that the applicants be required to re-file their permit application.⁵⁷

The court may also circumscribe the agency's authority to impose certain sanctions when the sanctions are believed to be beyond the agency's authority.⁵⁸ In such cases, the court may uphold the agency's decision but reverse the penalty and remand to the agency to enter a new order.⁵⁹

Lack of quality or quantity in the evidence may move a reviewing court to more closely examine the legal basis of an agency decision.⁶⁰ Also, illegally obtained evidence may be enough to require a higher standard of review.⁶¹ Evidence of failure to meet professional standards is not considered substantial in the absence of expert testimony when considering the individual's professional conduct, despite the individuals sitting on the board being professionals with knowledge of the standards.⁶² The board's testimony must be stated in the record; the court cannot be asked to read the minds of the expert board. The evidence must be known and the adverse party should be afforded the right to rebut it.⁶³

Case law reveals that one of the chief concerns of Texas courts when faced with contested cases on appeal is the Texas constitutional provision on separation of powers.⁶⁴ Unlike the federal Constitution where it is merely *implied* that there is a separation of powers, the Texas Constitution expressly forbids the combination of functions or

⁵⁷ 940 S.W.2d 667, 678-79 (Tex. App. 1996).

⁵⁸ See *Freightliner Corp. v. Motor Vehicle Bd. Of Tex. Dep't of Transp.*, 255 S.W. 3d 356 (Tex. App. 2008).

⁵⁹ See *id.*

⁶⁰ See *Texas State Bd. of Medical Examiners v. Gross*, 712 S.W. 2d 639 (Tex. App. 1986) (holding that a doctor's present qualification controlled, and therefore the record lacked the substantial evidence necessary to deny the doctor's requested transfer).

⁶¹ *Texas State Bd. of Medical Examiners v. Guice*, 704 S.W. 2d 113 (Tex. App. 1986) (holding that a doctor, caught with illegal drugs, was worthy of a separate proceeding as to whether his rights were violated after the doctor alleged he had been entrapped.)

⁶² See *id.*

⁶³ See *Dotson v. Texas State Bd. Of Medical Examiners*, 621 S.W.2d 921, 923 (Tex. 1981).

⁶⁴ See *City of Dallas v. Stewart*, 361 S.W.3d 562, 564 (Tex. 2012).

any one department exercising the powers of any other department.⁶⁵ Where the issue is not related to a constitutional taking or other right allegedly violated by a state agency, courts will defer to the agency and not usurp its power to issue decisions in contested cases.⁶⁶ This rule is illustrated in *Gerst v. Nixon*, where the Supreme Court held the legislature cannot grant the courts the power to issue charters, permits, or certificates because they are administrative functions.⁶⁷ If substantial evidence supports the agency decision, then the judicial inquiry is satisfied.⁶⁸

Even losing a professional or occupational license, which has long been considered a serious matter and subject to the constraints of due process, may be subject to the substantial evidence rule.⁶⁹ In *Texas Board of Dental Examiners v. Sizemore*,⁷⁰ a dentist complained of lack of substantial evidence to revoke his dental license. The evidence consisted of unnecessary prescriptions of Percodan (Oxycodone-Aspirin) and Tylox (Oxycodone-acetaminophen) to some patients and the dentist failed to keep proper records.⁷¹ Although reasonable persons could differ as to the quantum of evidence, the Supreme Court held that the evidence was sufficient to satisfy the substantial evidence standard.⁷² The Court stated, “Traditionally higher standards are not demanded because of more serious consequences; there is but one substantial evidence rule.”⁷³

⁶⁵ TEX. CONST. art. II, §1; *City of Dallas v. Stewart*, 361 S.W. 3d 562, 573-74 (Tex. 2012).

⁶⁶ See *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1966).

⁶⁷ *Id.* at 360.

⁶⁸ 411 S.W. 2d 350 (Tex. 1966).

⁶⁹ See *Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 118 (Tex. 1988).

⁷⁰ 759 S.W. 2d 114 (Tex. 1988).

⁷¹ *Id.* at 116.

⁷² *Id.*

⁷³ James R. Eissinger, *Judicial Review of Findings of Fact in Contested Cases Under Aptra*, 42 BAYLOR L. REV. 1, 45 (1990); see also *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 407 (1962) (per curiam) (“There is no place in the statutory scheme for one test of substantiality of evidence in reinstatement cases and another test in other cases.”). *Id.*

III. THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

In 1986, the Texas House of Representatives commissioned a study on the advantages and disadvantages of creating a central panel of administrative law judges.⁷⁴ The study was mainly concerned with the perception of unfairness due to regulatory agency employees overseeing their agency's contested cases.⁷⁵ The hearing officers may have already formed an opinion or bias against the respondent by the time a final agency decision was to be made. The study alluded to potential procedural due process problems and the need to protect those who deal with state agencies from arbitrary and unwise action.⁷⁶ The report concluded that an independent hearing officer system would introduce and ensure minimum standards of due process.⁷⁷ However, the report did not assert the need to *completely* remove decision-making power from the agency or restrict the agency from reversing the independent hearing officer system's decision only upon reversible error.⁷⁸ The report still found it critical to the overall workings of administrative agencies that the ultimate decision be determined by the respective regulatory agency.⁷⁹

In 1991, the Legislature responded to these findings by creating SOAH to be "comprised of 'independent' hearing officers to be utilized by all state agencies that did not employ at least one individual whose only duty was to preside as a hearing officer over contested cases" to SOAH.⁸⁰ Although there is no federal agency similar to

⁷⁴ For a discussion on SOAH's creation and history, see Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 119 (Spring 2005); Report on the Advantages and Disadvantages to the State Creating a Central Panel of Administrative Law Judges Before the Committee on the Judiciary, H.R. 69th Leg. Sess. (Tex. 1986) [hereinafter "House Report"].

⁷⁵ House Report at 98.

⁷⁶ *Id.* at 81-83.

⁷⁷ *Id.* at 98.

⁷⁸ *See id.*

⁷⁹ *Id.* at 83-100.

⁸⁰ Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. Nat'l Ass'n Admin. L. Judges.

SOAH, several states have comparable central hearing panels or agencies.⁸¹

A. Structure of SOAH

SOAH does not have a board or commission that governs its operation. The Chief Administrative Law Judge (hereinafter referred to as ALJ), appointed by the Governor and confirmed by the Texas Senate, is the head of the agency and responsible for its daily operations.⁸² SOAH ALJs preside in hearings covering a wide variety of subjects, including professional and vocational licensing and regulation, workers' compensation healthcare provider reimbursements, teacher and state employee benefits, financial and utility regulation, payment of taxes owed to the state and counties, and environmental and natural resources issues.⁸³

The judges are directly accountable to the chief administrative law judge and not subject to the direct or indirect influence of a referring agency.⁸⁴ This independence from outside influence is insured by the APA, since *ex parte* communications between a member or employee of a state agency who is assigned to render a decision or to make findings of facts and conclusions of law in a contested case and any person, party, state agency or representative of those entities is prohibited.⁸⁵

B. Duties and Legislative Delegation of Authority

The purpose of SOAH is to separate the adjudicative function from the investigative, prosecutorial, and policy-making functions

(2005)

available at <http://digitalcommons.pepperdine.edu/naalj/vol25/iss1/3>.

⁸¹ SOAH Self-Evaluation Rep. (2013), H.R. 591, § 1, 72nd Leg. Sess.(Tx.1991).<https://www.sunset.texas.gov/public/uploads/files/reports/State%20Office%20of%20Administrative%20Hearings%20SER%202013%2084%20Leg.pdf>.

⁸² TEX. GOV'T CODE ANN. § 2003.022(d) (West 2013).

⁸³ SOAH Self-Evaluation Rep., *supra* note 82 at 3.

⁸⁴ TEX. GOV'T CODE ANN. § 2003.022(a).

⁸⁵ *Id.* § 2001.061(a).

exercised by regulatory agencies.⁸⁶ For too long, administrative hearings involving state agencies were subject to charges of conflicts of interest because hearing examiners were often employed by the agency involved in the case before them.⁸⁷ In other words, SOAH exists solely to conduct contested case hearings and mediations; it does not have any other responsibilities. Its jurisdiction over agency contested cases was further bolstered by a 1993 Texas attorney general opinion that held an agency could not forego the services of a SOAH ALJ by a quorum of the members sitting as presiding officer at a contested hearing case.⁸⁸

The *Self-Evaluation Report* explains:

During FY2012, SOAH provided services to [forty-nine] state agencies. The number of cases handled for each agency varies widely. There are also one or more non-state parties involved in each case. These include individuals, corporations, local governments, and other entities. SOAH conducts hearings only in cases referred to it by state agencies or local government entities.⁸⁹

Although the TEC may bring a contested case to SOAH, there is no indication that this has ever occurred since at least 2008.⁹⁰

C. SOAH Contested Case Process

Unlike the TEC, private parties may not file cases with SOAH although cases can be referred to SOAH by a state agency on a request for a hearing submitted to the agency by a private party.⁹¹ An agency may commence the case itself or file the appropriate

⁸⁶ *Id.* §§ 2003.021(b)(1)-(2), (b) (4).

⁸⁷ See R. Pierce, S. Shapiro & P. Verkuil, *Administrative Law and Process* § 7.3.1 (1985).

⁸⁸ Tex. Att’y Gen. Op. No. DM-231 (1993) (holding that an agency could not forego the services of an SOAH ALJ by a quorum of the members sitting as the presiding officer at a contested case hearing and the legislative intent was to create an administrative judiciary independent of the agency who could objectively hear administrative disputes). (emphasis added).

⁸⁹ SOAH Self-Evaluation Rep., *supra* note 82, at 33-35.

⁹⁰ See *id.* at Exhibit 2, 3 (Note omission of TEC); § 571. 121.

⁹¹ 1 TEX. ADMIN. CODE §§ 155.7(a), 155.9(a)-(f) (2004)

pleadings and forms with SOAH in order to immediately grant SOAH jurisdiction over the case.⁹² Once the case is sent to SOAH, it will be assigned to an ALJ.⁹³ The ALJ is required to abide by applicable provisions in the APA and the referring agency's procedural rules.⁹⁴ If the referring agency does not have rules for its contested cases or if an agency does not have a rule on a specific issue, SOAH will simply, in whole or in part, substitute its own procedural rules as is necessary to address all of the issues in a proceeding.⁹⁵

Once the case is in SOAH's jurisdiction, the ALJ has authority to oversee discovery,⁹⁶ hold pre-hearing conferences with the parties,⁹⁷ issue subpoenas,⁹⁸ or refer the case to a mediated settlement conference or other appropriate alternative dispute resolution procedures.⁹⁹ An ALJ may also impose sanctions against a party or its representative for groundless motions, unnecessary delay, failure to obey an applicable rule, disallowing further discovery, and other violations that would impede a fair and impartial hearing.¹⁰⁰ At the conclusion of testimony, an ALJ can request that the parties submit legal memoranda on disputed issues and prepare and submit proposed findings of fact and conclusions of law.¹⁰¹

As to issues of fact, a finding may be inferred only by determination that the evidence preponderates in favor of its existence.¹⁰² Generally, evidence is improperly admitted if its admission would violate a specific evidence rule.¹⁰³ The APA provides that an objection may be made, but in order to preserve

⁹² *Id.* §§ 155.7 (b)-(c).

⁹³ TEX. GOV'T CODE ANN. § 2003.041 (West).

⁹⁴ *Id.*

⁹⁵ TEX. GOV'T CODE ANN. §§ 2003.050(a)-(b) (West 2013).

⁹⁶ 1 TEX. ADMIN. CODE §§ 155.29 (e)-(f), 155.31(g), (i)-(m), 155.56, 155.57 (2013).

⁹⁷ *Id.* § 155.33(a).

⁹⁸ *Id.* § 155.31(e).

⁹⁹ *Id.* § 155.33(d).

¹⁰⁰ TEX. GOV'T CODE ANN. § 2003.041 (West).

¹⁰¹ *See generally* 1 TEX. ADMIN. CODE §§ 155.15-60.

¹⁰² 1 TEX. ADMIN. CODE § 155.505 (2013).

¹⁰³ *See* Baylor Univ. Med. Ctr. V. Travelers Ins. Co., 587 S.W. 2d 501, 505 (Tex. Civ. App.-Dallas 1979), *writ denied NRE* (1979).

error, a party must make a timely objection, specify the evidence rule violated by the admission, and obtain an adverse ruling on its objection.¹⁰⁴

According to the APA, the State's evidence rules relating to "nonjury" civil cases apply to the formal hearing.¹⁰⁵ This application can be confusing because the evidence rules have been codified and include no rules specified to civil nonjury trials.¹⁰⁶ Many, if not most, of the evidentiary concerns addressed are important only to jury trials.¹⁰⁷ For example, Texas Rules of Evidence (TRE) 403 allows for exclusion of relevant evidence if the danger that it may lead to irrational or incorrect fact-finding *by jurors* substantially outweighs its probative value.¹⁰⁸ This rule may be an issue, for example, when a party wants to introduce an autopsy or graphic pictures into evidence.¹⁰⁹ An admission of such striking detail might leave jurors in shock and unable to concentrate on other relevant exhibits of evidence. However, in a formal hearing for a contested case, there are no jurors present.¹¹⁰ If an objection were made based on TRE 403, it would not preserve error.¹¹¹ The only possible way to preserve error based on TRE 403 is by arguing, for example, against the admission of "unduly repetitious" evidence as the rule's proscription against delay or cumulative evidence that may interfere with the presiding officers' ability to truly consider other evidence.¹¹²

A more serious consequence of the APA's adoption of nonjury rules of evidence is that it expands the scope of admissible evidence.

¹⁰⁴ See TEX. R. EVID. 103(a)(1); TEX R. APP. P. 33.1.

¹⁰⁵ For a general discussion on the APA's treatment of the Texas Rules of Evidence, see Chris Funderburg, *Evidence Law at SOAH*, 10 TEX. TECH. ADMIN. L.J. 423 (Spring 2009); TEX. GOV'T CODE ANN. § 2001.001(1) (West 2013).

¹⁰⁶ See W. Jeremy Counsellor, Professor, Baylor University School of Law, *Judicial Review of Evidentiary Decisions in Contested Case Hearings*, in *Advanced Administrative Law Course 1*, 2-3 (2006).

¹⁰⁷ See *id.*

¹⁰⁸ TEX. R. EVID. 403.

¹⁰⁹ See *id.*

¹¹⁰ See *Vaughn v. Johnson*, No. 7:98-CV-005-R, 2001 WL 912657, at *7 (N.D. Tex. Aug. 7, 2001).

¹¹¹ See *id.*

¹¹² TEX. GOV'T CODE ANN. § 2001.082 (West 2013).

There is essentially an “escape clause” created in the APA that allows evidence that would be inadmissible under the rules of evidence.¹¹³ For example, the APA allows evidence that would otherwise be *inadmissible* under those rules if deemed “necessary to ascertain facts not reasonably susceptible of proof,” or are not precluded by statute, or evidence upon which a “reasonably prudent person” would rely.¹¹⁴ Arguably, this provision allows for hearsay evidence not otherwise excepted from the TRE’s hearsay prohibition.¹¹⁵

Unless hearsay evidence fits into an exception described in the rules of evidence, a proper objection should exclude it from admission.¹¹⁶ The premise behind this exclusion is to prevent unreliable evidence from being reflected in the record.¹¹⁷ Its admission may otherwise create an unacceptable risk that jurors will confuse it with reliable evidence and then predicate incorrect verdicts on it.¹¹⁸ Exclusion of hearsay evidence is gravely important to the court system because this type of evidence—though unreliable—is often probative, and might therefore tempt jurors to consider it.¹¹⁹

Texas cases interpreting the escape clause support the view that the APA permits admission of un-excepted hearsay.¹²⁰ However, the evidence cannot be immaterial or irrelevant or unduly repetitious.¹²¹ Federal and state court decisions suggest that certain circumstances may be sufficient indicia of un-excepted hearsay evidence’s reliability if: 1) the declarant’s name and occupation are disclosed (if

¹¹³ See W. Jeremy Counseller, Professor, Baylor University School of Law, *Judicial Review of Evidentiary Decisions in Contested Case Hearings*, in *Advanced Administrative Law Course 1*, 2-3 (2006).

¹¹⁴ TEX. GOV’T CODE ANN. § 2001.081.

¹¹⁵ See W. Jeremy Counseller, Professor, Baylor University School of Law, *Judicial Review of Evidentiary Decisions in Contested Case Hearings*, in *Advanced Administrative Law Course 1*, 2-3 (2006).

¹¹⁶ TEX. R. EVID. 802-804.

¹¹⁷ See W. Jeremy Counseller, Professor, Baylor University School of Law, *Judicial Review of Evidentiary Decisions in Contested Case Hearings*, in *Advanced Administrative Law Course 1*, 2-3 (2006).

¹¹⁸ See *DePasquale v. Harrington*, 599 A.2d 314, 316 (R.I. 1991).

¹¹⁹ See *id.*, 599 A.2d. at 316.

¹²⁰ See *Tex. Dep’t of Pub. Safety v. Kimbrough*, 106 S.W.3d 747, 751 (Tex. App. 2003); *Tex. Dep’t of Pub. Safety v. Smith*, No. 05-95-01158-CV, 1997 Tex. App. LEXIS 2421, at *6 n. 4 (Tex. App.-Dallas May 5, 1997).

¹²¹ TEX. GOV’T CODE ANN. § (West 2013); TEX. R. EVID. 401.

relevant);¹²² 2) the declarant appears to be impartial, unbiased, and truthful;¹²³ 3) other admissible evidence supports the hearsay evidence and little probative evidence contradicts it;¹²⁴ 4) indications that the declarant is widely respected in the field or a source widely used in the field; 5) the evidence is not conclusory but is based on the relevant personal knowledge of the declarant and derived from procedures accepted in the field;¹²⁵ and finally, 6) indications that the hearsay evidence would fit within an accepted hearsay exception but for minor (i.e., not substantive) inconsistencies with the exception.¹²⁶

The escape clause emphasizes that reliable un-accepted hearsay evidence is admissible to prove a fact only upon a showing that the evidence is necessary to ascertain facts that are not reasonably susceptible to proof under the nonjury rules of evidence.¹²⁷ Whether these predicates are satisfied depends on whether the proponent of the hearsay evidence could obtain other proof to prove the fact and the cost of obtaining that other proof.¹²⁸ If it is determined, for example, that the un-accepted evidence is the most probative available, it should be admitted, because a fact is not reasonably susceptible to proof if its only proof is un-accepted hearsay.¹²⁹

Although this relaxed treatment of the rules of evidence may baffle some trial attorneys,¹³⁰ it is important to consider the *reason*

¹²² Richardson v. Perales, 402 U.S. 389, 403 (1971).

¹²³ *Id.* at 393, 403-04.

¹²⁴ Nat'l Council of Am.-Soviet Friendship, Inc. v. Subversive Activities Control Bd., 322 F.2d 375, 387-88 (D.C. Cir. 1963).

¹²⁵ Mayhew v. McLeod, C.A. No. 98-1271, 1998 R.I. Super., LEXIS 66, at *12 (R.I. Super. Ct. 1998) (confirming the validity of hearsay fishing records by their use by the federal government and virtually every state on the east coast engaged in fishery regulation).

¹²⁶ *In re Odessa Corp.*, 898 A.2d 1256, 1263 (Vt. 2006) (properly excluding a written statement about a disputed sale prepared by the store clerk after the fact and then introduced as a business record for not meeting exception requirements).

¹²⁷ TEX. GOV'T CODE ANN. § 2001.081 (West 2013).

¹²⁸ *See id.*

¹²⁹ C.T.S. Corp. v. Schoulton, 354 N.E.2d 324, 327 (Ind. App. 1976).

¹³⁰ Compared to military tribunal treatment of the evidence rules, the APA's application of the evidence rules may seem like a rigid adherence. *See generally* David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003).

for this treatment. As Justice John Powers noted in his manual for the training of Texas ALJs, the rendering of a contested case order is an “institutional decision.”¹³¹ The administrative process builds on the principle that each agency is equipped with “specialists,” much like a large medical clinic employs specialists who can often provide medical services superior to any individual physician by bringing in experts on an agency’s subject matter jurisdiction.¹³² Therefore, most agencies reject the idea of a lay decision-maker or jury trial where a strict application of the rules of evidence is necessary, and replace that setting with the intelligence and analysis of expertly trained personnel.¹³³

Critics may be offended by such a blurry separation of powers and argue that it creates an obstacle to fairness in administrative adjudications. But if every contested case were sent directly to a district court, the costs of defending the agency’s decisions in court would exponentially grow. Put simply, government spending would grow due to the inefficient use of administrative and judicial resources.

As to issues of law, the APA provides that a state agency must provide the ALJ with a written statement of its applicable policies and rules.¹³⁴ However, the “state agency may not attempt to influence the ALJ’s application of the law in a contested case, except by proper . . . legal argument.”¹³⁵

After analyzing and considering the evidence and legal arguments, the ALJ will issue a proposal for decision. The ALJ must base his or her findings exclusively on the evidence submitted in the written record.¹³⁶ The parties, however, may still submit any exceptions, objections, or other responses to the proposal for decision to SOAH and the referring agency, which possesses the final decision-making authority.¹³⁷ The ALJ, even at this point, has the power to review such

¹³¹ JOHN E. POWERS, AGENCY ADJUDICATIONS, 84-87 (Tex. A&M Press 1990).

¹³² Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, Vol. 1, § 8.6, 551-52 (Aspen Law & Business Co., 4th ed. 2002).

¹³³ *See id.*

¹³⁴ TEX. GOV’T CODE ANN. § 2001.058(e)(3) (West 2013).

¹³⁵ *See id.*

¹³⁶ 1 TEX. ADMIN. CODE §§ 155.7(a), 155.9 (a)-(f) (2013).

¹³⁷ *See id.*

documents and make changes to the original proposal sent to the referring agency.¹³⁸

D. The Referring Agency is the Final Decision-Maker

Prior to the creation of SOAH and for any current ALJ that is an employee of an agency, the ALJ had no power to bind state agencies by their proposals for decisions.¹³⁹ The agency could simply disregard with impunity an ALJ's findings in an agency's contested case.¹⁴⁰ After SOAH's inception, the legislature carefully calibrated a referring agency's final decision-making power by ensuring that the SOAH ALJ proposal for decision will be focal point of the agency's analysis in formulating its final order.¹⁴¹

The APA was modified when SOAH was created to provide that if an agency chooses to modify a SOAH ALJ proposal for decision, the agency must do so in writing and state the reason and legal basis for changing its order.¹⁴² In 1997, the legislature sharpened SOAH's ultimate say in the agency's decision by adding the following:

(e) A state agency may change a finding of fact or conclusion of law made by

the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided [to the ALJ by the agency] under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

¹³⁸ TEX. GOV'T CODE ANN. § 2001.058(d) (West 2013).

¹³⁹ *Hunter Indus. Facilities, Inc. v. Tex. Natural Res. Conservation Comm'n*, 910 S.W.2d 96, 102 (Tex. App.1995).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² TEX. GOV'T CODE ANN. § 2001.058 (e)(3) (West 2013).

(3) that a technical error in a finding of fact should be changed.¹⁴³

It is clear from the plain reading of the statute that an agency that merely follows the APA standard is no longer free to arbitrarily substitute its own judgment, including when the agency disagrees with how the ALJ weighed the evidence.¹⁴⁴ The standard restricts reversal of a finding of fact to “technical issues” only.¹⁴⁵ “Technical error” is ordinarily defined as “errors committed in the course of trial which would not have prejudiced a party and hence are not grounds for reversal.”¹⁴⁶ Hence, the only findings of fact amenable to change are those that do not affect the substantive rights of a party. It is also clear that the legislature meant for the agency to be the ultimate decision-maker on pure issues of law and the construction of the meaning of the agency’s own statutes and rules.¹⁴⁷ The statute expresses that the SOAH ALJ must “apply” the agency’s statutory interpretation or rule to the findings of underlying fact when making a decision.¹⁴⁸

This approach is consistent with the court’s judicial review approach of awarding substantial deference to agency’s interpretation of the law when challenged under substantial

evidence judicial review.¹⁴⁹ It is the state agency, not the ALJ, that is charged with the duty to consistently and uniformly interpret and apply the public policy of this state.¹⁵⁰

IV. THE TEXAS ETHICS COMMISSION

As its name denotes, the Texas Ethics Commission (“TEC”) administers and enforces the state’s ethics laws, including statutes that govern campaign finance, the conduct of state officers and

¹⁴³ 1997 Tex. Sess. Law Serv. § 1 (West) (codified as amended at TEX. GOV’T CODE ANN. § 2001.058 (e)(1)-(3). (West 2008).

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ Black’s Law Dictionary, Pocket ed. (4th ed. 1996).

¹⁴⁷ TEX GOV’T CODE ANN. § 2001.058(e)(1) (West 2013).

¹⁴⁸ *Id.*

¹⁴⁹ *See e.g.* State v P.U.C. of Tex., 883 S.W.2d 190, 195-196 (Tex. 1994).

¹⁵⁰ *See e.g. id.*

employees, candidates for and holders of state and local elected offices, political committees, lobbyists and, to some extent, political parties.¹⁵¹ Currently forty-one states have ethics commissions and most were established in the 1970s or earlier largely in reaction to the national Watergate scandal.¹⁵² While Texas laws were revised following Watergate and some homegrown scandals,¹⁵³ Texas joined a second wave of state ethics commission creations when it was established by a state constitutional amendment on November 5, 1991.¹⁵⁴

Texas history reveals a fickle affair between the state and its campaign finance and lobby laws, as the regulation of such state government actors had taken on many forms before the TEC's 1991 debut.¹⁵⁵ In the early 1900s, for example, lobbying was considered to be a crime in Texas with a penalty ranging from a fine "not less than two hundred dollars nor more than two

thousand dollars."¹⁵⁶ The first significant change occurred in 1937 when the Texas House of Representatives adopted rules mandating that persons testifying before one of its legislative committees register

¹⁵¹ TEX. CONST. art. III, § 24a; *See generally* TEX. GOV'T CODE ANN. §§571.061 (West 2013).

¹⁵² *See* Kayla Crider and Jeffery Milyo, *Do State Ethics Commissions Reduce Political Corruption? An Exploratory Investigation*, 3 UC IRVINE L. REV. 717 (August 2013).

¹⁵³ *See* Sam Kinch, Jr., *Sharpstown Stock-Fraud Scandal*, TEX. ST. HIST. ASS'N,

<http://www.tshaonline.org/handbook/online/articles/mqs01> (last visited September 23, 2014) (discussing the infamous scandal involving state lawmakers who made "profitable quick-turnover bank-financed stock purchases in return for the passage of legislation desired by the financier").

¹⁵⁴ Tex. S.J. Res. 8, 72d Leg., R.S., 1991 Tex. Gen. Laws 3520, 3520-21 (amending the Constitution to create the Texas Ethics Commission); *see* Tex. Const. III, §24a (providing for the Texas Ethics Commission).

¹⁵⁵ For a general discussion of the state's ethics laws history, *see* Ross Fischer and Jack Gullahorn, *The Advent of State and Local Lobby Regulations and the Legal and Ethical Considerations for Attorneys*. 3 ST. MARY'S L.J. 32 (2013).

¹⁵⁶ *Cf.* Act to Define and Punish Lobbying, 30th Leg., R.S., ch.79, § 4, 1907 Tex. Gen. Laws 162, 163 (providing a monetary fine and jail time for violation of lobbying statute) (repealed 1957).

and provide more information before testifying.¹⁵⁷ The state did not repeal the criminalization of lobbying per se until some twenty years later.¹⁵⁸ Following the Sharpstown scandal of 1971,¹⁵⁹ the Legislature created the state's first full lobby registration law, which established registration-triggering mechanisms based on direct communication, compensation and expenditures, as well as the enumeration of specific exceptions¹⁶⁰ and disclosure requirements.

Finally, and shortly after Lonnie "Bo" Pilgrim, an East Texas chicken magnate, waved \$10,000 campaign contribution checks at eight state senators on the Senate Floor during a heated debate over the state's workers' compensation laws, Texas created the Commission.¹⁶¹ The objective of the legislation was to enable the Commission to eliminate opportunities for undue

influence over elections and governmental actions; fully disclose information related to expenditures and contributions for elections and for petitioning (lobbying) the government; enhance the potential

¹⁵⁷ Tex. H.R. Rule 7 §41, H.S.R. 9, 54th Leg., R.S., 1955 H.J. of Tex. 16, reprinted in Rule of the House, Texas Legislative Manual 175-76 (1955).

¹⁵⁸ Representation Before the Legislature Act, 55th Leg., 1st C.S., ch.9, 1957 Tex. Gen. Laws 17, repealed by Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096, repealed by Act of Sept. 1, 1985, 69th Leg., R.S. ch. 479, § 224, 1985 Tex. Gen. Laws 1652, 1719; *United States v. Harriss*, 347 U.S. 612 (1954) (holding that the federal Lobbying Regulation Act as constitutional but narrowing its scope).

¹⁵⁹ See Sam Kinch, Jr., *Sharpstown Stock-Fraud Scandal*, TEX. ST. HIST. ASS'N, (September 23, 2014)

<http://www.tshaonline.org/handbook/online/articles/mqs01> (discussing the infamous scandal involving state lawmakers who made "profitable quick-turnover bank-financed stock purchases in return for the passage of legislation desired by the financier"). *Id.*

¹⁶⁰ Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096, repealed by Act of Sept. 1, 1985, 69th Leg., R.S., ch. 479, § 224, 1985 Tex. Gen. Laws 1652, 1719.

¹⁶¹ See *The 1990 Bum Steer Awards*, TEXAS MONTHLY (January 1990),

<http://www.texasmonthly.com/content/1990-bum-steer-awards> (reporting on Lonnie Pilgrim's contributions). See generally Act of Jan. 1, 1992, 72d Leg., R.S., ch. 304, 1991 Tex. Gen. Laws 1290 (chronicling amendments and expansions on then-existing lobby laws), amended by Act of Sept. 1, 1995, 74th Leg. R.S., ch.996, § 4.03, 1995 Tex. Gen. Laws 4999 (current version at Gov't §305.003 (West 2012)).

for individual participation in electoral and governmental processes; and to ensure the public's confidence and trust in its government.¹⁶²

A. Constitutional Body and Appointment Process

The TEC was carefully established to achieve bipartisan credibility.¹⁶³ The state constitution provides that the agency shall consist of eight members.¹⁶⁴ Four are appointed by the Governor as follows: one from each of the separate lists submitted by Senate Republicans, Senate Democrats, House Democrats and House Republicans.¹⁶⁵ Two are appointed by the Lieutenant Governor as follows: one from each of the separate lists submitted by Senate Republicans and Senate Democrats.¹⁶⁶ Lastly, two are appointed by the Speaker of the House of Representatives as follows: one from each of the separate lists submitted by House Republicans and House Democrats.¹⁶⁷ In this way, the appointing authorities are constitutionally required to split their appointments between each political party so the Commission is at all times evenly divided between Republicans and Democrats.¹⁶⁸

B. Duties and Delegation of Authority

Although created in the Texas Constitution, other than setting legislative per diem pay and recommending legislative salaries,¹⁶⁹ the

¹⁶² TEX. GOV'T CODE ANN. § 571.001 (West 2013).

¹⁶³ Texas Ethics Commission Sunset Final Report with Legislative Action, *Agency at a Glance*, 7 (July 2013) [hereinafter referred to as the "TEC Sunset Report"].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ TEX. CONST. art. III, § 24a (1876). To reach this result, however, the state's constitution does not use the words "Republican" and "Democrat"; it uses the neutral phrase "from each political party required by law to hold a primary," which only describes two major parties.

¹⁶⁸ Texas Ethics Commission Sunset Final Report with Legislative Action, *Agency at a Glance*, 7 (July 2013).

¹⁶⁹ TEX. CONST. art. III, § 24a, cl. (e).

Constitution leaves the Commission's primary duties to be prescribed by the Legislature.¹⁷⁰

The [Commission's] major functions include: maintaining financial disclosure reports and making them available to the public;¹⁷¹ investigating ethics and campaign finance complaints¹⁷² and assessing penalties when warranted;¹⁷³-issuing advisory opinions interpreting laws under the agency's jurisdiction [and specified criminal statutes];¹⁷⁴ providing information and assistance to stakeholders to help them understand their obligations under campaign finance and ethics laws;¹⁷⁵ and registering persons engaged in lobbying at the state level and requiring periodic lobby activity reports.¹⁷⁶

The agency shall enforce all non-penal or civil penalty laws under its jurisdiction.¹⁷⁷ Violations of most statutes under the agency's purview also entails potential criminal prosecution by appropriate prosecuting attorneys¹⁷⁸ depending on the character of the offense, and some authorize civil causes of action, that may result in liability to the state¹⁷⁹ or certain competitors in the electoral process.¹⁸⁰

The lynch-pins of the government-integrity laws enforced by the Commission are Chapter 305 of the Texas Government Code Annotated, relating to the registration, regulation, and reporting of lobbyists¹⁸¹ and Title 15 of the Texas Election Code Annotated,

¹⁷⁰ TEX. CONST. art. III, § 24a, cl. (d).

¹⁷¹ TEX. GOV'T CODE ANN. §§ 571.001(32);, 571.0031; , 571.066 (West 2013); *See generally* TEX. ELEC.TION CODE ANN. §254 (West 2013).

¹⁷² *See* Tex. Gov't Code Ann. §§571. 121-571.142 (West 2013) (putting forth TEC "Complaint Procedures and Hearings" regulations).

¹⁷³ *See* Gov't §§571.171-571-177 (referring TEC "Enforcement" regulations).

¹⁷⁴ *See* Gov't § 571.091-571.098 (defining scope TEC "Advisory Opinions").

¹⁷⁵ *Id.* §571. 071.

¹⁷⁶ *TEC Sunset Report* at 7; *see* TEX. GOV'T CODE ANN. § 571.001 (West, Westlaw through 2015 Legis. Sess.).

¹⁷⁷ TEX. CODE GOV'T ANN. § 571.061 (West 2013); *TEC Sunset Report* at 8.

¹⁷⁸ TEX. GOV'T CODE ANN. § 571.171 (West, 2015).

¹⁷⁹ TEX. ELEC. CODE ANN. § 254.232 (West, 2015) .

¹⁸⁰ *Id.* § 254.231.

¹⁸¹ *See* TEX. GOV'T CODE ANN. ch. 305 (West, Westlaw through 2015 Legis. Sess.) (putting forth lobby regulations); TEX. ADMIN. CODE ANN. tit. 1, ch. 34 (2014) (Tex. Ethics Comm'n, Regulation of Lobbyists) (providing further regulation).

regulating money used in elections. These statutes and their enforcement proceedings seek to create a fair, level playing field for those who pay others or make expenditures to petition the government for legislative action, establish rules to prevent and punish corruption and make the public aware of money used in political campaigns.¹⁸² With these functions in mind, the Legislature has authorized the agency, subject to oversight,¹⁸³ to receive and “investigate complaints, hold enforcement hearings, issue orders, impose civil penalties, refer issues for criminal prosecution, and take action against a lobbyist’s registration.”¹⁸⁴

Importantly, the agency may also issue advisory opinions about the laws under its jurisdiction¹⁸⁵ and two chapters of the Penal Code, including laws against bribery and abuse of office.¹⁸⁶ “The purpose of a TEC advisory opinion is not to make specified conduct illegal [but to] provide those who *reasonably rely* on the opinion a defense in an action to impose criminal or civil liability.”¹⁸⁷ In order to satisfy the “reasonable reliance” requirement, the written opinion must “relat[e] to [(1)] the provision of the law the person is alleged to have violated or . . . (2) a fact situation *substantially similar* to the fact situation in which the person is involved.”¹⁸⁸ Since issuing its first opinion in 1992, the Commission has issued approximately five hundred advisory opinions, and the number issued annually has remained

¹⁸² See TEX. GOV’T CODE ANN. § 571.001 (West, 2015) (defining the purpose of TEC as “protect[ing] the constitutional privilege of free suffrage by regulating elections and prohibiting undue influence while also protecting the constitutional right of the governed to apply to their government for redress of grievances.”).

¹⁸³ TEX. GOV’T CODE ANN. § 571.022 (West, Westlaw through 2015 Legis. Sess.).

¹⁸⁴ *TEC Sunset Report* at 8.

¹⁸⁵ TEX. GOV. CODE ANN. § 571.061 (West, 2013).

¹⁸⁶ TEX. GOV’T CODE ANN. § 571.091 (West 2015).

¹⁸⁷ *Tex. Ethics Comm’n v. Goodman*, No. 2-09-094-CV, 2010 WL 323544 at *3 (Tex. Ct. App. Jan. 28, 2010) (emphasis added); TEX. GOV’T CODE ANN. § 571.097 (West, 2015).

¹⁸⁸ *Goodman*, 2010 WL 323544 at *4; see also TEX. GOV’T CODE ANN. § 571.091 (West, 2015). (A legislator who reasonably relied on an advisory opinion of the Texas Ethics Commission was not liable for a \$10,000 civil penalty for converting political contributions to personal use).

relatively consistent over time, ranging from “five to ten per year during the last decade”.¹⁸⁹

The TEC has the authority to employ its own staff, which typically averages between 33 to 36 staff positions, including attorneys.¹⁹⁰ The “[C]ommission . . . may delegate [to staff] a[ny] power conferred on it . . . except for any power requiring a vote of the Commission; rulemaking authority; or the authority to issue advisory opinions.”¹⁹¹ The Commission, however, is not prohibited from using independent contractors “to carry out . . . [these] rules, standards or orders, . . . excluding any enforcement authority.”¹⁹²

C. The TEC Sworn Complaint Process

One of the most important enforcement authorities given to the agency is the ability to conduct a sworn complaint proceeding, which may become a contested case. “Unlike many state agencies with enforcement authority, the full . . . Commission is involved in developing proposed enforcement actions and sitting as final judge to take action on sworn complaints.”¹⁹³

“Any Texas resident or real property owner can file a sworn complaint with the Commission alleging a violation of a law enforced by the agency¹⁹⁴. . . .The process begins with the executive director determining whether the Commission has jurisdiction over the matter” addressed in the complaint.¹⁹⁵ This entails determining whether the complaint meets the form requirements of the statute,¹⁹⁶ including a determination that the complaint states facts which if true would constitute a violation.¹⁹⁷

¹⁸⁹ *TEC Sunset Report* at 9.

¹⁹⁰ *Id.* at 8.

¹⁹¹ Tex. Gov’t Code Ann. § 571.075 (West, 2015).

¹⁹² TEX. GOV’T CODE ANN. §§ 571.075-076 (West,2015); *see* TEX. GOV’T CODE ANN. § 571.075 (West 2015).

¹⁹³ *See TEC Sunset Report* at 2.

¹⁹⁴ TEX. GOV’T CODE ANN. §571.122(a)(7)(b-1) (West, 2015).

¹⁹⁵ *TEC Sunset Report* at 19

¹⁹⁶ *Id.* §571.123 (West, 2015).

¹⁹⁷ TEX. GOV’T CODE ANN. § 571. 122(d) (West,2015).

If the alleged violation is minor, the executive director can simply ask the respondent (i.e., the person alleged by the complaint to have committed a violation) for “assurance of voluntary compliance.”¹⁹⁸ In other words, a private reprimand. For more serious issues, the “TEC staff prepares a report for the full Commission for consideration with staff during a closed preliminary review.”¹⁹⁹ During the preliminary review session, staff may seek more information, propose an “agreed order”, or resolve the complaint through “assurance of voluntary compliance.”²⁰⁰

If the respondent refuses to sign an “agreed order” where it is deemed the appropriate action or refuses to cooperate at all, the Commission may elect to hold a closed preliminary review hearing.²⁰¹ In preparation for this hearing, the Commission may subpoena necessary witnesses, including but not limited to the complainant (i.e., the person who submitted the sworn complaint) or any persons involved in preparing the complaint to attend the hearing for more fact-finding.²⁰² However, the Commission is not required to subpoena such witnesses even upon request of the respondent.²⁰³

The preliminary review hearing may result in resolving the complaint or dismissal due to insufficient evidence or no credible evidence of violation.²⁰⁴ But if the matter is *not* resolved, it will be taken up for consideration at a formal hearing, either because the Commission determines that there is credible evidence of a violation or because it determines there is insufficient credible evidence but desires to move to the formal hearing stage to engage the full discovery process.²⁰⁵

¹⁹⁸ See *TEC Sunset Report* at 19.

¹⁹⁹ *Id.*; TEX. GOV'T CODE ANN. §§ 571.1242-571.1244 (West, 2015).

²⁰⁰ TEX. GOV'T CODE ANN. §§ 571.1242(d), 1243 (West, 2015).

²⁰¹ *Id.* §§ 571.124-571.125(a).

²⁰² *Id.*

²⁰³ Gov't § 571.126

²⁰⁴ *Id.*

²⁰⁵ TEX. GOV'T CODE ANN § 571.126(c) (West, 2015).

D. The Formal Hearing Process

A formal hearing to enforce a law under the Commission's jurisdiction differs substantially from the typical SOAH case in that it is governed regarding various issues and procedures by the Commission's enabling act,²⁰⁶ the APA,²⁰⁷ and the Texas Open Meetings Act.²⁰⁸ There is no explicit requirement or authorization in the Commission's enabling act for its formal cases to be heard by the State Office of Administrative Hearings (SOAH).²⁰⁹ Currently, Section 571.132(a), Government Code, *implies* that at least some Commission formal hearings may be done by SOAH.²¹⁰ Also, SOAH's enabling act provides that the agency "shall conduct all administrative hearings in contested cases under Chapter 2001 that are before a state agency that does not employ an individual whose only duty is to preside as a hearings officer over matters related to contested cases before the agency."²¹¹ The Commission does not employ anyone whose sole job is to act as an administrative judge.²¹²

During its 2013 regular legislative session, the Texas Legislature passed a "sunset bill" (*hereinafter* the "sunset bill"),²¹³ for the TEC, which would make substantial changes to its contested case proceedings. However, the Governor subsequently vetoed the bill for unrelated issues.²¹⁴ A sunset bill is legislation proposed to enact recommendations following extensive review by the Sunset Advisory Commission (*hereinafter* the SAC), an agency of the Legislature.²¹⁵ The SAC's main function is to evaluate the effectiveness of a state agency based on whether its operations meet the respective agency's mission and goals while also exercising fiscal prudence.²¹⁶ The term

²⁰⁶ *Id.* §§ 571.129-571.135.

²⁰⁷ *Id.* § 571.139(c).

²⁰⁸ *Id.* § 571.139(b).

²⁰⁹ *See Id.*

²¹⁰ *Id.* § 571.139(a).

²¹¹ TEX. GOV'T CODE ANN. § 2003.021(b)(1).

²¹² *Id.*

²¹³ S.B.219, 83d Leg; S.Res (Tex. 2013).

²¹⁴ S.B.219, 83d Leg; S.Res (Tex. 2013) (veto message of Governor Perry).

²¹⁵ *See generally* TEX. GOV'T CODE ANN. §§ 325.00-325.023 (West,2015).

²¹⁶ *Id.* § 325.011.

“sunset” comes from the threat that if the legislation fails to become law, a statute will require its’ expiration.²¹⁷

The TEC sunset bill, in its enrolled version,²¹⁸ recommended changes to the TEC’s treatment of contested cases by clarifying that the TEC has the authority (but is not required) to transfer cases to SOAH. Thus, limiting the involvement of the TEC’s commissioners in its preliminary hearing process. The bill, for most of its legislative existence, also contained a provision to repeal the historical standard of judicial review of TEC’s contested cases; which is *de novo*.²¹⁹ However, that provision was later removed on the House floor despite being approved by the entire Texas Senate and included in the House Committee version of the bill.²²⁰

In apparent response to a recommendation of the SAC, the TEC adopted an administrative “venue” rule that provides for its formal cases to be heard by SOAH or the Commissioners themselves, at the option of the agency.²²¹ For further clarification, the Sunset legislation, if enacted, would have expressly authorized the Commission to send its contested cases to SOAH.²²² Generally, a state agency may choose to add its own rules regarding procedure and evidence.²²³ Therefore, in order to fully ascertain the rules governing the process of proof at a TEC contested case hearing, it is necessary to examine the APA, the TEC’s enabling statutes, and the relevant agency rules.²²⁴ While the Commission is directed by statute to “adopt rules governing discovery, hearings, and related

²¹⁷ *Id.* § 325.017; *But see* Tex. CONST. ART. III, § 24(a) (reasoning that the TEC is a constitutional body. Therefore, failure of its sunset legislation alone could not end its existence).

²¹⁸ *TEC Sunset Report supra* note 164.

²¹⁹ *Id.*

²²⁰ *See* S.B. 219, Conf. Comm Rep., Section by Section Analysis (Tex. 2013) <http://www.lrl.state.tx.us/scanned/83ccrs/sb0219.pdf#navpanes=0>.

²²¹ TEX. ADMIN. CODE tit. 1, § 12.117 (2013).

²²² *House Report; supra* note 77, at 13.

²²³ TEX. GOV’T CODE ANN. § 2001.058(e)(1)-(3), *TEC Sunset Report supra* note 164 at 22.

²²⁴ *See Id.*

procedures,”²²⁵ critics say it has never complied with the full scope of this statutory duty.²²⁶ The Sunset Bill directed the Commission to promulgate rules for these matters in order to avoid any ambiguities in the process.²²⁷

In accordance with the APA, the Commissioners are prohibited from engaging in any *ex parte* communication with the respondent, a witness, or party to the complaint.²²⁸ Additionally, the agency is authorized to carry out certain civil procedures²²⁹ such as issuing subpoenas to necessary witnesses or documents and examining witnesses that directly relate to a sworn

complaint.²³⁰ If a person to whom a subpoena is directed refuses to appear, refuse to answer inquiries, or fail or refuses to produce books, records, or other documents that are under the person’s control when the demand is made, the Commission has the authority to report that fact to a district court in Travis County.²³¹ The district court can enforce the subpoena by attachment proceedings for contempt in the same manner as the court enforces a subpoena issued by the court.²³² Also, if a respondent refuses to answer any questions before the Commission at the formal hearing, the Commission is permitted to draw inferences adverse to the respondent that support the allegations in the sworn complaint.²³³

²²⁵ TEX. GOV’T CODE ANN. § 571.131(c) (West 1993).

²²⁶ TEX. ADMIN. CODE ANN. tit. 1, §12.13 (representation by counsel), §12.15 (appearance of complainant), §12.21 (Notice), 12.23 (hearing in respondent’s absence), §12.25 (waiver of hearing), §12.27 (deadline extension), §12.29 (subpoenas), §12.117 (venue), §12.119 (dismissal where evidence is insufficient)(West 2015).

²²⁷ S.B.219, 83d Leg; S.Res (Tex. 2013).

²²⁸ TEX. GOV’T CODE ANN. § 200.061(a) (West 2013).

²²⁹ TEX. GOV’T CODE ANN. § 2001.091 (West 2013).

²³⁰ TEX. TECH. ADMIN. L.J., *supra* note 106, at 17; TEX. GOV’T CODE ANN § 2001.001(1); *see also supra* text accompanying note 106.

²³¹ TEX. GOV’T CODE ANN. §§ 571.137(a) (West 2003),§ 2001.201 (West 1993).

²³² *See generally* Pelt v. State Bd. of Ins., 802 S.W.2d 822, 827, Sinclair v. Sav. & Loan Comm’r of Tex., 696 S.W.2d 142.

²³³ *In re* Michael Quinn Sullivan, Texas Ethics Commission Final Order, (hereinafter referred to as “*The Order*”), *see* Andrews v. Texas Department of Health, 2007 WL 486488 (provides example of how this presumption is applied in administration proceedings).

If the Commission finds that a violation within the jurisdiction of the Commission has occurred, it may impose a civil fine of no more than five thousand dollars or three times the “amount at issue”, whichever is greater²³⁴ It may also issue a “cease and desist” letter or refer the matter for criminal prosecution.²³⁵

The TEC process is unusual for Texas state agencies. At other Texas state agencies, the process typically starts with developing an agreed order without the full governing board; if, after investigation, the staff believes that grounds exist for enforcement action.²³⁶ There may even be informal discussions with the respondent and a subset of agency board members.²³⁷ However, if the matter is not resolved beyond this point, the state agency most likely sends the contested case to SOAH for a formal hearing.²³⁸

Some critics of the TEC process have noted that because the Commission is involved from start to finish, the Commission may be biased by the time the matter reaches a formal hearing.²³⁹ The agency may be partial to a particular set of facts it developed without hearing all sides; resulting in unfair decision-making. The sunset legislation acknowledged these concerns by proposing to eliminate any Commissioner’s involvement in the preliminary review of a sworn complaint and reducing the number of Commissioners involved in the preliminary review hearing.²⁴⁰ Until the Sunset bill reached the House floor, the legislation also proposed to repeal the statute requiring *de novo* review in favor of the substantial evidence rule.²⁴¹ This particular proposal would have greatly altered the way in which courts currently review the agency’s final orders in contested cases and strengthened the agency’s hand in enforcing state ethics laws.²⁴²

²³⁴ *The Order*.

²³⁵ *Id.*

²³⁶ *See generally*, FISCHER & GULLAHORN, *supra* note 156 at 23.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See generally* Crider and Milyo, *supra* note 153 at 23. *Texas Public Ethics Legislation: A Proposed Statute*, 50 TEX. L. REV. 931, 967 (1972).

²⁴⁰ *TEC Sunset Report*, *supra* note 164, at 25.

²⁴¹ Conf. Comm Rep. , Section by Section Analysis. *supra* at note, 219 at 32.

²⁴² *Id.*

E. Judicial Review of TEC Formal Hearing Decisions

A respondent who wishes to appeal a decision made by the TEC is able to do so in a Travis County district court or where the respondent resides.²⁴³ The court that reviews the appeal *de novo*, is required to try all issues of *fact* and *law* in the manner applicable to other civil suits in the state and may not admit into evidence the fact of prior action by the commission or the nature of that action, *except* for the purposes of establishing jurisdiction.²⁴⁴

In essence, the phrase *de novo* judicial review is a misnomer. There is no review of the agency's action since the process began, and the agency's decision is vacated.²⁴⁵ A party

may even demand a jury trial, which is virtually unheard of in administrative proceedings.²⁴⁶ This judicial review standard is recognized in both the APA and the agency's enabling statutes.²⁴⁷

Texas lawmakers have continuously preferred *de novo* judicial review for the TEC.²⁴⁸ This preference does not seem to be a partisan issue. In the most recent legislative session, two state representatives from completely opposite sides of the political spectrum engaged in a colloquy before offering an amendment, which affirmed the use of *de novo* judicial review, rather than substantial evidence review, for TEC contested case decisions.²⁴⁹ Both lawmakers expressed concern

²⁴³ TEX. GOV'T CODE ANN. § 571.133(a) (West, 2013).

²⁴⁴ See *id.* §571.133(d), *Empower Texans, Inc., v. Tex. Ethics Comm'n.*, 2014 WL 1366442 (Westlaw).

²⁴⁵ See *Southwestern Bell Tel. v. Public Util. Comm'n.*, 571 S.W.2d 503 at 509 (Tex. 1978).

²⁴⁶ TEX. GOV'T CODE ANN. § 2001.173(b), see generally *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n.*, 430 U.S. 442 (1977) (holding that a civil jury trial was not

available to a company that was fined by Occupational Safety and Health Review Commission).

²⁴⁷ See TEX. GOV'T CODE ANN. §§2001.173(b), 571.133(d) (West, 2013).

²⁴⁸ Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH ADMIN. L.J. 287, 300 (2006).

²⁴⁹ Summary of Enacted Bills, 84th Legislative Session by Texas Ethics Commission, (September 9, 2015), <https://www.ethics.state.tx.us/whatsnew/leg2015.html>

about “abridging an individual’s right to a trial by jury”²⁵⁰ where First Amendment rights are at stake.²⁵¹ One lawmaker even acknowledged that *de novo* review would “make it harder” on the TEC to enforce its decisions, but it is worth the cost to the agency when considering Free Speech rights.²⁵² He also expressed concern over ending a person’s “political career” due to a serious alleged ethics violation and never having a fair day in court to rebut the decision.²⁵³ Yet, the legislature has repeatedly approved substantial evidence review for courts to follow when reviewing other agencies’ decisions.²⁵⁴ It would be difficult to imagine that a contested case decision from one of these agencies has not been the cause of ending a person’s career. Moreover, the legislation directed the TEC to create precise rules for conducting its contested case hearings and limited the Commissioner’s involvement until the formal hearing in order to ensure more due process for affected parties. These changes, even taken as a whole, were not enough to persuade the legislature to repeal *de novo* judicial review for this agency.²⁵⁵

V. CONCLUSION

It is important to remember that other state agencies regulate occupations and handle property rights issues.²⁵⁶ These decisions are as important to the affected parties as the decisions of the TEC are to the politicians and lobbyists it regulates. Most agency decisions, however, are reviewed using the substantial evidence rule.²⁵⁷ If a person has been injured by *any* agency’s contested case decision, that person would most likely choose *de novo* over substantial evidence review for their appeal—if given the choice. No reasonable person

²⁵⁰ See videotape: *Chamber Session* (Texas House of Representatives March 30, 2013) (on file with Granicus) beginning at 3:32:00 http://tlchouse.granicus.com/MediaPlayer.php?view_id=20&clip_id=5123.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Schenkkan, *supra* note 16

²⁵⁵ *Id.*

²⁵⁶ TEX. GOV’T CODE ANN. § 2001.058(e)(1)-(3).

²⁵⁷ See generally Crider and Milyo *supra* note 153 at 23. *Texas Public Ethics Legislation: A Proposed Statute*, 50 TEX. L. REV. 931, 967 (1972).

would want to compete with the deferential standard given to a regulatory agency from the very outset of the case. The questions become: are the interests of politicians and lobbyists more important than the rights of someone who has been adversely affected by another agency's decisions; if the application of the substantial evidence rule can be explained by a preference for efficiency in the use of administrative and judicial resources; if so, why would the same efficiency not be preferred in cases involving participants in the political process; and is it that lawmakers prefer the protection of *de novo* review versus substantial evidence review?

There is no reason to believe that the United States Constitution explicitly requires *de novo* review of an agency decision affecting First Amendment rights. Assuming an agency's procedures are sufficiently defined by its statutes and rules to provide fair notice and an opportunity for a hearing before an unbiased finder of fact with some level of judicial review, due process should be sufficiently served. On the other hand, it is certainly within the prerogative of the legislature to balance protection of First Amendment activities with the public's interest in preventing corruption and having knowledge about government functioning and elections in favor of the former by concluding that *de novo* review is justified for TEC contested cases.

If the TEC's contested case proceedings are to be brought under the substantial evidence rule—that is, if the agency's power is to be strengthened, its decisions given greater deference and greater efficiency promoted—there must be additional changes in the way its cases are handled. Those changes should start with the Sunset recommendation of the agency adopt more detailed procedural rules and that TEC commissioners be removed from the early stages of complaint resolution in order to ensure an unbiased tribunal at the formal hearing stage. In addition, the agency needs to actively pursue more robust discovery in preparation for the formal hearing so that an adequate record can be made prior to decision and review. Those changes could be made, to some extent, by simply moving the process to SOAH and deferring to SOAH's procedural rules. This should be done consistently and not on a case-by-case basis.

Without these important changes, *de novo* review is entirely appropriate. The current system, although it affords due process, is not as tightly structured, as one would expect if the Sunset recommendations had been adopted. In addition, the combination of the APA's relaxed application of the rules of evidence and civil

procedure with the TEC's less structured approach, argues for courtroom treatment regarding contested cases that seek to resolve important issues about how our political system should function. Therefore, an affected party who truly believes he has adhered to state law on these issues should be unafraid to face a more strict application of evidence and procedural rules, such as the substantial discovery demands necessary to ascertain the truth of the matter asserted.

Favoring *de novo* review sets forth the importance of the rights and interests involved to the very fabric of governmental functioning; while balancing presently absent detailed procedural reforms. It may be a less efficient use of administrative and judicial resources; however, is necessary in the absence of a consensus among lawmakers to strengthen the TEC's enforcement of our state's ethics laws.