



State Agencies Unbound

In Support of House Bill 3662

by Kathleen Hunker, *Policy Analyst*

Every law, whether crafted by statute or judicial decree, carries with it a degree of ambiguity. Language is imprecise, and even the most tightly bound drafting will come across a combination of facts that resembles the proscribed conduct but does not match exactly. Other times, the haziness is by design because lawmakers could not meticulously predict how the undesirable behavior would arise or because they feared that enterprising individuals would successfully evade the rule.

Whatever its origin, this area of twilight gives the government a great deal of discretion in the law's application and enforcement, so much so that it often becomes a vehicle for ultra vires rulemaking and frivolous litigation.

Discretion on its own is not necessarily corrosive to liberty. Indeed, used properly, discretion can allow the government to decline enforcement when reason and compassion demand. It is when that discretion mixes with the persistent belief that government can correct society's ills if only its regulations were a tad broader that discretion becomes a danger.

The American system depends on a dense webbing of procedural checks to stop bad laws from being passed. Even regulations propagated by state agencies are filtered through a rulemaking process that elicits public comment. Creatively interpreting existing law enables state officials to side-step those legislative hurdles. Perceived gaps in the law are sealed but only at the expense of all the checks that keep the government from infringing on an individual's rights and enacting policy without the input of those most affected. Texas turns from a government built upon consensus to one ruled by convenience.

At present, there is not much to deter agents of the state from distorting existing regulations into new shapes and

new sizes. The government has inbuilt resources to fund otherwise frivolous enforcement proceedings, and individual agents are as a rule shielded from any liability and costs that the action inflicts on the accused claimant.

Experience, in fact, has shown that state agencies have everything to gain from nudging the rule's interpretation more and more away from its core meaning. Courts tend to be very deferential to administrative offices. Additionally, claimants have to spend substantial sums of money to defend themselves against even the most outlandish of accusations. If either the court submits to the agency's gamble or the claimant folds under the pressure, then the agency succeeds in expanding its authority even if it lacked a democratic mandate. Put in simple terms, the benefit to the state agency far outweighs the risks.

House Bill 3662 gives state agencies a reason to hesitate before dragging unsuspecting Texans into an enforcement action, especially when the proceeding is based on a questionable or stretched reading of existing law. Agencies would no longer enter into a proceeding with nothing to lose but instead would share in the costs that an arbitrary action imposes on a claimant. Thus, at the very least, victorious claimants would exit the process whole—although they will never recoup their expended time and heartache—and, at best, it would bind state agencies to the law's plain meaning.

Texans rely on the rule of law to protect their rights from the good intentions behind imprudent public policy, which in turn cannot exist without predictable enforcement and an adherence to legislative procedures. House Bill 3662 keeps state agencies securely anchored to the democratic process and ensures that the law Texans interact with is the same as what appeared before their duly elected representatives. ★

About the Author



Kathleen Hunker is a policy analyst with the Center for Economic Freedom at the Texas Public Policy Foundation. She is also a managing editor of the Foundation's research and publications, and specializes in comparative constitutional law and natural rights.

She graduated in 2012 with a Juris Doctor (J.D.) from Columbia University School of Law and a Masters of Law (LL.M) from the University College London. A former editor for the Columbia Journal of European Law, Hunker has written for such publications as Townhall.com, Ethika Politika, TheBelltowers.com, and the Harvard Journal of Law and Public Policy, among others.

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