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Marionneaux V. Hines: The Vacancy Factor in Louisiana

By Jerry Jones, Louisiana

In *Marionneaux v. Hines*,¹ the Louisiana Supreme Court held in 2005 that two vacancies in the Louisiana Senate had no effect on the number of votes required under the state constitution for the passing of legislation.

Background

The Louisiana Senate is normally composed of 39 members.² Due to the resignation of one senator and the unexpected death of another, the Senate began the 2005 annual regular session with only 37 members. Although special elections were called, it was clear that for most of the regular session the Senate would consist of only 37 members and two vacancies.

During the session, questions arose as to how voting requirements in the Louisiana constitution for passage of legislation³ should be calculated. The constitution specifies that legislative action is by “elected members” or “members elected.” For example, concerning majority and super-majority requirements, did a majority vote of the “elected members” in the Senate now consist of 19 instead of 20, and did a two-thirds vote now consist of 25 instead of 26?

The answer turned on a legal issue. The phrase “elected members” or “members elected” was not defined in the state constitution. Did it mean the total number authorized to be elected (39) or the actual number of existing members (37)?

A declaratory judgment action seeking to resolve the question was filed in state district court by two senators against the Senate president and parliamentarian. No specific legislation, vote or ruling was challenged or at issue, nor were there any litigants other than state legislators. The state House of Representatives intervened in the suit. All

parties stipulated to the facts. Therefore, the only question for the court was the legal issue of determining the required number of votes.

Prior to the hearing in the district court, all of the parties filed applications with the state supreme court. The state supreme court granted certiorari and ordered the record transferred to it for immediate resolution. Oral arguments were quickly scheduled, and the decision handed down the day after oral arguments.

The Court’s opinion.

The Court began by discussing its plenary supervisory jurisdiction under Louisiana law to hear the matter, and stated:

“Due in part to proper deference to the lower courts, this court must remain reluctant to exercise its authority to hear a matter prior to a lower court determination. However, this matter presents itself in a particularly uncommon fashion in that the parties stipulated to all facts and the matter presents only a question of law which affects presently pending legislation and the conduct of the legislature during this session, as well as future legislative sessions. *Id.* Absent a prompt response by this court, legislative actions now in progress may be invalid, thus spawning future litigation. The ultimate issue of the meaning of “elected members” as used in the Louisiana Constitution of 1974 (see Footnote 2, *supra*) is an issue that affects a fundamental political process in our representative form of government. The issue affects the entire state, not merely the legislature; it affects the validity of the actions taken by the Senate on bills pending before it that relate to all of the citizens of Louisiana. Further, judicial economy is

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best served by this court's exercising its supervisory jurisdiction. A matter as heavily impressed with public interest as the debate over the voting requirements for legislative action requires an immediate answer.

The need to resolve this matter expeditiously was pointed out by all parties in their briefs to this court. Indeed, the parties stipulated in the district court that "[o]ver one thousand bills and joint resolutions have been introduced or will be considered by the Legislature, including over three hundred bills and joint resolutions currently in the Senate awaiting action by that house." Additionally, "[a]ppropriations for the operating expenses of state government enacted in the 2004 Regular Session expire on June 30, 2005. House bills appropriating money for the operating expenses of state government for the upcoming fiscal year must be enacted."

Prompted by the above considerations and the requests of plaintiffs, intervenor, and defendants, this court has concluded the exercise of its supervisory jurisdiction should not be deterred by the fact this matter had been docketed and set for hearing in the district court.⁴

The Court further concluded (with little actual analysis) that a "justiciable controversy" existed. This determination was critical, as Louisiana courts do not render advisory opinions,⁵ and declaratory relief could not be granted without the existence of

interested "adverse parties with opposing claims ripe for judicial determination."⁶

On the merits of the case, the Court discussed a 1935 Louisiana Supreme Court opinion,⁷ and concluded that it effectively defined the phrase "members elected" as used in the previous state constitution to mean the entire membership *authorized* to be elected to each house. Reviewing the transcripts of the 1973 state constitutional convention, the Court stated:

"The drafters of the constitution were entitled to rely on this court's pronouncements defining the same terms contained in previous constitutions. Although there is nothing in the minutes of the constitutional convention to reflect that a definition of "elected members" was overtly discussed, we do have references to the meaning ascribed by some delegates."⁸

While noting that the defendants "made a cogent argument that if a senator is deceased or has resigned the senator cannot be an 'elected member,'" such argument was rejected in light of the above conclusion. The total authorized number of 39 (i.e., including the two vacant seats) was to be used in calculating the number of votes required for passage of legislation and establishing quorums.¹⁰

Jerry Jones is counsel to the Louisiana Senate.

Endnotes:

1. 902 So.2d 373 (La. 2005). The author was one of several attorneys assisting the defendants in preparation of materials.

2. La. Const. Art. 3, §3 states, "The number of members of the legislature shall be provided by law, but the number of senators shall not exceed thirty-nine and the number of representatives, one hundred five." La. R.S. 24:35.1 provides that the senate shall be composed of 39 members, elected from 39 senatorial districts.

3. As with most other state constitutions, the Louisiana constitution specifies voting requirements for the taking of certain action and adopting of certain legislation by the legislative branch. As pointed out by the intervenor state House of Representatives, "elected members" appears 73 times and "members elected" appears three times in the current state constitution. For example, Article III, §15(G) states, "No bill shall become law without the favorable vote of at least a majority of the members elected to each house. Final passage of a bill shall be by record vote. In either house, a record vote shall be taken on any matter upon the request of one-fifth of the elected members."

4. *Marionneaux* at 376-377.

5. See, e.g., *Louisiana Supreme Court Committee on Bar Admissions ex rel. Webb v. Roberts*, 779 So.2d 726 (La. 2001); *Edwards v. Parker*, 332 So.2d 175 (La. 1976); Advisory opinions and requisites of justiciability in Louisiana courts, 35 *La. L. Rev.* 898 (1975).

6. *Perschall v. State*, 697 So.2d 240, 251 (La. 1997); Louisiana Code of Civil Procedure Arts. 1871-1883. The Court in *Marionneaux* stated at page 377:

The second query as to the propriety of our granting a writ in this request for declaratory judgment is the existence of a justiciable controversy. This court recently stated:

Courts are without power to grant declaratory relief unless [a justiciable] controversy exists. To avoid deciding abstract, hypothetical, or moot questions, courts require cases submitted for adjudication be justiciable, ripe for decision, and not brought prematurely.... "These traditional notions of justiciability are rooted in our constitution's tripartite distribution of powers into the executive, legislative, and judicial branches of government." *Perschall v. State*, 96-0322, p. 15 (La. 7/1/97), 697 So.2d 240, 251. Essential to the exercise of this state's judicial power is the threshold requirement of a dispute, that is, "adverse parties with opposing claims ripe for judicial determination." *Id.*

... We have declined jurisdiction over issues posed in the abstract. We have declined jurisdiction when actions do not involve specific adversarial questions asserted by interested parties based on existing facts....

[A] person is entitled to relief by declaratory judgment when his rights are uncertain or disputed in an immediate and genuine situation and the declaratory judgment will remove the uncertainty or terminate the dispute." *Louisiana Associated General Contractors, Inc. v. State, Division of Administration, Office of State Purchasing*, 95-2105, p. 7, (La.3/8/96), 669 So.2d 1185, 1191, quoting *In Re P.V.W.* 424 So.2d 1015, 1020-21 n. 10 (La.1982). *Prator v. Caddo Parish*, 04-0794, pp. 5-9 (La.12/1/04), 888 So.2d 812, 815- 817.

As in *Prator* we find the instant matter satisfies the requirement of a justiciable controversy warranting exercise of this court's supervisory jurisdiction."

The comment can reasonably be made that the litigation gave every appearance of a model "friendly lawsuit" seeking in essence a prohibited advisory opinion from the court. All the parties were legislators, all the facts were stipulated, no specific legislation, vote or ruling was challenged or at issue, and no exception or objection was raised by the defendants as to whether an actual "justiciable controversy" existed or if subject matter jurisdiction by the judiciary branch was appropriate at that point in time. The Court could have declined to rule or could have even declined subject matter jurisdiction of the matter. See, e.g., *Brinkhaus v. Senate of the State of Louisiana*, 655 So.2d 394 (La. App. 1 Cir. 1995). Perhaps, as the Court indicated in its discussion of supervisory jurisdiction, the issue was so fundamental to the legislative process and of such magnitude in potential impact that it was simply "justiciable" on its face, and necessitated immediate action by the judicial branch to resolve the controversy for the legislative branch and prevent future litigation. See also, *Hainkel v. Henry*, 313 So.2d 577 (La. 1975).

7. *State ex rel. Garland v. Guillory*, 184 La. 329, 166 So. 94 (1935).

8. *Marionneaux* at 379.

9. *Id.*

10. "Accordingly, it is ordered, adjudged, and decreed that there be judgment herein declaring that "elected members" or "members elected," as that term is used in the Louisiana Constitution in referring to the members of the Senate, means the entire membership authorized to be elected, regardless of any vacancies, so that the current number of "elected members" or "members elected" of the Senate is thirty-nine." *Marionneaux* at 380. It should be noted that this effectively means that not only are vacant seats allowed to vote, but they also always vote "nay". The pragmatic consequences of this from a legislative process standpoint are obvious.

Legal Services Staff Section Report

By Michael Chernick, Chair Legal Services Staff Section

Overview

The Legal Services Staff Section (LSSS), one of 10 staff sections in the National Conference of State Legislatures, serves as a professional association for individuals working in legally related staff positions in state legislatures. The membership is comprised of drafters, editors, researchers, legal counsels and statutory revisors who are employed in centralized legislative legal offices, on committee staffs, and, to a lesser extent, on the staffs of individual legislators and political party caucuses. While the majority of LSSS members are attorneys, one need not be a lawyer to participate. Its administrative structure consists of an Executive Committee (the Excom); the Outreach Committee, which is focused on increasing both the geographic breadth and numeric size of the section; the Program Committee, which is dedicated to developing the section's sponsored and cosponsored seminars offered at the NCSL Annual Meeting, the Fall Professional Development Seminar, and the recently initiated Editors' Conference; the Technology Committee, which is charged with enhancing the section's web page; and committees responsible for designating award recipients, reviewing the section's bylaws, and nominating officers and Executive Committee members. Task forces are also established on occasion. Currently task forces exist to examine the membership's listserv etiquette, and fundraising.

Please contact any Executive Committee member if you have questions to ask, ideas to offer, or wish to volunteer for a committee or task force.

2005 Annual Meeting

During the third week of August, thousands of legislators and legislative staff journeyed to the Pacific Northwest for the 2005 NCSL Annual Meeting in Seattle. The event was well attended and offered informative and enlightening plenary sessions featuring Microsoft founder, Bill Gates, commenting primarily on education and workforce topics; Princeton University political economist, Uwe Reinhardt, speaking on the economic challenges confronting the nation's health care system; and National Public Radio and Fox News political correspondent, Mara Liason, expounding on the country's political scene. At the legislative staff luncheon, "Fish Philosopher," Carl Hagerman, enlightened the crowd with his personal perspective on life's travails.

While the conference-wide events are exciting, and frequently headline grabbing, the programs that are offered both through the organization's topical committees and specialized sections, such as LSSS, provide much of the academic and professional substance of the conference. This summer's legal seminars more than met their planners' expectations.

In recent years, Richard Ruda, Chief Counsel at the State and Local Legal Center in Washington, has presented an annual update on federalism jurisprudence at the U.S. Supreme Court. This field has emerged as an area of considerable focus for the Court, and it is very important to our membership. This year's update sparked intense audience interest in light of the late term decision in *Kelo vs New London*. This is the case holding that New London, Connecticut's economically based eminent domain authority, is constitutionally valid.

Legislative staff from our host state of Washington detailed instances of the state judiciary's misuse of legislative history and spoke on the importance of developing it in a way that will reflect accurately the legislature's true intent. Another LSSS sponsored seminar entitled "Every Vote Counts" retold, from a legal perspective, the extraordinary saga of the extremely close 2004 Washington State gubernatorial election. Other opportunities for sharpening our legal knowledge, both under the sponsorship of LSSS and other NCSL sections and committees, included a broadly based seminar on the juvenile justice system in King County (Seattle) that featured speakers from the prosecutorial and judicial perspectives, presentations on redistricting and campaign finance, and an examination of state economic incentives as a result of the Sixth Circuit U.S. Court of Appeals decision in *Cuno v. Daimler Chrysler*. Other major topics of interest included updates on Medicaid and the ramifications of the Schiavo end-of-life case.

Two highlights of the Annual Meeting for LSSS members are always the after hours social gathering and the business luncheon. This year, both events literally soared dramatically to unprecedented heights. The opening day's LSSS cocktail reception, despite competing against a free Seattle Mariners' baseball game, still attracted a respectable turnout. No doubt, the location, atop the Bank of America Tower in the 75th floor Columbia Club, proved to be a major attraction. I wish to thank Syd Abrams, who for many years was associated with the Wine Institute, for facilitating this outstanding venue. From this unusual perch, we had dramatic vistas of Seattle and its surrounding countryside, to say nothing of the bird's eye view looking directly down into the two stadiums where many of our NCSL colleagues were gathered.

The LSSS business meeting and luncheon, for which the section appreciates the sponsorship of LexisNexis, took place in the equally dramatic setting that the Sheraton Seattle's 35th floor picture window meeting room affords. It drew perhaps a record size crowd. In fact, extra tables and additional food were ordered to accommodate all of the attendees. On account of the magnificent harbor views and the large group, the event assumed a festive mood. At the luncheon, we recognized the service of outgoing

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LSSS, RACSS, and LRL Joint Fall NCSL Seminar

By Bob Nelson,
Staff section vice-chair

The joint fall seminar of the legal, research and committee, and library sections of NCSL was a great success. Over 200 persons attended the meeting in Chicago, including about 20 international guests from northern Africa. Because of the unexpected high turnout, attendees stayed in four hotels. Many people enjoyed the multiple hotels. It gave them the chance to see more of the downtown while coming to or going from the meetings. The weather was cooperative, so some of us spent some time running along Lake Michigan in the morning, shopping on Michigan Avenue at the end of the day, and visiting Millennium Park in the evening. The crashing of the waves while on a run was almost as awesome as the lights on the pavilion and fountains in Millennium Park.

The attendees appeared to enjoy the topics of the sessions and the chance to talk to legislative staffers with similar duties from other states. They also enjoyed mixing with the members of the other sections, especially during the plenary sessions, when they were able to hear about the issues affecting persons in the other sections. Often, they had the same issues and concerns. The evaluations were very positive, with the overall seminar receiving a ranking of 4.23 on a scale of 1-5.

The first plenary session in the morning of the first day discussed work issues in the legislative setting, and required groups composed of all three sections to talk about the issues that were of concern to them. This seemed to be a good way to get folks from the different sections to talk to each other. The afternoon of the first day included sessions on media training, evaluating research resources, legislative immunity, 50-state research techniques and statutory construction. The large turnout resulted in some creative room setups, with some rooms overflowing. Luckily, the presenters were interesting enough to keep everyone's attention. I attended Jack Stark's presentation on statutory construction, which was very informative. We ended the day with a reception hosted by the West Group. There was lots of interaction among the section members at the reception, which continued as groups went off to dinner together.

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section chair, Nancy Cyr, and presented a much deserved special achievement award to Rich Johnson, the legislative staff director in Iowa and a former NCSL Staff Chair.

Aside from the conference's activities, many of us took the opportunity to see the sights of Seattle either on foot or from the harbor. Seattle is a dynamic city, and our Washington State hosts, from both LSSS and NCSL as a whole, did an incomparable job of organizing a great week.

3. Looking Ahead

By the time you read this article, whether online or on paper, the Fall Professional Development Seminar will have occurred. We

The second day included two plenary sessions, one on confidentiality of legislative documents and the other on legislative-judicial relations. The afternoon sessions included an exciting, entertaining, and provocative session on the structure and writing of paragraphs by George Gopen from Duke University. It is amazing what can be made interesting if you have the right speaker. Other sessions in the afternoon were on the Patriot Act, the use and misuse of statistics, uniform laws, and legal issues in campaigning. The Saturday Distinguished Scholar speaker (sponsored by Lexis-Nexis) was Professor Stephen Presser. He entertained, engaged the audience, and made all of us think about our position on judicial selections. One historical note that he mentioned, which I would like a second opinion on, was that Article I. prohibiting Congress from making any law respecting an establishment of religion was added to the constitution because some states had established religions and those states wanted to maintain that right. He also discussed the selection of John Roberts to the U.S. Supreme Court, giving reasons why he supported the president's choice. It is too bad that Harriet Miers was not yet nominated; it would have been interesting to hear his take on her selection. The final session of the seminar gave attendees a chance to discuss what the hot topics in their states were. This was a time for attendees to vent about their concerns and listen to others with similar concerns. It seemed like a good way to end an excellent seminar. Members of all three sections expressed interest in jointing together again at another fall seminar in the future.

If you have any suggestions about topics for the fall seminar, speakers for the seminar, locations for the seminar, or what groups should join us at the seminar, share your ideas with any member of the executive committee or of the program committee. The fall seminar for 2006 is scheduled for Princeton, New Jersey from September 6-9, and an editor's conference is scheduled for the fall in Little Rock, Arkansas. See you there!

congratulate Nancy Cyr, the LSSS chair for 2004-05, on being elected to the NCSL Executive Committee. The 2006 NCSL Annual Meeting is slated for Nashville, Tennessee in August. Next fall's Professional Development Seminar will be an LSSS only event held in Princeton, New Jersey. The 2006 Editors' Conference will take place in Little Rock on fall dates to be determined.



STATE NEWS



WISCONSIN Steve Miller

The state attorney general has sued two members of the Legislature in a public records action. She contends that the members shared draft legislation with a lobbyist, therefore making the draft a public document. She requested a copy of the drafts, which the legislators declined to give. Wisconsin statutes provide that drafts are confidential until they are introduced.

WEST VIRGINIA Mark McOwen

The governor called the Legislature back into its 4th extraordinary session of the year during Sept. 7 - 13, during which 21 bills were enacted. Banner legislation reduced the sales tax on food by 1 percent (HB 401) and provided public employee and teacher salary increases (HB 413, HB 414 and SB 4008). Also included were measures limiting contributions to 527 political organizations (HB 402), conforming state unemployment compensation law to new federal requirements (HB 405), and providing supplementary appropriations of substantial payments of surplus revenues toward reduction of pension fund liabilities. Meanwhile, the Legislature's monthly interim study meetings continue and will conclude immediately before the next regular legislative session. Again, the 2nd Regular Session of the 77th Legislature will convene Jan. 11, 2006. To monitor legislative activity, please visit the West Virginia Legislature's web site at <http://www.legis.state.wv.us/>. For toll-free access, dial 1-877-56LEGIS

WASHINGTON Jeffrey Mitchell

It is tradition in the state of Washington to have an assortment of highly contentious, big impact initiatives on the November ballot. This year is no exception. This year's ballot includes five initiatives addressing topics ranging from medical practice, performance audits, and indoor smoking, to a repeal of a portion of the gas tax increase approved by the Legislature this last session.

Initiative 330 and Initiative 336 address medical malpractice. The similarity ends there. Initiative 330 would limit the recovery of noneconomic damages and attorney's fees, shorten the allowable time frame in which medical malpractice lawsuits may be filed, authorize the use of arbitration clauses, substantially limit the applicability of joint and several liability, and abolish the collateral source rule. Initiative 336 would require malpractice insurers to provide notice to the Insurance Commissioner of rate changes. Rate changes exceeding 15 percent would require a public hearing. Initiative 336 would also create a separate and distinct supplemental malpractice insurance program for additional liability coverage and require the revocation of a license to practice medicine for any one committing three or more acts of medical malpractice within a 10 year period.

Initiative 900 would require the state auditor to conduct comprehensive performance audits of all state and local government agencies and entities. The audits would analyze the economy, efficiency, and effectiveness of the policies and management, fiscal affairs, and operations of the agency or entity being audited. A portion of state sales and use taxes would be set aside in a new account to fund the performance audits.

Initiative 901 would expand smoking prohibitions. Currently, smoking is prohibited in public places, except within designated smoking areas. Bars, taverns, bowling alleys, tobacco shops and restaurants may designate their entire area as a designated smoking area. This measure would expand the definition of "public places" to include bars, taverns, bowling alleys, skating rinks, casinos, schools, reception areas and at least 75 percent of the sleeping quarters within hotels and motels. This measure would also prohibit smoking in certain places of employment and would eliminate the designation of smoking areas.

A mega-transportation revenue bill enacted this year, ESSB 6103, increased various transportation taxes and fees. The increased taxes and fees are expected to generate approximately \$8.5 billion in additional revenue. The centerpiece of this legislation is a 9.5 cent per gallon increase in fuel taxes, phased in over four years. Washington's fuel taxes are imposed separately on the two largest categories of fuel: gasoline and diesel. Initiative 912 would repeal the gasoline fuel tax. The diesel fuel tax is not sub-

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No, the editors of The Legislative Lawyer are not unduly challenged in the proper use of alphabetical order. Instead, the editors decided it was fair to reverse the alphabetical order of the state reports from time to time. Wisconsin, now it is your moment in the sun. It is your moment to proceed mighty Colorado. It is your turn to go first!

The editors did, however, incorrectly edit Rich Dillard's Delaware submission in the last newsletter. A fact that he, being a proponent of truth and justice, has alluded to in this week's submission.

ject to the initiative. A repeal of the gasoline fuel tax would reduce projected revenue by approximately \$5.3 billion.

On a final note, Kyle Thiessen has been hired as the new director of the Office of the Code Reviser. Kyle worked for the office as a bill drafting attorney for 17 years before taking over as director. The office looks forward to working with Kyle in his new role.

UTAH Gay Taylor

Utah amended the "Rules of Professional Conduct" to address legislative attorneys. One effort that Utah's legislative attorneys have been working on for some months was to clarify the Utah Rules of Professional Conduct, which are modeled after the ABA Rules. The ABA's and Utah's proposed changes to the rules requires informed, written consent if a lawyer is representing a client with a concurrent conflict of interest.

Our office presented to the Advisory Committee, and ultimately to the Utah Supreme Court, our concern that as nonpartisan staff we cannot comply with this rule and with our constitutional and statutory mandates. Our office is constitutionally required to represent the Legislature, and statutorily required to represent each member of the Legislature, its committees and subcommittees, its majority and minority leadership, the legislative staff offices, and legislative staff.

Attorneys in our office cannot satisfy the political process and the constitutional and statutory requirements and give notice to a sponsoring legislator that another legislator is interested in having the drafting attorney prepare an amendment that would counter the purposes of his bill. Both legislator's interests would be violated to satisfy the "Rules of Professional Conduct" written, informed consent agreement.

The legislative arguments proved persuasive; and the Utah Supreme Court adopted a Comment to Rule 13, "Organization as Client," to add the following language, which we had proposed:

Comment 13b to Rule 1.1.3

When the client is a governmental legislative body (such as the Utah Legislature, a city council, or a county council or commission), a lawyer representing that legislative body may concurrently represent the interests of the majority and minority leadership, members and members-elect, committee members, and staff to the legislative body. In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules related to conflict of interest and required consent to conflicts do not apply.

This comment was approved for inclusion in the Utah Rules of Professional Conduct, and is effective Nov. 1, 2005. In polling other states, many state legislative attorneys felt uncomfortable with their position with regard to the Rules of Professional Re-

sponsibility, but their position has been to treat this rule as if they had only one client, which is the legislature. Therefore, no informed, written consent is required of the legislature's component parts. But if your state has a constitutional or statutory basis for representing the Legislature's component parts, you may try to have your Rules of Professional Conduct amended like we did in Utah!

PENNSYLVANIA Stacey Connors Mosca

The Taxpayer Fairness Act, pending in the Pennsylvania Senate, would hold the line on state spending to ensure that the Commonwealth lives within its means and has adequate savings for fiscal downturns. A companion measure would amend the state constitution to hold state spending increases to inflation. In addition to restricting state spending growth, the bills would set aside surplus revenues into the state's Rainy Day Fund for use in times of economic necessity. Thirty other states have implemented spending controls, revenue controls or both. Pennsylvania is in the minority of states which have no such controls. The measures would restrict state spending growth to the lesser of: the average annual rate of change of personal income in Pennsylvania for the three preceding years; or, the average rate of inflation plus the average percentage change in state population for the three preceding years. Both measures include three common-sense exceptions: (1) In the event of an emergency or major disaster declared by the president, the spending limit may be exceeded by a simple majority vote. (2) In the event of other declared emergencies, the governor may request an increase in the spending limit. This would require a three-fifths vote. (3) And, for any other circumstances, the governor may request an increase in the spending limit. This would require a two-thirds vote.

In response to the United States Supreme Court decision which stated that lawmakers have the authority to provide greater protection to property owners than what the court is willing to provide, the Property Rights Protection Act has been introduced in the Pennsylvania Senate to restore the traditional balance in eminent domain cases for Pennsylvania. In recent months, the Supreme Court ruled that governments can seize property to make room for private development projects that promise to boost the local economy. The court supported the City of New London, Connecticut, which had seized the homes of a working class neighborhood to construct a riverfront hotel and office complex. In the case of *Kelo v. City of New London*, the Supreme Court significantly weakened property owners' rights. The Property Rights Protection Act addresses the court's decision regarding whether municipalities can seize an individual's property and transfer it to private developers. Specifically, this legislation will prohibit the use of eminent domain for private businesses, reform and tighten the definition of blight to eliminate its abuse, and require that properties representing the majority of a geographical area meet the definition of blight before the area can be considered for redevelopment purposes. Current case law only requires that 10 percent of an area be blighted before being declared a redevelopment area.

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NORTH CAROLINA

William R. Gilkeson

The big news is that North Carolina, as the General Assembly concluded its long legislative session August 31, became the 42nd State to establish a state-run lottery.

The legislation took all session to pass, and passed with the narrowest of margins. In early April, the 120-member House approved the bill by a vote of 61-59; then five months later the 50-member Senate passed the exact same bill by a vote of 25-24.

The lottery had become a partisan dividing line, with Democrats for and Republicans against. But independent party members made the lottery issue difficult but made it possible in the end. In the House, none Democrats (mostly urban progressives) voted no, and seven Republicans voted yes. In the Senate the partisan arithmetic was harsher. The Republicans took a firm caucus position against the lottery, and five Democrats (again mostly urban progressives) were firm noes. That was the whip count for almost five months: 26 to 24 against the lottery. It was not until the end of the session, when the Senate leadership had announced that it did not intend to return until next year, that two Republican senators absented themselves, one on a honeymoon and one on sick leave. The Senate leadership called the Senate back into session for a lottery vote without the two, resulting in a 24-24 tie. The tie was broken by the Senate's president, Democratic Lt. Gov. Beverly Perdue. The bill was quickly sent to Democratic Governor Mike Easley, long a lottery proponent, who signed the bill immediately. Disputes may go on for years about whether the two absent Republican senators (who had appeared less than fervent in their opposition to the lottery) knew what they were doing when they stayed away.

Fixing the details of the lottery proved complicated, but not insurmountable. When the House finished its squeaker vote for the lottery in April, Speaker Jim Black said he wasn't sure the House would approve any changes to the bill that the Senate might make. The House bill provided that 50 percent of the net proceeds of the lottery would go for school construction, 25 percent for educational scholarships, and 25% to a fund for achieving educational equality. The bill paid careful attention to restrictions on advertising: There could be advertising only at the sites where tickets are purchased, with minimized appeal to minors, no cartoon characters, and every ad must disclose the odds of winning a game. In the end, the Senate approved the House bill as the House had passed it. But before it approved, it placed in the budget bill, which the House felt compelled to pass, some modifying language to the House lottery bill, contingent upon the House lottery bill becoming law. In effect, the Senate changed the House bill (with the House's consent) before it passed the House bill unchanged. The budget bill changes included some loosening of the advertising limitations and a change in spending requirements for education (50 percent of net proceeds for a pre-kindergarten program, 40 percent for school construction, and 10 percent for college scholarships).

The lottery is to be overseen by a nine-member commission. To raise confidence in the whole project, the governor appointed as

chair Dr. Charles Saunders, retired CEO of the pharmaceutical company that is now called GlaxoSmithKline. Saunders had been an opponent of the lottery.

MISSISSIPPI

Ted Booth

The Mississippi Legislature met in extraordinary session from Sept. 27, through Oct. 7, 2005, to address the critical needs of the Mississippi Gulf Coast and other parts of the state following the destruction wrought by Hurricane Katrina. Measures considered and approved included:

Allowing casinos to move their gaming operations 800 yards inland. Since the approval of gaming, Mississippi has required that the gaming operations be on floating barges. Most of the barges along the coast were seriously damaged by the storm surge.

Loan programs for businesses and local governments to help them in reestablishing operations.

Authority for local governing entities to operate in places other than their usual seats of government. In some cases, local governments suffered serious damage to their building complexes. The changes in law would allow them to operate in alternate locales.

Gaming debates became somewhat heated as opponents argued that allowing gaming to move off of the water constituted a move toward extending gaming throughout the state. The governor signed the gaming legislation into law on Oct. 17, 2005.

MINNESOTA

Karen Lenertz

During the first legislative special session this past summer, the Minnesota Legislature passed and the governor signed into law a health impact fee of 75 cents per pack of cigarettes. Three tobacco companies and nine tobacco distributors have filed a lawsuit in the state district court challenging the fee as a violation of the 1998 tobacco settlement reached between the State of Minnesota and the tobacco companies. The tobacco companies contend that the state agreed in the settlement not to seek more money from the industry to pay for health care expenses related to smoking and the health impact fee is designated for health care. At this time, the lawsuit is pending.

The Legislature and the governor have been discussing another special session this year to discuss, among other issues, new stadiums for the University of Minnesota and the Minnesota Twins. No decision has been made yet to hold a second special session.

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MARYLAND **Sherry Little**

Each year, the General Assembly creates committees and task forces to conduct in-depth studies of important issues that are not possible to undertake during the legislative session. Most of these study committees are temporary, with reports due at the close of the interim or at the close of the next interim. In addition to legislators, the membership of many of the entities includes other state officials, individuals from interest groups and other concerned citizens.

This interim, several committees are examining different aspects of health care and health insurance. One task force is studying the impact of autoimmune disease in Maryland, which includes more than 80 serious, chronic illnesses such as lupus, Crohn's disease, multiple sclerosis, Type 1 Diabetes Mellitus, and rheumatoid arthritis. Another task force on small group market health insurance was established to study of the state's Comprehensive Standard Health Benefit Plan. The plan, mandated by the General Assembly in 1993, is a standard health benefit package that insurance carriers must sell to businesses with 50 or fewer employees. There is also a Task Force to Study Retiree Health Care Funding Options which is considered essential because of the state's inability to continue funding retiree health care each year solely on a pay-as-you go basis. The rough estimates are that the retiree health care liabilities for the state are as much as \$6 billion and, on an actuarial basis, are zero percent funded.

A Task Force on the Establishment of a Prescription Drug Repository System will examine the viability of setting up a program to try to take advantage of the surpluses of prescription drugs that are safe and that pharmacies are willing to donate. Another task force is to examine the use of electronic health care records as a more efficient exchange of information between networks, doctors and patients and as a method to reduce medication errors.

Other committees established by 2005 legislation are focused on matters related to unemployment insurance, the naming of state facilities, roads and bridges, establishing a Maryland Women Veterans Monument, and starting a pilot program to implement holocaust, genocide, human rights, and tolerance education through the University System of Maryland. A task force will be reporting to the governor and the General Assembly in December 2006 on identity theft. Statistics from 2002 show that 3,500 Marylanders were victims of identity theft and that the cost to businesses is approximately \$4,800 per victim.

Still other task forces are looking at assisting disabled veterans who are striving to become business owners, identifying impediments faced by community college students who have disabilities, and providing visual smoke and evacuation alarms for individuals who are deaf and dependent on these signals in an emergency evacuation. There are also joint commissions on agricultural stewardship and on the administration of Maryland's port, as well as a Special Committee on State Employee Rights and

Protections and a Senate Special Commission on Electric Utility Deregulation Implementation.

The General Assembly also established a new ongoing statutory committee, the Joint Committee on Access to Mental Health Services that will monitor access to public mental health services for eligible individuals and medically necessary mental health services for individuals covered by private insurance.

MAINE **Margaret Reinsch**

Public Law 2005, chapter 10 prohibits the denial of rights in employment, housing, public accommodations, credit and education opportunity to individuals based on their sexual orientation. Chapter 10 includes an unallocated construction section that provides that the act may not be construed to change any right to marry that exists under the U.S. Constitution, the Maine Constitution or any law of Maine.

Pursuant to Article IV, Part Third, Section 17 of the Maine Constitution, Public Law 2005, Chapter 10, although scheduled to take effect June 29, 2005, was stayed pending certification of the validity of the "People's Veto" petition, which was approved for circulation April 7, 2005. The Secretary of state determined that the petition was valid, and the question of whether to reject Public Law 2005, Chapter 10 will appear on the Nov. 8, 2005, ballot.

Public Law 2005, chapter 357 updates the definitions in the unclaimed property laws of "face value" and "property" to include "gift obligation," "prefunded bank card" and "stored-value card" where appropriate. It also revises the definition of "face value" to limit the deduction of service charges, fees and dormancy charges, when not prohibited, to be consistent with the other provisions of this amendment.

Chapter 357 creates a definition of "prefunded bank card," and establishes the presumptive abandonment period as three years. The amount abandoned is 100 percent of the face value or balance of the prefunded bank card. The financial organization that issued the prefunded bank card may impose dormancy fees consistent with the Maine Revised Statutes, Title 33, section 1956. The terms and conditions must be disclosed in a separate writing prior to the initial issuance and must be referenced on the prefunded bank card.

Chapter 357 revises the presumptive abandonment period for gift obligations and stored-value cards to clarify that the presumptive abandonment period begins to run from the last date that activity was recorded for that gift obligation or stored-value card. It also prohibits the issuer from imposing any fees or charges on the gift obligation or stored-value card, except that the issuer may charge a transaction fee for the initial issuance and for adding value to the gift obligation or stored-value card. The transaction fees must be disclosed in a separate writ-

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ing prior to the initial issuance or must be noted on the gift obligation or stored-value card. Although current law authorizes dormancy charges for other unclaimed property, dormancy charges and inactivity fees are prohibited for gift obligations and stored-value cards. The unclaimed amount of a gift obligation or stored-value card when it is turned over to the state unclaimed property account is 60 percent of the face value, allowing the issuer to retain the remaining 40 percent.

LOUISIANA

Clifford Williams

The silence of a quiet interim was broken by the landfall of Hurricanes Katrina and Rita, on the state's southeast coast and southwest coast, respectively. The House of Representatives and the Senate held a "joint special" meeting on Sept. 14, for the purpose of receiving and considering an update on the status of the state due to the public emergency caused by Hurricane Katrina. The House and the Senate each convened in their respective chambers and then met jointly in the House Chamber to hear the governor's remarks.

The speaker of the House and the president of the Senate have also appointed special committees, the House Special Committee on Disaster Planning, Crisis Management, Recovery and Long-Term Revitalization and the Senate Select Committee on Disaster Planning, Crisis Management, Recovery and Long-Term Revitalization. The special and select committees are further divided into subcommittees, whose composition is based upon geographical lines. The subcommittees are charged with focusing on the effects of the hurricanes and their aftermath, concentrating on: protective measures and infrastructure; evacuation planning, routes and infrastructure; communication systems; communications between local, state, and federal agencies; communication between government and citizenry; local, state and federal law enforcement; insurance coverage for personal and business property; public and private assistance; housing and shelters (short- and long-term); plans for returning displaced citizens; transportation and infrastructure; education; public health and the health care infrastructure; environmental impact and regulations; natural resources, including fisheries, wildlife, and energy; agriculture, forestry, aquaculture, livestock, animals, and rural development; economic recovery and development; sources for recovery and redevelopment funding, both public and private; coastal restoration; levee districts, drainage districts and flood control; and land rights policies. After its series of meetings, each subcommittee is to submit its report or reports of its findings and recommendations to the respective special or select committee.

The governor has also announced that she will call a special session to convene on Nov. 6th and last through the 18th. The session will be called to take up emergency issues and situations that can't wait until the next planned special session in January or the regular session next spring.

KENTUCKY

Ann Zimmer

On Nov. 16, 2005, the Supreme Court of Kentucky is scheduled to hear oral arguments in a case involving the 37th Senatorial District of Kentucky. It is one of several districts representing parts of Kentucky's most populous county, Jefferson County, whose county seat is Louisville. In the 2004 Regular Election, Dana Seum Stephenson received about 1,000 more votes than did her challenger, Virginia Woodward. On Nov. 1, 2004, the day before the election, Woodward filed a suit challenging Stephenson's qualifications to hold the office. Woodward alleged that Stephenson did not meet the residency requirements for the office. Woodward alleged that Stephenson had not lived in Kentucky for the preceding six years, but, instead had resided for part of that time in Indiana. However, the judge did not remove Stephenson from the ballot, and she received the most votes. A Jefferson Circuit Judge ruled, following the election, that Stephenson did not meet the residency requirements to hold the office of senator and ordered that votes for Stephenson be discarded. Neither candidate appealed this decision. Stephenson filed an election contest with the Senate asking the Senate to seat her. Woodward filed a suit in Franklin Circuit Court asking to be seated.

When the Senate convened on January 4, it refused to seat Woodward, and convened an election contest committee to recommend to the Senate which person should be seated. On January 7, the Senate determined that Stephenson met the residency requirement and voted to seat Stephenson as senator. In support of its decision to seat Ms. Stephenson, the Senate cited Section 38 of the Constitution of Kentucky, which provides, in part, that each house of the General Assembly shall judge the elections, qualifications and returns of its members. The Franklin Circuit Court judge ruled that the General Assembly has broad, but not unfettered, latitude in determining who serves in the Senate. The judge declined to seat Woodward but also issued a temporary injunction that Stephenson was not qualified to serve, based on the earlier Jefferson Circuit Court's ruling. The Franklin Circuit Judge ordered Stephenson not to vote, attend meetings, or accept a paycheck as senator while the courts decide who is to represent the 37th district.

In March 2005, the Supreme Court voted to uphold the Franklin Circuit Court's temporary rulings. The case has been in court ever since. Parties appealed the Franklin Circuit Judge's rulings to the Kentucky Court of Appeals. Motions were then made to transfer the case from the Court of Appeals to the Kentucky Supreme Court. The Supreme Court transferred the case from the Court of Appeals to itself, and issued a schedule of briefs and oral arguments.

INDIANA

George Angelone

The Indiana legislature is not in session. The legislators will return in November for a single organization day and then recess

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until early January. The session is scheduled to conclude on March 19, 2006.

Thirty-six study committees are engaged in reviewing various issues during the interim. One committee is overseeing the recodification of K-12 education finance law. Issues being studied by the other committees include: eminent domain practices, establishment of uniform practices and financing for the delivery of juvenile and other child services, establishment of a museum and gift shop in the historic state house building, and new proposals for the consolidation of county and city government in Indiana's largest metropolitan area—Indianapolis. Property taxes continue to be a subject of interest as increases in the property tax revenues needed to fund local government continue to exceed personal income growth in Indiana.

The governor is considering proposals for privatizing various aspects of state government. The most current focus is on toll roads. An updated 10-year road building and repair plan was recently issued by the Department of Transportation. The number of qualifying projects exceed revenues. The only toll road in Indiana running from the border near Chicago toward Toledo and Cleveland, Ohio, needs \$200 million in repairs. In addition, there is interest in building an interstate link to the southwest corner of the state. Funding for these projects may come from the sale or lease of roads to private groups.

The new Indianapolis Colts stadium work has begun. An agreement, in principal, has been reached with the Colts organization to stay in Indianapolis for 20 years. A swing loan was arranged until bonds can be issued to fund the \$500 million project. An additional \$400 million will be spent to upgrade convention facilities. Legislation was passed in the last session for the Colts stadium project that is similar to the legislation passed in Colorado for the construction of the Denver Bronco's stadium. A state authority will finance the construction and a local building authority will operate the facilities.

IDAHO **Katharine Gerrity**

Since the adjournment of the First Regular Session of the 58th Idaho Legislature on April 6, 2005, legislators have been engaged in one of the busiest interims on record, participating with numerous interim committees and task forces involving a broad range of topics. The work of the various committees and task forces will be reported back to the Regular Session of the Legislature when it convenes on January 9, 2006.

With growing public concern about property taxes throughout the state, one of the most active of interim committees has been the Property Tax Interim Committee. The committee has been charged with developing a strategy to implement a property tax structure over the succeeding years that is balanced in its application and effect, encourages economic development, meets the revenue needs of local units of government, encourages and assists economic development, and answers the concern over rising property values and property taxes. The Committee con-

ducted an extensive statewide series of public hearings where it heard testimony from interested and affected citizens throughout the state including homeowners, local elected officials, local governments, school district officials, legislators and business owners. The Committee is now continuing its work in considering the extensive public comment and various property tax structure options.

The Energy, Environment and Technology Committee has been meeting on a regular basis and has been informed by Idaho's Department of Water Resources Energy Division about a potential update to the State Energy Plan, which was last updated in 1982. In addition, the committee has also heard testimony relating to alternative energy projects, electricity regulation in Idaho and the nation, and energy facility siting.

One of the task forces meeting during Idaho's interim is the Biotechnology Task Force. The task force was initially briefed on the development of the Governor's Science and Technology Advisory Council and the creation, in 2004, of the Office of Science and Technology to implement and support a state strategic plan which includes establishing Idaho as a national center for biotechnology. During the course of its meetings, representatives from various fields including agriculture, commerce and labor, the university system, and medicine have testified before the task force concerning developments throughout the state in the area of biotechnology.

The Legislature also continues to study, through its Capitol Restoration Task Force, Idaho's Capitol restoration master plan with the goal of making recommendations to the full Legislature during the 2006 legislative session to address the financing and implementation of Idaho's Capitol restoration. In its continued study, a number of members have toured the Utah State Capitol as well as the Texas State Capitol to view restoration and extension projects at those sites.

FLORIDA **Edith Elizabeth Pollitz**

So far, things are quiet on the special session front this fall, but there is a rumor afoot that there will be a special session in December to deal with Medicaid waivers. There has been talk off and on since the regular session about a special session being in the works to deal with the constitutional amendment authorizing slot machines in Broward County at existing, licensed pari-mutuel facilities that have conducted live racing or games. The constitutional amendment required referenda in the two counties that were up for this, Miami-Dade and Broward, and Broward voters approved the slot machines. The required implementing legislation to regulate the machines did not pass in the next (2005) legislative session.



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DELAWARE

Rich Dillard

If you read my submission in the last issue you may have been puzzled or dismayed. If you wish to read what I actually sent for publication, it is now available on the NCSL web site, Legal Services Staff Section. Just click on Publications on the left side of the LSSS Homepage and scroll to The Legislative Lawyer July 2005.

Although the General Assembly is not scheduled to reconvene in regular session until the second Tuesday in January, the Senate will show up for a special session on Nov. 8th to consider the appointment or reappointment of six judges and five court commissioners. This is the largest number of judicial appointments at one time in institutional memory. Among those submitting an application to the judicial nominating commission for one of the judgeships is the current attorney general (a statewide elected position).

This spring the General Assembly enacted a constitutional amendment that converted two statutory courts (Family Court and the Court of Common Pleas) into constitutional courts. Any change to the Constitution of Delaware requires the exact same change to be enacted by two successive General Assemblies by a two-thirds vote. No action by the governor or public referendum is required. According to press reports, certain individuals and organizations believe this constitutionalization of Family Court now requires all Family Court proceedings to be open to the public. A lawsuit by two Delaware residents has been filed in Chancery Court for injunctive relief to open the proceedings. Their belief hinges upon the first five words of Section 9 of Article 1 of the Delaware Constitution: "All courts shall be open" though it doesn't say "all constitutional courts shall be open" so there is the question as to why making Family Court a constitutional court makes any difference as to its enforceability. There is also a 31-year-old Delaware Supreme Court case that ruled that the phrase "all courts shall be open" does not mean public access to the courtroom but rather litigant access to file cases with the Court.

COLORADO

Debbie Haskins

We continue to manage outside counsel on several lawsuits involving the General Assembly. Two lawsuits were filed by "Vote No; It's Your Dough," regarding two referred bills on the November ballot. In the first case, the plaintiffs sued the secretary of state, the General Assembly and the staff director of the Legislative Council, asserting that the title of a referred bill was misleading because the words "without raising taxes" were in the title of the measure. They asserted that the staff director and the General Assembly are required by the Colorado constitution to provide a fair and impartial analysis of Referendum C in the Blue Book, which is mailed out to voters, and that the information to be put in the Blue Book is misleading. They asked the court to order the staff director and the General Assembly from keeping those portions of the title from the Blue Book. They asserted that the title should have the TABOR language asking

the voters about whether they approve a tax increase. They asked the court to enjoin the secretary of state from certifying and delivering the ballot language as proposed and to strike the language "without raising taxes" and to treat it as a request for a tax increase under TABOR. Then, the plaintiffs voluntarily dismissed the case and refiled the action against the state of Colorado, the General Assembly, and the staff director for declaratory and injunctive relief on the basis that the state and the general assembly defendants breached a duty to provide voters with the text of the referred bills in the Blue Book and in legal notice publications. They also allege violations of the constitution and the election code for not including this text in the Blue Book and in legal notice publications, failing to capitalize titles, failing to include the warning "notice of election to increase debt" on the front of the Blue Book and putting specific language required by TABOR in the ballot question. Both defendants have filed motions to dismiss. Meanwhile the bluebooks have already been mailed to the voters.

The legislative leadership authorized the filing of interrogatories with the Colorado Supreme Court to determine the legal authority of the speaker and the president to appoint members of the Judicial Performance Commission, which evaluates the performance of judges prior to retention elections. Pursuant to section 13-5.5-102 (1) (a), C.R.S., the speaker and president are each required to appoint one attorney and one non-attorney to the commission for a term of four years. In 1989 and 1994, the speaker and the president each appointed an attorney to the commission for a term ending on a date in an odd-numbered year that was inconsistent with the statute and resulted in the terms of succeeding appointees being inconsistent with the statute. While still in office, in January 2005, Representative Lola Spradley and Senator John Andrews, notified the commission of the appointments of Paul Miller and William Banta, thereby replacing Mr. Sears and Mr. Levin because the terms for Sears and Levin ended in November 2005, when they should have ended in Nov. 2004. Subsequently, the new speaker of the House, Representative Romanoff, and the new president of the Senate, Senator Fitz-Gerald, notified the commission that the appointments of Miller and Banta were rescinded and the terms of Sears and Levin were extended to Nov. 30, 2006. The judicial commission is not sure which appointments are valid and have been meeting with all four appointees present and only acting where they have unanimous decisions. The Supreme Court declined to accept the interrogatories, but suggested an alternative method of getting the case before the court.

Although the General Assembly is not a party to this lawsuit, we are watching a challenge by 124 parents and school children and 14 school districts against the state of Colorado, the governor, the state board of education, and the commissioner of education to the state school finance system. The plaintiffs allege that the school finance law is unconstitutional under several provisions of the state constitution, including allegations that the school finance system denies children a right to a quality public education, fails to provide adequate funding under the thorough and uniform clause, and violates local control and uniform taxation guarantees.

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