

# Journal of the American Society of Legislative Clerks and Secretaries

Volume 15, Number 2

Fall 2009

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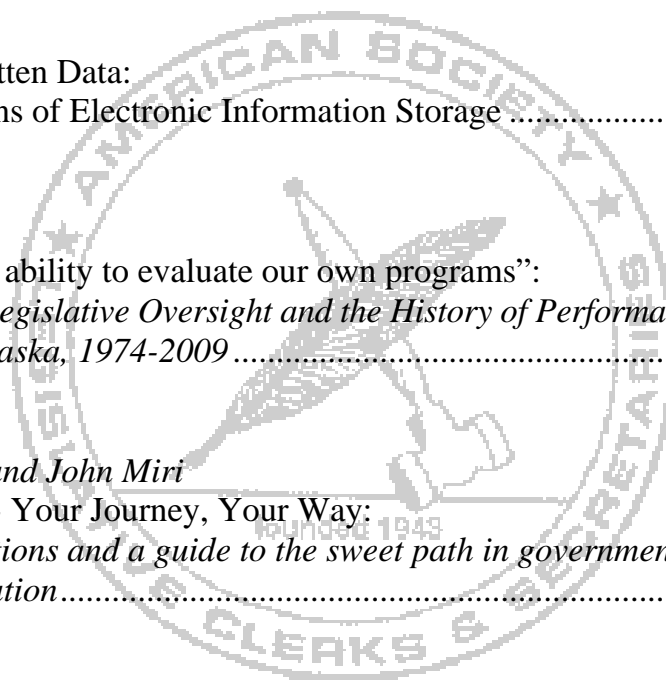
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# **Journal of the American Society of Legislative Clerks and Secretaries**

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The editor of the *Journal of the American Society of Legislative Clerks and Secretaries* welcomes manuscripts which would be of interest to our members and legislative staff, including topics such as parliamentary procedures, management, and technology. Articles must be of a general interest to the overall membership.

Contributions will be accepted for consideration from members of the American Society of Legislative Clerks and Secretaries, members of other National Conference of State Legislatures staff sections, and professionals in related fields.

All articles submitted for consideration will undergo a review process. When the Editorial Board has commented, authors will be notified of acceptance, rejection or need for revision of manuscripts. The review procedure will require a minimum of four to six weeks. Two issues are printed annually – one in the spring and the other in the fall.

## STYLE AND FORMAT

Specialized jargon should be avoided. Readers will skip an article they do not understand.

Follow a generally accepted style manual such as the University of Chicago Press *Manual of Style*. Articles should be word processed in Word 2000 or WordPerfect 8.0, and double-spaced with one-inch margins.

Number all references as endnotes in the order in which they are cited within the text. Accuracy and adequacy of the references are the responsibility of the author.

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Letters to the editor are welcomed and will be published to provide a forum for discussion.



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## **Data Rot and Rotten Data: The Twin Demons of Electronic Information Storage**

*Eddie Weeks,\* Legislative Librarian  
Tennessee General Assembly*

The twin demons of data rot and rotten data today stand ready to confront an electronic world. Information is everywhere; but can we find what we need, and will it still be there the next time that we need it?

The Information Age has become the Ephemeral Age. Nothing lasts, and nothing is expected to last. But we are charged, even commanded, to keep certain data.

State legislatures as a whole and individual legislators are responsible for creating, requesting, and requiring an incredible amount of data. Will we leave this data in a useful and organized informational pathway or in an unusable and insurmountable data dung heap?

Librarians are familiar with the problems. When we watched old books fall apart and pages crumble, we re-bound them and de-acidified the paper, then microfilmed the pages for preservation. When the new set of encyclopedias no longer fit where the old ones once did, we re-arranged the shelves, then found every inch of space available. But now we watch as electronic files disappear into nothingness, and storage arrays reach their limits. The challenges we face are not new, but they are orders of magnitude greater than ever before. Are we prepared to meet these challenges? Do we even know what these challenges will be?

### **Data Rot...**

'Data Rot' is simply one of the latest names for obsolescence. The term can refer to damaged data discs (think of a scratched CD), formats that are no longer in use (think Word 2.0), or storage media that are no longer being made (think ZIP drives).<sup>1</sup> The problems, though, go beyond the obvious. For nearly every book that is damaged beyond repair, there is probably at least one other copy in existence, but does every computer drive have an archive? And if it does, is the data in a usable format?

Computer programs and operating systems are constantly being updated, but stored files are not. The new programs do not always recognize all earlier formats. The file may be in perfect form, but unreadable by any existing program.

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\*My thanks to: Steve Kriegish, Director of Legislative Information Services, for technical advice; Jackie Nash, Legislative Researcher, for advice and proofreading; Darla Brock, Tennessee State Library and Archives, for support and assistance; and Dr. Gordon Coleman, University of Alabama School of Library and Information Studies, for the initial idea.

These are not new challenges. “Data”, in all its many forms, has been created (and lost) since the beginnings of recorded information. These beginnings, though, stretch back much further than computers or even books – they reach back to the origins of writing. Egyptian hieroglyphs and the Lascaux Cave paintings are forms of data. Consider the Rosetta Stone. This simple rock was the first key for the future translation of Egyptian writing; without it, all Egyptian data would still be lost with little hope for recovery. We now stand waiting for the discovery of the next Rosetta Stone – one which will recover Word 2.0 documents and Forethought Presenter files.

Hieroglyphics give an excellent demonstration of data loss (and may also be considered one of the earliest forms of government documents). Without the Rosetta Stone, hieroglyphics are gibberish – useless data. The data cannot be translated – moved from an unusable format to a useful format.

Consider the Pharaoh Djedefre. His father was the Pharaoh Khufu, the builder of the Great Pyramid. Djedefre’s successor to the throne was Khafra, the builder of the Pyramid of Khafra; his son and successor was Menkaura, the builder of the smallest of the three pyramids of Giza.

But what of Djedefre? We know his name (the name of the file); we know about when he reigned (when the file was created – though estimates for his reign range from eight years to more than twenty). He may or may not have had his own pyramid that may or may not have been torn down by his family. He may have created the Sphinx in honor of his father, Khufu, or he may have assassinated his father and, in turn, been assassinated by his nephew, Khafra. The details are unknown and can only be guessed, because we have lost the contents of the file.

Paper – the multipurpose storage hard drive for centuries – turns to dust. Acidic paper will last 50 to 100 years. De-acidification can stretch that an additional 250 to 300 years. Non-acidic paper can last over 1,200 years.<sup>ii</sup> The life span of a computer hard drive could be five years.

Our task, then, seems obvious: print everything on acid-free paper and preserve the paper in books! But no one has the room for all those books nor the money for all that paper.

We’re dealing with scopes of size that can scarcely be imagined. One megabyte – one 3 -1/2” diskette – is a small novel. Five megabytes is the complete works of Shakespeare. One gigabyte is ten yards of books on a shelf. One terabyte is 50,000 trees; 10 terabytes is the entire printed collection of the Library of Congress.<sup>iii</sup> A state’s legislative data can be hundreds of terabytes, growing daily.

Based on the rate of decay of a book, we can predict how long it will last – how long we have until its information is gone, until it is too late to save. But electronic information disappears in the blink of an eye. What was there is gone, inadvertently or deliberately, never to return. There is no warning, no notice, and often no recovery.

In addition to the degradation of the data itself, consider the storage media. Punch cards, 5 ¼” floppies, and ZIP discs have been relegated to the same bin as Betamax tapes and Laserdiscs, but what if the information on them is still needed? Does the equipment exist – and still function – to retrieve the data? And is it feasible and affordable to do so?

The simple truth is, no matter how important any data is to us, state legislative data is not the Dead Sea Scrolls; we cannot have teams of specialists to review each and every fragment to produce – decades later – a slightly more detailed description of what might have been there.

Vendors of new storage media exist to sell the latest product, not to save us or our data. If we make the commitment to check our data storage every five years, or every year, or every six months, do you doubt that there will be a new, latest and greatest, storage media that will meet all of our needs... until the next one comes out? And we dare not skip a single upgrade, as each new format is only capable of translating from the last!

We fear losing our data, so we save it as best we can. Size and expense limit us to electronic files, so these we try to preserve and keep useful. One may be damaged, so always make a second copy, and keep a third copy at an off-site location. Which leads us straight into the path of the second data demon: Incredibly, we're saving too much.

### **...And Rotten Data**

Rotten data is also not a new creation. It is simply too much data getting in the way of the wanted data. It is a problem of excess preventing access, of volume overwhelming value. The simplest example, familiar to almost anyone, is that of trying to find that one great vacation photograph that you remember from the boxes of pictures and the hundreds (or thousands) of jpegs.

Finding one bit of information may be compared to doing a dot-to-dot puzzle. All the dots must be found and connected in the right way, or the picture of the ducky will be skewed. Missing one dot, because that dot cannot be found for all the other dots in the way, affects the entire picture. But if there are too many other dots, how can the right one be found?

With the increasing cheapness of electronic storage, we are in an age of data hoarding. Where once file size was limited and we watched hard drives reach capacity, we now have cell phones with gigabytes of storage.

Our intended electronic storage media have terabytes of storage capacity, with petabyte capacity coming soon. With haystacks that large, is it still possible to find the needle? An article in *Wired* magazine discusses a “data deluge” that creates a new way of looking at everything<sup>iv</sup>, but what if that deluge also washes away the ability to find one particular item in that data?

We are admonished to see the forest in spite of the trees, but what if it is one particular tree for which we are searching? If the size of the forest becomes too great, can that one tree still be found?

The truth is that pruning of data is a necessity. We cannot keep everything forever; data must be removed once it is no longer useful, lest it prevent access to what is still useful.

In the library field, the term is weeding. Certain books are removed from the collection – weeded. This action is a necessity; library shelves simply don't grow, and library buildings don't expand. Some books must be removed to make room for new books.

But with electronic storage, we simply buy more storage. We copy all the files – regardless of their format or their currency or their usefulness – onto a bigger, better storage unit.

If we make the great decision that some piece of data – some fact – must be preserved, then, as mentioned above, how can it be maintained? How great of an effort must be expended to keep that data available and useful? The keeping of data becomes a problem of economics; we cannot afford to keep what we can no longer use.

But with electronic records, the problem is also identification and deletion. The best long-term electronic storage media are “write once read many” systems; they're not designed for individual files to be deleted or removed from storage. The goal of electronic storage is just that – storage. Not organization, not retrieval, and certainly not scheduled deletion.

We cannot weed. We cannot remove the useless. We cannot clean out the clutter.  
The volume of data grows. Its usefulness may not.

### **Challenging the Demons...**

The grand question for state legislators and legislative staff is, of course, how does this affect us?

State legislatures and legislators are responsible for creating, requesting, and requiring data, but who is responsible for maintaining that data in a usable and useful format?

There are state libraries, state records centers, state data centers; do we give them the responsibility to preserve the data without first giving them guidance on how to do so? Do we presume that they will simply do so, or do we check on their progress?

State legislative data is often requested by one agency, received by another, and stored by yet another. What if each has a differing retention period for this data? Must each agency keep a copy, or can they agree for one agency to keep the data for them?

### **... And Conquering the Demons**

Legislatures and legislators have created, requested, and required data; we must now decide what to do with that data.

As with nearly everything else, this data becomes an issue of economics. We cannot afford to keep what we no longer need. A commitment to keep – to truly preserve – some bit of information cannot be taken lightly; we cannot presume that the solution will appear without a determined quest for it.



We are only looking short term at a serendipitous solution: We'll save this file on a CD-ROM in its current format; when the data can no longer be read, then the data is no longer needed.

Are we willing to chisel hieroglyphs in rocks and then bury them in the desert so that their data is preserved? As mentioned earlier, Egyptian hieroglyphs are some of the earliest governmental data; are we willing to make less of a commitment than they were to preserve our governmental records?

A hundred or a thousand years from now, will others be searching for the key to unlock our data, or will they be wondering what was lost? Or will they have so many scraps that no material may be found?

In short, will we leave them an informational pathway or a data dung heap?

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<sup>i</sup> See CBS News, Sunday Morning, March 1, 2009.  
<http://www.cbsnews.com/stories/2009/03/01/sunday/main4836569.shtml>

<sup>ii</sup> Shipping, Xu. "China's Recent Achievements in the Protection of Paper Archives." Access to Information and Preservation Issues; International Conference of the Round Table on Archives XXXIV – CITRA (Budapest, 1999). [http://old.ica.org/citra/citra.budapest.1999.eng/proceedings\\_eng\\_budapest.html](http://old.ica.org/citra/citra.budapest.1999.eng/proceedings_eng_budapest.html)

<sup>iii</sup> <http://jamesshuggins.com> "How much data is that?"

<sup>iv</sup> Anderson, Chris. Wired Magazine 16:07 "The End of Theory: The Data Deluge Makes the Scientific Method Obsolete".  
[http://www.wired.com/science/discoveries/magazine/16-07/pb\\_theory](http://www.wired.com/science/discoveries/magazine/16-07/pb_theory)

# **“An institutional ability to evaluate our own programs”: The Concept of Legislative Oversight and the History of Performance Auditing in Nebraska, 1974-2009**

*Don Arp, Jr.<sup>1</sup>, Performance Auditor  
Legislative Audit Office, Nebraska Legislature*

Establishing expectations for agencies and programs can be described as a three step process: formation of the expectation, codification, and evaluation. Seeking vehicles for the last step, evaluation, and assigning it as a duty to an entity involves many issues that are fundamental to the founding principles of our government, namely the existence of three, co-equal branches each charged with a different and critical overarching mission. Many consider evaluation of a government program or agency to be the purview of the legislative branch and the core concept of legislative oversight.

In Nebraska, evaluation of program or agency performance is a duty held by the legislative branch exclusively. What is now known as performance auditing (or performance evaluation), a detailed study of entity performance as gauged against reasonable expectations (such as laws, managements practices, and best practices), came to Nebraska more than 30 years ago and has since undergone a variety of changes before finding a footing and taking its current shape. Despite all of the later attempts to do otherwise, the oversight of programs and agencies was ultimately viewed as a fundamental power of the legislative branch and an inherent facet of the three-branch goal of checks and balances.

## **The Concept of Legislative Oversight**

Legislative oversight is the process that legislative bodies use in “... making sure that funds appropriated by the legislature are spent as intended by the legislature and that they are achieving the objectives they were meant to achieve.”<sup>2</sup> United States history has seen many forms of legislative oversight because it “... occurs in virtually any congressional activity and through a wide variety of channels, organizations, and structures.”<sup>3</sup> More broadly, John Lees (1977) describes legislative oversight as “the behavior by legislators and their staffs, individually or collectively, which results in an impact, intended or not, on bureaucratic behaviors.”<sup>4</sup>

### *Neglected Interest*

Historically, interest in more formal legislative oversight has ebbed and flowed according to budget issues. “When revenues are limited and the demands for expenditures are seemingly limitless, legislators perceive a need for greater efficiency and effectiveness in government operations.”<sup>5</sup> Despite state and federal legislators having multiple methods of oversight available to them, like structuring and enabling legislation and investigations, much debate has occurred about what entities should conduct formal oversight and whether it is best conducted by the legislative or executive branch. Inaction at times among state-level legislatures has led to cases of delegation of oversight to the executive branch. “Legislatures have sometimes given little attention to oversight, and the function has fallen to audit agencies that at the state level are often headed by independently elected auditors.”<sup>6</sup>

This neglect is concerning, given that oversight actions are seen by many as fundamental to the checks and balances system of government. Woodrow Wilson points out that, “It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.”<sup>7</sup> Wilson argues this point so far to say that, “Quite as important as legislation is vigilant oversight of administration”<sup>8</sup> and makes the bold assertion that it is the oversight effort, what he also calls the “informing function” that “... should be preferred even to its legislative function.”<sup>9</sup> Delegation of oversight to the executive branch is concerning as the constitutional basis for oversight is inherently tied to the nature of the legislative branch. In *Eastland v. United States Servicemen’s Fund*, then U.S. Supreme Court Chief Justice Warren Burger wrote, “This Court has often noted that the power to investigate is inherent in the power to make laws because ‘a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.’ *McGrain v. Daugherty*, 273 U.S. 175 (1927).”

Although oversight is a facet of many congressional activities and, as Wilson notes, a chief duty of the legislative branch, efforts in those days were not as encompassing or systematic as they are today. Intensive, systematic, and programmatic evaluation of the executive branch—modern program evaluation or performance auditing—was not a concept then and has only in the past few decades become a field of oversight. The Congressional Research Service notes that organized examination of the executive branch by the legislative branch through the mechanism of performance evaluation “. . . remains a relatively new and still evolving technique in oversight. Modern program evaluation uses social science and management methodologies, such as surveys, cost-benefit analyses, and efficiency studies, to assess the effectiveness of ongoing programs.”<sup>10</sup>

### **What Does Legislative Oversight Look Like?**

Accountability in government, at least in the United States, has often been driven from the top down: federal to state. Practices developed at the federal level tend to cause phase shifts in corresponding entities at the state level. Once the concept of legislative oversight takes root, it may blossom in one of two forms: financial or performance audits. Financial audits, as the name implies, chiefly involve accounting and the nature of financial records. Performance audits are an objective examination of a program to determine, among other things, the program’s effectiveness, efficiency, and compliance with the law. Issues of compliance with other standards and legislative intent are also often part of the process.

For some time, financial audits were the only method of accountability used (apart from the normal legislative processes previously mentioned). Therefore, it was not until some years after the General Accounting Office (now known as the Government Accountability Office or GAO), the investigative arm of Congress, first entered the field of program evaluation in the late 1960s and early 1970s that the states asked GAO for help in expanding their accountability functions in the performance audit direction. GAO further cemented its leadership role in oversight and started producing the standards that many audit organizations follow today for both financial and performance audits.

There is much diversity amongst the states in what form legislative oversight takes, if it is conducted at all.<sup>11</sup> In 2008, an examination of legislative websites and other references found that 29 state legislatures conducted both financial and performance audits<sup>12</sup>, 12 conducted only performance audits<sup>13</sup>, one conducted only financial audits<sup>14</sup>, and 8 conducted neither financial nor performance audits.<sup>15</sup>

## **Legislative Oversight in Nebraska**

Currently, legislative oversight in Nebraska takes the form of performance audits. A special committee, the Legislative Performance Audit Committee, supervises performance audits conducted by the Legislative Audit Office, which is directed by the legislative auditor. The committee consists of: the Speaker of the Legislature; the chairpersons of the Executive Board and the Appropriations Committee; and four other members of the Legislature, chosen by the Executive Board. The Committee has several duties, including: selecting audit topics; defining the scopes of audits; adopting recommendations based on reports prepared by the audit office; holding public hearings and sponsoring legislation, as necessary, in conjunction with audits; and monitoring agency compliance with committee recommendations.

The concept of legislative oversight via performance auditing came to Nebraska in the early 1970s. It would be almost 25 years before a consistent legislative oversight function established itself. Despite attempts to legislate an expansion of the performance audit function into the executive branch, the function has remained strictly in the Legislature.

### *Early Attempts at Legislative Oversight*

In 1974, the appropriations committee introduced a bill that created the Legislative Audit Review Committee. Although the bill gave the state auditor (an elected executive branch position in Nebraska) the authority to conduct performance audits, the legislative committee had to request them.<sup>16</sup> There is no evidence found so far that any audits were conducted. Within three years, the Legislative Audit and Review Committee was dissolved and the state auditor lost the authority to conduct performance audits. A new committee, the Performance Review and Audit Committee, was created and staffed by Legislative Fiscal Office personnel.<sup>17</sup> The committee conducted sunset reviews of all state agencies. The effort lasted from 1977 to 1983. The concept of legislative performance auditing lay dormant for the next eight years.

### *Revival of the Concept*

In 1991, after a bill to give the state auditor the authority to conduct performance audits failed<sup>18</sup>, the late Nebraska state senator Jerome Warner, a proponent of legislative oversight, undertook a study to examine how other states conducted performance auditing, paying special attention to which branch of government held the authority. The resulting report led to the efforts to establish legislative performance auditing during the next session. The discussions that occurred during the next legislative session formed the philosophy of legislative oversight for the state of Nebraska.

The Executive Board of the Legislative Council, the administrative committee of the Legislature, introduced LB 988 during the 1992 session. The bill established performance auditing as a function of the Legislature and placed the staff tasked with it under a legislative committee. Performance auditing had a fragmented history at this point in Nebraska and had lain dormant since 1983. The concept of oversight and the legislative branch's relationship to the responsibility formed much of the discussion, especially when lawmakers considered the state auditor's office and its role in accountability. Senator Jerome Warner, then chair of the Executive Board, addressed the concept of legislative oversight head-on in the statement of intent for LB 988, by explaining:

“The fundamental policy issue . . . is whether or not performance evaluation is a legislative oversight function . . . well it goes back to the time the Performance Review and Audit Committee was established [LB 193 (1977)]. Senator Bereuter introduced that legislation, and he made it a part of the Appropriations Committee. Now I believe it's true . . . I'm not sure, but I believe it was true that maybe the auditor, or State Auditor's Office had, or presumed to have had that responsibility at that time. But the movement was made that it should be to the legislature. I believe this report [LR 100 (1991)], and it would indicate the vast majority of the states that have some type of performance audit or review evaluation, is under the legislative branch.”<sup>19</sup>

During floor debate of LB 988, Senator Warner continued to make the case for the proper placement of this type of oversight in the hands of the Legislature and noted how by its very nature, performance auditing was at the heart of the legislative process. In addressing the issue, Senator Warner said:

“The whole concept of legislative oversight is what is at stake here or the issue here and, of course, legislative oversight over the years has become recognized as a more and more important function . . . The purpose is, of course, that a legislative branch of government has a vehicle in which they are reviewing the various programs or agencies that have been established by law and whether or not the purpose and the accomplishment and the public service that was intended to occur is, in fact, happening, whether or not it should be changed or redirected. In many respects, it is an extension of the appropriations process . . .”<sup>20</sup>

Despite mounting a convincing case for the placement of such oversight in the Legislature, an attempt was made to amend LB 988 and give the state auditor the authority instead. Senator Warner countered the amendment, noting that “. . . it's a very basic issue and that is one that it's a legislative function, not an executive branch of government function. It's the Legislature reviewing the policies that past Legislatures have established and it, to me, is just simply not appropriate to put a mix of executive branch and legislative branch and in a sense, a competitive

system to review or to do performance audits and I would strongly oppose the amendment and retain its function as it is in most states.”<sup>21</sup> The amendment failed.

Others took a firm stance on the concept of legislative oversight. Senator Doug Kristensen summed up the arguments of Warner and others when he noted that, “And I think 988 does give us an institutional ability to evaluate our own programs. If the Legislature creates the programs, who is better to judge and evaluate if the programs are doing what we intended them to do? . . . I think it’s far more appropriate for the Legislature to be its own program evaluator.”<sup>22</sup>

LB 988 passed and created the Legislative Program Evaluation Act which gave the Legislature the sole authority to conduct performance audits and created a five member committee, the Legislative Program Evaluation Committee, consisting of the chair of the Executive Board, chair of the Appropriations Committee, and three other members chosen by the Executive Board. The Committee was to coordinate the efforts of the staff members within the Legislative Research Division tasked with the new duty. The Act also contained processes for topic selection, scope statement approval, and agency response to evaluation findings.

### *Modifications and Challenges*

Legislative oversight, through performance auditing, faced its first challenge a decade after Senator Warner successfully argued for its establishment. During the 2002 session, several senators signed on to a bill that sought to give the state auditor the authority to conduct performance audits.<sup>23</sup> The bill did not advance from the government committee and died at the end of the 2002 session. Another bill, in 2003, was introduced to the same end<sup>24</sup> and was indefinitely postponed by the government committee. Although neither bill proposed to remove the Legislature’s authority to conduct performance audits, expansion of the function was not well received and thus Nebraska Legislature preserved its vision for legislative oversight.

By 2003, changes were needed to the original act creating the performance audit function. Reflecting changes in this field of oversight, the name of the committee changed to the Legislative Performance Audit Committee and expanded its membership by two.<sup>25</sup> The bill changing the name and updating the process was amended into another bill that required the state auditor to report agency performance problems to the Performance Audit Committee; allowed for the committee and state auditor to conduct joint audits; and authorized the state auditor to do performance audits if the committee so authorized.<sup>26</sup> The bill passed.

Three years passed before further changes were necessary. In 2006, arising from issues encountered during audits, the Legislature reaffirmed that the audit staff have statutory access to all information, including confidential materials, necessary to conduct their work.<sup>27</sup> The Legislature also created the position of Legislative Auditor and renamed the Legislative Research Division the Office of Legislative Audit and Research.<sup>28</sup>

In 2008, the Performance Audit Section received its first peer review after claiming compliance with the Government Auditing Standards or “Yellow Book.” A recommendation by the peer review team suggested that the Legislature make the audit function “free-standing and

organizationally independent.”<sup>29</sup> In 2009, the Legislature passed a bill creating the Office of Legislative Audit and established the audit office as its own budget program.<sup>30</sup>

## Conclusion

Increasingly, citizens are demanding that policymakers review the programs they create and the agencies charged with implementation. Which branch or branches of government will conduct this oversight in the name of transparency and accountability has long been argued over. The legislative history of performance auditing in Nebraska exhibits a record of this discussion. However, since the function took root in 1992, program accountability has been consistently held to be a function of legislative oversight. Only time will tell if this opinion will continue to hold as policymakers grapple with ever-increasing demands for oversight and open government. Regardless of how oversight expands, it seems inconceivable that the legislative branch will ever eliminate its own review of the policies and programs it implements. The loss of legislative oversight would be a severe weakening of the branch and an unsightly wound on the separation of powers that, along with our personal freedoms, form the bedrock of American democracy.

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<sup>1</sup> Performance Auditor, Legislative Audit Office, Nebraska Legislature. The opinions contained do not necessarily reflect those of the Nebraska Legislature.

<sup>2</sup> Little, Thomas H. and David Ogle. *The Legislative Branch of Government: People, Process, and Politics* (ABC-CLIO, 2006), pg. 52.

<sup>3</sup> Kaiser, Frederick M., et al. *Congressional Oversight Manual* (Washington, DC: Congressional Research Service), May 1, 2007, pg. 1.

<sup>4</sup> Lees, John. “Legislatures and Oversight: A Review Article on a Neglected Area of Research” in *Legislative Studies Quarterly* 2 [2]:193-208, pg. 193.

<sup>5</sup> Lee, Robert D., Ronald W. Johnson, and Philip G. Joyce. *Public Budgeting Systems* (Jones & Bartlett Publishers, 2008), pg. 267.

<sup>6</sup> Lee, pg. 269.

<sup>7</sup> Wilson, Woodrow. *Congressional Government: A Study in American Politics* (Boston: Houghton Mifflin Co, 1901), pg. 303.

<sup>8</sup> Wilson, 297.

<sup>9</sup> Wilson, 303.

<sup>10</sup> Kaiser, pg. 2.

<sup>11</sup> In conducting the review and classifying the oversight activities, “performance audit” means audits, program evaluations, policy reviews, and any other comparable activity.

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<sup>12</sup> Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Florida; Georgia; Hawaii; Idaho; Illinois; Kansas; Louisiana; Maryland; Michigan; Minnesota; Mississippi; Montana; Nevada; New Hampshire; New Jersey; Rhode Island; Tennessee; Texas; Utah; Virginia; West Virginia; and Wisconsin.

<sup>13</sup> Indiana; Kentucky; Maine; Massachusetts; Missouri; Nebraska; New Mexico; North Carolina; Pennsylvania; South Carolina; Washington; and Wyoming.

<sup>14</sup> South Dakota

<sup>15</sup> Delaware; Iowa; New York; North Dakota; Ohio; Oklahoma; Oregon; and Vermont.

<sup>16</sup> LB 280 (1974)

<sup>17</sup> LB 193 (1977)

<sup>18</sup> LB 493 (1991)

<sup>19</sup> Introducer's Statement of Intent, Senator Jerome Warner, Committee on Government, Military and Veteran's Affairs, February 6, 1992, pg. 8.

<sup>20</sup> LB 988 Floor Debate, Senator Jerome Warner, pgs. 11567-11568.

<sup>21</sup> LB 988 Floor Debate, Senator Jerome Warner, pgs. 11573-11574.

<sup>22</sup> LB 988 Floor Debate, Senator Doug Kristensen, pgs. 11580-11581.

<sup>23</sup> LB 964 (2002)

<sup>24</sup> LB 115 (2003)

<sup>25</sup> LB 484 (2003)

<sup>26</sup> LB 607 (2003)

<sup>27</sup> LB 588 (2006)

<sup>28</sup> LB 956 (2006)

<sup>29</sup> *Peer Review: State of Nebraska Legislative Performance Audit Section*, National Conference of State Legislatures, July 2008, pg. 14.

<sup>30</sup> LB 620 (2009)



**The Sweet Path - Your Journey, Your Way:**  
**Choices, connections and a guide to the sweet path in government portal modernization**

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*You must take the `A` train  
to go to Sugar Hill way up in Harlem.*

*If you miss the `A` train  
you`ll find you`ve missed the quickest way to Harlem.*

*Hurry, get on, now it`s coming.  
Listen to those rails a thrumming.*

*All board! Get on the `A` train.  
Soon you will be on Sugar Hill in Harlem.*

Duke Ellington, 1941

Subway commuters make navigating an underground labyrinth that connects the city in ways that are not obvious at street level easy, while tourists and other first-time users tend to hesitate. For the less experienced, maps and guides — even iPhone applications — help us figure out the best routes from point A to point B. For most journeys, no single ‘A’ train can take you from where you are to where you want to go. The value and trick are in making connections and combinations with your destination in mind.

Video gamers call this the “sweet path.” It isn’t necessarily singular or uniform, and in most cases it is in a structure similar to a subway map where your choices either keep you near the sweet path, or divert you away from it. The closer you stay to the sweet path, the greater the range of choices you maintain for later in the game — or journey. Conversely, veer away from the sweet path and your choices narrow to very few options.

The story is the same when it comes to the hard work of government modernization, particularly as public agencies seek to extend the value of existing systems and data to meet the expectations of a public that are being fundamentally reshaped (over and over again) by the commodity Internet.

*Words of the prophets are written on the subway walls*  
Simon and Garfunkel, 1965

The good news is that, like subway commuters, there is a core contingent of e-government veterans who have seen most of this before, and bring those vital learnings with them to apply to the next generation of challenges.

Those veteran travelers are today’s map makers. It is a long and proud tradition. Map-guides—whether a Rand-McNally road atlas, motor league TripTik travel planner or GIS-based travel application— have long been popular for not only sketching the landscape, but identifying a

preferred route for the journey. Getting from point A to point B in the area of government modernization is often seen as a daunting journey made without recognizable signposts along the way.

In a four-part series of e-government map guides, the Center for Digital Government uses a subway map metaphor to define the starting and ending point for modern portal improvement services, along with the major stops along the way. Moreover, the map guide highlights the preferred or sweet path in contrast to dead-end routes that would send decision-makers to where they do not want to be.

## **PART ONE: A JOURNEY WITH A DESTINATION IN MIND**

Grand Central Station (itself a metaphor for the portal) is both the beginning point of the journey and the destination. It is where the various lines meet and help people begin, continue and conclude their journey. The making of a successful journey, and getting to a desirable destination, is based on transferring among key stops on three major lines (and staying off spurs). The first of the four pieces is an annotated portal modernization map-guide for getting from where you are to where you want to be. The first installment also focuses on the destination — the ends to which governments are working to meet today's needs and tomorrow's expectations for local, mobile and social information and services that fit with the communities served by government.

The trio of follow-on e-government TripTiks focuses on key stops or stations along the way — representing logical groupings of issues and themes to modernization success. Each of the three features a grouping of key decision points that determine how close a jurisdiction stays to the sweet path:

## **PART TWO: THE BLUE LINE**

The Blue Line travels to the capitol campus with stops at the following stations:

- *Planning the Trip (Strategic Planning)*: Take the time to identify and stay close to the sweet path;
- *Being Somebody's Rick Steves (Championship)*: More than a conductor or guide, this is somebody — like Rick Steves, the host of a popular PBS travel series in which he and members of his family crisscross the globe — who will make things right and says, "You can't get there from here"; and
- *Making the Trains Run on Time (Governance)*: Recognize that all the parts are connected into a loosely federated system that have to work together if anybody is going to get anywhere.

## **PART THREE: THE GREEN LINE**

The Green Line travels through financial and business districts with stops at the following stations:

- *Map Making (Benchmarking)*: Here, travelers come to terms with what they actually know about their starting point and how they'll measure their progress on the journey;
- *Paying the Fare (Funding Assessment)*: The conductor is going to check sooner or later, so it makes sense to guarantee there is a sustainable way to pay for all of this; and

- *Cross Cultural Contact (Lost in Translation)*: Here is where those raised in the separate cultures of service delivery, information technology and procurement find a common way of talking with each other to ensure optimum results from scarce public investments.

## **PART FOUR: THE PURPLE LINE**

The Purple Line extends into neighboring communities with stops at the following stations:

- *Comparing Itineraries*: Where travelers can see how and where others have gone and with what results;
- *Travel Companions*: Where travelers meet others they must have with them on the journey and see why traveling together is better than going it alone; and
- *The Destination and Beyond*: Where travelers ask the obvious question, “What do we do now that we’re here?” As important as the journey is, a point of arrival demands that other things get done — ongoing operations, continuous improvement, ongoing portal enhancements, monitoring performance and delivering public value.

Each installment will also feature captioned photos from the trip that highlight good practices and travel advisories about those stations at which you ought not get off the train and other potential hazards along the way.

## **THE POINT OF DEPARTURE (PART ONE)**

Every journey begins somewhere — often a train, subway or bus station. The stations themselves provide architectural cues as to why what happens there is important. They have that in common with seats of government. Consider the capitol dome and, in many cases, its virtual equivalents on the Internet — the portal.

As the official home of the state flag, the state seal and a portrait gallery of leaders past and present, the capitol building is high on symbolism. It is also, by design, high on function. It is the place where the people's business gets done — supported by a network of operating agencies that stand behind the capitol building with a reach extending across the state. The combination is at once compelling and comforting — just watch the first timers approach the grand edifices and enter these civic temples.

In the sometimes-overused speech of the Internet, the capitol is the original public-sector portal. As such, it is a useful standard bearer for those who are building 21st century government.

The state capitol represents a declaration of intent that the people in a geographically defined space, which spans multiple cities and counties, will act together as a single entity, sharing the burdens and the benefits of community. At best, such a community is bound together by both practical considerations of cost reduction and mutual aid, and by a big idea that is sometimes captured in the state motto — Alaska’s “North to the future”; Kansas’s “*Ad astra per aspera ...* To the stars through difficulties”; and New Hampshire’s embrace of “Live Free or Die” come to mind.

The big idea for the state Internet portal is to provide and support the kind of government that was imagined by the people who first chiseled those words into stone at their respective state houses, without the constraints of time or space that characterized the earlier era. The Internet collapses geographical barriers, making government available at the time and place of the citizen's choosing.

Just as the capitol is the most carefully maintained real estate in a state, the portal needs that same level of care and attention.<sup>1</sup>

What explains the difference between some of these public institutions in that some have been lovingly maintained over the years, others have been refurbished to meet modern expectations and still others have fallen into disrepair? The answer may be in a term of art borrowed from the transportation industry: *multimodal*.

Bus and train lines that insisted on a go-it-alone strategy where they are the only games in town fared the worst. Those that thrived have been those that integrated themselves into a multimodal environment, such that once single-purpose stations become transit points for subways, heavy- and light-rails, buses, ride sharing and even charging stations for electronic vehicles — all with a view to extending the value of each previously discrete system and expanding the choices available to the people they serve.

There is a parallel with a shift taking place in digital service delivery. The portal, which has been the nexus of the e-government movement since its inception, is becoming a non-exclusive route into the information and services that stand behind it. A decade ago, the search function was generally regarded as compensation for bad design. The conventional wisdom was that people would and should navigate in two or three clicks to the material they needed. That's changed. Search is now good design, and the preferred choice of a generation of Internet users raised on Google. Similarly, social networks have become aggregation points for people of like interests and concerns, which a growing number of portal operators are tapping as a means to drawing the assembled communities to information and applications which they would find useful — even (or especially) if they are likely not to visit the portal itself. The portal home page remains the front door of government and it is the standard bearer for the growing suite of online applications that stand behind it and the rapidly growing universe of mobile or smart phone apps that extend its reach to the palm of the user's hand, wherever in the world she might be. The portal and all its extensions are all about a sense of place. It is my town, my city, my state -- anytime and anywhere. That sense of comfort and connectedness relies on building and maintaining trust, which begins with ensuring their online services have first-rate functionality and security to support advanced transactions at a time and place of the citizen's or business owner's choosing. It extends to the look and feel of the suite of online offerings, regardless of platform or device, to assure users that the online services they are using are, in fact, from "home" — that is, their government.

Such a multimodal approach — which brings together the portal, a universe of conventional and mobile applications, robust search and a fluid relationship with social networks — is proof of the old proposition that the whole is greater than the sum of its parts. That is especially true when it comes to meeting service delivery, operational and policy objectives — provided that public agencies can get over a natural tendency to defend turf, whether that is the centrality of the portal or the uniqueness of an application or service of an individual agency's creation.

The act of overcoming provincial concerns is the function of a determined leader who champions the wider and bigger view and a governance structure that allows a federated environment to act like a single enterprise or community as the component parts come together to plan their work and work their plan. The trick in all of this is to recognize that constituents will arrive with baggage but, through meaningful collaboration and co-creation, can leave without it. Changing, engaging and codifying new behaviors can be a trip — a trip on the Blue Line, which is the vital next leg on your journey, your way.

*People get ready, there's a train a comin'  
You don't need no baggage, you just get on board*

Curtis Mayfield and The Impressions, 1964  
and Rod Stewart with Jeff Beck, 1985

If you have read this far, you have -- metaphorically speaking -- bought your ticket for the sweet path. That act of deciding changes the conversation from whether to take the journey, to how to make it from station to station. Answering the question of “how” is the focus of the other three installments in this series, which outline the actionable sweet path pioneered and taken by almost half of the nation’s states. Some of their lessons are best practices, others are emerging practices in new areas, but all are told through the experience of states that were in similar situations previously and chose to act. In all cases, they had more to do than they could reasonably do themselves. They had competing priorities for scarce public resources, and because they chose portal outsourcing, they were able to focus internal resources on other initiatives. Partnering on the portal (and the overall e-government program) provided a clear route from where they were to where they wanted to be.

Two decades of experience in states spread across the country indicate that this journey is a trip best taken in good company. You don’t need any baggage – or to travel by yourself – you just get on board.

## **NEXT STOP, THE BLUE LINE (PART 2)**

Maps and guides — even iPhone applications — assist the inexperienced subway traveler in figuring out the best routes to take them from Point A to Point B, building in contingencies for a late train or closed station. As discussed in the first part of *Your Journey, Your Way*, a four-part series on modern portal improvement services, there is no single ‘A’ train to take you from where you are to where you want to go. For most journeys; the value lies in making specific connections and combinations with your destination in mind – also known as finding the “sweet path.”

The closer you stay to the sweet path when it comes to the hard work of government modernization, the greater the range of choices you maintain for later in the journey, particularly as public agencies seek to extend the value of existing systems and data to meet the expectations of a public that are being fundamentally reshaped (over and over again) by the commodity Internet.

In this second installment in *Your Journey, Your Way*, the Center for Digital Government assesses the metaphorical subway’s Blue Line, which travels to the capitol campus with stops at the following stations:

- *Planning the Trip (Strategic Planning)*: Take the time to identify and stay close to the sweet path;
- *Being Somebody's Rick Steves (Championship)* :More than a conductor or guide, this is somebody who — like Rick Steves, host of a popular PBS travel series in which he and members of his family crisscross the globe— will make things right and can say, “You can't get there from here”; and
- *Making the Trains Run on Time (Governance)*: Recognize that all the parts are connected into a loosely federated system that have to work together if anybody is going to get anywhere.

While electronic government goes proudly back to the days of punch cards and green screens, it wasn't until the late 1990s that government technology was placed *in the hands of the public*. Sure, some states and localities had Web pages before then, but they weren't *using* them for anything. It was only once the transforming power of the Internet had captured the public's imagination that government began to experiment with these new tools. The first decade of online government was an exciting and challenging time, and all of today's great e-government platforms were working without the luxury of maps and guidebooks to portal success.

Times have changed. In this second decade of government portal innovation, we have the benefit of lessons learned from the experience of successful programs. The *sweet path* to success has come into clearer view.

By analyzing what went right, what went wrong, and what's happening now, we are able to chart the course of electronic government with much greater precision. Collecting these lessons and their interpretations provides a helpful roadmap for the next decade of online government innovation.

### **Planning the Trip (Strategic Planning)**

All travelers know that the hardest part of planning a vacation is choosing where to go. Online government is no different.

You might be tempted to think that we've worked this part out, and that the goals of online government are actually easy to define. While it's true that certain lofty aims do appear to be universal and clearly articulated — goals like citizen convenience, cost savings and operational improvements — turning those praiseworthy aims into concrete action is quite another matter.

What *exactly* does the public want from online government? Where do they expect to find it? Is online government a tool that citizens expect to use, or a service they want us to provide? Why are we undertaking these projects in the first place? What will be different when we achieve our goals? Finally, and most importantly, will we even recognize our destination when we get there?

The Center for Digital Government has been analyzing, ranking, dissecting and tracking portal excellence since its inception through venerable programs like *Best of the Web* and new ventures like the Digital States Performance Institute. While each state and locality is unique, certain common paths have become apparent by watching the footsteps of the successful travelers of the

past decade. The first — both in terms of chronology and in terms of importance — is *strategic planning*.

Strategic planning can be described as “an organization's process of defining its strategy, or direction, and making decisions on allocating its resources to pursue this strategy, including its capital and people.”<sup>ii</sup> That definition is sound, and strategic planning is an activity that we observed early in the states and localities that demonstrated the greatest success in the first decade of online government.

When we look back at the top award winners from the 2008 *Best of the Web* program, namely Virginia, Maine, California, Texas, Alabama and Rhode Island, most states placed a clear and early emphasis on strategic planning. Many of these plans still exist on the Web, and they have been refined over time. While each approach is different in terms of form and outcomes, they all share certain key attributes.

#### **Travel Advisory: *The Five Keys to Strategic Planning*:**

- Start with the public
- Define a clear vision
- Engage technology experts
- Allow flexibility for changing tactics
- Know your resources and limitations

***Start with the Public.*** Successful strategic planning efforts begin with the public – who they are, what they expect, and how their opinions change over time. History writ large has shown that the best governments were the ones that listened most closely to the will of their people then operated with determined efficiency to make those public goals a reality. Successful electronic government strategic planning processes worked much the same way.

***Define a clear vision.*** It has often been said that strategic planning is about deciding what *not to do*, since being all things to all people is an impossible approach. It is vital that the public policy goals of an online government effort be stoutly debated, clearly articulated and well documented. Once these are set, they should remain as a fixed navigational beacon. Clarity of vision will see you through the difficulties that arise along the way on your trip.

***Engage technology experts.*** Good intentions, however well documented, are futile if they are not coupled with honest-to-goodness technology know-how. No amount of consensus among stakeholders will keep your Web site running if you purchase the wrong gear. Utah is a great example in this regard. When Utah learned that the Flash player was on 97 percent of personal computers in the country, they were able to undertake a striking portal facelift that is engaging, interactive and evocative of the best user interfaces on the Web. Technology expertise matters and it is a critical attribute for online government leadership.

***Allow flexibility for changing tactics.*** It's tempting to think we can predict the future, but our experience teaches that human beings just aren't very good at it. When today's online government leaders began in the late 1990s, no one envisioned a day when members of the public would have broadband Internet access on their mobile phones. While most states were in the first generation

of their portal contracts, mobile access was a must. Lucky for these early pioneers, most of them built enough flexibility into their strategic plans to allow for unforeseen detours or changes on the way.

***Know your resources and limitations.*** Funding challenges, the rapid pace of technology innovation, complex regulations and inter-departmental politics are facts of life. Great plans are firmly rooted in the realities of government work. If your plan depends on things you don't have, can't get or aren't sure of, you may not make it to your destination.

### **Being Somebody's Rick Steves (Championship)**

If you went to Europe without a Rick Steves guidebook, then you simply paid too much and didn't have nearly the fun that you could have had. (No matter — there is always next time!) Trips are so much better when they benefit from the experience, wisdom, and, as Rick Steves puts it, “militant optimism” of that unique type of person that we call a *champion*.

A “project champion” is someone who wants you to get as much as possible from the journey, and makes an equal investment of time, talent, political capital and prestige in the task of making it happen. These unique individuals have as near an evangelical zeal as can be found in the professional sphere of life; they are convinced of the merits of their cause, committed to the outcome and vocal promoters to their well-placed colleagues inside and outside of government.

### **Travel Advisory**

- The bottom line is this: Every project, no matter how successful, will have a *do-or-die* moment. Your champion is the person who has the commitment and the authority to chose "do".

It is also important to note what these people *are not*. A project champion is not a fellow traveler, and is even more rarely the project manager or director. These are individuals who have reached the top levels of achievement in their fields — think of governors, legislators, commissioners, mayors and county executives — who have a passion for the cause of online government. In industry, they are called executive sponsors. The steadfast commitment of a well-placed champion is not just important to online government – it is essential.

TexasOnline.com, the highly successful state of Texas online government program, had the benefit of two primary champions that were instrumental in the project's success for most of its first decade. Gov. Rick Perry, as executive champion, consistently guided the project to success by focusing needed resources and brainpower on the project. In the Legislature, State Sen. Eliot Shapleigh of El Paso crafted multiple generations of the foundational laws that made the project possible. Without their bipartisan cooperation and shared championing of the program, TexasOnline.com could have ceased to exist on multiple occasions. Instead, the site boasts more than 800 online services, tens of millions of portal visits, and billions of dollars of online revenue, and a top five *Best of the Web* ranking in 2008.

The bottom line is this: Every project, no matter how successful, will have a *do-or-die* moment. Your champion is the person who has the commitment and the authority to chose “do.”



## **Making the Trains Run on Time (Governance)**

Seasoned travelers know that it takes more than a solid plan and a good guidebook to have a great vacation. Without the logistical and tactical leadership to make the trains run on time, we are destined for disappointment. Likewise, good governance is also critical for success in electronic government.

Even at the start of the second decade of online government, governance questions haven't been completely settled. Who will oversee the project? Should one agency take the lead, or should a new cross-agency authority be created? Who is an advisor and who is an operational manager? Will one governance model work for all time, or will we need to restructure over time?

Surveying the top e-government portals shows great diversity in some areas of governance and commonality in others. Regrettably, not all governance models have led to equal success. Interestingly, the states and localities that have evolved their governance models over time have seen the greatest success in this arena. While variations can and do happen around the nation, the key attributes emerge that chart the path to good governance:

### **Travel Advisory: *The Three Keys to Good Governance:***

- Start with the public
- Clear operational authority
- Agencies treated as customers
- Public-private partnership

***Clear operational authority.*** When everyone is in charge, no one is in charge. The vast majority of the top examples of electronic government programs have a clear organizational chart in which accountability and decision making is ultimately focused in a single individual who is accountable to a larger governance entity, and the others are trending in this direction. These individuals go by a multitude of titles, but they share a common role as the *chief executive officers* of their respective portal operations. Clear decision making, led by an appointed and accountable individual, has proven to be essential to portal success.

***Agencies treated as customers.*** In the best programs, agencies of government take on a role that is *less than an owner* and *more than an advisor*. Their stamp of approval is a critical outcome, and without it, the program will fail. On the other hand, they typically depend on project management and operational resources from an external portal authority to achieve their goals. In the best examples of e-government leadership, agencies and departments are treated as *customers* of the projects.

***Public-private partnership.*** A public-private partnership is not just a good way to *pay for* a project — it is also an outstanding way to *run* a project. By bringing together the disciplines of private-sector capital management and results-oriented operations with civic-minded public policy, real governmental transformation is possible. Fiscal responsibility in service of the public good is a powerful combination indeed.

As a final note, consider the aforementioned above that the best models change and evolve over time. To ensure maximum benefits for constituents, build in the ability to modify governance over time as the project matures. Additionally, states don't necessarily have to pass legislation creating

a new portal governing authority — the governance model may be in place already and be adapted to the portal. Moreover, a single entity — such as the IT team led by the CIO — can handle governance initially while the state refines and evolves governance.

### **NEXT STOP, THE GREEN LINE (PART 3)**

Any inexperienced subway traveler will become more familiar navigating the system after reviewing the map and figuring out the best routes from Point A to Point B. In addition, after taking some time traveling the Blue Line — which travels to the capitol campus with stops at *Strategic Planning, Championship and Governance* stations — our traveler is becoming more comfortable and knowledgeable about modern portal improvement services.

In this third installment of *Your Journey, Your Way*, the Center for Digital Government assesses the next path in the metaphorical subway system: the Green Line, which travels through financial and business districts with stops at the following stations:

- *Map Making (Benchmarking)*: Here, travelers come to terms with what they actually know about their starting point, and how they'll measure their progress on the journey;
- *Paying the Fare (Funding Assessment)*: The conductor is going to check for tickets sooner or later, so it makes sense to guarantee there is a sustainable way to pay for all of this; and
- *Cross Cultural Contact (Lost in Translation)*: Here is where those raised in the separate cultures of service delivery, information technology and procurement find a common way of talking with each other to ensure optimum results from scarce public investments.

Once you are in motion — and virtually all state and local portals are by this point — the quest for online government excellence becomes a bit more complex. Certain activities that take place during the trip become important as planning and governance issues that were set at the project's inception recede into the rearview mirror.

For those new to the subway, the trip can be either a fearful experience or an exciting one, depending on how you approach the journey. Three key aforementioned practices – benchmarking, funding assessment and intergovernmental collaboration – can make the electronic government journey much more pleasant and ensure better results for the people you serve:

#### **Map Making (Benchmarking)**

In the second installment, “The Blue Line,” we discussed the vital importance of strategic planning, project champions and governance. No doubt, that triad set out a pretty good map for our electronic government voyage. Still, it never hurts to take a quick glance at the vehicles to your left or right, or in front of you, for that matter.

Benchmarking isn't as much about competitive tracking as it is a learning exercise. While states diverge widely in many respects, certain tasks in electronic government are common across all jurisdictions. We all have to package our content to appear in the appropriate places in search results; we all need to make our home pages and online services compelling and interactive; we all have challenges paying for the wide spectrum of online services demanded by the public.

In these areas of commonality, cross-jurisdictional benchmarking can be a highly effective endeavor. A common passion for understanding benchmarking — and putting the lessons learned into practice — is a hallmark of the top performers in every Center for Digital Government ranking of online government progress.

Consider the fact that a few short years ago, no one had RSS feeds or Web 2.0 tools like Twitter and YouTube on their portal home pages. Seemingly overnight, they are now everywhere. How did that happen?

It didn't take every individual jurisdiction conducting its own research on its own time to make those tools appear so rapidly on everyone's sites. In this case, the governors of Virginia and California were among the first to begin posting videos on YouTube. They established their own YouTube channels, and then connected those efforts to their portals. When the first leading states and localities embraced social media tools, others quickly followed suit.

As a consistent leader in e-government, Utah officials constantly challenge themselves to generate new ideas, and often use benchmarking in a strategic way to measure themselves against private and public sector sites. State leaders took a keen eye to their colleagues work while taking a serious and deep look at the best practices in leading private sector Web sites. The result is that Utah has developed a navigational paradigm and home page that is effective and compelling, and sets a new standard for portal excellence.

For the field as a whole, it isn't important that any specific state or locality win a given competition. What is important that *someone* sets a new standard, so the rest of us can focus our time on harvesting the ideas that will make the biggest impact on our own efforts.

### **Travel Advisory: *Center for Digital Government Benchmarking Resources***

- Best of the Web Awards Program
- Digital Government Achievement Awards
- Digital Communities Program
- Digital States Performance Institute
- Thought-Leadership Whitepapers

### **Paying the Fare (Funding Assessment)**

If you are a fan of the travel-themed reality series called “The Amazing Race,” or if you traveled widely as a cash-strapped student, then you know how harrowing it can be to be trapped in a distant city without the money you need to get home. Even the most seasoned traveler has very few options when the funds run out. Great plans, strong support and excellent benchmarking intelligence won't close the gap when the budget outlook turns negative.

While the names and places may vary, all states and localities face the same challenges when it comes to funding. Who will pay the fare for electronic government transformation? Are there a sufficient number of fare payers to stay on the sweet path? Where will the money come from? If I can't get appropriations, am I out of luck?

Early-stage angel and venture capital investors know a thing or two about getting new startups off the ground. Unlike government officials, startup investors hope to see *all* of their projects become self-funding and self-sustaining. As a result, savvy early-stage investors have learned that it's not just the amount of money that matters, but the *quality* of the money.

Funding is funding, right? A quick look around the country shows that this is unfortunately not the case. Different methods of raising revenue have different characteristics, and they react quite distinctly when the stresses and strains of bad times emerge. There are three main sources of funding for any electronic government initiative:

- Transaction fees paid by citizens or businesses on a pay-per-use basis
- Assessments to agencies in a service bureau model
- Direct appropriations from a budget authority

Arguably, the most successful portals make use of all of these mechanisms to some degree or another. What distinguishes the winning projects, however, is that they tend to derive the vast majority of their funding from the first method: transaction fees on the public and businesses.

The high correlation between portal success and a transaction-fee-base revenue structure is no accident. It has everything to do with the quality (or color) of the money being used to fund the portal. In general, transaction fees have the following characteristics that make them the preferable funding source for state portals:

***Revenue Stability and Sustainability.*** As the economic climate has shifted wildly since September 2008, transaction revenue for portals has stayed comparatively stable. The reason is that transaction fees are directly tied to the level of demand for portal services. Renewing a driver's license, registering a new business or getting your car inspected are not discretionary purchases. Transaction fees aren't tied to property value fluctuations or changes in the labor market. Demand for services and the revenue to pay for them are as tightly correlated as they can be in a public-sector context. Many states with progressive e-government solutions, such as Kansas, Arkansas, Nebraska, Utah and Virginia, have been using transaction-based funding for more than 10 years, proving that the model has staying power.

***Pay for performance.*** Self funded portals are one of purest examples of pay-for-performance anywhere in government. If a public-private partnership doesn't build services that people want to use, then people won't use them. No money, no more portal services. Since the revenue stream is so directly tied to the services provided, gaining consensus on the right mix of services to provide and how to provide them becomes much easier.

***Availability of Investment Capital.*** While the general markets for investment capital have certainly tightened, private sector partners are still willing to put capital at risk to fund the development of new government services in a transaction-fee model. While the returns are lower than what might be expected in other types of investments, the risk involved in funding a government service is correspondingly lower as well. This brings private backers to the table in ways that are not possible with other funding regimes.

As a final note on paying the fare, remember that while money is necessary for a trip, it isn't why you took the trip in the first place. Revenue is always a means to an end, not an end in itself. The purpose of our comments here is to provide clear guidance to ensure that sufficient funds are available to focus on the real top priorities. The top goal, of course, is about good public policy: to deliver the services that the public needs in the most effective manner possible.

### **Travel Advisory: The Color of Money**

- **Not all revenue is created equal.** “The high correlation between portal success and a transaction-fee-base revenue structure is no accident. It has everything to do with the quality (or color) of the money being used to fund the portal.”

### **Cross Cultural Contact (Intergovernmental Collaboration)**

If benchmarking is important, then intergovernmental collaboration is critical. In the last segment of our series, we drew upon advice from travel guru Rick Steves. Consider this guidance from our hearty travel champion: “Many travelers toss aside their hometown blinders. Their prized souvenirs are the strands of different cultures they decide to knit into their own character. The world is a cultural yarn shop.”

Government portals may vie for the top spot in this or that ranking, but they are much more like *colleagues* than *competitors*. Conveniently, our jurisdictions don't overlap much (except in the case of certain state and local functions), and we don't have anything to fear from our neighbors. On the contrary, we have quite a bit to learn.

The very fact that each government is different makes our colleagues in other states all the more useful as a creative laboratory for experimentation, trial and error. Have we learned from each other's project plans? Do we read each other's requests for proposals? Even better, have any of us ever read the *responses* that companies provided to another state's or locality's inquiries? Do we network, collaborate and brainstorm with each other at events where we typically congregate?

Our travel expert Rick Steves is fond of saying that “extroverts have more fun.” We can all relate to the fact that traveling with friends and colleagues is much more enjoyable than a trip alone. By building a web of relationships among jurisdictions, we can all reach online government success faster.

### **Travel Advisory: Cross Cultural Contact**

- “The very fact that each government is different makes our colleagues in other states all the more useful as a creative laboratory for experimentation, trial and error. Have we learned from each other's project plans? Do we read each other's requests for proposals? Even better, have any of us ever read the responses that companies provided to another state's or locality's inquiries?”

## NEXT STOP, THE PURPLE LINE (PART 4)

### Points of Arrival, Points of Departure (AKA The Purple Line)

Everybody wants to slap your back  
wants to shake your hand  
when you're up on top of that mountain  
But let one of those rocks give way then you slide back down look up  
and see who's around then

This ain't where the road comes to an end  
This ain't where the bandwagon stops  
This is just one of those times when  
A lot of folks jump off

Run your car off the side of the road  
Get stuck in a ditch way out in the middle of nowhere  
Or get yourself in a bind, lose the shirt off your back  
Need a floor, need a couch, need a bus fare  
Man, I've been there

You find out who your friends are  
Somebody's gonna drop everything  
Run out and crank up their car  
Hit the gas, get there fast  
Never stop to think 'what's in it for me?' or 'it's way too far'  
They just show on up with their big old heart  
You find out who your friends are

Tracy Lawrence, 2007

Compare old and new subway maps and you will notice that blue and green are classic colors for the core lines that are the system's backbone. So it is with this guide to the sweet path for government portal modernization.

As the systems and the territories they serve expanded, so did the range of colors used to identify new lines. Purple would have been an unusual choice for a subway line at the turn of the 20<sup>th</sup> century because it signified wealth and its trappings. By the turn of the 21<sup>st</sup> century, however, the color had been democratized to the point that purple was the official color of the fight against pancreatic cancer, aging boldly and new horizons. It is apropos then that our Purple Line would take us to places once considered exotic territory or somehow out of scope.

### Comparing Itineraries

Most journeys worth taking have more than one possible route. In that way, there is no single sweet path. But the paths come with varying levels of sweetness. And complexity. And cost. And control, or autonomy. In short, there are trade-offs on the journey that should be navigated with eyes wide open.

The dot-com era came complete with a number of companies that offered to do for government what other start-ups were doing for retailing and financial services with all-in-one turn-key solutions, outsourcing applications one at a time or combinations of the two. Most have gone the way of the Pets.com sock puppet. Significantly, though, over the past 17 years a group of more than 20 states have partnered with a single company, operating through state-specific wholly-owned subsidiaries. While each state operation was primarily concerned with meeting the policy objectives, strategic goals and service delivery needs of the public partner, it came with the structural advantage to share useful applications and best practices across sister states within the systems. There are more than 2,000 applications in service across the partnering states and available for customization and implementation to other network states. Moreover, the portal and the suite of applications that stood up behind them came with the promise of paying for themselves through the assessment of fees on a small number of high value transactions brought needed relief to the general fund.

In its early years, out of an abundance of caution, the public-private partnerships that formed around the so-called self funded model sometimes came with legislative changes and the creation of complex joint governance structures. The partnering states' experience helped refine the model in ways that ensure public accountability and no loss of public services while streamlining the administrative overhead once deemed necessary when the model seemed untested and radical. After nearly two decades of supporting states from Arizona to West Virginia, the legislative and governance requirements are much lower and the model's track record continues to speak for itself. Legislation to create new governance models or create a special authority to charge fees is often no longer necessary because states have the statutory framework and enterprise governance models already in place — this can be leveraged for the portal.

## **Travel Companions**

*If you're living in a bubble  
Then I guess you got no troubles  
But if you're anything like me  
Well then I bet you really need*

*To take a ride  
Let's take a ride on the love train*

Big and Rich, 2004

No digital government project would be confused with a trip on the love train. But when there is an agenda — *improving public service delivery* — and a way to pay for it — *self funding* — contentious meetings about turf can become meaningful collaboration among formerly discrete public agencies for developing a shared platform for modern service delivery. Going it alone has always been difficult. It becomes all the more impractical and costly in an era when users expect immediate access to online experiences that are local, social, mobile and global.

When the discussion shifts from questions of “what” to “how,” and a platform approach such as the one previously described is readily available without financial barriers, it allows states to build a critical mass or, more properly, a scalable community around online service delivery.

### **A Place on the Portal, A Place at the Table ----**

- For an extended discussion of governance models and other structural considerations, see the Center for Digital Government white paper, *This Old Portal*, available as a free download from the Center’s website ([www.centerdigitalgov.com](http://www.centerdigitalgov.com)) under the publications tab.

One of the most difficult stops to navigate on the Purple Line is a place called procurement. It can be a cross cultural experience, where technologists, business managers and procurement officials — each speaking their own private language or heavily accented dialect — often talk past each other and never understand their shared or common interest in procuring a public private partnership in which the cost section calls for revenue rather than expenditure. It represents a challenge to deeply engrained bureaucratic practices and a procurement environment that often provides no legal way for the government to buy things that are “free.”

A related challenge are the subtle differences between procuring a commodity product versus a dynamic set of services that cater to the public’s evolving needs for – and expectations of -- online services. Public procurement processes were forged around the former, some which have proven unhelpful with the latter. That said, a number of states have begun to adapt their procurement practices to reconcile past practices with today’s practices and tomorrow’s prospects. For example, Texas recently conducted a rebid of its original portal contract. Procurement officials worked closely with the lead agency, the Department of Information Resources (DIR), to run a competitive procurement that protected and promoted the state’s interests while adapting to the realities of contemporary technology business models:

- Pricing: On the question of “free,” or how procurement evaluates a no-cost service, Texas evaluated the bidders’ overall investment in portal services over the life of the contract, as well as the narrative of how the vendor planned to deliver upon the state’s desired business model.
- Contract length: Many states have limitations on contract length, but a transaction-based enterprise portal may require several years for the state or private sector provider to recoup the initial investment. Texas elected to provide an initial seven-year term with renewals if the vendor is performing at satisfactory levels. This gives ample time to make necessary investments in services throughout the contract.
- Terms and conditions: Texas understood the difference between model and mandatory contract terms, recognizing that potential bidders may stay on the sidelines because of rigid language. Texas included a base contract in the Request for Offer (RFO) and asked the bidders to provide exceptions and additional terms in their responses. This set a baseline for negotiations, but did not eliminate potential bidders that could not agree with all of Texas’s terms.



- Contract structure: Form follows function and Texas was interested in maximizing the number of agencies that would participate in the portal over the life of a multi-year contract. Texas used a simple contract structure that features a single master contract with baseline terms for the overall services. Agencies that elect to participate will execute a customer agreement, which defines the specific services to be provided, as well as any changed or additional terms and conditions. This contract structure affords the flexibility to adapt for services that may not be predicted when the master contract is signed.

The overall procurement goal was to maximize competition by providing enough flexibility to attract the best available portal service providers to the competitive rebid, while delivering a flexibility contract that could adapt to the immediate and future goals of DIR and TexasOnline.

### **The Destination and Beyond**

Many trips end with an emblazoned T-shirt. Many online efforts end with a sentiment worthy of a T-Shirt — been there, done that, got the portal. After the dot-com era of the late 1990s, a new conventional wisdom set in that suggested that e-government was essentially done. That conventional wisdom was wrong.

Indeed, tweaking the portal has become an annual rite of summer in leading states. In the season just passed, California and Michigan both refreshed and streamlined their landing pages, adding and recategorizing features, functions and content according to their respective priorities and how people actually use their sites — primarily for living, working and visiting. Michigan's latest iteration reflects an effort to present information and services using clear, plain language and organizing them under a double-decker set of horizontal tabs, one above and the other below the updated masthead. California opted for a simpler, streamlined look too. There is a certain California sensibility to services highlighted as individual or groups of products, each carrying its own brand — the bright colors of which stand in bold relief against a toned down monochromatic Ca.gov background.

In keeping with their respective sensibilities, Michigan neatly itemizes its use of Web 2.0 under an appropriately labeled tab, while California ties itself graphically to brand name social networks such as Twitter, Facebook, Myspace and YouTube, among others, which carries with it an explicit call to engage government in these new ways during a new season of transparency and public accountability.

An informal comparison of these sites on the Wayback Machine demonstrates a tendency toward continuity and incremental improvements over time for both state portals. The changes are new enough to get noticed, useful enough to improve navigation and access to services, but nothing particularly disruptive.

Not so for Utah.gov. Not this time. The state portal re-launched in early June 2009 with extensive use of Flash, a Mac-like carousel of feature icons, a prominent and expanded search function intended to wrap results in actionable context (the list of services below the search field changes dynamically to match what the user types), and an innovative feature that uses noninvasive Geo-IP

technology to identify the area of Utah from which the user is coming so it can serve up relevant information. Geo-IP mapping has the added advantage of screening out the clutter.

Lynne and a pair of developers who work on a state portal elsewhere in the country were among those who took Utah to task for taking too many risks. Much of it had a scolding tone, “There is no way this would pass usability testing,” and, “This is a government Web site that should be providing information in a consistent manner that is usable by all of its residents.”

The online debate drew out Utah Technology Services’ Chief Technical Architect, Bob Woolley, and this rejoinder, “Good design does not preclude accessibility. Similarly, poor or unimaginative design does not ensure accessibility or usability.”

State CTO David Fletcher reminded his critics of the business drivers behind Utah.gov’s campaign to be relevant to state residents — including those who are Flash-ready, smart phone-equipped, high speed-connected, data hungry and widget happy. You don’t build an online constituency that includes everybody without them, and Utah was deliberate in its pursuit of advanced functionality to satisfy the demands of the state’s large population of tech-savvy citizens.

As with such moments earlier in the digital government movement, there may ultimately be no need to reconcile friends. Our shared future is in maintaining carefully developed (and jealously guarded) design disciplines while taking measured risk to meet nascent expectations today ... knowing that they will likely become tomorrow’s needs.

## **Conclusion: The People's Space**

*A light made of silver, through my window in creeps  
And the train keeps on rollin’ and it just rocks me to sleep*

*So goodnight, yeah goodnight  
Goodnight train is gonna carry me home  
So goodnight, yeah goodnight  
Goodnight train is gonna carry me home*

Gerry Rafferty, City to City, 1978

On the sweet path to a preferred digital future,<sup>iii</sup> there is still important work to be done in expanding functionality, hardening security and becoming more disciplined in content management on most public service portals.

It is sobering to walk the halls of state capitols and other public spaces, including subway and train stations. The architecture, the statuary, the inscriptions all reflect the aspirations of the people who dared to carve their values and dreams into stone. The permanence, the elegance and the grandeur of these public spaces may point out a faulty design assumption in much of what has been built in the government Internet space to date — we dream too small.

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<sup>i</sup> Paul W. Taylor, The Dome as Portal, Special Supplement to *Government Technology*, March 2002.

<sup>ii</sup> [http://en.wikipedia.org/wiki/Strategic\\_planning](http://en.wikipedia.org/wiki/Strategic_planning)

<sup>iii</sup> This section adapted from Paul W. Taylor, The Dome as Portal, Special Supplement to *Government Technology*, March 2002.

**Book Review of Democracy's Privileged Few:  
*Legislative Privilege and Democratic Norms in the British and American Constitutions*  
by Josh Chafetz**

*Charles Robert, Principal Clerk  
Chamber Operations and Procedure  
The Senate, Ottawa, Canada*

During the years 1797 and 1801 while Thomas Jefferson served as Vice-President to John Adams, he spent much of his official time presiding over the deliberations of the Senate, fulfilling his constitutional role as its President, a responsibility that is now largely ignored by his modern-day successors. In keeping with his serious intent in carrying out this office, Jefferson assembled notes on rules and practices to guide him and the Senate. In 1801, towards the end of his mandate, these assembled notes were published as the *Manual of Parliamentary Practice for the Use of the Senate of the United States*. The Manual was the first American book on parliamentary procedure and one of the few ever written by a practitioner. For many years, it remained the basic text to Senate procedure and it still fulfills this function for the House of Representatives.

In compiling his Manual, Jefferson made use of several authorities of British parliamentary practice, including Hatsell, Gray and Wooddeson. Some of these authors were known to Jefferson from his years in the Virginia Assembly prior to the Revolution. This reliance on British parliamentary texts was a natural outcome of America's colonial experience and the attachment of the Founding Fathers to certain fundamental principles of government developed by John Locke and other British thinkers of the Enlightenment. The Manual itself was divided into 53 sections or parts that covered such topics as petitions, bills, motions, and resolutions and, of course, privilege, the various protections from the law granted to parliamentarians and now congressmen while carrying out their duties.

For all his appreciation of British parliamentary history, Jefferson remained leery of parliamentary privilege as it had developed there. As he notes at the beginning on section III of the Manual, "The privileges of the members of Parliament, from small and obscure beginnings, have been advancing for centuries, with a firm and never-yielding pace." It was because of this tendency to expand privilege that Jefferson believed the framers of the American Constitution had sought deliberately to limit it to certain specific immunities. At the same time, however, Jefferson recognized the possibility that the scope of privilege might grow through necessity, but he thought this expansion should only occur through explicit statute law. As he put it "till the law be made, it does not exist." In other words, Jefferson was a codifier, an approach that was not much followed either in England, then or now, or by the American Congress itself.

Despite the shared history and many similarities between Parliament and Congress, evident from the days of Jefferson and before, few studies have ever explored in any depth the common heritage of parliamentary practice between England and the United States. Of these, a study of parliamentary privilege in the pre-revolution American colonies by Mary Patterson Clarke was published over sixty years ago. Now, a Yale University Law School graduate (2007) and Rhodes Scholar, Josh Chafetz, seeks to fill in some of the gap by analyzing the domain of parliamentary privilege following the adoption of the American Constitution. His book, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*

provides a comparative analysis of various critical aspects of privilege as developed and practiced by Parliament and Congress.

Chafetz's book, based on his Oxford University doctoral dissertation, is composed of ten chapters. The first chapter focuses on privilege as developed in Britain, followed by a comparable analysis of it in the United States. To begin, Chafetz justifies the need for privilege as the necessary protection for the House of Commons because it represented the democratic component of government. Further, in assessing the history of privilege and its relationship to democracy in the context of Britain's development without a written constitution, Chafetz identifies two paradigms, the two extremes, of its claimed extent. On the one hand, there was the claim to privilege which had as its objective the complete protection of the Commons from any and all possible outside interference, whether from the Crown, the Lords or even the people themselves. This protection had an almost geographical aspect constituting a kind of barrier that shielded the Commons from any and all external assaults. Chafetz identifies this paradigm with the jurist William Blackstone. On the other hand, as the reach of democracy expanded through the extension of the franchise in the nineteenth century, another paradigm emerged that sought to limit the extent of privilege so as to minimize its interference with the rights of citizens. This privilege was rooted basically in a functional appreciation of the work performed by MPs. This second paradigm is attributed to the Victorian philosopher, John Stuart Mill. In identifying these paradigms, Chafetz is aware of the artificial nature of his proposition and he acknowledges some of its shortcomings. The distinctions between the two extremes of privilege are not always obvious or historically congruent. This seems to be a genuine weakness in his approach, but he seems compelled to insist on it because he wants to base his analysis on the notion that privilege is justified primarily in its capacity to protect the democratic component of Parliament which he associates with the House of Commons. He feels that the paradigms serve a useful purpose in reflecting the dynamics at play in the history of British parliamentary privilege.

The explanation for the privileges claimed by the American Congress, as Chafetz sees it, is more straightforward. The privileges guaranteed to Congress are based on the Constitution of 1788, a written document that spells out the powers of each of the three coordinate branches of government. More importantly, the very fact that the Constitution is the clear expression of popular sovereignty based on "We the People" provides a solid justification for privilege, enabling the elected Congress to function as an instrument of the people. This openness is reflected in the specific acknowledgement of privilege in section 6 of Article I. Taken together, these limited privileges guarantee the ability of Congress to work with sufficient latitude unimpeded by unwarranted obstruction without unduly risking the legitimate rights of citizens, the fear that so concerned Jefferson. While there is no obvious Blackstone / Mill dichotomy in the history of American congressional privilege, Chafetz occasionally introduces it in his analysis of the exercise of certain privileges, particularly that relating to the protection of communication with constituents as a way to highlight the similar problems that confront Parliament and the Congress in the exercise of those privileges.

In exploring different privileges - freedom of speech, freedom from arrest, the determination of disputed elections, and the power to deal with contempt through the power to punish - Chafetz bases much of his analysis on case law, court judgments that have given texture to the nature and scope of privilege. While he also takes into account other factors, including particularly the historical circumstances surrounding the specific events that led to the court decision, his focus

remains largely case law. This emphasis tends to have what is likely an unintended consequence. Because Chafetz does not distinguish sufficiently between the judgments of a court made in the fifteenth century from those made in the nineteenth century, the merit of his analysis is somewhat undermined. In character and independence, the courts of the earlier era bear little comparison to their more modern counterparts. Indeed, it was royal influence over a corrupt court system in the seventeenth century, as Enid Campbell long ago observed, that explains Parliament's insistence that privilege be treated as a distinct part of the law, the *lex parliamenti*. A result of this undifferentiated analysis is the suggestion that privilege has not really changed much. Yet this is hardly true at least with respect to the history of privilege in England. Even before the expansion of the vote in 1832, for example, Parliament took steps to curb obvious abuses in the exercise of privilege that emerged through the eighteenth century. This is clear from Chafetz's well summarized account of the various Parliamentary Privilege Acts adopted through the eighteenth century to support the right of citizens to pursue parliamentarians through the courts in certain circumstances.

Even when dealing with court decisions, Chafetz sometimes seems to minimize their historical significance. In his account of the 1839 *Stockdale v. Hansard* case, for example, Chafetz notes how Parliament responded to the decision of the Court of Queen's Bench that ruled against the assertion by the House of Commons that privilege provided absolute protection for the public sale and distribution of papers ordered to be printed by it. The *Parliamentary Papers Act of 1840* effectively overturned the decision of the court. At the same time, however, the reaction of Parliament in enacting a law to protect its publications tacitly recognized the role of the court to scrutinize and judge any contested claim to privilege. In other words, parliamentary privilege, as a part of the law, was liable to the jurisdiction of the courts. This is a critical feature that Chafetz seems to downplay, yet it overturned a previously held view that proclaimed privilege to be beyond the review of the courts. The *lex parliamenti*, or what was claimed to be a part of it, was now within the competence of the courts. Instead, for Chafetz, this judgment and the reaction of the Commons to it offers evidence of the Millian paradigm, the need to effectively circumvent the court's judgment in order to expand the benefit of privilege "to take in tasks (such as communicating with constituents) that are functionally integral to, but sometimes geographically distant from, the workings of the Palace of Westminster." While it may be true that *Stockdale* challenged, within the context of Chafetz's theoretical construction, the Blackstone paradigm and more or less destroyed it, the real significance and importance of the case rests not so much in the expansion of privilege or the motivation for it, but in the acceptance by both sides of the relationship between Parliament and the courts in dealing with the law of privilege, whether or not it had been wholly merged into the common law.

Chafetz's treatment of the *Stockdale* case points to a shortcoming of Blackstone / Mill paradigm model that frames so much of his work. He attributes to them a significance that allows him to gloss over the historical forces that were in play during these two critical periods they are taken to represent, the late seventeenth century and the dawn of the Victorian era. The House of Commons in the time of Cromwell and the Stuart kings spoke for an emerging economic class determined to promote its views and assert its interests against claims made by either the Crown or the aristocracy. While members of the Commons could legitimately claim to have a representative function, they were hardly the democratic component that Chafetz pretends. With less than 5% of the male population eligible to vote in a system based on electoral boundaries that had not changed since medieval times, the House of Commons was still able to successfully insist on its rights. As

it turned out, privilege was a vehicle of that insistence. The establishment of parliamentary supremacy confirmed by the Glorious Revolution of 1688 and the adoption of the Bill of Rights marked this turning point. These constitutional struggles had been prompted in part by the religious ferment of the times and the absolutist claims of the King. Mimicking the Crown and the aristocracy, the privileges exercised by the Commons often took on an exaggerated character that had little to do with their parliamentary role and everything to do with status recognition in a society that remained hierarchical. At best, Blackstone might be taken as an exponent of the sentiments current at the time, but the paradigm he is taken to represent is not anchored in a convincing defence of democratic values.

The situation is not much different when considering John Stuart Mill. Several years before *Stockdale*, in 1832, Parliament enacted the Great Reform Bill in what proved to be the first step in enlarging the franchise to an extent that laid the basis for a genuine democracy. By the end of the nineteenth century, virtually the entire male population had the vote. Along the lines of Chafetz's approach, this growth in real democracy reduced the role and authority of the House of Lords and reaffirmed beyond any doubt the fundamental primacy of the House of Commons. At the same time, privilege was developing into its modern character, viz. the rights and immunities necessary to ensure the ability of Parliament to fulfill its functions, to match its law-making role in an open society. The primary justification for privilege enunciated in the *Stockdale* decision itself was necessity. Whatever historical roots might exist to justify previous claims to privilege based on precedent, necessity became the fundamental justification for the need to retain privilege. The groundwork for this position was laid in the decision of *Stockdale*, a point that is not sufficiently emphasized by Chafetz in his preference for Mill.

Whatever shortcomings in some elements of his analysis, Chafetz is right to be preoccupied with the exercise of the freedom of speech privilege. Without doubt, this is the most practical and obvious privilege. The treatment given to this privilege also serves as a model for the analytical approach he uses for the remaining chapters of his book. Chafetz explores with particular emphasis the usefulness of the free speech privilege in protecting communications with electors or constituents. As part of his review of the American context, he cites the infamous case involving the publication in 1971 of secret government documents relating to the war in Viet Nam, the Pentagon Papers. The disclosure of this classified material had an enormous impact on the public acceptance of the government's war policy. In various venues, through different courts, including the Supreme Court, the government sought to suppress the publication of the Pentagon Papers. With respect to actions against Senator Mike Gravel, who had placed all forty-seven volumes into the public record through a congressional sub-committee, the court confirmed his protection from prosecution by the federal government for publishing these papers on the basis of privilege. At the same time, the court found that the senator's attempt to arrange for the publication of the Pentagon Papers through the M.I.T. Press was not protected by privilege. Chafetz strongly disagrees with this aspect of the court decision and he forcefully advocates a more generous interpretation of the privilege based on the need to protect the two-way communication that is essential to the proper functioning of the Congress. By looking at this and other controversial cases, Chafetz highlights the differences in the scope and practice of the free speech privilege in Britain and the United States, even though the courts are not always consistent in their application or understanding of this fundamental privilege.

An explanation for the broader scope of this privilege in Britain, as provided by Chief Justice Burger in *United States v. Brewster*, is that it is exercised within a substantially different context there. According to Burger, Parliament is the supreme authority in Britain, whereas in the United States, privilege was designed to preserve legislative independence, not supremacy. In cases of conflict between the Executive and the Congress, the task of the third coordinate branch of government, the courts, is to interpret the privilege of freedom of speech in a way that ensures the autonomous role of the legislature without altering the historic balance of the three co-equal branches of the Government. Chafetz seems to accept this analysis up to a point, but he is much more insistent in extending the scope of the privilege to protect the democratic integrity of the Congress, especially with respect to all communications between its members and the electorate. “Because of the American Constitution is founded on a much stronger basis of popular sovereignty than the British Constitution ... that communication ought to be taken even more seriously in America.” However, the American courts have frequently failed to uphold this standard.

The obvious passion that Chafetz brings to this analysis is stimulating; it helps to focus his arguments and make them more persuasive, but it is not sufficient to make all of them compelling. In the end, the broad protection that he would apply through this privilege seems too expansive. It grants too much protection over a wide field within the Congress and does not take into sufficient account the potential abuse that could arise as has occurred in recent years based on some cases brought before the courts. In addition, Chafetz seems to accept that the Congress itself is best able to police any potential abuse, but the all too frequent instances of congressional misbehaviour and corruption suggest a misplaced confidence.

Moreover, in making his argument, in recounting some of the precedents and cases, Chafetz sometimes seems to misrepresent his evidence in order to strengthen his position. Among these, two British examples demonstrate his tendency to overlook or downplay certain critical elements that involve a subtle shift in their significance. One example is the 1868 case of *Wason v. Walter*. A newspaper account of a parliamentary debate was held to have qualified privilege, a common law protection which is less than absolute parliamentary privilege. Chafetz correctly maintains that this case involves a shift in the view of the courts from earlier judgments that, in fact, also corresponds with Parliament’s growing relationship to an expanding electorate. He goes much further, however, to use this case as a vindication of the necessary privilege aimed at protecting all communications between MPs and their constituents. Chafetz fails to note the significance of the fact that the communication involved in this case is a fair account by a newspaper of a speech in Parliament. This is not much different from the qualified privilege Chafetz favourably acknowledges applies to the publication of *Hansard’s Parliamentary Debates* as determined in the case of *Dillon v. Balfour* in 1887. As such, it is a rather limited form of communication between the MP and citizens at large conveyed by a third party. Nonetheless, given his outlook, Chafetz goes on to interpret a 2004 case, *Buchanan v. Jennings*, as a retreat from the broader protection he feels MPs should have since, in this case, the Privy Council found that an MP could be liable for defamation having repeated in a press interview the substance of a statement made on the floor of the House. This position is consistent, however, with an earlier finding by Parliament itself which Chafetz also recounts.

In 1958, an MP, George Strauss, criticized the London Electricity Board in a letter to the paymaster general and the board threatened to sue for libel. As Chafetz notes, the Committee on Privileges agreed that this letter, as a “proceeding in Parliament” enjoyed the protection of privilege as guaranteed by Article 9 of the Bill of Rights. This is not the whole story. Buried in a

footnote on the case is the information that the committee report was rejected by the House of Commons by a narrow vote. The meaning of this rejection, as Chafetz, admits in the footnote, is that the House of Commons determined that the letter is not actually regarded as a “proceeding in Parliament”. Despite the growth in the franchise and the greater scope of the relationship between the House of Commons and the electorate, the modern Parliament itself has consistently declined to view all communications of MPs with their constituents as a matter deserving of privilege.

This criticism of Chafetz is not intended to take away from the achievement of this excellent study. The author has brought together a wealth of material and through careful and perceptive analysis he has advanced significantly the understanding of privilege in its protection of the operations of Parliament and Congress. His insistence that privilege be associated directly to democratic values places it in a context that keeps privilege meaningful and important today even if it was not always viewed this way in the past. He is right to stress this link to democracy as the true purpose behind privilege with respect to its incorporation in the Constitution for the benefit of Congress and its members. What occurred consciously in the United States, emerged more gradually in Britain. Though chronologically privilege arose first in Parliament and provided a model for the Congress, there is a certain irony in accepting that privilege of modern day Parliament has more in common with the vision espoused by the United States than by seventeenth century England. As the modern authorities of British parliamentary practice acknowledge, the foundation of any claim to privilege must be necessity. This necessity, in turn, is based on the understanding that Parliament or Congress represents the legitimate voice of the people. The rights and immunities possessed by Parliament or Congress and their members have value only in so far as it enables them to support the principles of democracy. This is the real message of Chafetz’s book.

As noted earlier, Jefferson was suspicious of the encroaching tendency of privilege. There was always a risk, he feared, that its beneficiaries would seek to grow privilege beyond the narrow range of protection originally guaranteed. What Jefferson could not foresee was that the growth of democracy would create a new validating purpose for privilege that, in turn, would effectively narrow its scope. This occurred in Britain and the United States, as Chafetz proves convincingly, through an interaction between the courts and Parliament or Congress. Still, Jefferson was fundamentally right in believing that privilege should be codified. Only by codification can the fear be effectively minimized that privilege might be abused, that it might be applied to illegitimate purposes. It is only through codification that the purpose of privilege can be carefully balanced with the rights of citizens it is ultimately created to serve.



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