

# Journal of the American Society of Legislative Clerks and Secretaries

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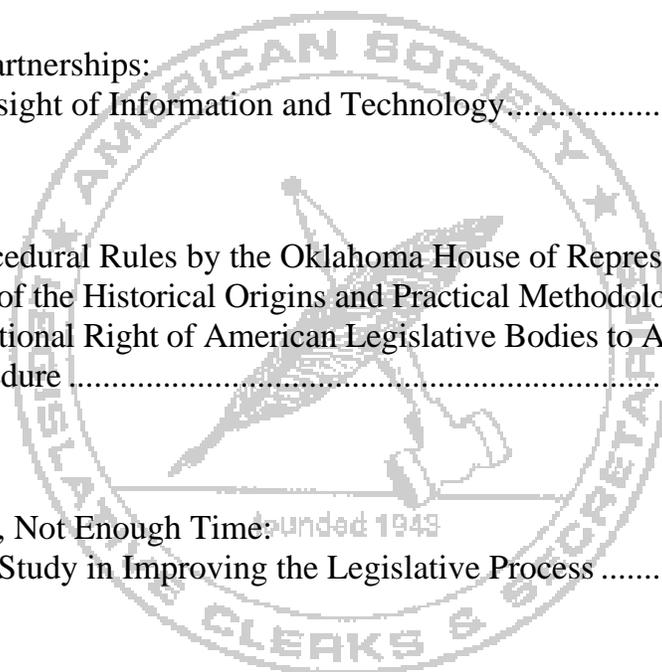
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# **Journal of the American Society of Legislative Clerks and Secretaries**

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

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## **Public-Private Partnerships: Legislative Oversight of Information Technology**

*Ashley Colvin, Chief Legislative Analyst  
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In 1998, this journal published *Legislative Oversight of Information Systems*, which outlined several reasons why legislators should oversee the information technology (IT) systems used by executive branch agencies. This current article offers the perspective of a legislative oversight agency on key lessons learned from Virginia's use of a public-private partnership in order to modernize IT operations. These lessons may be useful for other states to consider if they pursue similar partnerships for IT operations or other governmental functions.

While public-private partnerships offer potential benefits, Virginia's experience with IT outsourcing reveals that there are potential challenges as well. Virginia's partnership with Northrop Grumman (NG) brought private sector investment and expertise to IT operations, but cost overruns, missed deadlines, and serious performance issues and contractual disputes have strained the partnership. These issues have been brought to the attention of legislators by State agencies who are concerned that agency expenses have increased while the quality of services has decreased. In addition, the legislature's own IT operations were almost disrupted by the outsourcing process, as the case study later in this article will illustrate.

The Virginia Information Technologies Agency (VITA) was created in 2003 as the State's new approach to central oversight and provision of IT services. In 2005, VITA executed a \$2 billion, ten-year contract with NG. NG now provides personal computers, mainframe and server computers, voice and data networks, email systems, and security and disaster recovery services. NG's service responsibilities include the modernization and consolidation of IT equipment for all executive branch agencies, through a process known as transformation. VITA currently oversees NG, making VITA's oversight performance essential to the successful operation of all State agencies. In turn, VITA has been under the authority of an independent board known as the Information Technology Investment Board. (This relationship was changed during the 2010 legislative session, and VITA now reports directly to the Secretary of Technology.) In 2008, the Joint Legislative Audit and Review Commission (JLARC) was directed by the General Assembly to examine the services provided to State agencies by VITA through its partnership with NG.

### **DECISION TO USE A PUBLIC-PRIVATE PARTNERSHIP SHOULD BE CONSIDERED THOROUGHLY**

Public-private partnerships are designed to provide public entities with access to the financial resources and expertise of the private sector. Recognizing the shortage of public resources needed to develop new infrastructure, the Virginia General Assembly enacted the Public-Private Education Facilities and Infrastructure Act (PPEA) in 2002.

Virginia's experience with the NG partnership highlights the importance of pursuing a partnership only after thoroughly considering whether it is the best approach to meeting the State's goals. The decision to form a partnership involves a basic choice between using a vendor or a State agency as the primary means of accomplishing an objective. A vendor can offer resources and expertise that are often not

available to an agency, but the accompanying contract can decrease the ability of decision-makers, including legislators, to direct or oversee the partnership's activities.

The use of a defined process for reviewing partnership proposals will help ensure all factors are thoroughly considered. As part of this review, the inclusion of formal documentation analyzing the relative benefits and risks of using either a vendor or a State agency will provide assurance that the decision was thoroughly considered. However, if the initial decision to form a partnership is poorly considered, the State's ability to take corrective action later on may be decreased.

### **VITA Decided to Pursue Partnership Without Thoroughly Considering All Factors**

Under the PPEA, consideration of a partnership may be initiated when a vendor submits an unsolicited proposal. VITA received the first unsolicited proposal in October 2003. By March 2004, four additional proposals had been received from competing vendors, and VITA had begun to implement a defined review process. By this time it was clear that the General Assembly would not appropriate the funds VITA had requested, and VITA advised key legislators that "going it alone [was] not an option" because "Virginia did not have the funds needed to invest in infrastructure and facilities, nor the people, time, or resources to implement a large-scale project."

It appears that VITA decided in favor of a partnership approach without thoroughly considering all relevant factors. The process VITA used to review vendor proposals was ad hoc and poorly documented. Key elements lacking from VITA's process included adequate criteria for analyzing whether the proposed partnership approaches were feasible and met VITA's needs, and an evaluation of whether VITA could achieve its goals in the absence of a partnership. It also appears that VITA failed to formally document the decision to choose the partnership approach, which hinders any subsequent review of the basis for this decision.

Despite the decision in favor of a partnership approach, under the PPEA it was still possible for VITA to reject all of the proposals at any time. However, it does not appear that VITA ever reconsidered the initial decision to pursue a partnership. This may result in part from the clear interest expressed by the Governor and General Assembly that VITA expedite the review of proposals and report on "opportunities to expand public-private partnerships" by November 2004.

### **Lack of Defined Criteria and Review Process Led to Partnership Based on Faulty Assumptions**

VITA adopted guidelines to use in considering proposals, but it lacked key criteria required by the PPEA. Consequently, VITA did not formally consider the feasibility of two key technology assumptions behind the projected cost savings: that State agency operations would be streamlined and that this would allow use of a "one-size-fits-all" or enterprise approach to providing services.

The failure to thoroughly consider these assumptions, which have not been borne out, has contributed to delays and a failure to achieve anticipated savings. More specifically, VITA does not appear to have considered which State agency operations would be streamlined, how this would occur, how long this would take, and who would pay for the accompanying costs. Consideration of these factors may have revealed that many of the business practices used by State agencies are driven by federal or State requirements that cannot be easily modified. Limitations on the ability to streamline operations has reduced the ability to use a one-size-fits-all approach. Moreover, some of the savings achieved from streamlining and other efficiencies must be returned to the federal government or are otherwise restricted in their use.

## **Failure to Thoroughly Evaluate Whether Public Funds Could Be Obtained Led to Inadequate Consideration of Partnership Risks**

VITA also does not appear to have formally considered the risks and benefits of working toward its goals internally, without forming a partnership. Instead, VITA appears to have determined that the concurrent decline in State revenues meant that a partnership was the only means of obtaining capital.

Despite the inability to secure funds, VITA still should have formally considered the risks and benefits of a partnership. There is no indication in the public record that VITA or State policymakers fully considered the risks associated with such an arrangement at the time the decision was made, the most significant risk being that the State might become dependent on a private vendor for the provision of IT services and could not terminate the relationship without a substantial expenditure of funds. This situation has come to pass. Moreover, the State is not in a position to resume the internal provision of IT services without a substantial investment in human and physical capital.

## **UNDERSTANDING SPECIFIC NEEDS IS ESSENTIAL TO THOROUGH EVALUATION OF PARTNERSHIPS**

The partnership with NG illustrates the importance of documenting an agency's specific needs before determining whether a partnership approach is preferable. Identification of broad goals, while necessary, is not sufficient because it does not give the agency the ability to thoroughly evaluate the reasonableness of a vendor's proposal. Moreover, a failure to ensure adequate documentation may result in reliance upon the vendor to determine specific needs. This situation can hinder an objective and informed evaluation of whether the partnership will be capable of meeting State goals.

Although VITA faced several strong incentives to use a partnership, VITA still had a responsibility to ensure that a partnership could in fact meet State goals. This responsibility was hindered by VITA's limited knowledge of State agency needs. This shortcoming not only limited VITA's consideration of whether a partnership was advisable, but it also limited its evaluation of vendor proposals and the subsequent negotiation of a contract with NG.

## **VITA Lacked Key Documentation of Needs Necessary for Thorough Evaluation of Partnership Proposals**

At the time VITA began considering proposed partnerships it had not finalized many key documents, including an inventory of the State's IT equipment and an enterprise architecture that analyzes how the equipment is used to support specific business functions. As a result, VITA did not have a full understanding of the extent of the State's assets or the needs of its customer agencies, which limited its ability to assess whether a partnership would meet the State's needs.

VITA lacked a complete and accurate inventory of the specific IT assets used by its customer agencies and a description of their physical location. The inventory was crucial to an accurate determination of the unit cost of any outsourcing contract. In part because VITA's inventory was not reliable, VITA added several additional months to the review of vendor proposals so that both vendors could jointly create a new inventory. In hindsight, a former CIO stated that VITA should have first developed an adequate inventory before it began considering partnership proposals. Making the vendors responsible for determining the inventory in the midst of negotiations resulted in competing inventory amounts and required VITA to rely upon the vendors to determine critical information used to calculate the cost of services.

VITA also lacked an enterprise architecture. Its absence meant that VITA did not know how agencies differed in their business operations and in their use of IT. This limited VITA's ability to determine whether the streamlining of operations proposed by NG was feasible. It also limited VITA's review of whether the standard "enterprise" set of services NG proposed was capable of meeting the varied needs of State agencies.

### **Lack of Key Documentation of Needs Has Led to Potential Overpayments and Inadequate Services**

A lack of certainty about initial inventory amounts has compromised a determination of whether the agreed-upon price for services is reasonable. If the inventory was under-counted, then the vendor may not be receiving adequate compensation. If the reverse is true, then the State may be over-paying for services.

In addition, VITA's limited knowledge of State agency business needs, and their use of IT, appears to have resulted in the selection of enterprise services that do not meet the unique needs of some agencies. For example, the contractual performance targets do not require 100 percent network availability, but public safety agencies have reported that any outage of the network or telephones hinders their operations. In other cases, agencies have reported that the standard enterprise computers lack sufficient memory or disk space (storage), and have purchased additional memory or storage at additional cost. Other agencies have reported the need for more specialized equipment, such as more powerful computers and larger monitors that are not regularly provided under the contract. Although agencies can obtain additional memory or specialized equipment, it is not subject to the same contractual service levels and prices that apply to standard equipment.

### **PRIOR EXPERIENCE WITH SIMILAR PROJECTS IS A CRITICAL FACTOR IN SELECTING A VENDOR**

The partnership with NG highlights the importance of selecting a vendor with prior experience on similar projects. This is especially important when the project is complex and highly technical. If the selection of a vendor involves consideration of several attributes or criteria, the prioritization of prior experience will help minimize the risk of problems after a contract is executed. Conversely, selection of a vendor without substantially similar prior experience will increase project risks and inevitably lead to difficulties during implementation. VITA selected a vendor that did not have experience with projects of similar scale and complexity, and shortcomings in project planning and execution have contributed to delays and service disruptions.

### **State's Evaluation of Proposals Gave Low Weight to Prior Vendor Experience**

The evaluation of proposals submitted to VITA under the PPEA was inadequate because the vendor selection committee gave a relatively low priority to the vendors' prior experience. On the advice of consultants, the selection committee assigned weights to several criteria. The highest priority (a weight of 20 points) was given to criteria involving project financing, technical viability, and the impact of the project on State employees (many of whom would be encouraged to leave State employment and join the winning vendor). The aspects of the proposals involving economic development were given half as much weight (10 points). However, the committee's scoring system gave only two points to the prior experience of the vendors in providing comparable services.

## **Lack of Vendor Experience Contributed to Poor Planning Which Disrupted and Delayed the Transformation Process**

Although NG had experience on similar projects, it appears that these were of a smaller scale. Moreover, NG's prior experience does not appear to have been adequate preparation for planning the complex set of activities required to meet State goals. NG failed to adequately understand the actual customers (State agencies) and the diversity of their needs or manage the cultural aspects of change.

The magnitude of planning required of NG to execute contractually-required tasks was substantial. The "transformation" process to modernize and consolidate the State's IT infrastructure has involved 59 individual projects carried out at more than 2,000 sites for more than 70 State agencies. (Transformation was required to be completed within a three-year period, by July 2009, but is not yet complete.) Transformation projects have also been highly interdependent, such that delays in one project have had a cascading effect on other projects. Management of this effort has therefore required substantial coordination among VITA, State agencies, NG, and numerous subcontractors.

***Service Disruptions and Delays Resulted from NG's Failure to Adequately Account for Agency Culture and Constraints.*** NG bore the contractual responsibility to plan for and conduct transformation such that it had "no material adverse effect" on agencies or the quality of IT services. To be successful, NG needed to plan for and manage the significant cultural shift that resulted from the reduction of agency control over IT infrastructure. Indeed, in its 2004 and 2005 proposals NG identified agency cultural resistance to change as a key risk that it was prepared to address.

However, senior NG staff informed JLARC staff that NG did not fully understand the importance of managing the cultural aspect of change. NG staff admitted to underestimating the desire by State agencies to retain autonomy and participate in project decisions that affected their agency's operations. For example, NG's project schedules did not account for the time and effort that was required of agency staff, such as the reprogramming of agency-specific software applications to make them compatible with NG's new hardware systems. For their part, agencies assert that NG was reluctant or resistant to accommodating agency concerns. As a result, project schedules that allocated a week to a certain task began to slip by several months as agencies began to ask unanticipated questions. In many cases, agencies report that the drive to meet contractual deadlines overshadowed the need to ensure the continuity of operations, leading to service disruptions. Some of these situations, such as a reported decrease in network reliability and robustness, suggest a failure to anticipate potential problems and take steps to prevent their recurrence.

NG also failed to account for the different business needs across the more than 70 agencies involved in the transformation process. To ensure project deadlines were met and that services were not disrupted, NG needed to understand each agency's business needs and operational constraints. For example, some agencies have an operational tempo that is intolerant of lengthy outages, such as the Department of Motor Vehicles. Other agencies have "blackout" dates during which large-scale projects of any nature cannot be conducted, such as the Department of Taxation. It appears that NG failed to obtain the information needed to understand these constraints and also failed to place adequate emphasis on addressing agency needs that differed from the standard set of enterprise services.

### **Case Study**

*As part of the transformation process, NG needed to update network equipment used in State office buildings located on the Capitol Campus. In reviewing the Capitol campus NG engineers viewed a space in the Capitol housing General Assembly data equipment and decided to design and install the Sonic-node system there. (The room had been designated during the recent renovation for legislative use only due to past disruptions when the data closet was shared with the executive branch), It was only due to an email request received from VITA to add additional power to the closet that the Clerks were made aware of the installation. The Clerk of the Senate emailed NG to request they meet with her and the Clerk of the House. The response from NG management to the Senate Clerk indicated a lack of understanding of the customer. NG's responding email was addressed "to whom it may concern" and closed with a side comment that "I'm not sure who this email is from." Although more senior NG management subsequently stepped in to address the legislature's concerns, the event also highlighted NG's lack of understanding of agency needs and constraints. NG had intended to perform this work in the middle of the 2010 legislative session, which could have disrupted all networked equipment—phones, email, Internet access and possibly electronic voting. The equipment was later installed at the correct location in another building.*

***Independent Reviews Identified Concerns With the Quality of NG's Project Planning.*** The concerns over the inadequacies in NG's planning were confirmed by several independent reviews, which appear to point to inadequacies resulting from insufficient experience. An independent review conducted by Hewlett Packard in July 2007 (one year into the three-year transformation process) rated NG's planning as "fair to poor." Hewlett Packard also found that NG's plans did not account for outside risks to the project schedule, such as delays caused by subcontractors. Four other independent reviews by CACI found NG's project management was not sufficiently mature, and that NG's transformation schedules were incomplete, not accurately updated, and too complex for managerial use.

***Inadequate Planning Led to NG's Failure to Complete Transformation by the Contractual Deadline.*** NG failed to complete transformation by the contractual deadline of July 1, 2009. On June 30, 2009, VITA formally notified NG of its failure to complete transformation and requested that the vendor provide a corrective action plan detailing how transformation would be completed. NG submitted a plan on August 28, 2009, that proposed a new completion date of July 1, 2010. VITA formally rejected the plan on October 22, but states it has no objections to NG working to the new deadline. It is not yet clear whether the new deadline will be met.

### **EFFECTIVE CONTRACT IS CRITICAL TO THE SUCCESS OF PUBLIC-PRIVATE PARTNERSHIPS**

Virginia's experience with the NG partnership indicates that project risks can be minimized if greater attention is paid to three specific aspects of the contractual relationship. First, the contract should stipulate the discrete tasks to be performed by the vendor in order to lessen the possibility of delays and disputes over the nature and scope of work involved in each task. Second, the contract should assign all parties (the vendor, the contracting agency and any other involved agencies) with specific responsibilities and duties in order to help ensure the success of complex tasks that require the active participation of more than one party. Third, the contract should include penalties and incentives so that the contracting agency will be better able to respond to shortcomings in vendor performance. This includes ensuring that discrete payments are tied to the completion of all specific tasks, and that the

circumstances under which payments are withheld (and later repaid) are specifically delineated. It is also useful to consider including a defined array of several progressively stronger penalties.

### **NG Contract Did Not Specify Key Tasks Vendor Must Perform**

The contract with NG did not define the specific tasks NG must perform and instead included a requirement that NG prepare a document that described how they would be performed. Known as a procedures manual, this document was intended to accompany the main contract to provide additional detail. Several parts of the contract include statements that a certain task will be performed in accordance with procedures set forth in the manual. The contract requires NG to provide a table of contents for the manual before the commencement of services on July 1, 2006, and the manual was to be completed by October 1, 2006. However, as of October 2009, NG had failed to complete the manual.

The failure to complete the procedures manual in a timely manner points to two larger concerns. First, the absence of a procedures manual at the time the contract was signed meant that VITA and NG never agreed upon how NG would actually provide services. As a result, it was not clear what the State was paying for. Second, the contract never defines the level of detail that NG was required to include in the manual, and instead states that the manual be developed “to the satisfaction of the Commonwealth.” This creates a potentially open-ended obligation for NG and does not provide a standard by which either party can measure NG’s progress. Several disputes have centered over whether NG has provided adequate detail and whether VITA’s requests for more specific procedural information infringed upon proprietary NG processes.

### **Unclear Definition of Obligations in the NG Contract Has Led to Disputes**

The NG contract does not provide a sufficient means of ensuring vendor performance because some key contractual responsibilities are unclear and appear difficult to enforce. The contract is also silent on other key issues. As a result, VITA and NG have disputed several key provisions of the contract, which has led to delays in the completion of required tasks.

***VITA and NG Have Disagreed About Contractual Responsibility for Planning.*** As noted above, independent reviews noted that NG’s transformation plans were incomplete and contained unrealistic schedules. However, NG and VITA have differing interpretations of their respective contractual obligations in this area. These disagreements reveal several weaknesses in the contractual assignment of responsibility. NG asserts that VITA was responsible for working with agencies to identify blackout periods and ensuring the enterprise services met the needs of all agencies. From its perspective, VITA asserts that NG was slow to assume its role as the primary transformation contact for agencies, arguing that the contract requires NG to identify and address any barrier to completion of transformation.

Although VITA’s interpretation appears to be supported by provisions in the contract that require NG to “take ownership of day-to-day operational relationships to ensure delivery of services,” additional clarity of specific responsibilities would have been beneficial. Other key contractual disputes between VITA and NG have included:

- whether NG is required to complete certain transformation tasks and all work at all agencies by the July 2010 deadline;

- whether NG is required to provide a range of service options versus a single, enterprise solution to State agencies; and
- the State agency locations where NG is required to provide services.

Delays in the resolution of these disputes have led to delays in the fulfillment of procurement orders and requests for new services, including critical data encryption services.

### **Oversight Provisions in the Contract Are Not Adequate to Ensure Vendor Performance**

The oversight and enforcement provisions in the State's contract with NG are inadequate. The existing penalties for poor vendor performance have limited value and have not been capable of preventing transformation delays or addressing vendor performance concerns. As the transformation process unfolded, NG began to miss some of the specific deadlines outlined in the contract. In response, VITA took several steps to avoid further transformation delays, but the agency's efforts were limited by inadequacies in the contract's enforcement and incentive provisions.

The first steps undertaken by VITA to ensure NG met its performance obligations involved using contract amendments to give NG additional time to meet deadlines for deliverables (or "milestones"). Between June 2007 and May 2008, VITA agreed to five amendments that extended 31 of the 74 contractual milestones. As concerns about performance and timeliness persisted, VITA began withholding substantially higher amounts from NG's monthly payments beginning in the fall of 2008. Through December 2009, VITA had withheld \$16.3 million for billing and inventory errors and other performance issues (\$6.7 million of that amount had been repaid). However, VITA lacked additional options for ensuring NG's performance because the contract lacked an adequate array of incentives and penalties.

***Effectiveness of Financial Penalties Was Undercut by Extension of Deadlines.*** The NG contract defines 74 specific milestones and the date by which the associated work must be completed. For 14 of these milestones, NG can be penalized if the deadline is missed and earn a credit if the milestone is delivered early. However, NG was able to earn credits for early delivery of milestones that were delivered later than originally required. NG was able to do this because VITA agreed to amend the contract to give NG additional time to complete these milestones. NG then completed some milestones before the new deadline, thereby earning credits, even though the milestones would have been late under the initial deadline. As a result, NG earned a sufficient amount of financial credits to offset the penalties imposed for late delivery.

***Use of Financial Penalties Was Limited Because Few Contractual Deliverables Were Tied to Individual Payments.*** Sixty milestones are not tied to a discrete payment, which has limited VITA's ability to compel their timely completion. In addition, other key deliverables are also not directly tied to individual payments. This includes completion of a final inventory and also completion of performance measures (known as service level agreements) whereby NG's attainment of contractually-required performance targets can be assessed. Full implementation of these targets would allow VITA to financially penalize NG for non-performance, but this system could not be fully used because implementation of the targets was substantially delayed.

***No Penalties Are Available to Address General Performance Concerns.*** The contract also provides limited options for addressing general performance problems. The penalties levied by VITA in 2007-

2008 were typically tied to specific instances of non-performance. In early 2009, VITA staff began to consider withholding funds because of more general concerns about overall delays in completing transformation and other service issues. However, because the NG contract has limited options for addressing performance issues that are not tied to specific payments, additional withholding of funds required VITA to specify damages. Establishing such damages in a court of law would have been difficult given the structure of the contract.

In the spring of 2009, after consultation with the Office of the Attorney General, VITA determined that withholding full payment of NG's monthly invoice was the most contractually defensible way to address general performance problems. This was an extreme option, but it was contemplated by the contract and no intermediate options were available. The contract only provided penalties for specific instances of non-performance and lacked a clear means of penalizing general non-performance. Given the reluctance of the Information Technology Investment Board to approve the CIO's use of this option, VITA has not been able to effectively address non-performance where the activity is not tied to a discrete payment.

### **Lack of Contractual Clarity Led to Partnership Trap**

Back in 1997, JLARC retained the IT consulting firm Gartner to review the possibility of privatizing (or outsourcing) the State's data center. As part of its review, Gartner offered several best practices for consideration during IT outsourcing that were not followed by VITA in its pursuit of a partnership.

One of these best practices describes the need to avoid the "partnership trap." As Gartner noted, many outsourcing arrangements are not true partnerships, as defined by having mutual economic consequences. As a result, a State agency must ensure that the contract precisely defines all terms and conditions. However, Gartner cautioned that "even in the best relationships, the potential for conflict between the vendor's profit motive and the client's needs will arise." This is the partnership trap, and it occurs when either party relies too heavily on assurances instead of contractual requirements.

Both VITA and NG have admitted that they fell into the partnership trap during the initial years of the relationship. NG asserted that the State's reluctance to increase NG's payments to account for growth in the use of IT services reflected the State's desire to unfairly limit its expenditures. VITA asserted that NG was incorrectly interpreting or downplaying contractual terms to avoid expending funds needed to meet its obligations.

A key lesson learned from Virginia's partnership with NG is that the viability and success of a partnership is best assured when contractual terms, obligations, and requirements are clearly defined and both parties agree to adhere to the contract whenever possible. In cases where the contract is vague or fails to contemplate an important factor, both parties benefit by adhering to contractual mechanisms for resolving disputes and making improvements. Reliance on assurances by either party that are not governed and defined by contractual terms can lead to misunderstandings at best, and a breakdown of the relationship at worst.

### **PARTNERSHIP MAY NOT PRODUCE FINANCIAL BENEFITS FOR STATE GOVERNMENT AND MAY LIMIT BUDGET FLEXIBILITY**

Virginia's experience with the NG partnership has shown that partnerships may not produce the anticipated financial benefits. Spending reductions are often an important part of the rationale advanced in favor of forming a partnership. Verification of the assumptions behind the projected reductions can help ensure that the reductions are real and accurate.

As part of this analysis, it is important to make two key distinctions. First, there is an important distinction between savings (reductions in current spending) and avoided costs (projected reductions in future spending). Although both are beneficial, savings can be more accurately determined and be immediately reprogrammed to other uses. Avoided costs are, by definition, estimates of the extent to which future increases in spending will not occur. Second, spending reductions (in the form of savings or avoided costs) may benefit non-state entities as well, such as federal or local governments, and these distinctions should be clearly identified in any overall estimate of spending reductions.

Virginia's partnership with NG was intended to produce a combination of savings and cost avoidances, but these distinctions were not clearly made. Moreover, to the degree either type of spending reduction occurs, it is still unclear to what extent the benefits will be realized by the State and what amount will in fact benefit the federal government in the form of reduced payments to federally-supported agencies. Lastly, State agencies should understand that a long-term financial commitment to a partnership may limit budget flexibility because policymakers will be bound by contractually-established fees and spending levels. This is particularly true if substantial funds are required to exit a contract before the full term ends.

### **Standardization and Centralization of State's IT Infrastructure Have Not Achieved Anticipated Cost Efficiencies**

Virginia pursued IT consolidation under VITA in the anticipation that savings would result from centrally managing a standardized IT infrastructure. A partnership was then pursued in order to obtain the expertise and capital needed to consolidate and standardize IT, but this was done without the State ever adequately analyzing the extent to which savings (or avoided costs) would actually be realized. As noted above, VITA lacked key information on agency IT usage and business practices needed to analyze the extent to which either standardization or central management would reduce spending. Because of the need to satisfy unique agency business requirements, the anticipated efficiencies resulting from standardizing and centralizing the State's IT infrastructure have been limited.

It appears that the NG contract was intended to provide only a limited number of service offerings to State agencies, but these standard enterprise services have not met all agency needs. For example, agencies have only two choices for desktop or laptop computers. As a result, agencies have incurred additional costs procuring the type of IT equipment they believe is required. This may be a faster processor, additional memory, larger hard drives (storage) or larger monitors.

In addition, centralization has not been as effective as anticipated. This has occurred in two main areas. First, consolidation of equipment to a central data center has strained the capacity of the network connecting agencies with the data center and raised concerns about insufficient redundancy. Addressing these issues has reportedly increased the costs NG is incurring. Second, the central helpdesk has not been capable of addressing all concerns, so some agencies have resumed providing local help desk functions to address unique agency systems or business processes. Central oversight also included an assumption that State agencies would no longer be able to administer their computers, but this has hindered the agencies' ability to maintain and develop needed software applications. Addressing the management inefficiencies introduced by centralization has also been reported to increase NG's costs.

## **Recent Contract Amendments Have Eliminated Anticipated Savings and Avoided Costs**

To a degree, the original NG contract reflected the untested premise that standardization and centralization would reduce spending. This can be seen in a contractual guarantee of savings under a particular circumstance, and an assertion that avoided costs would result from placing a \$236 million cap on annual payments to NG.

However, recent contract amendments eliminated these potential spending reductions. It appears that these amendments are intended to allow NG to recoup its higher than anticipated costs, owing to the inability of standardization and centralization to achieve cost efficiencies.

***Recent Amendment Eliminated \$84 Million in Savings.*** VITA is allowed to renew the contract to add up to an additional three years to the original ten-year term. During that time, the contract originally stated that NG must lower its fees by 14 percent, for an estimated savings of \$28 million each year. It is likely that the prices agreed to by NG for the first ten years were developed in anticipation of the lower prices for years 11 through 13. As a result, it appears that VITA assumed that the State would extend the contract for the three additional years.

On March 31, 2010, VITA executed a contract amendment that extended the contract for three years but removed the requirement that NG lower its fees during that time. As a result, the State will pay \$84 million more than had been required. This eliminates the only guaranteed savings from the partnership.

***Contractual Cap Has Been Unable to Prevent Increases in IT Spending.*** In August of 2005, three months before the State selected NG as the winning vendor, VITA produced an analysis of the financial benefits from forming a partnership. This began with an estimate that VITA expended \$236 million in FY 2005 to provide infrastructure services to its customer agencies. VITA projected that this cost would increase over the next ten years by an average of three percent due to cost of living adjustments. VITA estimated that these projected increases would result in a cumulative cost increase of \$200 million over the ten-year period.

VITA informed policymakers that \$200 million in avoided costs would be achieved by capping annual payments to the vendor at \$236 million annually. However, the contract allows NG to make annual requests for cost of living adjustments, resulting in total annual payments in excess of the \$236 million cap. As a result, a key assumption behind VITA's projection of future avoided costs was not actually reflected in the terms of the contract. In addition, the contract's cap was never intended to apply to key costs such as VITA's overhead expenses (\$25 million annually) and the costs borne by State agencies to modify applications to facilitate the transformation process. It does not appear that policymakers were clearly informed that these costs were excluded from the \$236 million cap.

The ability of the cap to contain IT spending was further reduced by the contract amendments executed on March 31, 2010. One amendment clarified confusion about whether NG could be granted cost of living adjustments by apparently adding a prospective inflation adjustment to future fees. The other amendment adjusted prices for NG's fees such that NG will receive an additional \$12 million in each of the remaining nine years of the contract. In addition, NG will receive an additional \$5 million annually for additional security measures and enhanced disaster recovery services that were not in the original contract.

## **NG Contract Reduces Ability of Policymakers to Limit IT Spending**

The contract with NG has placed new constraints on the State's IT budgeting process because contractually-established fees and minimum payments to NG will drive the State's IT spending. Before VITA entered into the partnership with NG, policymakers could adjust the annual appropriation to VITA (and to State agencies for their payments to VITA) based on the availability of funds. VITA asserted that one benefit of entering into a partnership was that IT funding would now be consistent. Prior to the partnership, the variation in annual IT expenditures limited the ability of State agencies to maintain up-to-date IT equipment and implement new applications and systems. However, the actual effect of the partnership is that IT expenditures are more consistent. It is not yet clear how State agencies will obtain the funding needed to pay for the IT services NG provides.

The new consistency in IT expenditures derives from several aspects of the NG contract. One of these is the mirror image of the cap on increases in spending—a minimum revenue commitment which sets a floor on payments to NG. As part of transformation, VITA and NG must complete a final inventory of the IT equipment used by State agencies and reconcile this with the “baseline” inventory from 2005. This process, known as “re-baselining,” is crucial because it creates a new baseline amount of each type of computer equipment against which future increases or decreases will be measured.

This new baseline has important implications for the payments the State must make to NG. If the State's use of a particular service decreases by more than 15 percent below the new baseline amount, the State must pay additional fees to meet the minimum revenue commitment. For example, if the use of a mainframe computer decreases by more than 15 percent, or if agencies reduce the number of desktop computers by more than 15 percent, the State will not recoup the full amount of the savings because additional payments must be made. This ongoing payment for assets no longer in use ensures that NG recovers certain upfront and ongoing costs.

In addition, the new amendments with NG have established new contractual fees for the functions and services provided by NG, such as desktop computer support. Because payment is contractually-required, these fees will drive the State's IT spending. Although some sections of the NG contract note that VITA's payments to NG are “contingent upon the appropriation, allocation and availability of sufficient government funds,” the new amendment adds a clause specifying that “in the absence of same, Vendor shall not be required to perform the corresponding services.” Therefore, in order to avoid unknown disruptions to State agencies resulting from a cessation of services provided by NG, the State must ensure that the vendor is paid.

## **Lack of Financial Resources Limits Ability of Policymakers to Cancel the Contract**

The Commonwealth signed a contract with NG in part because it lacked the capital to finance the modernization of its IT infrastructure. Because terminating the contract with NG would be costly, and the State's debt capacity and general revenues are currently limited, a lack of funding also appears to limit the State's ability to exit the contract before the full term ends. This same lack of resources may compel the State to continue outsourcing IT services indefinitely, even after its contractual relationship with NG expires.

The State has six means of terminating the contract. Three of these options include mandatory payment to NG of contractually defined fees. Although the amount of these mandatory fees decreases over time, in FY 2010 the mandatory fees could total as much as \$399 million. Some of these fees cover

administrative, labor, and other costs that NG would incur if the contract was terminated early. Other fees consist of payments to NG for the continued use of IT assets, including the main data center, as well as other costs incurred by the company during the early years of the contract.

Even if the State exercised one of the other three options (where mandatory payments to NG are not required), exiting the contract with NG prior to the full term would still require a substantial capital investment by the State. NG now owns the IT equipment used by State agencies, and the State would need to purchase or lease these assets. In addition, if VITA resumed responsibility for providing infrastructure services, rather than another vendor, the State would have to rehire the staff that left State agencies and transitioned to NG. In other words, under the three options where mandatory fees to NG are not required, the State has the choice whether to pay NG or another vendor. But in any event, payment of these fees to NG or another vendor (or related expenditures to resume internal management of IT services) would be required because the State no longer owns its enterprise IT assets and must pay to reacquire them.

Early termination would also pose significant logistical challenges. Agency operations would likely be disrupted as services are transferred to VITA or a new vendor. In the immediate timeframe, this transition would be complicated by the lack of a completed procedures manual describing how services are provided.

## **LEGISLATURE SHOULD OVERSEE FINANCIAL AUDITING AND PERFORMANCE EVALUATION OF PARTNERSHIPS**

Virginia's experience highlights the fact that public-private partnerships have the potential to reduce the accountability of the executive branch to the legislature. Legislative oversight is critical to ensuring that State agencies effectively manage such partnerships, and it may be necessary for the legislature to take steps to ensure continued accountability. In this case, the partnership with NG reduced the accountability to the legislature of a major government function, and only limited steps have been taken to ensure continued accountability.

Virginia's partnership with NG has diminished direct legislative authority over IT. Key aspects of the Commonwealth's IT program, such as the cost of services and the standards used for equipment provided to agencies, are now determined by the contract with NG and cannot be easily modified through statutory or budgetary actions. As a result, the General Assembly has limited ability to change how IT is used or modify IT spending.

### **Legislature Lacks Defined Role in Reviewing Amendments to Existing Partnership Contracts**

The legislature has a defined role in reviewing new contracts developed as part of a partnership, but not the modifications to them. Many modifications, such as the new amendments executed by VITA in March 2010, make widespread changes to the contract that can change many of the original purposes or mechanisms.

When a State agency wishes to form a new partnership, the PPEA requires them to ensure that a mechanism exists for "the appropriating body to review a proposed interim or comprehensive agreement prior to execution." Beyond this requirement, there has not been a traditional role for the legislature to oversee the approval or implementation of public-private partnerships. In contrast, executive branch agencies are authorized to solicit, negotiate, and implement partnerships, and legislative authority appears largely limited to appropriating public funds.

In order to create an affirmative legislative role, the General Assembly created the Public-Private Partnership Advisory Commission in 2007. The Commission is responsible for advising State agencies on proposed partnerships, but the Commission's approval is not required before a contract is signed, and it lacks statutory authority to monitor existing partnerships. Moreover, the Commission cannot review proposed amendments to existing contracts, and there is no statutory requirement that State agencies seek its approval before signing an amendment. To address some of these concerns, Virginia statutes could be amended to require that the Commission or other legislative body review proposed contract amendments. The General Assembly may wish to require that fiscal impact statements be presented as part of this review.

### **Legislature Has Limited Ability to Independently Audit and Evaluate the Contract with NG**

The General Assembly has limited ability to audit the State's contract with NG. Contractual provisions limit the scope of audits to defined objectives and suggests that some audits can only be performed at the request of VITA. As a result, the legislature may have a limited view into the status of the contract with NG and the performance of the vendor. Giving the General Assembly a more defined role in auditing future PPEA contracts would strengthen oversight and help to ensure adequate accountability to the legislature.

A more defined role for the General Assembly in overseeing public-private partnerships could allow for regular financial audits and performance evaluations by legislative entities. Financial audits could be used to track the ongoing cost of a partnership or identify any savings that may have resulted. Performance evaluations could be used to evaluate the vendor's compliance with service provisions in the contract, including whether services are meeting agency needs, as well as determine if the partnership is meeting stated goals.

**Adoption of Procedural Rules by the Oklahoma House of Representatives:**  
An Examination of the Historical Origins and Practical Methodology Associated with the  
Constitutional Right of American Legislative Bodies to  
Adopt Rules of Legislative Procedure<sup>1</sup>

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In the course of considering a simple resolution containing proposed House rules for the 52nd Oklahoma Legislature, a point of order was raised as to what authority, statutorily or constitutionally, the House was proceeding under when considering adoption of procedural rules.

The concerned member<sup>3</sup> also inquired as to whether the House of Representatives should adopt temporary rules, as had occurred previously in 2005,<sup>4</sup> prior to adoption of permanent rules for the present two-year Legislature.

In response, the presiding officer stated that the House of Representatives was operating under the customs of the House and that the custom and practice of the House had been to adopt its [permanent] rules on the first day of [regular] session and that the House would proceed with the adoption of House rules for the 52nd Oklahoma Legislature.<sup>5</sup>

Under what authority may the Oklahoma House of Representatives or, for that matter, the legislative chambers of the other forty-nine states adopt procedural rules? And, in doing so, what procedures should be observed? Analysis of these questions requires consideration of the interrelated matters of historical influences, constitutional authority, and judicial interpretation and generally agreed upon standards of parliamentary procedure.

To begin with, the idea that internal rulemaking should be left to the legislature is a notion deeply rooted in American constitutional theory and history. Whether created as a royal colony, proprietary colony or by parliamentary charter, each British colony in North America at some time during its colonial history maintained a representative assembly.<sup>6</sup> To one degree or another, each colonial assembly perceived itself to possess equivalent “privileges” as those claimed by the British Parliament.<sup>7</sup> Among privileges claimed was the long-standing assertion that Parliament alone would decide matters of internal procedure.<sup>8</sup>

After declaring independence, most American colonies codified this “privilege”, the notion that internal rulemaking should remain the sole province of the legislature, explicitly reserving it to the legislative branch in most of the early state constitutions.<sup>9</sup> Likewise, in 1789 the states ratified the current United States Constitution which itself contains a similar provision reserving to Congress the creation and adoption of procedural rules.<sup>10</sup>

Similar to other jurisdictions,<sup>11</sup> Article V, Section 30 of the Oklahoma Constitution contains a “textually demonstrable constitutional commitment of the issue”<sup>12</sup> to the respective chambers of the legislature.

Paragraph two (2) says in relevant part:

*Each House may determine the rules of its proceedings...*

That the constitution is referring to the houses of the legislature is beyond dispute. By definition the words “may”, “determine” and “rule” connote discretionary authority<sup>13</sup> to conclusively and authoritatively fix standards for orderly conduct of business.<sup>14</sup> From the plain, natural and ordinary meaning of the words, in the order of grammatical arrangement,<sup>15</sup> it is clear that the people of Oklahoma intended for the Legislature to decide its own rules of procedure.<sup>16</sup>

Even without “textual commitment” to the legislative branch, adoption of procedural rules is an inherently legislative function intrinsic to the powers of a legislative body<sup>17</sup> and thus falls under the protections of the separation of powers requirement.<sup>18</sup> This must be so because the legislative branch could not function as a co-equal branch of state government if it lacked the authority to organize itself and manage its own internal processes.

While the Oklahoma Constitution clearly grants authority to the House to adopt rules, besides requiring a quorum be present to conduct business,<sup>19</sup> there is little guidance on precisely how to adopt such rules. While there appears to be no Oklahoma case law directly on point, the Oklahoma Supreme Court has historically exercised restraint when asked to intervene in disputes arising over intracameral procedure or other activities of a recognizable legislative character.<sup>20</sup>

Likewise, case law from other jurisdictions does not appear to speak to the specific question of how procedural rules should be initially or otherwise adopted. With great uniformity other jurisdictions hold that, apart from violation of fundamental rights or other requirements within a jurisdiction’s organic law, the legislature is empowered to determine for itself its own rules of procedure.<sup>21</sup>

If Article V, Section 30 says the House may “determine the rules of its proceedings” and no case law provides additional, specific guidance, what is left to proceed under but the “customs and practices of the House”?<sup>22</sup> This being the case, what is meant by the terms “customs and practices of the House”? In this context it is the historical practices of the House as they pertain to adoption of rules.

The historical practice for adopting the standing rules of the Oklahoma House of Representatives is as follows: in the opening days of the first session of a two-year Legislature, a member, usually the Majority Floor Leader seeks recognition to present a motion to adopt House Rules. The motion typically is offered in the form of a simple resolution.

Upon obtaining recognition from the presiding officer, the Majority Floor Leader provides a detailed explanation of the proposed rules and then yields to questions from other members. As consideration of the main question continues, members are recognized to offer amendments, both friendly and unfriendly. Proposed amendments are either considered on their merits or disposed of procedurally. Finally, debate takes place unless curtailed by an appropriate procedural motion, followed by a vote on the question of adoption.<sup>23</sup>

The actions taken in adopting House Rules for the 52nd Oklahoma Legislature complied not only with the requirements of the prior session's rules, but also with the requirements and principles present in any given set of procedural rules adopted by the House of Representatives since statehood.<sup>24</sup> Moreover, the ruling of the Chair paralleled guidance provided in *Mason's Manual of Legislative Procedure*<sup>25</sup> both for initial adoption of rules<sup>26</sup> and for group decision-making.<sup>27</sup>

For proper decision-making, *Mason's Manual* says that the group attempting to make the decision must be legally constituted and must have the legal authority to exercise the powers it is attempting to exercise. Second, there must be a meeting of the group at which the decision is made.

Third, the group must be given proper notice of the meeting thus allowing opportunity for attendance and participation. Fourth, a quorum must be present at the meeting. Fifth, there must be an explicit question for the group to decide. Sixth, when a question is under consideration, members of the group must be given the opportunity to debate the question under consideration. Seventh, in order to make a decision or take an action, the group must take a vote.

Eighth, to carry the proposed question, at least a majority of the group must vote in the affirmative. Ninth, there must not be fraud or deception present within the decision-making process. Tenth, any decision made by the group must not be in violation of any laws, rules or decisions of higher authority. Eleventh and finally, there must be a record of the decision made by the group.

In comparison, the Oklahoma House of Representatives was duly constituted<sup>28</sup> and was constitutionally authorized to adopt procedural rules.<sup>29</sup> Second, the House assembled and convened on the date and at the time constitutionally mandated.<sup>30</sup>

Third, the constitutional provision establishing the day and time for convening the first day of regular session provided each member with explicit and proper notice of the date, time and location of the next daily session of the House.<sup>31</sup> Additionally, at the conclusion of the "organizational day" which convened roughly a month earlier on Tuesday, January 6, 2009, the House adjourned to a date and time certain, namely 12:00 noon, Monday, February 2, 2009.<sup>32</sup> Without question, each member possessed notice of the precise date, time and location of the next sitting of the House of Representatives.

Fourth, a quorum was established.<sup>33</sup> Fifth, a clear question came before the House to be decided when the Majority Floor Leader<sup>34</sup> moved adoption of House Resolution 1005 which contained proposed House Rules for the 52nd Oklahoma Legislature.<sup>35</sup> Sixth, upon consideration of House Resolution 1005, members of the House were afforded opportunity to offer debate on the merits of the proposed rules.<sup>36</sup> Seventh, the question before the House, adoption of House Resolution 1005, House Rules, was brought to a vote.<sup>37</sup>

Eighth, the question before the House passed with a majority of the House voting in the affirmative.<sup>38</sup> Ninth, nothing fraudulent or deceptive occurred in the decision-making process. Tenth, neither the action of adopting House Rules nor the process by which the rules were adopted violates the federal constitution or federal law. Additionally, it did not violate the Oklahoma Constitution or any known case law interpreting the Oklahoma Constitution.

Finally, the actions taken by the House in adopting House Rules were recorded in the House Journal,<sup>39</sup> including a clear record of the motion to adopt House Resolution 1005, the proposed amendments offered to the main question and their disposition, the final roll call vote showing a majority of votes cast in the affirmative and a verbatim record of House Rules as adopted.<sup>40</sup>

In conclusion, by ruling that the customs and practices of the House govern consideration and adoption of House rules, the Chair abided by relevant constitutional requirements, the time-honored practices of the House itself and generally agreed upon standards of parliamentary procedure all of which conform with the general historical practices of American legislative bodies.

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<sup>1</sup> This article is based on a published precedent of the Oklahoma House of Representatives, *Prec. Okla. H. of Rep.*, Gen. Prec. (1.), 52nd Leg., 1st Reg. Sess. (Feb. 2, 2009). This precedent, in addition to all other published precedents of the Oklahoma House of Representatives, may be accessed at: <http://www.okhouse.gov/Information/HousePrecedents.aspx>.

<sup>2</sup> Mr. Kintsel is the Clerk of the Oklahoma House of Representatives and was appointed in 2005.

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<sup>4</sup> An exhaustive search of all House Journals reveals adoption of only one set of temporary rules as a distinct set of rules in their own right. In all other cases, the House adopted “temporary” rules in the sense that it adopted the previous session’s rules for a short period prior to adoption of permanent rules for that two-year Legislature. Such an approach seems to indicate permanent rules were not prepared prior to the convening of the first session as is the current practice. See *Okla. H. Jour.*, 33, 50th Leg., 1st Reg. Sess. (Jan. 4, 2005); Daily H. Sess. Dig. Rec., 50th Leg., 1st Reg. Sess. Track 10:01, 0:00-44:48 (Jan. 4, 2005).

<sup>5</sup> *Okla. H. Jour.*, 268, 52nd Leg., 1st Reg. Sess. (Feb. 2, 2009); Daily H. Sess. Dig. Rec., 52nd Leg., 1st Reg. Sess. Track 10:16, 2:40-8:04 (Feb. 2, 2009).

<sup>6</sup> Francis Newton Thorpe, *The Federal and State Constitutions, Charters and other Organic Laws of the States, Territories and Colonies Now or heretofore Forming the United States of America* [Connecticut] vol. I, 528, 531, [Delaware] vol. I, 559, [Georgia] vol. II, 768, [Maryland] vol. III, 1679, [Massachusetts] vol. III, 1853, 1854, 1864, 1878, 1886-1888, [New Hampshire] vol. IV, 2449, [New Jersey] vol. V, 2536-2538, 2565, 2566, 2574, 2575, [North Carolina] vol. V, 2758, 2781, [Pennsylvania] vol. V, 3037, 3047, 3048, [Rhode Island] vol. VI, 3214, [Virginia] vol. VII, 3810 (Government Printing Office 1909); for New York see Charles Lincoln, *The Constitutional History of New York* 429, 440 (The Lawyers Co-operative Publishing Company 1906); for South Carolina see Richard Middleton, *Colonial America, A History, 1565-1776*, at 184-187 (Blackwell Publishers Ltd. 2002).

<sup>7</sup> Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 12, 13 (Yale University Press 1943); Donald S. Lutz, “The Colonial and Early State Legislative Process” in *Inventing Congress: Origins and Establishment of the First Federal Congress* 54 (Kenneth R. Bowling & Donald R. Kennon eds., Ohio University Press 1999).

<sup>8</sup> *The Parliament Rolls of Medieval England, 1275-1504* vol. VII, 64, 99, 100, vol. VIII, 232 [The Earl of Northumberland’s Case], vol. XII, 56 [Earl of Arundel’s Case, 27 Henry VI], vol. XII, 106 [Impeachment of Duke of Suffolk], vol. XII, 254-255 [Baron Thorpe’s Case, 31 Henry VI] (The Boydell Press 2005); Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 14, 15 (E. and R. Brooke 1797); Sir William Blackstone, *Commentaries on the Laws of England* vol. I, 163 (A. Strahan 1800); John Hatsell, *Precedents of the Proceedings of the House of Commons* vol. IV, pref., vi-vii (Luke Hansard & Sons 1818) (modern reprint Irish University Press 1971); A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 52-54 (MacMillan and Co., Ltd 1915).

<sup>9</sup> Thorpe, *The Federal and State Constitutions, Charters and other Organic Laws of the States* [Connecticut] vol. I, 540, [Delaware] vol. I, 571, [Georgia] vol. II, 779, 781 [Maryland] vol. III, 1695, [Massachusetts] vol. III, 1897, 1899, [New Hampshire] vol. IV, 2460, 2462, [New Jersey] vol. V, 2602, [New York] vol. V, 2640, [Pennsylvania] vol. V, 3094, [Rhode Island] vol. VI, 3227, [South Carolina] vol. VI., 3260, [Virginia] vol. VII, 3816 (Government Printing Office 1909).

<sup>10</sup> US CONST I, 5.

<sup>11</sup> Ala. IV, 53; Alaska II, 12; Ariz. IV, II, 8; Ark. V, 12; Cal. IV, 7(a); Colo. V, 12; Conn. III, 13; Del. II, 9; Fla. III, 4(a); Ga. III, Sec. IV, 4; Haw III, 12; Idaho III, 9; Ill. IV, 6(d); Ind. IV, 10; Iowa III, 9; Kan. II, 8; Ky. 39; La. III, 7(a); Me IV, Part III, 4; Md. III, 19; Mass. Part II, Ch. 1, Sec. II, 7, Sec. III, 10; Mich. IV, 16; Minn. IV, 7; Miss. IV, 55; Mo. III, 18; Mont. V, 10(1); Neb. III, 10; Nev. IV, 6; N.H. II, 22, 37; N.J. IV, Sec IV, Par. 3; N. M. IV, 11; N.Y. III, 9; N.D. IV, 12; Ohio II, 7; Okla. V, 30; Or. IV, 11; Pa. II, 11; R.I. VI, 7; S.C. III, 12; S.D. III, 9; Tenn. II, 12; Tex. III, 11; Utah VI, 12; Vt. II, 19; Va. IV, 7; Wash. II, 9; W.Va. VI, 24; Wis. IV, 8; Wyo. III, 12; Unincorporated, organized United States territories: Guam, 48 USCA § 1423a; Northern Mariana Islands, NMI CONST II, 14; Commonwealth of Puerto Rico, PR CONST III, 9; U.S. Virgin Islands, 48 USCA § 1572g; unincorporated, unorganized United States territory: American Samoa, RCAS II, 11.

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<sup>12</sup> *In re INITIATIVE PETITION NO. 348*, 1991 OK 110, 820 P.2d 772, 780 (1991) footnote 21 contains discussion of the Guaranty Clause, US CONST IV, 4, and adopts the factor of “textual commitment” when determining whether a question is political as set forth by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>13</sup> *Shea v. Shea*, 537 P.2d 417, 418 (1975).

<sup>14</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 616, 1396 (ed. 1993); BLACK’S LAW DICTIONARY, 1357 (8th ed. 2004).

<sup>15</sup> See *Shaw v. Grumbine*, 278 P. 311, 315 (1929); *Wimberly v. Deacon*, 144 P.2d 447, 450 (1943).

<sup>16</sup> The will of the people is expressed in the various provisions of the state's organic law. See *City of Sapulpa v. Land*, 101 Okla. 22, 223 P. 640, 644 (1924); *Dank v. Benson*, 5 P.3d 1088, 1090 (Okla. 2000).

<sup>17</sup> H. W. Dodds, *Procedure In State Legislatures* 12, 13 (The American Academy of Political and Social Science 1918).

<sup>18</sup> OK CONST IV, 1.

<sup>19</sup> OK CONST V, 30.

<sup>20</sup> The Court is without authority to interject itself into the legislative process [assigned by the Constitution to the House] by directing how that body shall conduct its business, *Dank v. Benson*, 5 P.3d 1088, 1092 (Okla. 2000).

The Legislature has power and right to determine for itself when moment of time has arrived for adjournment of a legislative day, subject to the rule of reason, *Davis v. Thompson*, 721 P.2d 789, 792, 793 (Okla. 1986), *Bellmon v. Barker*, 760 P.2d 813, 814 (Okla. 1988).

The Legislature decides fiscal policy and the Court may not direct legislative decision-making, *Calvey v. Daxon*, 997 P.2d 164, 171, 172 (Okla. 2000), *Oklahoma Education Association v. State ex rel. State Legislature*, 158 P.3d 1058, 1065 (Okla. 2007). The Legislature’s policy-making power specifically includes determination of policies related to public education. *Id.* at 1065, 1066.

<sup>21</sup> With its rules Congress cannot ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. Within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. Within the limitations suggested, the power to make rules is absolute and beyond the challenge of any other body or tribunal, *U.S. v. Ballin*, 144 U.S. 1, 5 (1892).

The courts accept as passed all bills authenticated in the manner provided by Congress, *Field v. Clark*, 143 U.S. 649, 672 (1892).

If the question of construction of Senate rules affects persons other than members of the Senate, the question presented may be decided by the courts, *U.S. v. Smith*, 286 U.S. 6, 33 (1932).

Conviction for perjury held to be violation of fundamental rights because committee rules required presence of quorum; committee lacked quorum at time perjured testimony was offered falling short of a “duly constituted tribunal,” *Christoffel v. U.S.*, 338 U.S. 84, 90 (1949).

Conviction for contempt of Congress based on refusal to answer questions at a subcommittee hearing reversed because committee failed to comply with its own rules, *Yellin v. U.S.*, 374 U.S. 109, 123, 124 (1963).

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*Cf. Brown v. Hansen*, 973 F.2d 1118 (C.A.3, V.I. 1992); *Birmingham-Jefferson Civic Center Authority v. City of Birmingham*, 912 So.2d 204 (Ala. 2005); *Mission Hospital Regional Medical Center v. Shewry*, 168 Cal.App.4th 460 (C.A. 3, Cal. 2008); Att’y Gen op. 05-1, 2005 WL 1378063 (HI).

<sup>22</sup> *MASON’S MANUAL OF LEGISLATIVE PROCEDURE* 36 § 39(6) (National Conference of State Legislatures 2000); *Cf. Hind’s Prec., H. of Rep.*, Ch. 141 §§ 6758-6759, 887 (G.P.O. 1907); *Cannon’s Prec., H. of Rep.*, Ch. 271 § 3386, 831 (G.P.O. 1936); *Deschler’s Prec., H. of Rep.*, Ch. 1 § 1, 6 (G.P.O. 1976); Josef Redlich, *The Procedure of the House of Commons* vol. II, 4-6 (Archibald Constable & Co. Ltd. 1908).

<sup>23</sup> *Cf. Okla. Terr. H. Jour.*, 49, 1st Sess. (1890); *Okla. Terr. H. Jour.*, 55, 1st Sess. (1893); *Okla. Terr. H. Jour.*, 294, 1st Sess. (1895); *Okla. Terr. H. Jour.*, 503, 1st Sess. (1897); *Okla. Terr. H. Jour.*, 18-19, 1st Sess. (1899); *Okla. Terr. H. Jour.*, 50, 1st Sess. (1901); *Okla. Terr. H. Jour.*, 85, 1st Sess. (1903); *Okla. Terr. H. Jour.*, 71, 1st Sess. (1905); *Okla. H. Jour.*, 47, 1st Leg., 1st Reg. Sess. (1907); *Okla. H. Jour.*, 58, 2nd Leg., 1st Reg. Sess. (1909); *Okla. H. Jour.*, 56, 3rd Leg., 1st Reg. Sess. (1911); *Okla. H. Jour.*, 339, 4th Leg., 1st Reg. Sess. (1913); *Okla. H. Jour.*, 203, 5th Leg., 1st Reg. Sess. (1915); *Okla. H. Jour.*, 18, 6th Leg., 1st Reg. Sess. (1917); *Okla. H. Jour.*, 91, 8th Leg., 1st Reg. Sess. (1921); *Okla. H. Jour.*, 135, 9th Leg., 1st Reg. Sess. (1923); *Okla. H. Jour.*, 300, 10th Leg., 1st Reg. Sess. (1925); *Okla. H. Jour.*, 454, 11th Leg., 1st Reg. Sess. (1927); *Okla. H. Jour.*, 158, 12th Leg., 1st Reg. Sess. (1929); *Okla. H. Jour.*, 480, 13th Leg., 1st Reg. Sess. (1931); *Okla. H. Jour.*, 338, 14th Leg., 1st Reg. Sess. (1933); *Okla. H. Jour.*, 204, 15th Leg., 1st Reg. Sess. (1935); *Okla. H. Jour.*, 602, 16th Leg., 1st Reg. Sess. (1937); *Okla. H. Jour.*, 233, 17th Leg., 1st Reg. Sess. (1939); *Okla. H. Jour.*, 263, 18th Leg., 1st Reg. Sess. (1941); *Okla. H. Jour.*, 492, 19th Leg., 1st Reg. Sess. (1943); *Okla. H. Jour.*, 118, 20th Leg., 1st Reg. Sess. (1945); *Okla. H. Jour.*, 20, 22nd Leg., 1st Reg. Sess. (1949); *Okla. H. Jour.*, 118, 23rd Leg., 1st Reg. Sess. (1951); *Okla. H. Jour.*, 7, 24th Leg., 1st Reg. Sess. (1953); *Okla. H. Jour.*, 7, 25th Leg., 1st Reg. Sess. (1955); *Okla. H. Jour.*, 12, 26th Leg., 1st Reg. Sess. (1957); *Okla. H. Jour.*, 11, 27th Leg., 1st Reg. Sess. (1959); *Okla. H. Jour.*, 9, 28th Leg., 1st Reg. Sess. (1961); *Okla. H. Jour.*, 9, 29th Leg., 1st Reg. Sess. (1963); *Okla. H. Jour.*, 6, 30th Leg., 1st Reg. Sess. (1965); *Okla. H. Jour.*, 6, 31st Leg., 1st Reg. Sess. (1967); *Okla. H. Jour.*, 10, 32nd Leg., 1st Reg. Sess. (1969); *Okla. H. Jour.*, 7, 33rd Leg., 1st Reg. Sess. (1971); *Okla. H. Jour.*, 8, 34th Leg., 1st Reg. Sess. (1973); *Okla. H. Jour.*, 8, 35th Leg., 1st Reg. Sess. (1975); *Okla. H. Jour.*, 89, 36th Leg., 1st Reg. Sess. (1977); *Okla. H. Jour.*, 225, 37th Leg., 1st Reg. Sess. (1979); *Okla. H. Jour.*, 80, 38th Leg., 1st Reg. Sess. (1981); *Okla. H. Jour.*, 103, 39th Leg., 1st Reg. Sess. (1983); *Okla. H. Jour.*, 295, 40th Leg., 1st Reg. Sess. (1985); *Okla. H. Jour.*, 141, 41st Leg., 1st Reg. Sess. (1987); *Okla. H. Jour.*, 112, 42nd Leg., 1st Reg. Sess. (1989); *Okla. H. Jour.*, 316, 43rd Leg., 1st Reg. Sess. (1991); *Okla. H. Jour.*, 8, 44th Leg., 1st Reg. Sess. (1993); *Okla. H. Jour.*, 40, 45th Leg., 1st Reg. Sess. (1995); *Okla. H. Jour.*, 1383, 47th Leg., 1st Reg. Sess. (1999); *Okla. H. Jour.*, 24, 48th Leg., 1st Reg. Sess. (2001); *Okla. H. Jour.*, 23, 49th Leg., 1st Reg. Sess. (2003); *Okla. H. Jour.*, 54, 50th Leg., 1st Reg. Sess. (2005); *Okla. H. Jour.*, 256, 51st Leg., 1st Reg. Sess. (2007).

<sup>24</sup> *Id.*

<sup>25</sup> *Mason’s Manual of Legislative Procedure* in creation, approach and function is a guidebook to parliamentary practice in the state legislatures of the United States and is updated on a decennial basis by a commission comprised of members representing a broad cross-section of state legislatures and professional experience; see also *Okla. H. Rules*, § 9.2 (32nd Leg.); *Okla. H. Rules*, § 9.2 (33rd Leg.); *Okla. H. Rules*, § 9.2 (34th Leg.); *Okla. H. Rules*, § 11.2 (35th Leg.); *Okla. H. Rules*, § 11.2 (36th Leg.); *Okla. H. Rules*, § 25.3 (37th Leg.); *Okla. H. Rules*, § 25.3 (38th Leg.); *Okla. H. Rules*, § 25.3 (39th Leg.); *Okla. H. Rules*, § 25.3 (40th Leg.); *Okla. H. Rules*, § 25.3 (41st Leg.); *Okla. H. Rules*, § 25.3 (42nd Leg.); *Okla. H. Rules*, § 25.3 (43rd Leg.); *Okla. H. Rules*, § 25.3 (44th Leg.); *Okla. H. Rules*, § 25.3 (45th Leg.); *Okla. H. Rules*, § 25.3 (46th Leg.); *Okla. H. Rules*, § 25.3 (47th Leg.); *Okla. H. Rules*, § 25.3 (48th Leg.); *Okla. H. Rules*, § 25.3 (49th Leg.); *Okla. H. Rules*, § 14.2 (50th Leg.); *Okla. H. Rules*, § 14.2 (51st Leg.).

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<sup>26</sup> *MASON'S MANUAL OF LEGISLATIVE PROCEDURE* 36 § 39(6) (National Conference of State Legislatures 2000); see also Cushing, Luther Stearns, *ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES OF THE UNITED STATES OF AMERICA* 312 § 792, 793 (Little, Brown and Co. 1856); *U.S. H. Jour.*, 36, 27th Cong., 1st Sess. (June 3, 1841); *Cong. Globe*, 18, 27th Cong., 1st Sess. (June 3, 1841).

<sup>27</sup> *Mason's*, 37-40 §§ 42, 43.

<sup>28</sup> *Okla. H. Jour.*, 1-6, 52nd Leg., 1st Reg. Sess. (Jan. 6, 2009).

<sup>29</sup> OK CONST V, 30.

<sup>30</sup> *Okla. H. Jour.*, 35, 52nd Leg., 1st Reg. Sess. (Jan. 6, 2009); *Okla. H. Jour.*, 37, 52nd Leg., 1st Reg. Sess. (Feb. 2, 2009); OK CONST Art. V § 26.

<sup>31</sup> *Id.*

<sup>32</sup> *Okla. H. Jour.*, 35, 52nd Leg., 1st Reg. Sess. (Jan. 6, 2009).

<sup>33</sup> *Okla. H. Jour.*, 37, 52nd Leg., 1st Reg. Sess. (Feb. 2, 2009).

<sup>34</sup> Representative Tad Jones (R) (HD 9, Claremore).

<sup>35</sup> *Id.* at 270.

<sup>36</sup> Daily H. Sess. Dig. Rec., 52nd Leg., 1st Reg. Sess. Track 10:16, 32:18-55:29 (Feb. 2, 2009).

<sup>37</sup> *Okla. H. Jour.*, 270, 52nd Leg., 1st Reg. Sess. (Feb. 2, 2009).

<sup>38</sup> *Id.*

<sup>39</sup> OK CONST V, 30.

<sup>40</sup> *Okla. H. Jour.*, 268-295, 52nd Leg., 1st Reg. Sess. (Feb. 2, 2009).

## **Too Much Work, Not Enough Time:** A Virginia Case Study in Improving the Legislative Process

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"[O]ne of the major challenges of lawmaking is squeezing everything into a finite calendar."<sup>1</sup>

When the Virginia House of Delegates adopted its Rules for the 2008-2010 legislative biennium, a new feature was a limit on the absolute number of bills that House members could introduce in the regular session of odd-numbered years. This was but the latest in a series of steps taken over the past decade by Virginia's part-time, citizen legislature in an effort to manage an extensive workload within narrow time limits. Virginia's experience over the last decade may be of comparative interest to other part-time, citizen legislatures that have been engaged in similar activity and instructive for others that are looking for ways to control their time.

Virginia ranks twelfth in population size among all states and its legislature consequently faces a complex and lengthy legislative agenda each year. The volume of legislation the Virginia General Assembly considers in a two-year cycle places it among the busier state legislative bodies.<sup>2</sup> Further, Virginia's legislative deliberations are compressed into a limited time frame, especially when compared with most states of comparable size. A majority of the 15 most populous states have virtually unlimited sessions and none are more restrictive than Virginia.<sup>3</sup>

Ten years ago, the Virginia General Assembly directed its Joint Rules Committee to study ways to improve the legislative process and maintain the citizen legislature and to report its recommendations to the 2001 Session of the General Assembly.<sup>4</sup> The Assembly at the same time created a Citizens Advisory Board to assist the Joint Rules Committee in its work. In June 2000, the Joint Rules Committee contracted with the National Conference of State Legislatures to conduct a study of the legislative process in Virginia, "prompted by concerns legislators have with conducting their business in the most efficient and effective manner and maintaining their part-time status."<sup>5</sup> The scope of the study included maintaining a citizen legislature, promoting full and open consideration of issues, and increasing public accessibility to the legislative process.<sup>6</sup>

The Joint Rules Committee did not file an official report of its deliberations with the 2001 General Assembly, instead allowing the reports of the Citizens Advisory Board<sup>7</sup> and the NCSL to stand on their own.<sup>8</sup> The absence of an official response, however, was not an indication that legislative reforms would not be forthcoming. The Joint Rules Committee incorporated some of the recommendations into the joint procedural resolution for the 2001 session, other recommended changes in committee restructuring and related matters were initiated by the leadership of the separate chambers in 2002, and still other changes have ensued from time to time over the last decade. The purpose of this article is to highlight and assess the effects of a few major steps rather than review the full range of study recommendations and legislative responses.

## Historical Perspective: Annual Sessions and Legislative Continuity

Historically, the Virginia General Assembly met in even-numbered years for sessions of 60 calendar days. When Virginia adopted a new constitution in 1971, the major change in the legislative article was to move the Virginia General Assembly from a biennial to annual legislative schedule. An advisory Commission on Constitution Revision, which was established by the 1968 General Assembly and whose members were appointed by the Governor, had recommended retaining the biennial session tradition.<sup>9</sup> The Commission recognized the growing problems that the General Assembly encountered in attempting to accomplish its work within the 60 calendar day session, noting that the number of bills per session had increased by almost 50 percent between 1956 (1,154 bills) and 1968 (1,724 bills).<sup>10</sup> "That members of the General Assembly have too many bills to consider in too short a time, and that they cannot give proposed legislation the mature consideration they would wish is . . . clear," concluded the Commission.<sup>11</sup>

However, the Commission rejected the idea of annual sessions, with the "off-year" session being limited to budgetary and other specified matters because, in the words of the Commission, "experience in other states reveals that such sessions prove an unworkable and unstable half-way station . . . to full fledged annual sessions."<sup>12</sup> The Commission's compromise recommendation to address the evident legislative dilemma was to increase the length of the biennial session from 60 to 90 days.

The General Assembly, in proposing the final version of the new constitution, and the voters in ratifying it, instead chose the annual session alternative without any subject matter limitations on either session. Consequently, the Constitution now provides that the Virginia General Assembly will meet for 60 calendar days in even-numbered years and 30 calendar days in odd-numbered years, with authority to extend either or both sessions up to 30 additional calendar days.<sup>13</sup> The two sessions commonly are referred to as the "long" and "short" sessions, respectively. The long session is in even-numbered years to follow Virginia's odd-numbered year election schedule for state legislators and statewide officials. Virginia's biennial budgets also are adopted at long sessions. The practice since annual sessions began has been to schedule the short session for 46 days. The long sessions in some years have been extended by one to five days to conclude the business of the session, usually to reach agreement on the biennial budget, but the understanding has been that the 60-day limit will be maintained.

## Trends in Legislative Workload

Table 1 reflects the trends in the volume of bills that have made up the General Assembly's workload since the advent of annual sessions. There is no obvious explanation for the actual decline in the volume of legislation introduced during the 1980s.

Table 1

Average Volume of Bills Introduced by Decade, Long and Short Sessions<sup>14</sup>

Decade	Long Session	Rate of Change	Short Session	Rate of Change	Short as Percent of Long
1972-1980	1686		1203		71.4%
1981-1990	1459	(-) 13.4%	1151	(-) 4.3%	78.9%
1991-2000	2085	(+) 42.9%	1735	(+) 33.7%	83.2%
2001-2010	2221	(+) 6.5%	2076	(+) 19.7%	93.5%

To an extent, the legislative agenda during the 1970s may have been expanded as an urban Virginia moved to address a range of issues that had been pent up by the Commonwealth's historically limited approach to government. However, the most striking fact demonstrated in the table is the explosive growth of legislation during the 1990s. It illuminates the initiatives taken by the leadership of the General Assembly in 2000 to find ways of coping with the burgeoning workload, and perhaps to restrain its growth, in order to make the constitutionally established time frames work.

Also notable in Table 1 is the volume of legislation considered in the short sessions. Since the Revision Commission had discussed a limited off-year session, the notion gained some currency that the odd-year "short" session would be limited in scope to mid-point adjustments to the biennial budget, bills continued under "legislative continuity" from the prior long session, and those public policy issues too pressing to defer until the next session. In fact, however, the Constitution did not specify such limits nor has the General Assembly from the outset limited itself in the procedural resolutions scheduling the "short" sessions.

Table 1 indicates that, while legislators were modestly restrained in the first few short sessions, the volume of short session legislation has gained steadily on that of the long session. In the last decade the short session has nearly matched the long session in total volume of bills. Had more of the legislation carried over from the long session actually been taken up in the ensuing short session, a process described below, there would in fact be little to distinguish the workload of the two sessions.

#### Legislative Continuity and Carry Over Legislation

The ability to continue or "carry over" legislation from the first, long session to the short, second session in the session cycle between legislative elections was a feature of legislative continuity that accompanied the move to annual sessions. As the NCSL explained in its study, the carry over device in other states traditionally provided true continuity by having bills listed on the second year legislative calendar at the same point from which they were continued from the first session.<sup>15</sup> Virginia's carry over practice from the outset has not followed that pattern.

Most carry over actions occur at the committee stage in Virginia; only in rare instances is a bill sent back from the floor to be carried over in committee. In the initial two decades of annual sessions, the deadline for committee action on carry over legislation as set in the even-year procedural resolution was a week after the beginning of the next, short session, allowing committees a week to take up these measures. The likelihood of success in committee in early years has not been calculated for each biennium, but a sampling of the statistics for selected years indicates that the percentage of carry over bills that made it to the chamber floor the next session was modest at best.<sup>16</sup>

Beginning with the 1994 session, the General Assembly procedural resolution shifted ground and required committees to take action on carry over bills on a set date in the December prior to the beginning of the next session. Bills not reported by that date would not be before the ensuing session and bills that would continue on the agenda could be clearly identified. This approach, coupled with on-line reporting of legislative statistics that began at the same time, make it easier to quantify the use of the carry over practice during the last decade and a half.

Table 2 shows clearly what has happened in this decade to what even in the 1990s was the modest utility of carry over. While bills might occasionally be continued because of the complexity of the issue or the need to refine further the legislative proposal, in practice to carry over a bill in Virginia has been an indication that the bill has failed. Most committees in recent years have in fact not met by the December deadline to take up carry over legislation.

Table 2 also reflects a decline each biennium over the last decade in the actual number of bills carried over. A decade ago, carry over action was the fate of fully one-fourth of all legislation introduced in even-year sessions. In contrast, the carry over has been the final action on roughly 12 percent of the bills introduced in each even-year session over the last three biennia. The reason for the decline in the use of the carry over procedure is open to interpretation. The high percentage of bills carried over during the 1990s could reflect that the General Assembly at that stage simply lacked the time otherwise to address all the legislation on its agenda. The decrease in numbers over this decade may be an admission by legislators that little will be done during the interim to affect the final outcome for carry over bills. It may simply be that today's legislators are more willing to kill legislation directly rather than apply the face-saving carry over procedure. Most likely, a combination of these factors has been at work.

Table 2  
Use of the Bill Carry Over Option, 1994-2010

Biennial Period	Bills Carried Over in First Session	Carry Over Bills Presented to Second Session	Percent
1994-1995	257	42	16%
1996-1997	504	37	7%
1998-1999	562	61	11%
2000-2001	528	31	6%
2002-2003	472	2	>1%
2004-2005	383	11	3%
2006-2007	303	3	1%
2008-2009	275	2	>1%
2010-2011	257	NA	NA

### A Decade of Reforms

The General Assembly has avoided the most obvious option that would allow more legislative time, namely to use its constitutional authority to extend the sessions up to 30 days in order to set sessions at 90 days in even-numbered years and 60 days in odd-numbered years. Instead, the General Assembly over the last decade has turned to other measures to control time and workload.

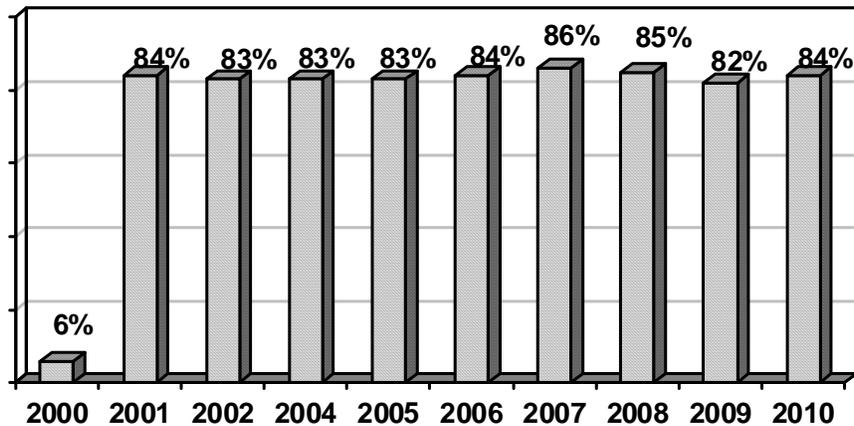
#### Frontloading the Process: Prefiling and Session Bill Limits

The primary initiative taken by the General Assembly to better manage its workload, beginning with the 2001 session, has been to frontload the work through a combination of prefiling and in-session bill introduction limits. The NCSL recommended in its 2000 report that the General Assembly expedite the legislative process by providing incentives to prefile legislation, suggesting that members be permitted to prefile an unlimited number of bills but be limited to an unspecified but low number of bills once the session convened.<sup>17</sup> This step, NCSL maintained, would give legislative staff more time to prepare bills for introduction and allow committees to begin work as soon as the session started rather than continue to experience the down time of the existing system, where bill preparation and introduction occupied most of the first week and a half of the session.

Prefiling had in fact been available to the Virginia General Assembly for 30 years, but the voluntary prefiling option had been little used.<sup>18</sup> Only twice between 1970 and 1999 did prefiling rise above five percent and never more than 7.8 percent of all bills for even-year sessions. Odd-year sessions, offering a longer prefiling period, showed somewhat better usage, but again only on two occasions did prefiled bills exceed 10 percent of all bills, with 15.8 percent being the best showing.<sup>19</sup>

Pursuant to the procedural resolution controlling the 2001 session, adopted by the Joint Rules Committee and approved by both houses, an unlimited number of bills could be prefiled but limits were set of six bills and substantive joint resolutions for House members and 10 such measures for

Graph 1  
Percent of Bills Prefiled

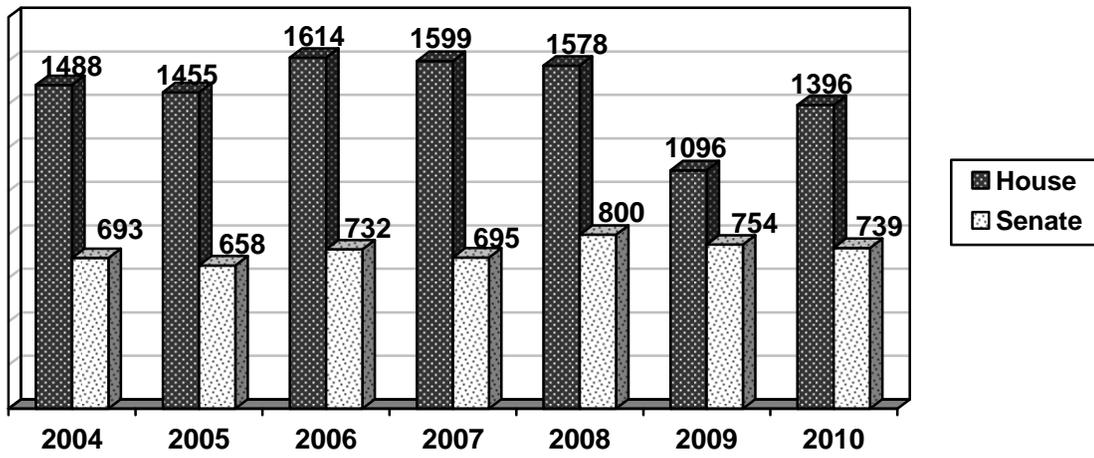


Senate members once the session convened.<sup>20</sup> The 2002 and each subsequent procedural resolution reduced the limits to five House and eight Senate bills, respectively. Graph 1 shows that the prefiling-session limit approach clearly has succeeded in Virginia. Most legislation now is available by the first day of the session. Committees can start work immediately, gaining at least a week of productive time, and can better plan their agendas.<sup>21</sup>

Prefiling did little to reduce the actual volume of legislation, however. The average number of bills introduced in the 2004 through 2008 sessions reflected only a three percent reduction from the total in 2000, the last session before prefiling began.

The House of Delegates took a step towards addressing this issue by imposing comprehensive bill introduction limits for the 2009 short session. House members were limited to a combined prefiled and session total of 15 bills; the House limit of 5 in-session bills remained and was to be counted against the overall total.<sup>22</sup>

Graph 2  
Bill Volume 2004-2010



Graph 2 shows that the House limit had a measurable effect on the number of House bills introduced.<sup>23</sup> The numbers for 2009 reflect a reduction of around 30 percent from the previous year and from the previous five-year average. (Parenthetically, it is impossible to determine whether any of the introduction load shifted to the Senate. There was also a drop in the number of Senate bills compared to a recent high of 800 in 2008, but an increase in Senate bills when 2009 is compared overall with the previous five-year average.) The absolute bill limit was retained when the 2010 House of Delegates adopted its set of rules for 2010-2011, so a pattern of limiting at least the odd-year short session may have been established

### "Incorporating" Duplicate Legislation

The NCSL in 2000 determined that the introduction of duplicate bills added significantly to the General Assembly's volume of legislation.<sup>24</sup> A related issue was that many bills that failed in the first session were introduced again in the following second session.<sup>25</sup> The NCSL recommended that the General Assembly consider some aggressive measures to address these issues, such as prohibiting the introduction in the same biennium of bills identical or substantially identical to bills that already had been defeated. Another suggestion, in the case of duplicate House and Senate bills, was to act only on the bill that crossed to the other house first and to halt consideration of all companion measures.

The General Assembly has not been willing to impose extensive restrictions of this nature. It has found useful one option mentioned in the NCSL report, that of consolidating identical or similar bills. (The General Assembly actually had begun to use this procedure before the NCSL study.) Known in Virginia as "incorporation," several bills may be "rolled into" one bill that moves forward as a substitute, with the bill numbers and patrons of the measures that are being incorporated into it being identified. A bill so incorporated may be identical to the prevailing bill, it may offer alternatives on the issue addressed by the main bill and at least part of its proposal is included in the main vehicle, or none of the provisions of the bill may make their way into the prevailing bill but by being incorporated the bill is recognized as having addressed the same or similar issue. The summary statistics for each session posted on the Virginia Legislative Information System do not report incorporated bills as a separate category. A review of all legislation for the 2010 session shows that the last action on 90 House and 53 Senate bills, or approximately seven percent of each house's legislation, was to incorporate them into other measures. The incorporation procedure thus does play some part in managing the session workload.

Evidence was presented earlier that the procedure allowing bills to be continued from the first to the second session in the legislative biennium almost exclusively has become a method of killing legislation (See Table 2). The carry over process thus affords the General Assembly a way to regulate its workload by removing several hundred bills from the cycle without having to deal with them extensively. However, there is a mitigating factor in judging the level of effectiveness of the practice in reducing workload. No rule prohibits the reintroduction at the subsequent session of a carry-over bill that "dies" due to the failure of a committee to act on it during the interim. Not all carry over bills in fact are removed from the biennial cycle; they simply reappear again in the second year, and some are perennial offerings.<sup>26</sup>

### Committee Restructuring

Another finding by the NCSL in 2000 was the need to overhaul the committee structure, particularly in the House of Delegates. There were too many committees, subcommittees had proliferated, and a lack of unified scheduling led to multiple schedule conflicts for members. The resulting multiple committee and subcommittee responsibilities, the NCSL concluded, impaired the ability of members to control their time, develop expertise in an area, and focus on key issues.<sup>27</sup> Under the leadership of then Speaker of the House of Delegates, Vance S. Wilkins, Jr., and based on data collected by the staff of the Office of the House Clerk, the House committee structure was reformed for the 2002 legislative session.<sup>28</sup> The number of House committees was reduced from 20 to 14 by abolishing four committees and consolidating three others into one committee. No direct effort was made to limit the number of subcommittees. Whelan reported an initial reduction in subcommittees occasioned by the elimination of parent committees and action by several committee chairmen independently to reduce the number of subcommittees in their individual committees.<sup>29</sup> The reductions proved temporary, however, and the number of permanent subcommittees in 2010 roughly matches that of 2000.

A significant change also was made to the Rules in order to reduce scheduling conflicts:

Between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday, no subcommittee of a standing committee except for the Appropriations or Rules Committee shall meet opposite another standing committee unless the parent committee foregoes meeting at its designated time to allow its subcommittees to meet.<sup>30</sup>

The rule, unchanged since 2002, undoubtedly has extended the working day for legislators and staff, forcing subcommittees to meet as early as 7:00 a.m. and run late into the dinner hour at the end of the day. The benefits are reduced time conflicts both for legislators in attending to their own committee assignments and tending to their individual legislative packages and for those who are tracking the process of legislation.<sup>31</sup>

Earlier in this decade, Maddrea examined some indicators of the initial impact of committee reduction and committee-subcommittee restructuring in the House.<sup>32</sup> Under the new structure, House committees reported more than three times the number of bills during the first 15 session days than in recent prior sessions, with a concurrently greater amount of work accomplished on the floor early in the session. Further into the session, as House committees approached the deadline for acting on House bills, the committees were well ahead of the historical patterns for reporting bills.

One additional change of note to the House committee system was made in 2006 when the following language was added to House Rule 18:

The chairman shall have discretion to determine when, and if, legislation shall be heard before the committee. The chairman, at his discretion, may refer legislation for consideration to a subcommittee. If referred to a subcommittee, the legislation shall be considered by the subcommittee. If the subcommittee does not recommend such legislation by a majority vote, the chairman need not consider the legislation in the full committee.

Statistics from the 2010 General Assembly indicate that a negative action in subcommittee has become the final action for a significant percentage of legislation (Table 3). These bills were never docketed for full committee consideration.

Table 3  
Last Action on Bills Failing in House of Delegates, 2010 Session\*

	Total Failed in House	Died on House Floor	Committee Failed to Report	Failed in Full Committee	Failed in Subcommittee	Subcommittee as Percent of Fail to Report
House Bills	617	8	609	324	285	47%
Senate Bills	93	7	86	51	35	41%

\*Carry Over is not counted as failing and are excluded.

Committee restructuring has not been a major concern of the State Senate and, with a few isolated shifts in meeting schedules, the structure of 11 standing committees has remained unchanged for several decades.<sup>33</sup> The committee meeting schedule generally provides that only one committee will meet in the morning or afternoon time slot each day or, in two instances, that meetings for two committees are staggered by early and late afternoon starting times. Only on one afternoon is there a direct conflict between two committee meetings. The number of regular subcommittees, which are used although not officially recognized in Senate Rules, has increased only slightly. Important in reducing member assignment conflicts and generally facilitating the committee and subcommittee system is the use of proxy voting. Senate rules provide that once a member is recorded present at a committee meeting, that member may leave a general proxy with another member for the duration of his or her absence from the meeting.<sup>34</sup>

### Measuring the Overall Impact of Changes

Is it possible to measure or demonstrate quantitatively the extent to which changes in legislative scheduling, committee procedures, and other operations in the last decade have increased the efficiency of the General Assembly? To what extent has the capacity of the General Assembly to manage its legislative agenda improved?

The end result of the changes described in this article should have been to allow the full legislative chambers a more ordered atmosphere in which to act on the legislation and conclude the session agenda. One measure of the latter is the amount of floor time required to conclude the legislative workload at critical, deadline-produced periods of the legislative process. Here two time periods are examined, that leading up to the "cross over" deadline and that leading to the end of the session itself.

In Virginia, the point in the process referred to as "cross over" is the day of the session set by the procedural resolution at which each house must have concluded action on the bills introduced in that house, with exceptions for budget bills and related measures. Thereafter, with only limited exceptions, the first house can only take up measures that have come to it from the other house. This last day for action by the house of origin is, by procedural resolution, the 35th day of the long session or the 28th day of the short session, a Tuesday in each instance. The pattern in Virginia is that the heaviest flow of legislation reaches the floor in the week to 10 days preceding cross over. Historically, it was common for the House and, to a lesser extent, the Senate also to meet on the Saturday or Sunday, or both, preceding cross over to handle the burgeoning workload and move legislation along through the required constitutional readings.

In Table 4 the length of each floor session beginning with the second Monday preceding cross over Tuesday has been used as a starting point.<sup>35</sup> The two sessions that preceded the beginning of reform and the last two sessions of the General Assembly are used for comparison, also allowing a contrast between long and short session effects.

Table 4  
Time Spent in Session Approaching Cross Over

	1999 House	2009 House	2000 House	2010 House	1999 Senate	2009 Senate	2000 Senate	2010 Senate
Total Minutes in Session	2665	1911	3165	1560	1950	1310	1335	999
Decrease in Total Session Time		28%		51%		33%		25%
Session Days	8	7	9	7	6	7	7	7
Average Time in Session Per Day	333	273	352	223	325	187	191	143
Decrease in Average Daily Session Time		18%		37%		42%		25%

The General Assembly today needs to spend less time in session during this critical legislative stage than was required a decade ago. The change particularly is noticeable for the House of Delegates, which had cut its 2000 session time in half by 2010. An additional consequence for the House of Delegates is that it was able in both 2009 and 2010 to finish work on its own bills without holding sessions on either day of the weekend preceding cross over. The extra week available before cross over during the long session evidently is particularly useful in enabling committees to clear their dockets sooner and reduce the crunch on the full body as the cross over date approaches. Progress has been made in reducing floor time in the short session, but the reduction is less dramatic. Also to be considered is that the House in 2009 operated under the absolute bill introduction limit and consequent reduction in the total number of bills considered, as described earlier. Otherwise, the reduction in time required to process an additional number of bills certainly would have been less in 2009. The floor time that the Senate requires at this legislative juncture also has declined, but the distinctions between long and short sessions are not as sharp as for the House. There is no obvious explanation for why the Senate would have gained more time at the short and not the long session.

The period approaching the end of the session affords another observation point. Under Virginia's procedural resolutions, committees have until midnight on the Monday of the last week of the session to report most bills and the full body until Thursday to complete floor consideration of them. A period beginning with the next to final Monday of the session and going through the Thursday of the last week of the session therefore captures the crescendo of activity winding up the session. (The final Friday and Saturday of the session primarily deal with conference reports.) Table 5 summarizes session time during this period.

Table 5 shows that General Assembly has been able to conclude recent sessions at a more controlled pace than during an earlier period. As is the case for the mid-point of the session, the effect of the change is more evident in the long session than in the shorter odd-year one. The House and Senate needed about 40 percent less time in floor sessions to complete their work during the closing days of the 2010 session than was necessary a decade ago. Longer daily sessions still are required under the more compressed time schedules for the short session, but some reduction in floor time still was accomplished.

Table 5  
Time Spent in Session Approaching End of Session

	1999 House	2009 House	2000 House	2010 House	1999 Senate	2009 Senate	2000 Senate	2010 Senate
Total Minutes in Session	2371	2143	3093	1776	2387	1980	2810	1708
Decrease in Total Session Time		10%		43%		17%		39%
Session Days	9	9	9	9	9	9	9	9
Average Time in Session Per Day	263	238	344	197	265	220	312	190
Decrease in Average Daily Session Time		10%		43%		17%		39%

## Conclusion

The Citizen Advisory Board on Improving the Legislative Process, in its 2000 report to the Joint Rules Committee, recognized that:

(N)ot all changes can be implemented for the 2001 Session. However, the Joint Rules Committee should act now to lay the groundwork for improving the process - then make the process even better for tomorrow.<sup>36</sup>

Seldom may a legislative body be inclined or able to adopt in its entirety a comprehensive reform package set out by consultant groups or advisory panels. Legislators may yet, however, find such proposals a valuable resource for incremental solutions and a useful source of authority on which to rest needed changes.

This article has described some of the key steps taken throughout the past decade by the Virginia General Assembly to improve its process. This analysis confirms that these initiatives enabled the General Assembly to manage its agenda more efficiently and, by implication, to consider more effectively the issues that were selected for attention. While the legislature has not reduced its volume of legislation, it at least has slowed the rate of increase that alarmed legislators and observers during the 1990s, and while the legislative process remains fast-paced, it is less hectic than in earlier periods. The implemented changes have led to a Virginia General Assembly better positioned today to continue the status of a part-time citizen legislature that it long has valued.

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<sup>1</sup> Alan Rosenthal, Heavy Lifting: The Job of the American Legislature (Washington: CQ Press, 2004), 73.

<sup>2</sup> Virginia currently ranks in the top third of the states in volume of legislation for a two-year cycle. See "Table 3.19 Bill and Resolution Introductions and Enactments: 2007 Regular Sessions", in Council of State Governments, The Book of the States Vol. 40 (Lexington, Ky: The Council of State Governments, 2008), 130; "Table 3.19 Bill and Resolution Introductions and Enactments: 2008 Regular Sessions", Council of State Governments, The Book of the States Vol. 41 (Lexington, Ky: The Council of State Governments, 2009), 132. Although the General Assembly's volume of legislation rose over the last decade, Virginia's rank declined slightly over during the same period.

<sup>3</sup> See "Table 3.2 Legislative Sessions: Legal Provisions", in Council of State Governments, The Book of the States Vol. 41 (Lexington, Ky: The Council of State Governments, 2009), 83-86. California, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin are unlimited or virtually unlimited states. Florida and Georgia, with sessions limits of 60 calendar and 40 legislative days respectively, are most comparable to Virginia. Texas, with biennial sessions of 140 days, falls somewhere in between.

<sup>4</sup> SJR 243, 2000 Acts of Assembly, Vol. 3.

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<sup>5</sup> National Conference of State Legislatures, A Study of the Legislative Process in Virginia: A Report Submitted to the Virginia Joint Rules Committee, November 2000, 6. See at <http://dls.state.va.us/pubs/NCSLrept.htm>. Henceforth referred to as NCSL, A Study of the Legislative Process in Virginia.

<sup>6</sup> Ibid, 6.

<sup>7</sup> Report of the SJR 243 Citizen Advisory Board on Improving the Legislative Process and Maintaining the Citizen Legislature to the Joint Rules Committee, General Assembly of Virginia, November 30, 2000. See at <http://dls.state.va.us/pubs/report2SJR243.htm>.

<sup>8</sup> The recommendations of the two studies, the steps initiated by the Joint Rules Committee in 2001, initial reactions of legislators, and some analysis of the impact of the prefiling changes were covered in detail in John T. Whelan, "A New Majority Takes Its Turn At Improving the Process in Virginia," Journal of the American Society of Legislative Clerks and Secretaries, 7, No. 2 (Fall 2001), 13-17.

<sup>9</sup> The proposed section on legislative sessions is discussed in Commission on Constitutional Revision, The Constitution of Virginia: Report of the Commission on Constitutional Revision, (Charlottesville: The Michie Company, 1969), 131-140.

<sup>10</sup> Ibid. 134. Analysis of the workload of the General Assembly in this article is based bills relating to statutory law; the extensive number of legislative resolutions is excluded. While some legislative resolutions have potentially significant effects, such as proposing constitutional amendments and creating legislative studies or directing executive agency reports, the vast majority commend worthy individuals and organizations or memorialize the notable contributions of Virginians upon their deaths.

<sup>11</sup> Ibid, 135.

<sup>12</sup> Ibid, 138.

<sup>13</sup> Virginia Constitution, Article IV, Section 6. The General Assembly acted pursuant to procedures in Article XIV, Section 196 of the Constitution of 1901 by which the General Assembly proposed amendments to the constitution. (The alternative method of change, in Section 197, was by constitutional convention, whose call but not final product required voter approval.) The General Assembly met in special session from February 26 to April 25, 1969, to consider in detail the revision submitted by its advisory Commission. Numerous changes were made to the Commission proposal and, as required by Section 196, this revised version was referred to the 1970 session following the November 1969 election of House members. The 1970 session again approved the revision and submitted it to the voters at the November 1970 general election as required by Section 196. The voters ratified the revision and the new constitution became effective July 1, 1971.

<sup>14</sup> Decade averages were calculated from data on the number of bills introduced in each session for 1972 through 1999 in Virginia A. Edwards, "A History of Prefiling in Virginia," NCSL Professional Journal, 5, No. 2, (Winter 2000), (See Table 1: Prefiling for the 1970-1999 Sessions of the General Assembly of Virginia). Henceforth cited as Edwards, "A History of Prefiling in Virginia." For 2000 through 2010, the data are from annual session statistics reported on the General Assembly's Legislative Information System website at <http://leg1.state.va.us/>

<sup>15</sup> NCSL, A Study of the Legislative Process in Virginia, 26-27.

<sup>16</sup> The rate was about 10 percent for 1976-77 and 15 percent for 1988-89. Robert J. Austin, "The Virginia General Assembly: Structure, Process, and Influencing Policy," in Thomas R. Morris and Larry Sabato, Virginia Government and Politics: Readings and Comments, Second Edition, Revised (Virginia Chamber of Commerce and The Institute of Government, University of Virginia, 1984), 89 for 1976-77; Robert J. Austin, "The Virginia General Assembly: Structure, Process, and Influencing Policy," in Thomas R. Morris

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and Larry Sabato, Virginia Government and Politics: Readings and Comments, Third Edition, Revised (Virginia Chamber of Commerce and The Institute of Government, University of Virginia, 1990), 147 for 1988-89.

<sup>17</sup> See Recommendations 7, 8, and 9 in NCSL, A Study of the Legislative Process in Virginia, 20.

<sup>18</sup> Beginning with the 1970 session members could prefile bills up to 40 days before the session convened. In 1973, the prefilings window was greatly expanded, to 60 days before even year sessions and 180 days before odd year sessions. The statute was modified in 2005 to begin prefilings on the third Monday in November before even-year sessions and on the third Monday in July before odd-year sessions simply to reduce the confusion of having to calculate a different date each year. See Va. Code § 30-19.3 for current statute.

<sup>19</sup> See Table 1: Prefiling for the 1970-1999 Sessions of the Virginia General Assembly, in Edwards, "A History of Prefiling in Virginia."

<sup>20</sup> HJR 4, 2001 Acts of Assembly.

<sup>21</sup> Virginia by statute also has required that several categories of bills be introduced on the first day of the session. The 2010 General Assembly repealed this requirement, reflecting that most bills covered by the first-day provisions are now subsumed by prefilings. The pattern further has developed in procedural resolutions of requiring all bills to be introduced by the second Friday of the session, the tenth day of the session, since the session begins on the Wednesday following the second Tuesday in January. Thereafter, bills may be introduced only by unanimous consent or upon the request of the Governor.

<sup>22</sup> The House of Delegates in adopting the House Rules for 2008-09 included in Rule 37 a limit of 10 bills per member for odd-year sessions only. Later in the session, House Resolution No. 20 amended House Rule 37 to increase the limit to 15. See the Rules of the House at <http://hodcap.state.va.us/publications/20102011HouseRulesText.pdf>.

<sup>23</sup> The effects of the 2009 House introduction limits are examined in more detail in Robert J. Austin, "Many Bills, Limited Time," Virginia Legislative Record 19, No. 1, 4-5. See at <http://dls.state.va.us/pubs/legisrec/PDFs/Record%20June%202009.pdf>.

<sup>24</sup> NCSL, A Study of the Legislative Process in Virginia, 25. "Recommendation 15. The General Assembly should adopt procedures to reduce the number of duplicate bills that are drafted, introduced, and passed."

<sup>25</sup> NCSL, A Study of the Legislative Process in Virginia, 26. "Recommendation 16. Given its short sessions and the volume of legislation that it has to process, the Virginia General Assembly should prohibit bills that have been defeated (or bills that are substantially the same as ones defeated) from being reintroduced - either as a bill or as an amendment - during the same legislative biennium."

<sup>26</sup> Legislative information statistics do not afford a ready way of quantifying the extent to which such identical or nearly identical bills are reintroduced.

<sup>27</sup> See NCSL, A Study of the Legislative Process in Virginia, 28-34, for an analysis of the committee and subcommittee operation and nine separate recommendations for reform.

<sup>28</sup> John T. Whelan, "Reorganization in the House: Republicans Make Their Mark," The Virginia News Letter, 80, No. 2 (February 2004), describes in detail the committee reorganization.

<sup>29</sup> *Ibid.*, p. 4. Whelan found that the number of permanent subcommittees was reduced from 58 in 2000 to 44 in 2002.

<sup>30</sup> 2002-03 Rules of the House of Delegates, Rule 17 (c).

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<sup>31</sup> The resulting reduction in committee and subcommittee conflicts was quantified and analyzed in B. Scott Maddrea, "Committee Restructuring Brings Positive Changes to the Virginia House," Journal of the American Society of Legislative Clerks and Secretaries, 8, No. 2 (Fall 2002), 7-11.

<sup>32</sup> *Ibid.* Maddrea attributes the improvements in efficiency that he documents to the reduction in number and size of committees and the new committee-subcommittee scheduling requirements. No doubt the shift to prefiling most legislation also enabled the subcommittees to begin work earlier.

<sup>33</sup> The NCSL study emphasized the need for the House of Delegates more so than the Senate to take steps to reduce the number of committees. See NCSL, A Study of the Legislative Process in Virginia, 28-29

<sup>34</sup> Rule 20(e), Rules of the Senate. See at <http://hodcap.state.va.us/publications/SenateRules.pdf>

<sup>35</sup> Data for the length of each day's floor session used in constructing Tables 4 and 5 are from the daily minutes of the House and Senate floor sessions found on the Virginia Legislative Information System at <http://leg1.state.va.us/>.

<sup>36</sup> Citizen Advisory Board on Improving the Legislative Process, at <http://dls.state.va.us/pubs/report2SJR243.htm>.

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