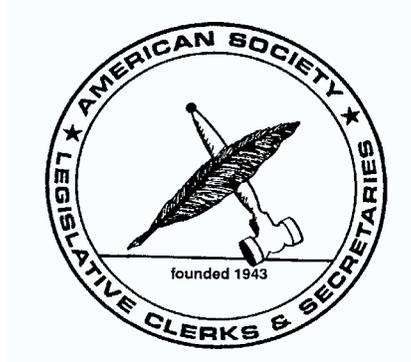


Journal of the American Society of Legislative Clerks and Secretaries



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INFORMATION FOR AUTHORS

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

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

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

STYLE AND FORMAT

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

Follow a generally accepted style manual such as the University of Chicago Press *Manual of Style*. Articles should be word processed on 3.5” disks in WordPerfect 8.0 or Word 2000 or typewritten, one-sided, double-spaced, with one-inch margins.

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

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The material should be mailed flat. Graphic materials should be submitted at the same time with appropriate cardboard backing.

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FOREWORD

In 2001 the Professional Journal Committee of the American Society of Legislative Clerks and Secretaries discussed the idea of devoting one entire issue of the *Journal of the American Society of Legislative Clerks and Secretaries* to papers written by legislative interns during or after the 2003 legislative session. The committee believed a project of this kind could benefit not only the *Journal* and its readers, but the student interns as well.

It was proposed that a contest be held in each state and that the best paper or papers from each state would then be submitted to the *Journal's* editorial board for consideration. From those submitted four or five papers would then be selected for actual publication in the Fall 2003 issue of the *Journal*.

The Professional Journal Committee adopted a motion to proceed with the “legislative intern paper contest” and created a list of criteria consistent with the guidelines currently in use for publishing the *Journal*.

In August 2002 a letter was sent to legislative intern coordinators throughout the United States to explain the contest and determine if there was sufficient interest to proceed with the project. Several follow-up letters with additional details and instructions were sent—together with a copy of the criteria—and eventually ten or twelve states expressed an interest in participating. Ultimately, however, only four states—Arizona, Ohio, Utah, and Virginia—actually did participate.

By August 2003 the review and selection process had begun. The final selections were made jointly by the outgoing and incoming editors of the *Journal*—Annette Moore, Utah Senate (2001-2003) and Scott Maddrea, Virginia House of Delegates (2003-2005).

The Professional Journal Committee wishes to thank the interns who wrote and submitted the papers, the intern coordinators who supported and encouraged them, the staff of the National Conference of State Legislatures for facilitating the notification of intern coordinators about the project, and the members of the 2001-2003 editorial board for their assistance in reviewing the papers submitted.

The Professional Journal Committee believes this has been a very worthwhile project and hopes the *Journal* readers will enjoy the articles selected for publication.

Annette B. Moore
Professional Journal Committee Chair, 2001-2003

FIRST-TERM SPEAKERS IN A DIVIDED GOVERNMENT: A Comparison of Virginia Speaker William J. Howell and Maryland Speaker Michael E. Busch in the 2003 Sessions

By Thomas J. Cosgrove
University of Richmond

When the 2003 legislative sessions commenced, two Mid-Atlantic states faced a unique challenge. Maryland and Virginia both had to contend with situations of divided government in which the Governor was of a different party than the majority of both houses of the legislature. While this, in and of itself, was not unique, it was complicated by the fact that these neighboring states had to face this difficult situation with Speakers of the House who were serving in the position for the first time. Maryland's divided government had been set up the previous November when Republican Robert L. Ehrlich, Jr., mounted a come-from-behind victory to take control of the Governor's office away from Democrats for the first time in over thirty years. In an even bigger upset, the Democratic Speaker of the House, Casper R. Taylor, Jr., lost his bid for re-election. The results of these two races brought Maryland in line with Virginia, which had been working with a divided government since Democrat Mark R. Warner won the Governor's Mansion in the 2001 election. When Warner took over as Governor, he was working with Speaker S. Vance Wilkins, who was entering his third year as Speaker of the Virginia House of Delegates. However, during the summer of 2002, Wilkins was forced to resign after the Washington Post reported that he had paid \$100,000 to settle a sexual harassment complaint.¹ As both states selected new Speakers to begin their 2003 sessions, they chose two men who seemed very similar. Yet, as the sessions unfolded, they went about their jobs very differently, leading to questions about who was more powerful and why.

Selecting New Speakers

As the two states selected new Speakers, they both looked for similar criteria. Due to the divided government situation, both wanted Speakers who were consensus-builders and who would be viewed favorably by members of both parties. However, it was crucial that the new Speakers also be trusted within their caucuses as they would have to serve as a key representative for the party since the Governor was of the opposite party. Both states wanted to move quickly to designate a new Speaker. In Maryland, this was due to the need to begin

preparations for the upcoming session, and in Virginia, it was out of a desire to quickly put the embarrassment of Wilkins' situation behind them.

In Virginia, several candidates emerged almost immediately, but most were quickly eliminated from consideration. The Majority Leader had recently been through a divorce and was not seen as a good choice after the shame of the Wilkins situation. The interim Speaker after Wilkins' resignation was an Independent, and even though he caucused with Republicans, they wanted a member of their own party. As each potential candidate dropped out of the race, a consensus was finally found in the person of William J. Howell, the Chair of the Courts of Justice Committee. A member of the House of Delegates since 1988, Howell was seen as a strong conservative and was well liked within his party. He was also seen as having impeccable moral character and as being dedicated to the legislature after he passed up an opportunity to run for Congress in 2000.² On July 20 the Republican caucus met and formally backed Howell.³ On the first day of the 2003 legislative session, Howell was formally elected Speaker through a unanimous vote of the House of Delegates, receiving the support of Democrats who felt that Howell would treat them fairly despite their minority position. Even the Democratic Governor expressed his pleasure at Howell's elevation, saying in July, "I anticipate that Delegate Howell and I will have many productive conversations between now and the day he assumes the office of Speaker. I know him only so far to be a fair and honest individual, as well as a gentleman."⁴

In Maryland the Democratic caucus moved with equal haste in designating a new Speaker. As results came in on Election Night, Delegate Michael E. Busch, the Chair of the House Economic Matters Committee, began calling his colleagues seeking their support in his quest for the Speaker's post. Busch had an easy time garnering votes, for he had already done it earlier that year when the media reported that Taylor was considering a run for Lieutenant Governor. In early December, the House Democratic caucus met and formally backed Busch as Speaker through a unanimous voice vote.⁵ Busch was

officially elected Speaker by the entire House of Delegates at the start of the 2003 session with no opposition.⁶ Like Howell, Busch, a member of the House of Delegates since 1987, had the support of both parties. Minority Leader Alfred W. Redmer, Jr., said, “Mike typically leaves partisan politics outside the room.”⁷ Additionally, Busch and Ehrlich had served in the House of Delegates together and had maintained a close friendship, leading many observers to predict that they would work well together. Said Ehrlich: “Michael and I are friends and have built a solid foundation for a new working relationship in Annapolis.”⁸ Still, Busch was quick to note: “I like him, but I can compete against him.”⁹

The Sessions

As the sessions got under way, observers knew that the budget problems in both states would take priority during the session. “While each state has its own political character and unique budget demands – Maryland must begin closing a projected \$1.2 billion shortfall, while Virginia has \$1.2 billion left to go on a nearly \$6 billion shortfall – the two are mirror images when it comes to escalating costs, regional needs and a stark political gulf between the executive and legislative branches of government.”¹⁰ Despite the challenges they faced, both new Speakers entered the session knowing that they had solid support in their respective party caucuses. Virginia’s 100-member House of Delegates was made up of 64 Republicans, 34 Democrats, and 2 Independents. Maryland’s 131-member House of Delegates was made up of 98 Democrats and 43 Republicans.

Virginia

Going into the session in Virginia, Republican leaders pledged that when it came to balancing the budget, they would not raise taxes.¹¹ Additionally, legislators on both sides of the aisle wanted to include in the budget funds to reopen the Department of Motor Vehicles (DMV) offices that the Governor had closed a few months earlier as a cost-saving measure. On the first day of the session, the Governor won praise from the legislature when he announced he had found money to reopen the DMV offices.¹² Yet, the good feelings between the Governor and the legislature quickly dissipated. Soon thereafter the legislature announced that it had found funds to reopen the DMV offices five days a week whereas the Governor’s plan would have only had them open four days a week. With this disagreement, Warner accused Republicans of having misplaced priorities while the leaders in the Assembly countered that the Governor did not

understand the budget process.¹³ About a week before the end of the session, the House and the Senate each passed different balanced budget plans and a group of conferees was appointed. While most observers felt the differences would be resolved quickly, the negotiations lasted until the final day of the session when the Speaker entered the process. House Appropriations Committee Chair Vincent F. Callahan, Jr., said in speaking of the resolution that “the Speaker was of unbelievable value; he was the catalyst who brought the warring sides together.”¹⁴ Warner, however, criticized the final plan as empty election year promises, for it only would provide pay raises to public employees should the economy improve.¹⁵ Accordingly, Warner amended the budget to make these raises automatic and the reconvened General Assembly voted in April to accept his amendment.¹⁶

This budget amendment, however, was one of very few victories that Warner experienced during the session. According to Howell, this was a “disastrous session” for the Governor.¹⁷ He introduced two major bills during the session, only to see both killed by a divided House of Delegates. First, Warner introduced a constitutional amendment to remove the provision which prohibits a Governor from serving consecutive terms. The bill was voted down in the House. A re-vote the following day ended with the same result.¹⁸ Despite this setback at the session’s mid-point, the Governor claimed he was still having a good session, while the Speaker leveled accusations that Warner’s failure was due to his inability to work across party lines.¹⁹ The second setback for the Governor came with the defeat of his proposal to make failure to wear a seatbelt a primary offense, thus allowing law enforcement officers to stop motorists solely on the basis of whether or not they were wearing a seatbelt. Having passed the Senate, the bill came before the House for a vote and passed. However, the following day a member called for reconsideration and this time the bill was rejected. Warner claimed to be pleased by how close the bill came to passage; however, it was an obvious setback for the Governor to see a second major initiative fail.²⁰ While Warner experienced mostly defeat in the session, the Republican caucus led by the Speaker scored many victories. They passed the repeal of the estate tax, although Warner later vetoed it, illustrating the power he retained despite his legislative setbacks. Warner also amended several key abortion measures that were passed by the legislature, only to see the Assembly override his amendments during the reconvened session in April.²¹

One possible reason for the success of the Republican Caucus and the failure of the Governor was a new dynamic in Virginia government that had come about largely due to the new Speaker. In the previous session, Speaker Wilkins worked closely with first-year Governor Warner and the two made many deals.²² There had also been a lingering distrust between the House and the Senate that hindered their ability to work together. However Speaker Howell and the President Pro Tempore of the Senate, John H. Chichester, represent the same part of the state and have a positive relationship. Because of the sense of trust between Chichester and Howell, there was a new-found degree of cooperation between the houses this year that was important to the success of the Republican agenda.²³ Howell and his caucus had tangible success during the session despite some of their legislation being vetoed by the Governor. The Governor, however, emerged with very few victories on his own legislation. His most visible successes came in blocking Republican initiatives through his veto.

Maryland

Like Virginia, Maryland entered the 2003 session knowing that the budget shortfall would be a dominant issue, and during the session, most other issues took a back seat. During his campaign, Ehrlich pledged to avoid a tax increase and to raise money by installing slot machines at horseracing tracks in an effort to generate revenue through licensing fees and proceeds. Going into the session, it looked as if Ehrlich would get his way, as many Democrats already supported slots and Ehrlich's victory only secured Republican support.²⁴ Speaker Busch's opposition to slots was well known. Regardless, Ehrlich felt he had the votes to get a slots bill through the legislature. When Ehrlich presented his balanced budget plan, it included revenue from slots, yet his final slots bill was not forthcoming for several weeks.²⁵ During these weeks, there was sharp rhetoric as Busch pushed for a one-year moratorium on slots while Ehrlich said that without them, he would cut funds to a major education initiative and refuse to reintroduce slots legislation during his term. Ultimately, the slots bills that Ehrlich proposed proved unacceptable, and the Senate ended up writing its own bill. The House did not want to wait. It passed a bill calling for a six-month study of slots and then passed a budget that was balanced by more than \$200 million in tax and fee increases.²⁶ When the Senate slots bill was completed, it quickly passed the Senate, but when it got to the House, Busch refused to allow a hearing on it despite pressure from Ehrlich and Senate President Mike Miller. After

several days, Busch relented and allowed a committee to hear the bill. He scored a major victory that day as the committee rejected the bill by a 16-5 vote.²⁷ Because the balanced budget plan passed by the Senate included slots, a conference committee convened and negotiated for several days before agreeing on a \$135 million tax bill that Ehrlich vetoed. He went on to balance the budget through a series of massive cuts.

Outside of the budget, neither the Speaker nor the Governor fared very well. Ehrlich's bill to promote charter schools passed but with amendments that he did not support. He finally reached a compromise on a watered-down version of the bill.²⁸ His proposal to create a Project Exile program was stalled by the Chair of the Senate Judicial Proceedings Committee after Ehrlich failed to agree to stricter gun control measures as a compromise.²⁹ The Speaker had two items on his agenda, but neither passed in the form that he proposed. The Senate rejected the Speaker's version of both bills and ultimately passed watered-down versions.³⁰

At the session's conclusion, Miller called the session "a disaster." "For all my years, it has been collegial; but this year, there have been new elements in the mix that have made this a very unpleasant, very unhappy experience."³¹ People were surprised at how the Speaker carried out his job. J. William Pitcher, a Maryland lobbyist, expressed surprise at Busch's non-conciliatory tone, saying: "He has always been a moderate to conservative Democrat, without much partisanship in the legislature. But from day one on the job as speaker, he sounded like Tom Daschle."³² Like Virginia, initial hopes of bipartisan cooperation quickly faded in Maryland, and the long-standing friendship between the Speaker and the Governor did nothing to help the cause. Everyone expected a new dynamic in Maryland this year, but few could have foreseen how it turned out with the Governor and the Senate President working well together and teaming up against the Speaker. While Busch did not score many victories with his own legislation, he showed his strength in getting the slots bill defeated. Busch questioned the proposal from the beginning, made sure his members knew what to ask, put Democrats loyal to him and Republicans who campaigned against slots on the committee that would have to approve the measure, and sat through committee meetings when the bill was being debated.³³

Discussion & Conclusion

In observing everything that Speakers Howell and Busch have done over the past year, several general observations and comparisons can be made. First of all, they both rose to the speakership along essentially the same path. In a 1995 study, Patricia K. Freeman found there is a general tenure for which a legislator must serve before being elevated to the position of speaker and that this tenure is increasing as legislatures become more professional. The average length of service before election to speaker climbed from 4.4 years in 1975 to 7.8 years in 1991.³⁴ In this case, Howell and Busch both fit with Freeman's findings, as they had been members for fifteen and sixteen years respectively at the time of their elevation. Moreover, they fit with the historical background of their states. In both Maryland and Virginia, the Speakers of the House have traditionally been senior members at the time of their elevation. Freeman also found most new speakers hold another leadership position before their elevation whether it be as a party leader or a committee chair. Both Howell and Busch held leadership positions prior to their elevation with Busch serving as the Chair of the Economic Matters Committee and Howell serving as Chair of the Courts of Justice Committee. Both men's backgrounds were in line with Freeman's research.

Not only did the new Speakers have similar backgrounds, they also were seen as bringing similar qualities to their new positions. They were considered consensus builders and were praised for their ability to work both within their caucuses and across party lines. Yet, when they got to work in their new positions, they carried out their jobs differently. Rosenthal points out that legislative leadership has undergone a change in the past twenty-five years. As legislatures have taken on more responsibility and legislators have become younger and more ambitious, he argues, the leadership has had to adjust to accommodate these changes. "If they are to maintain their positions and if they are to manage the work of the legislature, contemporary leaders have to build consensus."³⁵ He goes on to discuss how leaders today who are autocratic and use a heavy hand are no longer effective and risk revolt from within their party. Howell seemed to epitomize this. He had disagreements with the Governor but was not active in defeating the Governor's proposals. He allowed them to be heard and shared his opinions within the caucus, but he did not force members to vote a certain way.³⁶ At the end of the session, he received praise for his performance from both Democrats and

Republicans, who said that he was fair and let the process take its course. Yet Busch worked in the opposite way. He disagreed with a proposal of the Governor and did everything he could to defeat it from stacking the committee that would receive the bill to sitting in on hearings when it was being debated.³⁷ In so doing, he prevented the bill from coming to a vote before the full House of Delegates where many observers felt it would have had the votes to pass. "When government is divided, issues can be resolved only by compromise, and strong partisanship may not be conducive to compromise."³⁸ Yet Busch was unwilling to compromise on his position. As Rosenthal points out, legislative leaders such as speakers are crucial in determining if the governor's legislation gets passed. "These individuals stand between legislative rank and file and the governor. To varying degrees, they speak for the membership in setting priorities."³⁹ Both Speakers could stand between their caucuses and the Governor, but Busch used the power in a more heavy-handed manner.

Despite their differences, both Speakers left the session having had similar results. Busch got his legislative package through in a watered-down form. Howell was able to get most of his caucus's package through, with some of it watered-down and some vetoed. Also, both oversaw the defeat of legislation that was put forth by the Governor. However, Busch was far more aggressive than Howell in defeating portions of the Governor's agenda. Hence, it would appear that Busch was more powerful as a Speaker than was Howell. This perception runs contrary to findings of Hamm and Squire who, based on several criteria, found that the Speaker of the Virginia House of Delegates has more institutional power than the Speaker of the Maryland House of Delegates.⁴⁰ The difference in 2003 is due in part to the different personal styles of Howell and Busch. While Busch's more autocratic style led him to appear more powerful in the 2003 session, it is unclear what long-term effects his style may have. Rosenthal implied that such a style may cause revolt among members;⁴¹ but the opposite may be true in this case, for Maryland Democrats may have wanted a powerful leader given the newness of divided government. Another possible reason for Busch being more powerful was that he took over the speakership in a more traditional manner after an election as a new House was assembling. Howell came in under more extraordinary circumstances when Wilkins was ousted in the middle of his term and he simply inherited Wilkins' House from the previous year. These unique circumstances left him in a far less powerful position than would ordinarily have been

the case. What is clear from observing the performances of the two Speakers is that although they had similar qualifications and brought similar qualities to the position, they went about their jobs very differently. They achieved similar legislative results, but the way in which they did it showed Busch with more power. It will indeed be interesting to see if both men continue to use the styles they demonstrated this year in future sessions and to what effect.

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I WILL SURVIVE: One Bill's Journey Through the Arizona Legislature

By Michelle Morales
Arizona State University

Twenty-one “kids” sat patiently in a room. It was a Senate Hearing Room, though many of them probably did not know what a hearing room is. Waiting quietly in what they would soon come to know as Senate Hearing Room 3, these “kids” awaited what would be their fate for the following four months.

Three seats away sat the girl who would eventually become my cubby mate. I was pretty content to keep to myself. A few of the guys carried on easy, joking conversations; the girls were mostly quiet.

This was the beginning of orientation week. Vagueness and uncertainty surrounding the details of the internship were looming in the air, and it is fair to say that most of the interns had no idea what to expect. Had I been told what close friends we would be in 16 weeks' time, or how much I would learn, I would not have believed it.

In the course of five quick days, the CliffNotes™ version of the Arizona legislative process overloaded what precious little space was left in my head. My mind came in as a blank slate—with practically no knowledge of the process of lawmaking. I was surrounded by political science majors and local government junkies. I felt in over my head, and I still was not clear what I would be *doing* for the next four months.

My first week as a legislative intern can be summed up in three words: overwhelming, exciting and unexpected. I was taught everything I needed to know in the span of one week, and then I was left to re-learn everything again as I experienced it through the course of the internship. One of the most fundamental, yet equally critical, things that I would learn is how a bill becomes a law. At the time, the multi-step process that a piece of legislation must go through seemed very abstract.

Bill Before Law

The life of a legislative bill can be compared to a person. Some are over before they begin; others are lost in the crowd, and many die before they have

reached their full potential. In order to reach this level of full potential, there are many hurdles a bill must overcome and barriers to pass through. One could argue that these obstacles are necessary in order to ensure the quality of legislation that eventually passes through the two chambers of Arizona's legislative branch.

As a research intern for the Senate Judiciary Committee (where I was ultimately assigned on the last day of orientation), approximately one-third of the committee's bills were assigned to me. Of these roughly 30 bills, few succeeded in being passed through both chambers. One bill that did manage to sustain life is Senate Bill 1158: campus sex crimes prevention. This bill was introduced by Senator Dean Martin and came to be known as my pet project. In order to move through the Senate, this bill had to first be “read,” so that is a good place to start.

The first reading for Senate Bill 1158 occurred on January 28, 2003. First reading involves the Senators hearing the bill read during floor action. Subsequently, the bill was read a second time on January 30, 2003. The fact that this bill was read twice means that it already managed to pass through a few checkpoints towards becoming a law. The President of the Senate could just as easily have chosen not to hear the bill. This is just one of the many places that a bill's life can be cut off before it ever really begins. Luckily for my pet project, the process was just getting started.

SB 1158 did get a second reading and, at this time, President Bennett determined that the bill would be assigned for consideration to the Judiciary Committee. At this point the bill was given to me. Once a bill is assigned to a committee, it is available to be placed on the committee's agenda. Accordingly, I began preliminary research on the bill.

Agenda Setting

Agenda setting for the Judiciary Committee usually included all judiciary research staff; the committee vice chairman, Senator Thayer Verschoor; and the committee chairman, Senator James Weiers. These

meetings occurred once a week, with potential for a follow-up on any additional issues that might arise before committee. During agenda setting, all bills that have been assigned for the week, and any that may have been held or not considered in previous weeks, are available for committee action. Staff briefs the chairman on each bill, and it is up to the chairman to decide whether or not a particular bill will be heard in that week's committee meeting. Often our chairman would ask our opinions on certain bills. I was told repeatedly that research staff are non-partisan and do not offer up their "opinions," but that is easier said than done. When the former Speaker of the House is asking you what you think of a bill, just try pleading the fifth. To be frank, I was fairly intimidated during the first few weeks. As a result, it never really occurred to me that I might not have to answer these types of questions. That is a good thing, too, because these very questions are what gave me a better understanding of the bills I was researching.

All in all, agenda setting does not have to be all business— at least not Judiciary agenda setting. For every ten minutes of business conducted, an equal part was spent in easy conversation. This easy relationship between the Judiciary chairmen and staff is what helped to make my experience unique and helped me to become more comfortable with my Senators.

Most of the time, I was given a fair amount of freedom to choose the bills for which I would be responsible. My analyst gave me free reign over the "interesting" bills. Obviously, he took the liberty of overruling me when necessary. However, for the most part, I got what I picked. SB 1158 falls into the category of bills that I found interesting. Senator Weiers asked me why our committee should hear this bill. I cannot remember exactly what I said, though I am sure I reflected on my current status as a university student and how important it is for us to feel safe on campus. Whatever I said must have been sufficient because the bill was placed on the agenda. Making the agenda in the Judiciary Committee was not a particularly formal process. Either the chairman wanted to hear it or he did not. Ultimately, regardless of how influential the intern might like to think she is, the decision is up to the chairman.

The agendas for the Judiciary Committee were set on Thursdays and posted by Thursday afternoon. At this time, I was able officially to research my bill for the Senate fact sheet. This fact sheet would eventually contain a concise, but comprehensive background on the issues raised by the bill and a summary of its

provisions. This fact sheet is distributed to all members and enables them to become familiar with the legislation. Upon receiving the fact sheet, members are able to propose committee amendments to the bill. In the case of SB 1158, there were no amendments offered. Without any proposed committee amendments, the campus sex crimes prevention bill was introduced to the Judiciary Committee free of potential changes.

Committee Action

Once a bill has been placed on the committee agenda, its next step is to be heard in committee. Just because a bill makes it onto the agenda does not guarantee that it will be heard. Sometimes bills are held in committee as a result of a conflict between stakeholders. Sometimes the chairman simply changes his or her mind about hearing a bill. The point is, it can be sidelined at any point of the process. SB 1158 was heard in the Senate Judiciary Committee on February 5, 2003. I started by summarizing the bill for the committee members and offered to answer any questions that they might have. As is often the case, they had none. More often than not, committee members will save their questions for individuals who have signed up to testify for or against the bill. Either way, there were no questions of staff. After completing my presentation, the sponsor of the bill, Senator Martin, stepped up to give his own explanation.

SB 1158 provides for the tracking of convicted, registered sex offenders working, volunteering or enrolled as students at institutions of higher education. This is a shorthand description but sums the bill up concisely. Senator Martin explained to the committee that this bill is related to the Sex Crimes Prevention Act, which became federal law in 2000. He stated that he brought the bill forth as a result of an incident at Arizona State University, and that similar legislation had been passed in eight other states. Unlike most other bills, the controversy around this one was virtually non-existent. There were no individuals present in committee to speak for or against this bill. If there had been amendments, the committee members would have voted on each one to determine whether or not it should be adopted by the committee and added to the bill. SB 1158 passed through the committee with a unanimous vote from the nine Senators who gave it a "do pass" recommendation.

If a bill manages to survive committee, meaning it is not held or voted down, several things can happen. If the bill has been assigned to more than one

committee, it must first pass through any additional committees before it can progress. Another possibility is that it may be withdrawn from those other committees. If the bill is not dual-assigned, it moves to the Rules Committee. The Senators who serve as members of the Rules Committee work together with a non-partisan Rules Attorney in order to review the bill for Constitutionality, germaneness, and any other elements that might be considered as legal review. During this phase, a bill may be placed on the Consent Calendar. This is done if the bill passed through committee action with no amendments placed on it, as was the case with SB 1158. If a bill is put on Consent Calendar, and no member objects, it goes directly to third reading.

Partisan Politics

After surviving the Rules Committee, bills are moved through caucus. Caucus is, by far, one of the most interesting steps in the legislative process. If someone asked me what a caucus was before this internship, I do not think I could even have guessed. Now I would call it a free-for-all.

Caucus is the forum for partisan discussion on bills. There is a Democrat Caucus and a Republican Caucus composed of all Senate members from their respective party. During caucus, committee research staff, and sometimes partisan staff, summarize the bills on the calendar and address any questions from caucus members. This forum gives members the opportunity to discuss the bill with all other party members and lobby for their support (or opposition, in some cases). Additionally, this step enables non-committee members to get their questions answered. In the case of SB 1158, Senator Martin used the Republican Caucus as an additional opportunity to explain to his colleagues why this bill was needed and what issues it would help to address with regards to campus community safety.

SB 1158 passed through both caucuses with little controversial discussion. "Discussion" typically results from one of two things. Either the party members philosophically disagree on the issues, or the members are legitimately confused. Most members would agree that community notification of sex offenders is a positive thing. There was some confusion regarding how much this bill would change current protocol, but that was the extent of the discussion.

Time for Committee of the Whole (COW)

At this point in the process, the bill can be moved to Committee of the Whole (COW). The President of the Senate selects bills from the calendar of the Committee of the Whole for the active COW calendar. The President can also elect to stop the bill's tour through the legislative process by never choosing to put it on the active COW calendar. COW, which I repeatedly questioned before fully comprehending it, is when all 30 Senators gather on the floor for consideration of bills that have already passed through committee(s), Rules and caucus. At this time, Senators are given another opportunity to propose changes to a piece of legislation. These potential changes are offered in the form of floor amendments. Additionally, members often argue the merits of bills and the intention of floor amendments. Members offer explanations of their amendments, and other members may pose questions. This is the place for the bill to be openly debated by all members.

When SB 1158 came through COW, a floor amendment was offered by Senator Martin. This floor amendment served to clarify some language in the bill that had been confusing to members during caucus. Its purpose was to work out any vague language or misinterpretation.

COW votes on whether to adopt the amendments approved by committee or Rules and any floor amendments that may also have been offered. In the case of SB 1158, Senators Pete Rios and Martin offered floor amendments to the bill. Senator Rios' amendment failed to pass. Martin's was adopted.

After a bill has successfully moved through COW, it is engrossed. Engrossment means that all amendments to the bill that have been adopted are incorporated in one clean version. If the Senate President chooses to have a third reading of the bill, members must electronically vote "aye" or "no" on a bill for the record. Many members elect to explain their vote. As with asking questions in caucus, one quickly notices which Senators frequently feel the need to justify their positions on issues. This part always intrigued me because often it seems as if they really believed that their explanations would change other members' votes. This is rarely the case. However, I witnessed members switching their votes more than a few times. Nevertheless, it was always interesting to hear a Senator validate his or her vote on a piece of legislation.

From the Senate to the House

If the bill survives third reading, which my bill did, the Secretary of the Senate is instructed to transmit the bill to the House of Representatives. Once a bill has been transmitted, it then must move through the same process for consideration by the House. It may remain unchanged, but the House still has the ability to further amend the legislation. As it happens, SB 1158 was amended by the House Education Committee. However, in a strange twist of events (strange twists are fairly common place at the legislature) this amendment was withdrawn in the House's Committee of the Whole. In its place, a floor amendment was adopted, which removed a delayed repeal that was formerly placed on the Community Notification Guidelines Committee (CNGC). With this change, the bill was voted on, passed and transmitted back to the Senate for Senator Martin to do one of two things. He could (a) concur with the changes offered by the House or (b) refuse to concur with the changes and request a conference committee on the bill. The conference committee is a meeting in which selected Senators and Representatives sit, hear testimony, and attempt to reconcile their differences over a bill.

Refusing to Concur

Senator Martin chose to refuse the changes. However, the bill did not advance. The "refuse" was simply a tactical move to buy more time. Senator Martin had some issues with the bill and was not clear as to whether the CNGC had the jurisdiction to address them. As a result, he chose to refuse the changes so that staff would have time to research the changes requested by the House and report back. A conference committee was never scheduled, and we were left with approximately two weeks to do the research. Once the research had been completed, Senator Martin changed his decision and chose to concur with the House changes. This "concur"

enabled the bill to move on to the next step: Final Reading.

Out of Our Hands

Once a bill has been read a final time, assuming it passes, it can then be transmitted to the Governor. The Governor can sign the bill, veto it or choose to do nothing. If the bill is not signed, but not vetoed, it will still become law. As of this writing, SB 1158 has yet to be returned from the Governor's desk, so its fate is still up in the air. I will just hope that its life is not cut so late in the process. It has so much potential.

An Internship's Aftermath

The legislative process is something that one can grasp but still be surprised by on a day-to-day basis. As a small example, after witnessing several COWs, I spent one afternoon in awe watching my first division. A division is called on the floor when it is not clear which side (ayes or nays) holds the majority on a vote. If one is called, each Senator must stand up in support of their vote and be counted by staff. Watching, for the first time, all of the Senators stand in support of their votes was an interesting sight. I felt like a little kid as I and my fellow interns leaned over from the gallery to see who was staking their position on either side. There are still events that can happen and be considered as something new and exciting.

Are there still interns that know more about politics than I do? Of course. However, I can now say that I understand the legislative process just as well, if not better. The difference is that now I feel like I am on a level playing field. I understand the steps, the system, the formality and the chaos of it all. And, I appreciate the legislative process much more than I could have without this experience and without this exposure to what few people ever get the opportunity to see close up.

Virginia's Judicial Selection Process

By LaToya Gray
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Verbena Askew's bid for reappointment as judge to the Newport News Circuit Court of Virginia was one of the more controversial issues of the 2003 Virginia legislative session. Askew was the first black female to be appointed to the Circuit Court of Virginia.¹ Askew was appointed at a time in which the Democrat Party dominated the General Assembly.^{2,3} Her initial appointment to the Circuit Court position eight years ago faced controversy.⁴ Several local politicians in Newport News, Virginia—where Askew was formerly a city attorney—clashed with Askew, therefore opposing her election to the Circuit Court.⁵ Oddly enough, some of those who opposed her as the city attorney actually voted her onto the bench.^{6,7}

Due to the fact that Askew's reappointment proceeding was so controversial and appeared to lack fairness, there is a need to review Virginia's judicial electoral process and determine whether or not it is the best method. This paper will explore Virginia's current judicial electoral process, examine processes used by other U.S. state governments—in particular, the Missouri Plan, and make the argument that Virginia's current judicial electoral process should adopt elements of the Missouri Plan. This paper will use the Askew issue as a demonstration of the unfairness and bias in Virginia's judicial selection process.

The Askew Issue

In 1998, Brenda Collins alleged publicly that Askew had sexually harassed her in 1995, while she worked as an employee under Askew's supervision.⁸ Collins claimed that Askew had tried to force a relationship on her and retaliated when she (Collins) did not reciprocate.⁹ City officials in Hampton, Virginia, hired an attorney to investigate the validity of Collins' charges.¹⁰ The hired investigator concluded that Collins' version of events did not agree with several witnesses and was, therefore, invalid.¹¹ However, after quitting her job in 2000, Collins filed a formal complaint with the federal Equal Employment Opportunity Commission against the City of Hampton.¹² Collins stated that the city should have known she was being harassed, that it was negligent for not protecting her, and that her Hampton-employed supervisor and others retaliated against her for filing the complaint.¹³ The City of Hampton paid \$54,000 to Collins and \$10,000 to her

attorney to settle the complaint.¹⁴ Askew did not sign and her name does not appear in the settlement agreement between the city and Collins.¹⁵ However, Askew did sign a "letter of understanding" in which she and Collins agreed not to have any contact with each other or sue each other.¹⁶

It was obvious that Askew's reappointment to the Circuit Court would be controversial when several key lawmakers publicly stated that they would oppose her reappointment due to Collins' sexual harassment claim. Some of these key lawmakers included Senators Kenneth Stolle, Thomas Norment, Jr., Martin Williams, and Delegate Robert McDonnell.¹⁷ Because they represent portions of Newport News, Senators Norment and Williams had a level of influence on the reappointment that amounted to veto power.¹⁸ By longstanding Virginia tradition, the majority party lawmakers from the local jurisdiction decide who will become judges and who will be retained.¹⁹ Before Askew's reappointment hearing, both Norment and Williams had expressed the opinion that Askew needed to be ousted from her position.²⁰

According to her opponents, Askew failed to disclose the sexual harassment claim on her judicial questionnaire.²¹ They declared that Askew was dishonest when she replied on a 2000 Judicial Advisory questionnaire that she had "never been a party to a civil action."²² Furthermore, towards the end of her term, there were many complaints of Askew's demeanor in the courtroom. Lawyers and clients both accused Askew of being rude, biased against men and too harsh to felons.²³ Those who supported Askew believed that she had rightly judged sexual offenders and predators and had handed out appropriate sentences for those who had committed brutal crimes.²⁴

On Friday, January 17, 2003, in a crowded committee room, the Senate and House Courts committees held a hearing to find out more about the sexual harassment allegation and whether or not Askew falsified information on her judicial questionnaire. The legislators grilled Askew for six and a half hours²⁵ before deciding not to recommend her reappointment.²⁶

Several Virginia legislators—mainly African-Americans—claimed that the decision not to

recommend reappointment was due to racism, sexism and sexual orientation (because a woman made the sexual harassment claim). Senator Louise Lucas, a member of the Senate Courts of Justice Committee, compared the hearing to a “lynch mob.”²⁷ Proponents felt it was a justified action and that Askew did not display the proper conduct to continue as a judge.

Was the reappointment process for Askew carried out fairly? Is Virginia’s system for appointing and re-appointing judges open to manipulation by lawmakers and others?²⁸ Did some politicians have a personal vendetta towards Askew? Was this a political technique of Republican legislators to get rid of a judge appointed by a Democratic legislature? The fact that such questions arise from this case calls for the need to reexamine Virginia’s current selection process for judges.

Virginia’s Judicial Selection Process—dominated by politics?

Virginia is one of two states (the other is South Carolina) whose legislature has been given the sole power of judicial selection.²⁹ With the exception of 20 years in Virginia history, Virginia judges have been elected by a joint vote of the Senate and House of the General Assembly.^{30,31} The Justices of the Virginia Supreme Court are elected for twelve-year terms, Court of Appeals judges and circuit court judges are elected for eight-year terms, and district court judges are elected for six-year terms.^{32,33} Under the 1971 Constitution of Virginia, a justice or judge can be removed from office by two methods— in addition to the failure of the legislature to reelect.³⁴

- Judges may be impeached by the House of Delegates and removed by a two-thirds vote of the Senate.³⁵
- The Virginia Supreme Court may remove a justice or judge from office upon the filing of a complaint by the Judicial Inquiry and Review Commission.³⁶

The Judicial Inquiry and Review Commission (JIRC) was created by the 1971 Constitution of Virginia.³⁷ The JIRC is responsible for investigating charges of judicial misconduct or serious mental or physical disability.³⁸ The commission has seven members consisting of three judges, two lawyers, and two citizen members who are not lawyers.³⁹ The Virginia General Assembly elects the members for four-year terms.⁴⁰ If substantial charges are brought up and are well founded, the commission can take two courses

of action. If the physical or mental disability of a justice or judge is established, voluntary retirement can be urged.⁴¹ The commission can also file a formal complaint with the Virginia Supreme Court.⁴² After a public hearing of the case, the Supreme Court may retire the justice or judge from office with or without benefits, censure him, or remove him from office.⁴³ Oddly enough, since 1992, only one complaint has been filed with the JIRC, which led to the censure of a sitting judge.⁴⁴

Due to its powerful role in judicial selection, the Virginia legislature has used this power for political advantage. Throughout most of the twentieth century, the election of justices and judges took place in the legislative caucuses of the majority political party.⁴⁵ For a century prior to 1995, Democrats controlled the General Assembly, therefore controlling the selection of judges.⁴⁶ Ritually, Democrats met in closed-door caucuses to select candidates who were later approved by the Democratic majority in the House of Delegates and the Senate.⁴⁷ In 1996, there was a 20-20 split in the partisan makeup of the Virginia Senate, prompting the Senate to change its rules for appointing judges.^{48,49}

In 1996, the authority to recommend judges shifted to local legislative delegations, establishing a form of senatorial courtesy.⁵⁰ Senators representing the judicial district in which the vacancy occurred recommended nominees.⁵¹ If these Senators were in agreement, the full Senate followed their recommendation.⁵² If they did not agree, other candidates were nominated and debated on the Senate floor.⁵³

In 2000, for the first time in more than 100 years, Republicans gained a majority in both the House and the Senate in Virginia.⁵⁴ The Republican majority established a Joint Judicial Advisory Committee to review and evaluate candidates for vacancies on the Supreme Court and Court of Appeals and to advise the General Assembly on their qualifications.⁵⁵ The Joint Judicial Advisory Committee is a bipartisan, 14-member committee composed of both lawyers and laypersons who screen candidates for vacancies on the Supreme Court and Court of Appeals.⁵⁶ Many legislators have also set up local citizen commissions to screen nominees for Circuit and District Court judgeships.⁵⁷ Despite such changes, there are many groups—including the Joint Judicial Advisory Committee itself—that continue to press for reform in Virginia’s judicial selection process. Some other options for judicial selection will be discussed in the following sections.

Popular Electoral Process

In the early years of America, election by the legislature or appointment by the governor with the confirmation of the legislature were the two favored methods of judicial selection.⁵⁸ The emergence of Jacksonian Democracy in the 1820s triggered a movement to transfer the responsibility for selecting judges from the political elites to the electorate.⁵⁹ In 1832, Mississippi became the first state to establish a completely popularly elected judiciary, and every state entering the Union from 1846 through 1912 mandated the selection of judges through popular elections.⁶⁰ Initially the states used partisan elections to choose judges.⁶¹ However, concerns about the dominance of political parties quickly led to the adoption in some states of an alternative electoral scheme—non-partisan judicial elections.⁶²

Both the partisan and non-partisan electoral systems received a lot of criticism from judicial reformists. Opponents of partisan and non-partisan elections claim that such processes “have a detrimental effect on the operations of courts.”⁶³ First, popular elections are criticized because they do not result in the recruitment of the most qualified lawyers to sit on the bench.⁶⁴ Successful lawyers are said to be reluctant to set aside their lucrative law practices to pursue an election to the judiciary.⁶⁵ Also, the uncertain tenure of an elected judge is said to discourage the most successful members of the legal profession from risking damage to their established careers.⁶⁶ Furthermore, lawyers are reluctant to participate in a selection process, which more frequently rewards individuals skilled in politics than it does those who possess superior professional qualifications.⁶⁷ Many opponents of the popular electoral process for selecting judges prefer the Missouri Plan, also known as the “merit plan.”

The Missouri/Merit Plan

In 1937, the American Bar Association endorsed a plan for the “merit selection” of state judges, a plan said to combine the benefits but avoid the weaknesses of both the electoral and appointive procedures.⁶⁸ In 1940, Missouri adopted the plan (hence the name “Missouri Plan”).⁶⁹ There are several variations of the Missouri Plan, but the basic plan starts with the governor appointing a judicial nominating commission composed of lawyers and laypersons who suggest a list of qualified nominees for a judicial vacancy—usually three—to the governor.⁷⁰ The governor appoints one of the three to fill the vacancy.⁷¹ After a short period of service on the bench (usually a year), the new judge stands

uncontested before the state’s voters solely on the question of whether he/she should be continued in office.⁷² If the voters approve, the judge begins a regular term of office; if voters disapprove, the process begins anew.⁷³

The merit selection process has been promoted by its supporters as a fairer method for recruiting qualified judges over popular elections.⁷⁴ Because a nominating commission screens the candidates’ credentials, advocates argue that the Missouri Plan results in the recruitment of significantly more qualified judges than those chosen in partisan or nonpartisan elections.⁷⁵ Furthermore, Missouri Plan supporters declare that because voters have the opportunity to remove unacceptable judges in retention elections, the plan ensures continued popular control over the bench.⁷⁶ Simultaneously, the population is not given absolute control over the judiciary. Voters are able to remove judges who have demonstrated inferior or unethical behavior while on the bench during their probationary period.⁷⁷ The voters cannot base their decision on the judge’s ideological preferences; rather it is the merit of the judge upon which their votes are based.

Because judicial candidates are selected through a commission, it is also argued that the merit plan improves the operation of the judiciary.⁷⁸ Judges are able to devote full time to their duties without the constant distractions imposed by the necessity to campaign for re-election.⁷⁹ The uncontested merit retention election virtually guarantees the long tenure of the judge and thus serves as an encouragement for successful lawyers to sacrifice their legal practices in exchange for the prestige and security of a judgeship.⁸⁰

The Missouri Plan does have its criticisms. Opponents claim that the Missouri Plan does not take politics out of the judicial selection process. Rather than eliminating politics, the merit plan “has changed the nature of politics to include not only partisan forces, but also those relating to the interests of the organized Bar, the judiciary, and the court’s ‘attentive publics’.”⁸¹ Some critics believe that allowing the governor to appoint the nominating commission is extremely political. Governors are likely to influence the nominating process so that the commission will recommend individuals with acceptable policy views, and appointment to the commission itself may be used as a reward for political supporters.⁸² Some states have taken steps to curb this overt expression of partisanship by requiring bipartisan representation on the nominating commission and by limiting and staggering the terms

of commissioners.⁸³ In addition, many states prohibit nominating commissioners from holding public government office and/or an official position in a political party.⁸⁴

Opponents also claim that the merit plan does not ensure popular control over the court. Because electoral campaigns in the retention elections tend not to involve opposing candidates aggressively challenging incumbents' records or raising significant issues, voters are presented with little information about incumbents and are not stimulated by campaign activity or controversy to pay attention or to vote.⁸⁵ In states that have adopted the Missouri Plan, incumbents rarely are defeated and only a small proportion of the voters actually cast ballots in retention elections.⁸⁶ Therefore, many have concluded that the Missouri Plan fails to provide for popular control of the judiciary.⁸⁷

Why Virginia's current system needs to be reformed

The legislative appointment of justices and judges gives one branch of government too much power over another branch. There is the risk of lawmakers using such a responsibility to further their own political agendas. As stated earlier, up until the 1980s, the Democrat majority in the General Assembly of Virginia held private meetings to discuss who would be appointed or re-appointed to judicial offices. The fact the meetings were not open to the public implies unfairness in Virginia's judicial selection process. Virginia government needs to be protected from such abuses by lawmakers.

While there has been some reform to the current Virginia judicial selection process—such as the creations of JIRC and the Judiciary Advisory Committee—there remains the uncertainty of whether or not the reformations actually work. For example, since 1992, only one complaint has been filed to the JIRC, which led to the censure of a sitting judge.⁸⁸ Furthermore, it has been reported that the JIRC was invited to investigate the charges against Askew in 1999 and declined to do so.⁸⁹ Because the charges against Askew were so serious, it seems sensible that the JIRC should have been more than willing to investigate the charges—yet the agency did not. In this case, the JIRC failed Askew, Collins and the Commonwealth of Virginia.

Virginia should consider adopting some elements of the Missouri Plan. The establishment of a formal nominating commission would be a start. Because the commission would consist of members who are

not government officials, political considerations in the judicial selection process would be greatly reduced. There have been numerous proposals introduced to establish a formal Judicial Nominating Commission, but none of those proposals has succeeded.⁹⁰ One bill, introduced by Senator William Mims calls for the establishment of a judicial nominating committee in each circuit, composed of citizens and lawyers appointed by members of the General Assembly who represent any portion of the circuit.⁹¹ The committees would investigate candidates (including incumbent judges) for circuit and district court vacancies and submit reports on up to three nominations per vacancy to the General Assembly.⁹² The bill was not acted upon in the 2002 session and was continued to the 2003 session. Unfortunately, Senator Mims did not bring up the bill during the 2003 session.

The only problem with Mims' bill is that the legislators would be allowed to appoint the members of the judicial nominating committees. This would still leave a substantial amount of power in the hands of the legislative branch. However, if the governor were allowed to select the members, political considerations would still be an issue. Furthermore, allowing a judicial nominating committee to be established for each circuit in Virginia might lead to a lack of uniformity regarding how judges are selected. For example, a committee in one circuit might place an emphasis on certain selection criteria while another committee in a different circuit could have a different emphasis.

Therefore, it should be proposed that one official judicial nominating commission be established for the state of Virginia for the purpose of screening judicial candidates. The governor should be allowed to select the commission members—with a 2/3 vote required from the General Assembly regarding each member. In this way, both the executive and legislative branch would have a role in the judicial selection process. The author also supports retention elections for those wishing to continue in office.

The next issue that needs to be addressed is the re-election of judges. This responsibility should not be left with the legislative branch. The popular election of judicial candidates raises its own challenges—i.e. unchallenged incumbents, low voter turnout, etc. Therefore, a commission should be set up, including laypersons and professionals who do not hold a political office, to review judicial questionnaires and interview the candidates. The commission, just as the judicial nominating committees, would be composed of non-partisan members who do not have

political considerations. The candidates would be judged upon their behavior while serving on the bench. Ideological beliefs would not be considered at all.

Virginia is a very conservative state. Change comes slowly. However, a change in the judicial selection process is an issue worth addressing. The process has been the same since the late 1800s. Furthermore, Virginia is only one of two states that still use this method to choose judges. It is time for a change. Allowing politicians to select judges runs the risk of self-interests being the motivator behind certain appointments or non-reappointments.

¹ Dave Hendrickson and Terry Scanlon, "Askew to face a judgment call," *Daily Press*, 13 January 2003.

² The General Assembly is the formal title given to the body of representatives elected to the state legislature of Virginia. Virginia's state legislature is bicameral. It consists of a House of Delegates and Senate.

³ The Democratic Party has dominated the General Assembly for 112 years. In 2000, the Republican Party gained a majority in both houses of the General Assembly.

⁴ Hendrickson, "Askew to face a judgment call."

⁵ Hendrickson, "Askew to face a judgment call."

⁶ Hendrickson, "Askew to face a judgment call."

⁷ The following background information comes from the article written by Hendrickson and Scanlon titled "Askew to face a judgment call." Senator Marty Williams was on the City Council of Newport News in the early 1990s, the same time Askew was the city's attorney. Williams blamed Askew for helping to create three separate wards for city elections (which in part, helped black candidates to be elected to the city council). When Askew decided to run for a Circuit Court seat, Williams supported her nomination to get Askew out of Newport News' City Hall. In Virginia local legislators are allowed to make recommendations to the General Assembly on whom to appoint to judicial offices.

⁸ Hendrickson, "Askew: Guilty till proven innocent?"

⁹ Robert McCabe, "Former employee says judge tried to force relationship," *The Virginian-Pilot*, 18 January 2003.

¹⁰ Hendrickson, "Askew: Guilty till proven innocent?"

¹¹ Hendrickson, "Askew: Guilty till proven innocent?"

¹² Hendrickson, "Askew: Guilty till proven innocent?"

¹³ Hendrickson, "Askew: Guilty till proven innocent?"

¹⁴ Hendrickson, "Askew: Guilty till proven innocent?"

¹⁵ Hendrickson, "Askew to face a judgment call."

¹⁶ Hendrickson, "Askew to face a judgment call."

¹⁷ Senator Stolle is the chairman of the Senate Courts of Justice Committee while Delegate McDonnell is the chair of the House Courts of Justice Committee.

¹⁸ Hendrickson, "Askew to face a judgment call."

¹⁹ Dave Hendrickson, "Askew: Guilty till proven innocent?" *Daily Press*, 21 January 2003.

²⁰ Hendrickson, "Askew to face a judgment call."

²¹ The judicial questionnaire is something that all judicial candidates must complete in order to be considered for

appointment. The questionnaire is seen as an informal interview between the candidate and legislators.

²² Terry Scanlon, "Courts committees schedule Askew vote for Wednesday," *Daily Press*, 21 January 2003.

²³ Hendrickson, "Askew: Guilty till proven innocent?"

²⁴ Hendrickson, "Askew to face a judgment call."

²⁵ Hendrickson, "Askew: Guilty till proven innocent?"

²⁶ The House committee voted 15-7 not to reappoint Askew, while the Senate committee voted 10-5.

²⁷ Tyler Whitley and Alan Cooper, "Judge will not be re-elected," *Richmond Times-Dispatch*, 23 January 2003.

²⁸ Hendrickson, "Askew to face a judgment call."

²⁹ American Judicature Society, *Virginia Judicial Selection*, < <http://www.ajs.org/js/VA.htm> > 6 Apr 2003.

³⁰ Margaret Edds and David Poole, "Democrats Judicial Control a Casualty of Split," *Virginia Government and Politics*, eds. Thomas Morris and Larry Sabato (Charlottesville: University of Virginia, 1998), 353.

³¹ Within a 20 year period, Virginia's judges were popularly elected under the Virginian constitution of 1851.

³² "The Judiciary," *Virginia Government and Politics*, 330.

³³ See Appendix A for complete diagram of Virginia's Judicial Selection process.

³⁴ "The Judiciary," 330.

³⁵ *Virginia Judicial Selection*.

³⁶ "The Judiciary," 330.

³⁷ "The Judiciary," 330.

³⁸ "About the Judicial Inquiry and Review Commission," *Virginia's Judicial System*, 18 October 1999,

< <http://www.courts.state.va.us/pamphlets/inquiry.htm> > 6 April 2003.

³⁹ "About the Judicial Inquiry and Review Commission."

⁴⁰ "About the Judicial Inquiry and Review Commission."

⁴¹ "The Judiciary," 330.

⁴² "The Judiciary," 330.

⁴³ "The Judiciary," 330.

⁴⁴ "The Judiciary," 330.

⁴⁵ Edds, 353.

⁴⁶ *Virginia Judicial Selection*.

⁴⁷ *Virginia Judicial Selection*.

⁴⁸ Morris and Sabato, 353.

⁴⁹ Virginia's General Assembly has 140 members total. The Senate is made up of 40 members, while the House of Delegates is made up of 100 members.

⁵⁰ *Virginia Judicial Selection*.

⁵¹ *Virginia Judicial Selection*.

⁵² *Virginia Judicial Selection*.

⁵³ *Virginia Judicial Selection*.

⁵⁴ *Virginia Judicial Selection*.

⁵⁵ *Virginia Judicial Selection*.

⁵⁶ *Virginia Judicial Selection*.

⁵⁷ *Virginia Judicial Selection*.

⁵⁸ Dubois, Philip, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (Austin: University of Texas Press, 1980), 1.

⁵⁹ Melinda Hall, *American State and Local Politics: Directions for the 21st Century*, eds. Ronald Weber and Paul Brace, (New York: Chatham House, 1999), 131.

⁶⁰ Hall, 131.

⁶¹ Hall, 131.

⁶² Hall, 131.

⁶³ Hall, 131.
⁶⁴ Dubois, 6.
⁶⁵ Dubois, 6.
⁶⁶ Dubois, 6.
⁶⁷ Dubois, 6.
⁶⁸ Dubois, 4.
⁶⁹ Dubois, 4.
⁷⁰ Dubois, 4.
⁷¹ Hall, 132.
⁷² Dubois, 4.
⁷³ Hall, 132.
⁷⁴ Dubois, 8.
⁷⁵ Hall, 132.
⁷⁶ Hall, 132.
⁷⁷ Dubois, 8.
⁷⁸ Dubois, 8.
⁷⁹ Dubois, 8.
⁸⁰ Dubois, 8.
⁸¹ Richard Watson and Rondal Downing, The Politics of the Bench and the Bar: Judicial Selection under the

Missouri Non-Partisan Court Plan (New York: John Wiley and Sons, 1969), 352.
⁸² Dubois, 9.
⁸³ Dubois, 9.
⁸⁴ Allan Ashman and James Alfini, The Key to Judicial Merit Selection: the Nominating Process (Chicago: American Judicature Society, 1974) ,72.
⁸⁵ Hall, 135.
⁸⁶ Hall, 135.
⁸⁷ Hall, 135.
⁸⁸ Morris and Sabato, 330.
⁸⁹ “Judging the Judge: Lawmakers should ask independent review of Askew,” Daily Press, 14 January 2003.
⁹⁰ “Virginia Judicial Selection.”
⁹¹ “Virginia Judicial Selection.”
⁹² “Virginia Judicial Selection.”

Appendix A

SELECTION OF JUDGES IN VIRGINIA

	Supreme Court	Court of Appeals	Circuit Court
Number of judgeships	7	11	150
Number of circuits	---	---	31
Geographic basis for selection	Statewide	Statewide	Circuit
Method of selection (full term)	Legislative election	Legislative election	Legislative election
Length of term	12 years	8 years	8 years
Method of retention	Reelection by legislature	Reelection by legislature	Reelection by legislature
Length of subsequent terms	12	8	8
Method of filling interim vacancies*	Gubernatorial appointment	Gubernatorial appointment	Gubernatorial appointment
When interim judges stand for appointment*	Next session of legislature	Next session of legislature	Next session of legislature
Selection of chief judge/justice	Seniority	Peer vote	Peer vote
Term of office for chief judge/justice	4 yrs	4 yrs	2 yrs
Qualifications	Virginia resident; state bar member > 5 yrs; maximum age of 70	Virginia resident; state bar member > 5 yrs; maximum age of 70	Virginia resident and resident of circuit; state bar member > 5 yrs; maximum age of 70

*When the General Assembly is in session, vacancies are filled through legislative election. When the legislature is not in session, the Governor fills vacancies through appointment. Appointees must be confirmed at the next legislative session. (courtesy of www.ajs.org/js/VA.htm)

LIMITED JURISDICTION COURTS

Type of court	Jurisdiction	Selection of judges	Retention of judges	Qualifications
General District Court	Civil cases < \$15,000; violations of ordinances and county/city by-laws; misdemeanors; traffic offenses; preliminary hearings; no jury trials	Legislative election*	Legislative reappointment	Must be state and local resident; have a law degree; be a member of state bar for at least five years; maximum age of 70

Juvenile & Domestic Relations District Courts	Juvenile and domestic relations cases	Legislative election*	Legislative reappointment	
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*Vacancies occurring when the General Assembly is not in session are filled by the Circuit Court judges of the corresponding circuit. Appointees must be confirmed at the next legislative session.

THE WILL OF THE PEOPLE: Arizona's Legislative Process

By Matthew S. Bailey
University of Arizona

Four score and eleven years ago, our forefathers brought forth a new government dedicated to the proposition that the power of ruling lay within the abilities and duties of the common man. While each of the states adopted the Constitution's principles, the specific means used to implement these principles varies as widely as the states themselves. Ever changing and evolving, the process used to govern the people of Arizona is an intricate interpretative dance of legislation, execution, interpretation and citizen approval. The Arizona Constitution provides that "The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."¹ The process of their efforts to fulfill this constitutional mandate is the matter of subject brought to bear in the following pages. To understand this, it is necessary to examine the two wings, public and political, of the state's legislative process.

The elements of the public wing include the committee hearings, the party caucuses, the floor speeches, and a myriad of other events, all of which the media and the public see. Schoolchildren are taught that this is the face of the political process in both the state and the nation as a whole. If the elements of the public wing make up the face of the creation of laws, then the brain certainly lies in the political wing of the legislative process. The political wing is where the work of staff, lobbyists, and leadership all come to bear upon the end result of creating a better place to live, work, and grow.

Before proceeding, it is important to consider the nature of Arizona politics. As remarked by Justice Sandra Day O'Connor, Arizona was originally denied admittance into the Union because Washington couldn't accept the idea of judges being subjected to recall. In order to gain acceptance, Arizona removed the recall of judges from its Constitution. Soon after admission, through the initiative process, Arizonans found fit to put back that section of the Constitution.² This act and others established Arizona's maverick independence while portraying what the framers of

its Constitution had already begun - the idea of the importance of citizen's will.

Arizona's Constitution rests ultimate authority with the citizens. It imbues them with the ultimate check upon all branches of government through the ability to create, overturn, and amend both statute and constitution. The Courts, ideally, merely interpret the laws and are therein also bound by the people. Thus, the State really has four branches of government: the Legislative, the Executive, the Judicial, and the Citizen.

The state Constitution further provides that "except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."³ Quite to the contrary, all four branches of government are consistently in a power play over one another's areas of responsibility. The Executive recommends legislation and laws. The Courts, through rulings and interpretations, create and administer law. The Citizens create law through popular initiative and approve laws proposed by referendum. The Legislature investigates operations of both the Executive and the rulings of the Judiciary while redesigning the laws of the Citizens. Thus they must all come together to form more perfect legislation.

The creation of legislation and its resulting law can be two totally different things. Consider the entire process to be like building a house. The ideals of the political parties, the public and members of the Legislature are the foundation. The legislation that is written and amended is the framework of the house. It is the beams and rafters that give it form. The wiring and plumbing of the house are the Executive's administration of that law. The painting and landscaping of the house lie with the Judiciary's interpretation. Finally it rests with the Citizens to actually care for the house, maintain it, live within its bounds and make it a home. Therefore, if any of these branches do not fulfill its role, then the house, like one made of cards, will collapse. However, when legislation is being created, it is with this end home in mind. Legislation is not created and amended to merely make a framework and leave the rest to be filled in by the design of other bodies. This would be a shirking of the duties imposed and the powers

provided. It is the will and duty of the Legislature to try to account for how those branches and bodies will act with what is written in order to try to build their home as closely to their design as possible. It is what Stephen Covey would call, "Begin with the end in mind."⁴ This end is what both the public and the political wings of the legislative process work towards.

There has been much consideration given to the split lives of members of Congress. Notably the work of Davidson and Olessek details the "Two Congresses" of the Federal Government.⁵ This idea can be adapted to fit the State Legislature of Arizona and its two-winged legislative process.

The first wing to consider is political. Here is where many would say "the work" of the legislation is done. It starts with party policy. Certainly, party policy is in great part derived from the events and opinions expressed in society, but it is here where they are refined and given form.

Every party, in each state, has its own membership with its own beliefs and its own philosophies. These core ideals will become the fife and drum to which the members of that party's banner will flock. The legislators' own ideas and positions will mostly be variations upon the theme. Through meetings, phone calls, emails, memos, research, staff work, and a cornucopia of other efforts that go unseen, legislation is crafted and issues are pushed forward. All bills will undergo a portion of their life in the cold and darkened confines of office spaces, on interns' desks, in file folders and exposed to artificial, windowless lighting. If for no other reason than that is where the staff that monitor these marvels of modern democracy toil.

Once the bill has taken shape behind closed doors, it will be aired to the public part of the process. However, the political wing will not rest. While the public sees committees, votes, and speeches, an unseen marathon will be run. Chairmen of committees will set agendas based on meetings with legislators, leadership, staff and lobbyists. They will hear bills which meet their principles and political goals or that are politically infeasible to ignore. Lobbyists will work with other stakeholders, staff and legislators to create acceptable legislation. While the public process is airing, people are taking tally of expected votes, making deals, having meetings, and constantly negotiating. However, this wing is absolutely necessary.

Public appearance is public perception. In the openness of the public wing, members can make

costly mistakes with the media and/or public. Not wishing to be criticized or cornered leads members to partake of the scripted security described below. A process must be open to mistakes and a person must always be able to try new methods without fear of reprisal.⁶ Otherwise, such a process could destroy elected officials' ability to work towards their end goals, erode public confidence, and destroy creativity and proper legislation. Therefore, the political process gives legislators a chance to be creative, be ignorant, gain guidance, and, in general, formulate a solid position. To their credit, legislators truly believe this position, once taken, will do the greatest good for those they represent. This belief creates their public demeanor and position.

A fundamental tenet of democracy is that the process is open and participatory. The public wing maintains that tenet, while still proving true Shakespeare's immortal line, "All the world's a stage, and all the men and women merely players."⁷ Much like Shakespeare's dramas, the public is made to see a carefully scripted performance. The men and women, from Senators to staff to lobbyists, all play a part in creating what would amount in *Fox's* mind to a reality-based show. Like any good reality show though, there must be an unknown. The unknown part of this show is that the public doesn't get a copy of the script. In their emotional and intellectual appeals and testimony, they present a human side to the process that, while sometimes exploited by unscrupulous persons, can be where some of the most moving and powerful points of any given piece of legislation may come to light. It is in these speeches, committees, and hearings that legislators take to posturing and trying to put through their legislative proposals. It is here where legislators take their stand and attempt to garner sound bites on the evening news and in the morning papers.

The end result of legislation is within the public wing of existence, as a law. It is at this point in the process that the law will be administered by the Executive, tried by the Judiciary and either accepted or rejected as part of the societal structure by the Citizens. Any of these branches, unapproving of it in the form passed, can decide to alter or destroy the law. The Executive can choose not to enforce it. The Judicial can strike it down or interpret it so as to nullify its intended purpose. The Citizens can exert their ultimate veto by rejecting it in one of several methods.

It is with all of this mind that CHART I was created. It details the steps in the process of turning a problem in need of a resolution into a law. From the initial

problem to its final legal form the two wings of the political process constantly meet and diverge. Both wings share the common goal of creating meaningful and correct legislation. In the end, it is the position of all sides of an issue that they have upheld the beliefs and interests of those who empower them to vote and speak on their behalf. This is the basic pillar of our representative democracy.

Despite this process, Citizens have felt compelled to exert, through several propositions, their power to legislate. Similarly, the Judiciary not only interprets law, but also proactively puts forward new law and administers the same. The Executive has created strongholds of policy and administrative rules that essentially codify new law that has no legislative backing. In so doing, the Legislature has lost some of its constitutional authority and already shows signs of strain in its current budget crisis and lack of will, on the part of some members, to reassert their prime role in this quartet. Some consider it their duty to not overturn law that allowed a particular court decision, executive order, or other means of legislating without authority. This defies the intended and needed legislative process. When utilized, the two wings of the legislative process come together to show that through the fires of trial the law forged is wide and just. The end product of this process is what the framers intended to be held as the public law of the common man for the common good. Attempts to create law otherwise, while momentarily expedient, are in the long run destructive to the credibility of our democratic institutions and ideals. In the end, it is this process that will ensure “that government of the people, by the people, for the people, shall not perish from the earth.”⁸

¹ Brewer, Jan. Arizona Secretary of State, ed. The Constitution of the State of Arizona. Arizona: West Group, 2001.

² O'Connor, Sandra Day. “Legislative Celebration of Arizona’s 91st Birthday.” Arizona State Senate. Old House Chambers of the Arizona Capitol, Phoenix. 13 February 2003.

³ Brewer, Jan. Arizona Secretary of State, ed. The Constitution of the State of Arizona. Arizona: West Group, 2001.

⁴ Covey, Stephen R. The 7 Habits of Highly Effective People. Fireside Publishing: New York, New York, 1989.

⁵ Davidson, Roger H.; Oleszek, Walter J. Congress and its Members. CQ Press: Washington, D.C., 2002.

⁶ Abrashoff, D. Michael, CAPT, USN. It’s your ship. Warner Books: New York, New York, 2002.

⁷ Shakespeare, William. As you like it. 2.7.139-167. 29 April 2003.

<<http://web.uvic.ca/shakespeare/Library/SLTnoframes/life/lifesubj+1.html>.>

⁸ Lincoln, Abraham. “The Gettysburg Address.” The Library of Congress. 28 April 2003.

<<http://www.loc.gov/exhibits/gadd/4403.html>.>

CHART I. THE LEGISLATIVE PROCESS

Step	Explanation	Wing
<u>Problem</u>	The problem in society to be solved and the formation of the resulting issue.	POL/PUB
<u>Issue Stance</u>	Adoption of the issue into the party's ideals and social awareness and then creating a party position on that issue.	POL
<u>Election</u>	The electorate puts forward the candidates whose views on these issues are consistent with their own, thus making a majority and a minority.	PUB
<u>Leadership</u>	Within the body leadership is elected, which will emphasize major policy initiatives to be dealt with and influence the policy agenda.	POL
<u>Lobbying</u>	Particular interest groups bring forward legislation to deal with issues looking for sympathy and sponsorship.	POL
<u>Drafting</u>	Ideas take form as legislation (bills, resolutions, et al. are researched, drafted, and submitted).	POL
<u>Assignment</u>	Herein, the President of the Senate assigns, according to his preference, where the legislation will be heard.	PUB/POL
<u>Agenda Setting</u>	A Chairman decides what will be heard in committee and when.	POL
<u>Meetings</u>	Meetings will take place among a variety of parties to answer questions, garner votes, promulgate information, etc.	POL
<u>Hearing</u>	Testimony is given and questions are asked as well as consideration of the pieces of the bill. This can happen in multiple committees. This will be sent to the body in the form of a committee report.	PUB
<u>Meetings</u>	Stakeholders and interested parties try to make corrections and come to consensus on amendments.	POL
<u>Caucus</u>	Each party discusses a bill and comes to a basic understanding of each piece of legislation they will vote on.	PUB
<u>Committee of the Whole</u>	The opportunity of the whole body to hear, amend, and argue the merits of legislation as well as the amendments proposed by the committee.	PUB
<u>Campaigning</u>	The attempt of interested parties (leadership, lobbyists, citizens, parties, etc.) to lobby a particular member.	POL
<u>Third Reading</u>	The final vote, with some discussion but no amending, of a piece of legislation within that body.	PUB
<u>The Other Chamber</u>	See below*	PUB/POL
<u>Pre-Conference Committee</u>	Meetings occur where compromise is mostly predetermined and the fate of the final product is almost always arranged.	POL
<u>Conference Committee</u>	An opportunity to work through problems on the legislation or create more legislation.	PUB/POL
<u>Final Reading</u>	An opportunity for opponents to kill arrangements of Conference Committees or defeat a bill.	PUB
<u>Lobbying</u>	Attempts by the Legislature and interested parties to get the Executive or the Citizens to sign legislation into law.	PUB/POL

<u>Action</u>	The Executive's or the Citizens' action upon legislation.	PUB
<u>Administration</u>	The Executive creates appropriate rules and enforcement of the enacted law.	PUB
<u>Review</u>	Inevitably, the enacted law will be challenged in some way in the Judiciary. This review will determine the precise meaning.	PUB
<u>Law</u>	The interaction of the Citizen with the everyday meaning of the enacted legislation will determine its true outcome and effect.	PUB

* The process described to this point is, for the majority, done again in the separate chamber. Communications between both chambers are frequent and can result in a great deal of changes to the legislation before it becomes law.

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