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Journal of the American Society of Legislative Clerks and Secretaries

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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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LEGISLATIVE LOGJAMS RECONSIDERED



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Practitioners and scholars agree that state legislatures are very busy in the final days of each session. The typical legislature passes a large number and/or proportion of laws at the end of the session.¹ Many decisions to kill bills are also made then.² There is no doubt a logjam of work exists just prior to adjournment.

Popular authors and journalists frequently add another element to the discussion: *contempt*. Implicitly or explicitly, many portray the end-of-session logjam as evidence of poor performance. They disparage and ridicule state legislators for being inefficient, ineffective, uninformed, and uncaring. The following is a description of the Texas Legislature written by Molly Ivins. Its tone and content are characteristic of editorials and articles published across the nation as state legislatures close their sessions.

Many bills are passed by the Legislature after consideration lasting one minute. During the traditional end-of-the-session logjam, this bill-a-minute pace is sometimes for four or five days. The House's all-time record was passing the state's first sales tax at eight minutes to midnight on the last night of the 1961 session. The House then took four of the remaining minutes to consider and pass the entire \$388 million biennial appropriations bill. Still other bills are passed without being given any consideration. To do this, a legislator gets a bill placed on what is called the local-and-consent calendar.³

Molly Ivins is unsurpassed as a commentator on the Texas Legislature. She is an outstanding investigator

and an effective communicator. She is a sophisticated observer who has mastered the details of the legislative process. She knows that bills considered for minutes on the floors of the Texas House and Senate are considered for hours—frequently hundreds of hours—in hearings, committee meetings, caucuses, conferences, summits, palavers, chitchats and so forth. Yet she and others who are most knowledgeable about the legislative process choose to present a skewed and inaccurate picture of how state legislatures handle their workloads.

I would argue that most analyses presented in the popular media (and in some scholarly publications) are based on a number of unarticulated assumptions that oversimplify and misconstrue the legislative process. The following are examples.

- All bills are submitted with the intention that they be passed.
- Bills are independent of each other. Each can and should be considered in isolation from others.
- All bills are equally important and deserve equal consideration.
- Floor discussions should parse bills to provide members with the information they require to decide how to vote.
- Good practice requires all members to know the details of each bill they vote on.
- Legislators want to be knowledgeable about all bills. Insufficient time at the end of the session is the major obstacle they face.

The inevitable deduction from these premises is that legislative logjams are harmful and ought to be eliminated. However, if the premises are incorrect, the conclusion may also be incorrect.

Premises Reevaluated

All bills are submitted with the intention that they be passed. This is an incorrect assumption. House and Senate members frequently submit verbatim identical bills or nearly identical bills.⁴ The goal is to maximize the probability of passage, not to pass two bills with the same content. Furthermore, legislators submit many bills with no intention of enacting them. Authors often let their bills die immediately after submission. This strategy makes sense for many reasons. Sometimes the member is doing a favor for a constituent. Sometimes the member is acting symbolically. Sometimes the member knows the bill cannot be passed and is seeking publicity. Sometimes the member intends only to establish a topic for action in future sessions. In short, there are numerous reasons for submitting bills other than enacting them into law.

Bills are independent of each other. Each can and should be considered in isolation from others. These ideas cannot withstand scrutiny. Expenditure bills must be linked to revenue bills. Measures concerning universities may be linked to measures concerning community colleges and primary and secondary education. Proposals to assign obligations to local governments may be linked to proposals to give powers or financial resources to those governments.

It is relatively easy to understand that passing some bills is contingent on passing other bills. It may be more challenging to recognize bills that pass are frequently linked to bills that do not pass. In any legislative session there is widespread advance agreement on action-item topics. These topics are rarely addressed by a single submission. More typically, several bills—sometimes dozens—are entered. Formally or informally, committees assigned these bills contemplate them as a group. The result is passed legislation that includes elements from multiple bills. Outsiders see a single successful bill and many failures. Members report that enactments meet some or all of their goals even when the bills they submit seem to have been rejected.

All bills are equally important and deserve equal consideration. All bills are important to some but

rarely are bills equally important to all. The idea that all bills deserve equal quality of consideration need not require that all bills receive equal quantity of consideration. The large majority of state legislative chambers use consent calendars or other procedures to identify bills that are not expected to be controversial. Procedures vary, but all include a process for placing bills on consent calendars and a process for a small number of legislators to remove and reassign bills to other calendars.⁵ The purpose is to identify measures that do not require lengthy consideration on chamber floors. Molly Ivins' statement notwithstanding, bills in the Texas House and Senate are thoroughly screened and reviewed by two separate groups before being placed on consent calendars. Passing consensus bills without lengthy floor consideration is an efficient practice.

Floor discussions should parse bills to provide members with the information they require to decide how to vote. This was the mode of operation in the U.S. Congress and state legislatures in the 18th and part of the 19th century. When chambers had few members and contemplated few acts of legislation, floor proceedings included meaningful debate and exchange of information. For more than one hundred years detailed consideration of bills has been assigned to legislative committees. Floor speeches are intended to explain, not to convince. They seem to target external audiences more than colleagues. In most state legislatures near-unanimous floor votes are much more common than close votes. Floor actions tend to ratify decisions previously made elsewhere.

Good practice requires all members to know the details of each bill they vote on. Legislators must vote on hundreds of bills each session in some states and on thousands of bills in other states. Bills are written in a legal and technical language. Many cannot be fully understood without supplemental information such as the complete text of previous actions being changed. The workload is too large and too difficult for each member to know every bill in detail. Committee members share their knowledge and expertise with the larger chamber. Individual legislators seek advice from many parties including colleagues, staff, leaders, lobbyists, constituents and others.

Legislators want to be knowledgeable about all bills. Insufficient time at the end of the session is the major obstacle they face. Experienced members know they cannot achieve legislative omniscience. A Texas legislator was asked in one of my classes how many bills he read of the six thousand plus submitted each session. His reply was frank: “Before my first session I had the goal of reading all bills. After a few weeks I had the goal of reading all bills assigned to my committees. Now that I have served several terms, my goal is to read most of the bills I submit.” He went on to explain how his network of advisors makes it unnecessary to read each bill to know how to vote. No matter when a bill comes up for floor action, most members will not decide how to vote based exclusively or primarily on their own reading.

Life Without Logjams?

Even if the arguments underlying most criticisms of legislative logjams are flawed, there may be good reasons to try to eliminate or reduce them. Many state legislatures have enacted procedural changes intended to decrease their logjams, and others are contemplating changes. NCSL has an Internet page titled “Controlling End-of-Session Logjams.” It advises that deadlines are the most common mechanism for managing the overall work flow. It also lists other methods used by many legislatures to expedite or streamline the process: bill pre-filing; proposed, short-form or skeleton bills; companion bills; committee bills; bill carryover and bill introduction limits.⁶ NCSL has helped individual state legislatures consider how to improve their procedures.⁷

Too much work and too little time to do it is clearly a problem. But, passing lots of bills at the end of the session may not be a problem for all legislatures. If the focus is when during its sessions bills are passed, the Texas legislature has one of the largest legislative logjams. However, decisions to kill bills are also part of the legislative process. In the typical state legislature decisions to kill outnumber decisions to pass by a ratio of three to one. If the focus is when final decisions to pass or kill bills are made, the agenda in Texas is cleared at an almost perfectly even rate from the time it

is fully established to the final day of the session.⁸ A legislature can have a logjam without having a logjam problem.

The NCSL cautions that the reforms it suggests to manage the flow of work do not constitute a panacea. For some legislatures the reforms may be counter-productive. Fewer bills may not be better than more bills if submissions are considered in groups rather than one at a time. Multiple bills on the same topic may provide useful text for committee substitutes, floor amendments and conference committee changes. Having more time to work is not always better than less time to work. Deadlines can be useful for stimulating cooperation aimed at resolving issues. State legislatures with longer sessions do not systematically have smaller end-of-session logjams than those with shorter sessions. I doubt many would suggest that the U.S. Congress, with its professionalism and unlimited sessions, is a paragon of efficiency.

Last-minute decisions raise the possibility of passing contradictory legislation and provide opportunities for malicious behavior by some legislators. The empirical question of how often such problems occur at the beginning, middle and end of sessions is still open. Those who are most critical of end-of-session logjams argue the practice violates principles I think are misguided. They rarely, if ever, cite concrete examples of bad decisions made only because of impending deadlines. Indeed, the harshest critics argue that legislatures are capable of making bad decisions throughout their sessions.

Conclusion

I find it easy to explain to my students why state legislatures pass the large majority of laws at the end of each session. I simply remind them that students tend to write their major research papers and take their final exams at the end of each semester. Then I ask how they would react if their parents (or journalists) accused them of being irresponsible early in semesters and inefficient and ineffective at the end of semesters. Students know that papers written later are based on work done earlier. They know that studying for final

exams is linked to studying for prior exams. Parents understand the stream of academic work during the semester and the seasonal differences in work flow in their own occupations. Yet even the most informed observers seem to overlook the division of labor and flow of work in state legislatures when they evaluate the quantity and quality of work completed just before adjournment.

When can we expect state legislatures to work without end-of-session logjams of any kind?

- When business meetings that begin at 1 PM and at 4 PM are equally efficient.
- When students no longer cram for exams at the last minute.
- When professors no longer finish professional papers just before delivery.
- When parents no longer purchase gifts for children shortly before their birthdays.
- When journalists no longer turn in their stories immediately before deadlines.

I suggest it is reasonable to expect that state legislatures will no longer have end-of-session logjams when all other groups and individuals no longer change their behavior in anticipation of deadlines.

¹ For example, Belle Zeller, *American State Legislatures*, (New York: Thomas Crowell, 1954), Alan Rosenthal, *Legislative Life* (New York: Harper and Row, 1981); Harvey J. Tucker, Legislative Logjams: A Comparative State Analysis, *Western Political Quarterly*, 1985, 38: 432-46.

² Illinois Legislative Council, *Scheduling Legislative Workloads* (Springfield: Legislative Council

Publication 108, 1952); Charles W. Wiggins, *The Legislative Process in Iowa* (Ames: Iowa State University Press, 1972).

³ Molly Ivins, *Molly Ivins Can't Say That, Can She?* (New York: Random House, 1991).

⁴ In Texas, identical bills are called companion bills. Approximately 20% of House bills are companions to 20% of Senate bills. Harvey J. Tucker, Legislative Workload Congestion in Texas, *Journal of Politics*, 1987, 49: 565-578.

⁵ American Society of Legislative Clerks and Secretaries, *Inside the Legislative Process*, (Denver: NCSL, 2002).

⁶ <<http://www.ncsl.org/programs/legman/about/logjam.htm>>.

⁷ For example, NCSL, A Study of the Legislative Process in Virginia: A Report Submitted to the Virginia Joint Rules Committee, November 2000 and 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*, 2001, 7:13-17.

⁸ The first 60 days of the session are not intended for passage of bills. There are no restrictions on bill introductions until day 61 when 80 percent of the chamber must approve. Bills cannot be enacted during the first 60 days unless they are designated emergency bills by the governor. See Harvey J. Tucker, Legislative Workload Congestion in Texas, *Journal of Politics*, 1987 49: 565-578 and Gary M. Halter, *Government and Politics of Texas*, 3rd edition (New York: McGraw Hill 2001).

PERFORMANCE EVALUATIONS FOR LEGISLATIVE STAFF



By Andrew Geiger
NCSL Policy Specialist

An increasing number of legislative staff agencies are developing and using performance evaluation systems. Performance evaluations have long been a standard component of human resource operations in executive branch agencies; however, the lack of a civil service culture within legislatures, along with much smaller employee groups, has meant legislative agencies have been slower to use this management tool. Indeed, the very status of legislative employees under federal and state law makes them unique, and in almost all cases they are considered to be *at-will* employees who serve at the pleasure of the legislature. Thus the argument has been made that having a formal performance evaluation process is not needed since continued full-time employment (or being invited back for another session) is by its very nature an approval of past performance. Yet some human resource professionals and legislative administrators are seeing a value to formalizing a process to review the development of legislative staff.

What Form Should I Use?

Performance evaluations vary greatly from organization to organization, and many administrators looking to jump in and get started tend to focus immediately on the instrument that will be used by supervisors. Experts advise that you first determine why you want to implement a performance evaluation process and what goals you want to accomplish. A good first step is to get together with all front-line supervisors as a management team to discuss the

advantages and challenges of reviewing performance within your own organization. Devising a strategy and clear objectives will then allow you to use a critical eye when developing your own performance evaluation system. Some items to think about include:

- **Keep it simple.** Human resource consultants can at times go overboard in developing the latest and greatest performance review instrument that will solve all of your problems for you. Remember that you know best what qualities and skills your constituents value, and any system that will ultimately work for your agency or chamber should focus on these areas.
- **Get supervisors to sign off on the instrument.** The truth is that performance evaluations often take much more of supervisors' time than is anticipated. This will be a big job for all employees with management responsibility, and so the rating system should be one they think makes sense and they can work with.
- **Seek counsel.** Often times administrators will glean information from several different sources in developing their own performance review form. This is fine—all part of customizing a process and documents that best fit your culture; but as in all personnel areas there can be legal ramifications, and so a review by legislative counsel before implementation is an important step.

The Compensation Question?

Employees will react in various ways upon hearing they will now be evaluated as a routine part of their job in the legislature. Expect some anxious feelings, as well as perhaps some unreasonable expectations, that can come into play in the area of compensation. The next question you will have to answer is should you tie an individual employee's (yearly) performance review to pay raises? *Pay for performance* has long been a

standard part of many private-sector organizations, with proponents making the case that rewarding top performers with higher compensation ultimately improves morale and performance across the board. This can be true, and all administrators can appreciate being able to reward those employees who really do go the extra mile to get the job done. However, this is yet another situation in which you may want to get together with your management team to discuss potential ramifications. Some items for consideration:

- Is it necessary to use this process to award pay raises? While pay increases are frequently tied to performance reviews, it is not necessary for you to do so. Human resource experts recognize an intrinsic value to performance reviews as you help people focus on areas for improvement and development as a professional. (Legal experts will add that a well documented record of less-than-competent performance is advantageous in those instances in which an employee must be dismissed).
- What value should be placed on various levels of performance? This gets to the technical compensation question of the percentages between the different rating levels. Some organizations start at a static level, or no pay raise, and then go up by predetermined and consistent percentages. Others start with a cost-of-living adjustment (COLA) and then give actual *raises* only to higher performers. While the goal is to reward performance, you also want to make sure you do not create too great of a disparity between employees in the same job classification. Public budget realities should make this principle easy for you to adhere to.
- What about a one-time cash bonus rather than a percentage increase? Many management gurus recommend this type of performance reward because it allows the organization to recognize a particular achievement while not adding to the base of any individual's salary rate. Employees also respond well to this type of a system, yet the term "cash bonus" can

become complicated as it is applied within the public sector.

- If I implement a pay-for-performance system, does that make it automatic every year? Once again, this goes to the question of employee expectations. Those employees who receive the highest ratings one year will of course look forward to the newly implemented performance review process; however, budgetary concerns may force you to cut back or even freeze the "pool" of money for raises in any given year. This is of course the reality of any legislative agency in the political environment, and most employees understand this; yet it underscores the importance of explaining to staff that pay raises are just one component of the performance evaluation process. The larger goal—which pay raises may accompany—is to make each individual the best legislative employee possible.
- Make a trial run? Should you decide to implement a pay-for-performance system but have concerns about employees' comfort levels with the process, you may want to consider starting out with one review cycle (six months or even a year) in which pay rates are not yet impacted. This will allow employees and supervisors to become comfortable with the process, and allow you to work through any potential problems.

Employee Participation

Up-front communication will help to calm most employees' concerns with the performance evaluation process. Like many things in the professional world, peoples' anticipation of change can cause them to worry more than is necessary; and there is no shortage of anecdotes floating around that focus on what can go wrong with performance reviews. A good way to begin is to have an organization-wide meeting in which you explain some of the goals of the overall process. Employees should not view this as something that is being mandated upon them, but rather a team process they are involved in. Some of the unavoidable rumors will focus on a perception that the management and/or

leadership must not be happy with performance or “why else would they be doing this?” An up-front question-and-answer session can explain the more nuanced position that there is always room for everyone to improve and that the focus is on improving service to constituents rather than singling out any individual employee or unit. In addition to good communication, other groups have tried the following tactics:

- Make sure all employees have reviewed the evaluation form well in advance of their review. It seems only fair that employees know which categories the organization values and thus will be used for evaluation purposes. Some groups have even tried having a category on the form that is determined by the employee. Under this scenario the form may have generic categories such as *knowledge of subject area, customer service/relationships with members, teamwork, etc.*, with employees suggesting core skill areas—with their supervisor’s agreement—that they feel are important for anyone who is filling their position.
- Train your supervisors on how to review performance. Performance evaluations are not easy and should not be treated lightly. Not only should supervisors understand the time commitment that will be demanded of them, but they should also have some basic training in

the practical and legal components of the process. All employees will inherently understand the significance of having their professional life reviewed, and they will demand a fair and thoughtful process.

- Conduct a 360 degree evaluation. Many organizations provide employees the opportunity to review their supervisors. Typically the ratings are provided blindly through aggregated results, and participation is voluntary. While this process may seem uncomfortable for some employees, many greatly appreciate the chance to provide some thoughtful feedback to their supervisors.

Institutional Development

Ultimately a performance review system and its impact on your organization will depend on the commitment and effort from top administrators. Employees will quickly understand if the performance review becomes an *exercise* rather than a valued part of the overall goals and mission statement of the legislative agency or chamber. While no system is without flaws, experience has shown that administrators who value the opportunity for communication within the process—and view it as a tool to build morale and pride in the institution—are those who find the effort provides the biggest reward.

HOW STATE LEGISLATURES COMMUNICATE WITH THE FEDERAL GOVERNMENT



By Thomas H. Clapper
Committee Staff
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If you can play tic-tac-toe, you can understand our system of government because one way to view the United States government is through the use of the matrix used in this game. The three horizontal levels represent the federal, state, and local governments. The three vertical rows symbolize our legislative, executive, and judicial branches. In this arrangement you can see a possible total of nine different categories of our federal government with its division of powers. The question arises: How do all these different factions communicate with each other?

The purpose of this article is to demonstrate, at least in one state, how a state legislature communicates with two branches of the federal government or with other state and local divisions of government on matters relating to federal issues or individuals. One way of accomplishing this is through a simple or concurrent resolution. In Oklahoma these resolutions give a sense of the body but are not codified as law, nor do they have the force of law as does a joint resolution or a bill. A simple resolution is passed by only one house while a concurrent resolution requires passage by both. Thus, in Oklahoma there are four possibilities: a House (simple) Resolution (HR), a House Concurrent Resolution (HCR), a Senate (simple) Resolution (SR), or a Senate Concurrent Resolution (SCR).

Oklahoma State Senate Rule 5-5 limits Senate Concurrent Resolutions, Senate Resolutions, and House Concurrent Resolutions to certain purposes. All

these need to come to the Senate floor. A House Resolution (HR) does not. Section A of Rule 5-5 includes “memorializing Congress, the President of the United States, or an executive agency of the federal government.” Note that the federal judiciary is not included. The Oklahoma House of Representatives does not have a similar rule. I have analyzed the 30 resolutions relating to the federal government that were introduced during the Second Session of the 48th Oklahoma Legislature (2002) to determine what topics were covered and the audience for whom the resolutions were introduced. All percentages relate to the number (30) of federally related resolutions introduced (but not necessarily passed) in the 2002 session of the Oklahoma State Legislature.

Given that there are 101 state representatives and only 48 state senators in Oklahoma, one would think there would be more House than Senate resolutions; but this was not the case. One explanation could be that the Senate, as a more deliberative body, is more interested in federal affairs. This theory gains some credence when one realizes that both of Oklahoma’s United States senators and one of its five current congressional members are former state senators. However, three of the other five congressional members served previously in the Oklahoma State House of Representatives. Another explanation could be that the State Senate has a designated staffer specifically assigned—among other things—to draft resolutions, while the House does not.

As with bills, some resolutions are known as “request” resolutions. An interest group, entity, or individual constituent may request that a state legislator introduce a specific bill or resolution. Although I have not studied this area, I am under the impression there is a greater percentage of resolutions “requested” than there are bills. However, there are also cases where an individual state legislator introduced a resolution as part of an overall program or plan in which he or she

had a personal interest. You can read the topics and reach your own conclusion.

There were four House (simple) Resolutions (HRs) or

13 percent of the total relating to the federal government in the 2002 Oklahoma state legislative session (Table A-1).

TABLE A-1	
HR 1029	Praised the federal Older Americans Act
HR 1033 & HR 1035	Called upon the federal government to support the State of Israel in its war against terrorism
HR 1041	Called upon Congress to restore funding to Medicare and extend the program

There were five House Concurrent Resolutions (HCRs) or 17 percent of the total relating to the federal

government in the 2002 Oklahoma state legislative session (Table A-2)

TABLE A-2	
HCR 1054	Congratulated West Point on its bicentennial
HCR 1057	Asked for increased federal funding for the federal Medicaid program
HCR 1060	Declared support for a temporary federal backstop program for insurance against terrorism
HCR 1072	Requested federal anti-terrorism research grants for Oklahoma State University
HCR 1077	Called for federal funds to support areas devastated by ice storms

There were nine Senate (simple) Resolutions (SRs) or 30 percent of the total relating to the federal

government in the 2002 Oklahoma state legislative session (Table A-3).

TABLE A-3	
SR 25	Congratulated former President Ronald Reagan upon the occasion of his 91st birthday
SR 32	Praised the 687th Field Artillery Battalion
SR 33	Called for the expansion of federally funded passenger rail service into Oklahoma
SR 34	Praised the federal Older Americans Act
SR 41	Called upon the federal government to support the State of Israel in its war against terrorism
SR 45	Requested changes in Internal Revenue Service rules to help Oklahoma business
SR 46	Urged the Oklahoma Department of Transportation to take advantage of federal railroad funding

SR 53	Supported designation of the Chisholm Trail as a federal National Historic Trail
SR 59	Called for the adoption of a National Intercity Passenger Rail Policy and federal funding for a high-speed rail corridor system

Finally, there were 12 Senate Concurrent Resolutions (SCRs) or 40 percent of the total relating to the federal

government in the 2002 Oklahoma state legislative session (Table A-4).

TABLE A-4	
SCR 52	Requested the U.S. Fish and Wildlife Service to alter its policy on the management of Canadian geese
SCR 53	Urged the president to adopt the recommendations of the International Trade Commission regarding steel imports
SCR 56	Requested the Federal Emergency Management Agency (FEMA) to fully fund storm-related damage efforts
SCR 60	Called upon the federal government to support the efforts of the Republic of China on Taiwan to obtain “observer status” in the World Health Organization
SCR 63	Honored Congressman Wilburn Cartwright and other members of his family
SCR 66	Urged congress to quickly pass a farm bill
SCR 67	Requested federal agencies to provide emergency drought assistance to Bartlesville and Dewey, Oklahoma
SCR 70	Commended the 45 th Infantry Division, the state’s primary Army National Guard unit
SCR 71	Memorialized the president and congress to preserve the traditional powers of state and local governments while negotiating international investment agreements
SCR 78	Named an auditorium after a retired Oklahoma United States military officer
SCR 79	Requested the Oklahoma Health Care Authority to study the feasibility of changing its system of handling Medicaid reimbursement
SCR 87	Named a state highway after a United States military hero from Oklahoma

A broad scope was used in determining if a resolution was “federally” related. For example, SCR 63 honored Oklahoma’s Cartwright family whose most prominent member was also a member of congress. Likewise, not all the resolutions passed. For example, SCR 52 asked for the U.S. Fish and Wildlife Service to alter its policy regarding Canadian geese. The U.S. Fish and Wildlife Service did change its policy as requested just after the resolution was introduced, making its passage a moot point.

Determining the topic of the resolution proved even more challenging than deciding if it was federally related. Some had more than one topic. Others could have been combined. For example, the military and civilian commendation resolutions could have been combined, but I wanted to demonstrate the political presence of military/national guard/veteran groups in the Oklahoma State Legislature. Likewise, some resolutions were unique to the time of their passage. This would include resolutions on terrorism or the

weather. Other issues such as railroads happened to be a topic of much discussion in 2002 but were not before and may not be in the future. Note that the top two topics asked for federal action on certain policy issues or requested federal funds for specific programs. There was also one case where the topics or issues were identical but introduced in separate resolutions by different authors (HR 1033 and HR 1035).

I was surprised by the third-place ranking of foreign affairs or international relations; however, this category did not exclude the war on terrorism. Tied for third place was the call for state action regarding federal programs or individuals. These usually related to naming a building or highway after a prominent federal personage (usually a military hero from

Oklahoma), requesting a state agency to take action regarding a federal program, or informing a local government that the state legislature had requested federal aid. This year was a positive one as the state legislature either praised federal programs, requested federal funding, or asked the federal government to take certain policy positions. The state legislators could just as well have introduced resolutions condemning federal policies or programs.

Please note that some resolutions are counted more than once. For example, SR 33 asked for federal action/policy, requested federal funding, and related to railroads. Therefore, adding up the numbers resulted in a sum greater than 30 and percentages totaling more than 100 percent. See Table B for groupings by topic.

TABLE B	
Federal action/policy	Eleven resolutions (HR 1041, HCR 1060, SR 33, SR 45, SR 53, SR 59, SCR 52, SCR 53, SCR 60, SCR 66, and SCR 71) or 37 percent requested a change in or action on federal policy.
Federal funds	Eight resolutions (HR 1041, HCR 1057, HCR 1072, HCR 1077, SR 33, SR 59, SCR 56, and SCR 67) or 27 percent requested federal funding.
Foreign affairs	Six resolutions (HR 1033, HR 1035, SR 41, SCR 53, SCR 60, and SCR 71) or 20 percent dealt with foreign affairs/international relations.
State action	Six resolutions (SR 46, SCR 63, SCR 67, SCR 78, SCR 79, and SCR 87) or 20 percent asked for state action on federal programs or individuals.
Military	Five resolutions (HCR 1054, SR 32, SCR 70, SCR 78, and SCR 87) or 17 percent praised U.S. military units, institutions, or individuals.
Terrorism	Five resolutions (HR 1033, HR 1035, HCR 1060, HCR 1072, and SR 41) or 17 percent dealt with the war on terrorism.
Commendation	Four resolutions (HR 1029, SR 25, SR 34, and SCR 63) or 13 percent commended federal (non-military) programs, personnel, or institutions.
Medicaid/Medicare	Three resolutions (HR 1041, HCR 1057, and SCR 79) or 10 percent dealt with Medicaid or Medicare.
Railroads	Three resolutions (SR 33, SR 46, and SR 59) or 10 percent dealt with railroads.
Weather	Three resolutions (HCR 1077, SCR 56, and SCR 67) or 10 percent related to weather damage.

Simple and/or concurrent resolutions are unique in that they are usually distributed to certain people or institutions instead of being codified (like a passed bill) or published in the Session Laws (like a joint resolution, which has the force of law in Oklahoma but is not codified).

The distribution is listed in Table C. Note that some of the resolutions are distributed to more than one of the parties in Table C. Not surprisingly, the Oklahoma congressional delegation was the most popular recipient of the Oklahoma state legislature's simple and/or concurrent resolutions. I was surprised that state and local governments ranked second; however, these should not be difficult to identify when looking at

the "A" tables. The president and his cabinet could have been combined, but I did not do so. The "president" grouping included the vice president, former president, or presidential staff. Likewise, the "cabinet" category included others in the executive branch of the federal government. Two of the resolutions were addressed to congressional leaders outside Oklahoma's congressional delegation, while one was sent to each member of congress. This proved to be a logistical challenge but was accomplished by placing the resolutions in two separate boxes—one sent to the U.S. House of Representatives mail room and the other to the U.S. Senate mail room. Sending both of these boxes alleviated having to send more than 535 separate mailings. Again, many resolutions had

distribution to more than one of the categories listed in Table C. As a result, the total number exceeded 30 and

the percentages added up to more 100 percent.

TABLE C	
Oklahoma's delegation	Nineteen resolutions (HR 1033, HR 1035, HR 1041, HR 1072, HCR 1057, HCR 1060, HCR 1072, HCR 1077, SR 33, SR 41, SR 45, SR 53, SR 59, SCR 52, SCR 53, SCR 56, SCR 66, SCR 67, and SCR 71) or 63 percent were distributed to Oklahoma's delegation.
State/local	Twelve resolutions (HR 1029, HCR 1057, HCR 1077, SR 34, SR 46, SCR 52, SCR 63, SCR 67, SCR 70, SCR 78, SCR 79, and SCR 87) or 40 percent were distributed to state or local office holders or entities.
President	Ten resolutions (HR 1033, HR 1035, HR 1041, HCR 10606, SR 25, SR 41, SR 59, SCR 53, SCR 60, and SCR 71) or 33 percent were distributed to the president, vice president, a former president, or a member of the presidential staff.
Cabinet member	Nine resolutions (HR 1033, HR 1035, HCR 1054, SR 41, SR 59, SCR 52, SCR 56, SCR 60, and SCR 71) or 30 percent were distributed to a cabinet member or other federal executive branch/official entity.
Congressional leadership	Two resolutions (HR 1041 and SCR 66) or 6 percent were distributed to congressional leaders.
Congress	One resolution (SR 59) or 3 percent was distributed to every member of congress.

A quick check shows a total of 22 resolutions distributed to the federal legislative branch, 19 to the federal executive branch, and 12 to the executive branch of state government or to local governments. Again, the total adds up to more than 30 since the distribution is not mutually exclusive and sometimes includes more than one individual or entity. It seems logical to assume that Oklahoma state legislators realized the importance of the legislative branch of government and, as a result, did not exclusively communicate with the federal executive branch of government.

While the approximately 30 resolutions took only a small fraction of the resources of the Oklahoma State

Legislature, they do demonstrate that the legislature is aware of the federal government and is willing to praise, petition, thank, make suggestions, or request funding. This study will be replicated in 2003 so trends can be identified and followed. If another researcher were to study the effect (if any) of state legislative resolutions on the federal government, we would have an even more complete picture.

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JUDICIAL SELECTION: AN IMPORTANT PROCESS



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Importance of Judicial Office

Ideally, every state's judiciary would be comprised solely of judges who possess a high degree of integrity, legal knowledge, and ability to interpret and apply the law in an impartial manner. Judges should also be professionally experienced and demonstrate an extraordinary ability and willingness to continue cultivating qualities of compassion, humility, tact, patience, and understanding. This article explains the Utah Senate's recent experience of enhancing its senate confirmation procedures for judicial appointees in an effort to continually strengthen the quality of Utah jurists.

Judicial Selection Process in General

Generally, states select their judges by some form of appointment process or by contested elections. Judicial appointments are usually made by the executive branch, although some state supreme courts and legislatures also serve as the appointing authority. Judicial elections are either partisan or nonpartisan. The National Center for State Courts recently published a *Call to Action* which provides twenty recommendations for consideration by states that elect some or all of their judges. Utah's judicial selection method is immune from most of these recommendations because Utah is the only state that uses a merit-based appointment process as the sole method for selecting all of its judges.

Utah's Judicial Selection Process is Unique

The citizens of Utah are fortunate to have judges who are selected by merit, without partisan political considerations. As discussed below, Utah's merit-based selection process is comprised of four interdependent components. Those familiar with Utah jurists acknowledge that our unique approach to judicial selection is the primary reason Utah is able to attract and retain so many well-qualified judges.

Like any governmental system, however, an occasional review can generally serve a legitimate purpose. Such was the recent case of the Utah Senate's examination of its role in the judicial selection process.

A. Utah's Merit Selection System

In 1985 Utah eliminated its contested elections for judges and adopted instead a merit-based judicial selection process comprised of four interdependent components: judicial nominating commissions, gubernatorial appointment, senate confirmation, and judicial retention elections. Utah's four-step merit selection process is designed to select highly qualified and skilled judges without regard to partisan political considerations.

Even among states that employ a merit selection process, Utah's is unique because it combines both senate confirmation and retention elections, something no other state does. Alaska, Colorado, Iowa, Nebraska, and Wyoming have merit selection systems remarkably similar to Utah's except none of these states provide for senate confirmation. Delaware, Hawaii, Maryland, and Vermont use nominating commissions, gubernatorial appointment, and senate confirmation; but none of these states provide for retention elections. Delaware and Hawaii allow the governor and the nominating commission to decide the issue of reappointment rather than a retention election. Maryland allows for partisan elections, and in Vermont retention is decided by its legislature.

In the past Utah's merit-based selection process has been most similar to Alaska, Colorado, Iowa, Nebraska, and Wyoming since these states have a

retention election and because the Utah Senate exercised its confirmation powers perfunctorily, presuming that each gubernatorial appointee was qualified for office and interviewing appointees only on rare occasions. While it is true that over the years individual members of the Senate Judicial Confirmation Committee attempted to review the credentials of some judicial appointees, the public nature of Utah's Open Meetings Act and the political consequences that would likely result from declining a judicial appointment served to douse the efforts of individual senators to bring a consistent and meaningful review of judicial appointees.

Although the focus of this discussion is senate confirmation in a merit-based selection process, it is important to remember that retention elections are a critical component of any merit selection process. From the Utah Legislature's perspective, the key to successful retention elections is an informed electorate. Some of the disagreements in Utah between the judiciary and the legislature involve the type and amount of information that is provided to the public prior to retention elections.

B. Utah's Senate Confirmation Procedures Criticized

After the removal of a district court judge for conduct that may have predated his appointment to judicial office, several senators expressed concern about how thorough the Utah Senate had been in confirming judicial appointments. With two pending vacancies on the Utah Supreme Court, the President of the Utah Senate asked the Office of Legislative Research and General Counsel to research the potential consequences of a more thorough senate confirmation process. The briefing paper resulting from that research outlined the likely consequences of the Utah Senate's options and explored the practices of the other states that provide for senate confirmation. Many of the points of that briefing paper are reiterated here.

C. Review of Senate Confirmation

The President of the Utah Senate decided that senate confirmation should serve as both a check on the governor's judicial appointment authority and provide a process for limited legislative input into the judicial

selection process. Senate confirmation is the final review a candidate receives prior to taking office; and as such, the Utah Senate began to view its confirmation powers as including the authority to reject an appointee.

Indeed, the Utah Senate discussed the possibility that enhanced confirmation procedures may in fact result in the denial of some appointments. This, in turn, could discourage qualified individuals from applying for future judicial positions. The Utah Senate was faced with a decision as to whether or not it could exercise its confirmation powers in a manner that would provide a useful review of the qualifications, background, and temperament of judicial candidates without producing a chilling effect on future potential applicants.

The Utah Senate reasoned that it should not neglect its confirmation process on the basis that someone might not apply for a future position because of its confirmation decisions. Yet, the Utah Senate acknowledged that inconsistent or arbitrary confirmation decisions could result in fewer qualified candidates seeking judicial office.

The Utah Senate decided that the optimal solution was to design a senate confirmation procedure that allowed it to scrutinize appointees in a manner that promoted public confidence without creating an unreasonable fear of unfair or politically motivated confirmation decisions. The only way for the Utah Senate to accomplish this objective was to enhance its procedures in a manner that even its critics would agree was consistent, objective, and fair.

1. Comparison with Senate Confirmation in Other States

A review of other state senate confirmation practices indicated that Utah's confirmation process relied on the least amount of information and was the most informal. Since 1985, when senate confirmation was first established in Utah, the senate had received only the appointee's resume. In most cases the resume was less than a page in length, including a brief employment history and a list of universities attended. The Utah Senate interviewed appointees only occasionally, whereas many other states placed a

judicial candidate under oath in a mandatory interview prior to a confirmation vote by the full senate.

2. Utah Senate Found Information Was Key

After reviewing the confirmation process in other states, the Utah Senate decided it wanted each judicial appointee to be interviewed under oath prior to the full senate confirmation vote. To facilitate the interview, the Utah Senate felt it needed more than the appointee's basic resume if it were to effectively evaluate the appointee's credentials.

To understand the breadth and depth of the governor's appointment decision, the Utah Senate felt it needed to have the same information that was before both the Judicial Nominating Commission and the governor. Additionally, the senate expressed an interest in any legal publications authored by a candidate and the written judicial opinions of a candidate who had previously held judicial office.

To facilitate access to the application materials and to change its senate confirmation committee procedures, the Legislature—in the 2003 general session—passed S.B. 165, "Governatorial Nominee Amendments," which detailed information the Utah Senate wanted to receive from the governor including:

- the appointee's complete file of application materials;
- reference letters;
- investigations into the character, ability, health, fitness, temperament, or experience of the appointee; and
- comments submitted by the public either in support or opposition to the candidate.

The governor vetoed this bill. The Utah Senate also passed Senate Resolution 6, "Senate Rules Resolution - Senate Confirmation Process," which required:

- an interview of each judicial candidate prior to a confirmation vote by the full senate;
- limited distribution and review of the application materials; and
- procedures for taking public testimony.

D. Most Recent Appointments to the Utah Supreme Court

During the 2003 Legislative General Session, before S.B. 165 passed, the governor appointed two new members to the Utah Supreme Court. One appointee was a federal prosecutor, and the other was the Presiding Judge of Utah's Third Judicial District. The newly reconstituted Senate Judicial Confirmation Committee received for the first time detailed information on each candidate which included the application materials, criminal background checks, credit reports, standardized reference letters, a writing sample, and dozens of letters from people who responded to a press release seeking public comment.

The committee staff was instructed to provide a summary of every judicial opinion written by the judge, and a search was conducted to obtain published articles written by the candidates. Staff was instructed to conduct a confidential interview with both state and federal judges as well as other respected professionals in the business and legal community who were in a position to evaluate the candidates.

All of the documents, along with summary information obtained from the confidential staff investigations, were classified as private documents under Utah's access to government records act. Under this classification the documents could be reviewed only by members of the senate confirmation committee. Other senators were denied access to the information; and some documents that were distributed to the committee contained only summary reports, void of any identifying information.

Shortly after the distribution of these materials the candidates were interviewed under oath in an open meeting. The interview started with an opening statement from the appointee which included an explanation of the appointee's motives for seeking judicial office.

Members of the Senate Judicial Confirmation Committee questioned each of the appointees on two occasions for a total of approximately three and a half hours on topics which included judicial philosophy, their individual approach to legal analysis, and judicial activism. One of the candidates had health concerns which the committee explored with the candidate's physician, and there were some questions regarding the candidates' legal opinions and published articles.

The interviews explored other issues deemed important by the committee including separation-of-powers doctrines, a legislative perception of a lack of judicial discipline for errant judges, and a lack of information in retention elections regarding judicial candidates, as well as administrative decisions made by the presiding judge.

Occasionally a question was asked that prompted the candidate to reference the Code of Judicial Conduct wherein a judicial candidate is prohibited from making pledges or promises of conduct in office other than the faithful, impartial, and diligent performance of judicial duties. Because the governor interviewed the candidates in private, some senators questioned whether the appointee was asked similar questions by the governor and, if so, whether the Code of Judicial Conduct was invoked during those interviews.

The interviews were long, but cordial and respectful. The appointees were exceptionally well prepared. Members of the Senate Judicial Confirmation Committee were also prepared. The committee's questions were difficult but fair. When the interview was completed, both the appointees and the senators were genuinely impressed with one another's diligent efforts to perform their respective constitutional roles.

Tension Between the Branches

Certainly a natural tension among the three branches of state government exists by design. For those with experience on the front lines of state government, these tensions can often become quite taut. What is most interesting about the Utah Senate's attempt to enhance its confirmation procedures is that the additional scrutiny of judicial candidates is actually serving to release tensions between the judiciary and the legislature through a measure of mutual respect.

As judicial candidates progress through Utah's confirmation process, there is opportunity for them to gain a better appreciation for the legislative perspective on issues of general interest to the legislature. Undoubtedly judicial candidates will come to a greater appreciation of the difficulty of answering tough questions under oath. Legislators are also in a position to gain a better understanding of the responsibilities of judges, the inherent ambiguities in the law, and the need for judicial interpretation which may help legislators become more understanding and less critical of the judiciary generally.

There is clearly room in Utah for both the legislative and judicial branches to grow in respect for each other's roles in the overall scheme of state government, and a more rigorous senate confirmation process may provide an opportunity to facilitate a greater understanding between the two branches.

But the inverse is also true. It is possible, for example, that a few bad experiences with the senate confirmation committee may cause the branches to drift further apart, damaging relationships and harming opportunities for mutual respect. This could easily happen if the public or the legal community perceives the Utah Senate denying confirmation for arbitrary or capricious reasons. It could also happen if the governor were perceived to overlook well-qualified candidates to appoint political allies or family friends. Moreover, the results would be similar if a judicial nominating commission declined to forward qualified candidates to the governor or selected a pool of candidates in such a manner that would be perceived to influence the governor's selection.

Over time honest differences of opinion will undoubtedly arise between the branches regarding the selection process. For a merit-based selection process to work most effectively the nominating commissions, the governor, and the Utah Senate must each resist the temptation to allow politics to enter into their selection decisions.

Since the Utah Senate decided to provide more scrutiny to judicial candidates the governor has been under greater pressure to select candidates that will withstand senate inquiry into their background, character, and general fitness for office. This situation has created

some additional tensions between the senate and the executive branch, but both the senate and the governor are attempting to work through the senate's increased interest in judicial appointments in a thoughtful manner.

Even after the governor vetoed S.B. 165, "Gubernatorial Nominee Amendments," because he felt those who comment to the governor about a candidate's potential weakness have the expectation that those comments will only be reviewed by the governor, the Utah Senate is interested in appointments made by the governor notwithstanding complaints about the candidates' character or abilities. The governor invited the legislature to work cooperatively toward the best choices for judicial vacancies and to respect his appointment process as he respects the senate's confirmation process. The Utah Senate accepted the governor's invitation and declined to override the veto.

Conclusion

It is important to the Utah Senate to strike the proper balance between the level of scrutiny and the potential

adverse consequence of intimidating otherwise qualified candidates from seeking future judicial office. The executive branch and the senate have the same goal: to make the best possible appointments to the state judiciary. Both the governor and the senate have a duty to the merit selection process. The executive's duty is to make judicial appointments in conjunction with the Judicial Nominating Commissions without partisan political considerations; and the senate's duty is to play a limited, although important, check on the executive and help determine the composition of the state judiciary by performing its senate confirmation process in a consistent and fair manner without partisan political considerations.

As each component of Utah's merit selection process focuses on its duty to the system, the people of Utah will continue to have their legal matters heard and resolved by bright, capable individuals who are serving as judges because of their personal desire for public service and their exceptional legal and professional abilities.

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