



MIDWEST

LOOKING BEYOND THE PANDEMIC

Midwestern Legislatures Address New Challenges

A webinar series hosted by the CSG Midwestern Legislative Conference

Checks & Balances in Times of Emergency: Legislative Oversight of Executive Actions

Thursday, June 25, 2020 | 10:00 – 11:00 a.m. CDT

MODERATOR

Representative Rick Hansen | Minnesota

PRESENTERS

Dr. Marjorie Sarbaugh-Thompson | Professor of Political Science | Wayne State University

Representative Bob Cupp | Former State Supreme Court Justice, Ohio

HOUSEKEEPING



This webinar is being recorded. The recording and presentation slides will be available this afternoon on the CSG Midwest website at www.csamidwest.org



To reduce noise on the phone line, all **participants will be in “listen-only” mode** during the presentations



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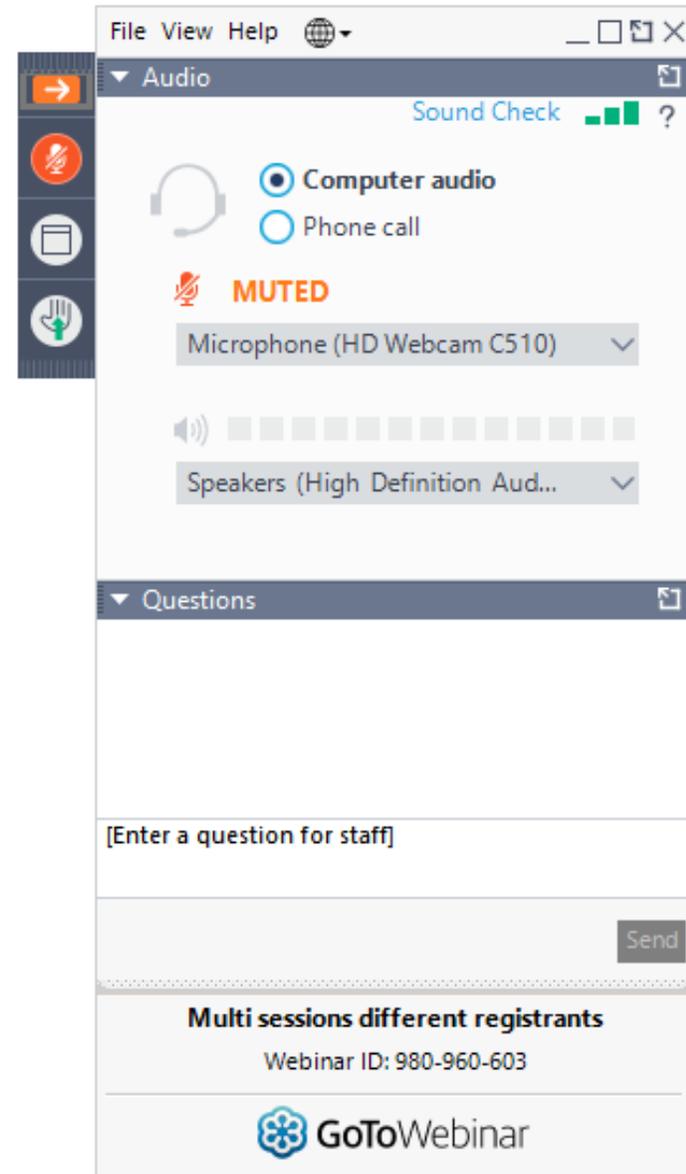


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MIDWESTERN LEGISLATIVE CONFERENCE



- **The Council of State Governments**
 - Only national organization that works with all three branches of state government
- **CSG Midwest and the Midwestern Legislative Conference**
 - Serves legislators in 11 Midwestern states and 4 Canadian provinces
 - Conducts policy research and publishes a monthly newsletter
 - Provides educational and networking opportunities through in-person and virtual events
 - Offers annual leadership training for new legislators

LOOKING BEYOND THE PANDEMIC WEBINAR SERIES

BACKGROUND & TOPICS

Six live, web-based teleconferences that explore new institutional, organizational and policy challenges that state and provincial lawmakers are dealing with as a result of the pandemic

1. Elections
2. Remote Legislative Sessions
- 3. Legislative Oversight**
4. Fiscal Impact of the Pandemic
5. Emergency Preparedness
6. Reopening the Economy

In addition to the live webinars, each session will be recorded and made available on the CSG Midwest website.

CHECKS & BALANCES IN TIMES OF EMERGENCY: LEGISLATIVE OVERSIGHT OF EXECUTIVE ACTIONS

MODERATOR



MIDWEST



Rep. Rick Hansen
Minnesota

LOOKING BEYOND THE PANDEMIC WEBINAR SERIES

CHECKS & BALANCES IN TIMES OF EMERGENCY: LEGISLATIVE OVERSIGHT OF EXECUTIVE ACTIONS

Today's webinar will include:

- Perspective on the push-and-pull between the state legislative and executive branches of government in our nation's system of checks and balances
- Recent developments in the Midwest
- A review of the institutional tools available for legislatures to oversee and check governors and the executive branch
- Notable examples of how some state legislatures use these institutional tools

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PRESENTERS



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DISCUSSION

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CHECKS & BALANCES IN TIMES OF EMERGENCY: LEGISLATIVE OVERSIGHT OF EXECUTIVE ACTIONS

Developments in the Midwest

- Examples of methods to curb state executive branch's emergency powers
 - Legislature given authority to pass a resolution rescinding governor's emergency order at any time
 - Several examples from region
 - Limit length of emergency order/declaration and establish role for legislative branch in extension of emergency order/declaration
 - Example: Minnesota
- Litigation
 - Example: Wisconsin Legislature wins in case challenging stay-at-home order of executive branch



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Developments in the Midwest

- Three examples of legislation passed this year
 - Minnesota's early actions creating a COVID-19 Minnesota Fund— and providing legislative oversight
 - Kansas' recently enacted HB 2016
 - Iowa's recently enacted HF 2486



Bipartisan, Solution-driven State Legislative Oversight of the Executive Branch

Based on Research by

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Professor of Political Science at Wayne State University

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with funding from

The Levin Center at Wayne Law

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WAYNE STATE
UNIVERSITY

Why Should We Study State Legislative Oversight?

- Fundamental part of checks and balances between branches of government
- Preserves public welfare, increases government efficiency and effectiveness
- Important now because states are delivering more and more services with pass through money from the federal government
- States are “laboratories of democracy” and can learn from each other’s practices and procedures.

Our Methods



- We wrote summaries for all 50 states:
 - Based on document searches
 - Chamber rules
 - State Constitution
 - Websites of Analytic Support Agencies
 - Number and type of reports produced
 - Auditor General – Elected, Appointed by Legislature, Independent?
 - What other staff resources does the state have (ex. Fiscal staff)?
 - Listened to Legislative Committee Hearings
 - For appropriations, standing, oversight & interim committees
 - Recordings, Minutes, and Transcripts of hearings
 - State media reports on scandals, crises, or problems
 - Follow-up phone interviews with staff, legislators, and some media sources

We Examined 6 Categories of Oversight

- Performance Audits:
 - These focus on service delivery and service quality rather than on financial audits.
- Committee Hearings:
 - Agency officials are called to testify; audit reports are discussed and examined by committee members.
- Budget and Appropriations:
 - Often through the appropriations committee with fiscal staff.
- Administrative Rule Review:
 - Most states have some procedure to provide feedback about the rules state agencies adopt to implement laws legislatures pass, but these procedures vary widely.
- Advice and Consent:
 - For example: How are gubernatorial appointees vetted?
- Oversight of State Contracts:
 - How well are the services performed and delivered?

Content of State Summaries

- **Describe the State**
 - Institutional Characteristics and Political Context
- **Describe the Analytic Support Agencies**
 - Number of reports, type of reports, budget, distribution of reports, number of staff, types of staff.
- **Appropriations Process and Oversight** – reports, hearings, testimony
- **Standing Committee Involvement in Oversight** – reports, hearings, testimony
- **Administrative Rules Review Process**
 - New and existing rules (sunset)
- **Advice and Consent**
 - Confirmation of gubernatorial appointments
 - Approval of government reorganization
 - Executive Orders Reviewed
 - Review of Government Contracts
- **Other Mechanisms of Oversight**
 - Sunset legislation or other



A Major Contribution of Our Report



- We list the best practices that we found in all the states for the various categories of state legislative oversight.
- We ranked the states' performance on the different categories of oversight.
 - Many states excel at some categories of oversight, but lag in their use of other oversight tools.
 - Therefore, it appears that states could learn from each others' best practices.
 - The two top performing states nationally are Nevada and Colorado.
 - In the Midwest region Minnesota, Ohio, and Illinois received high marks, ranking in the top 10 overall.

Legislators Need Performance Audits

- Some states do not have auditors who produce performance audits.
 - Performance audits are necessary, but not sufficient to produce high quality oversight.
 - Financial audits are valuable, but they do not help legislators oversee program performance.
- Nationally 25 states elect a state auditor.
 - Some elected auditors produced no performance audits (e.g. IN and SD) while others produced several (Ohio) in our study year.
- States that elect an auditor often have an additional legislative auditor to produce performance audits.
 - 13 of the states with an elected auditor also have a legislatively appointed auditor that produces performance audits (e.g., MN).
 - 22 states have only a legislatively appointed auditor (e.g. MI, KS, WI). These legislative auditors often produce financial as well as performance audits.

The Number of Performance Audits

- The average number of performance audits produced by auditors in the Midwest region states was **10 performance audits**.
- The range was 30 to 0.
- States with a legislative auditor tended to produce more performance audits.
- Michigan's Audit General's office produced 30 performance audits in 2017-18.
 - This is an independent agency that has the authority to initiate and prioritize its audit work. Its head is selected by the legislature and could be removed for cause by the legislature,

Performance audits are necessary, but not sufficient to produce high quality legislative oversight.

Best Practice: State Legislators and Auditors Need to Work Together

Legislators in states that do not have close ties with the performance auditors have a harder time monitoring the performance of state agencies.

- This might occur because they cannot request audits to discover what agencies are and are not doing.
- We found states with award-winning audit agencies (Michigan), where legislative committees rarely hold hearings on audit reports (only 3 hearings in one chamber and none in the other on 30 audit reports), and little or no legislation is introduced to address audit findings.

Best Practice

Encourage Legislative Action on Audits

- **Ways to increase the use of performance audits:**
 - Some states have laws or rules that require that each performance audit receives a legislative hearing. (Colorado and Washington State)
 - Some states create a report at the end of the legislative session explaining what actions the legislature took to resolve the problems identified in audit reports. (South Carolina and California)
 - Some part-time legislatures appoint an interim committee to follow up on problems identified in performance audits. (Montana and Nevada)

Citizen Oversight Initiatives

- Voters in Washington State passed a ballot initiative in 2005, I-900, that requires that:
 - the legislative auditor can independently initiate performance audits, and
 - the legislature must hold public hearings on each of these audits, and
 - audit information must be used during the appropriations process.
 - The legislature must report actions taken in response to audit findings.
 - These activities are funded by 0.16% of the existing state sales tax—a part of the initiative voters approved.
- The oversight committee is balanced by political party so that the minority party has a voice in oversight even during periods of one-party government.

Legislative Oversight Committees

Many states have a committee responsible for oversight. Some states with part-time legislatures use special interim committees to perform oversight—focus is on a specific service or problem.

- **Best Practice:**

- Thirteen states require equal party membership on these oversight committees. (In the Midwest region: Illinois, Indiana, Minnesota have some type of bipartisan oversight committee.)
 - This ensures that the minority party has a voice in oversight and reduces use of these committees as partisan political tools.
 - Balanced party membership also provides cover for members of the governor's party if criticizing the governor might be risky politically.

- **Best Practice:**

- Several states use joint chamber oversight committees.
 - These are more efficient because audit staff does not have to present the same information twice. (Minnesota and Wisconsin)
 - This also could produce partisan balance if the two chambers are not controlled by the same political party. (Minnesota currently)

Administrative Rule Review

- This is often complicated by legal constraints on the separation of powers. States vary widely on this, so we consider only general practices that would probably be legal anywhere.
 - Many states have a specific rule review committee with dedicated legal and professional staffs.
 - Most states focus on the cost of administrative rules, but often there are benefits to public health and welfare from rules. One best practice is to **consider benefits as well as costs of rules**—or the costs of not adopting the rule. (Minnesota)
 - **Bipartisan rule review committees** are valuable ways to keep the focus on the public welfare rather than just the cost of administrative rules. (Illinois and Indiana)

Other Best Practices

Best Practice:

- Some states provide the public with video recordings of oversight hearings including links to relevant documents. States can buy software that creates a transcript to accompany recordings of the hearings. (This is very common in the Midwest region: IN, MI, MN, OH, SD, WI)

Best Practice:

- Good analytic bureaucracies provide staff support to legislatures to ensure follow through on sunset rule review processes (OH).

Need to Monitor State Contracts

- We found several very troubling instances of terrible service delivery provided by private contractors in areas like foster care, juvenile detention, prison food services, and so on. We describe these as terrible because people died or were harmed.
 - Some state legislators expressed their concern about their lack of access to information needed to monitor these private contracts—not with respect to financial management, but about the quality of services delivered.
- A few state legislatures are developing systems to audit the performance of private contractors. (Idaho)
 - Some state legislatures are auditing the state agency to try to gather evidence about these contracts—an indirect method of oversight in an area in which no tools exist.

Sharing Ideas Across States

- We have just scratched the surface of the best practices in the states in this presentation.
 - We also hope that states will find it helpful to share information among themselves about what works best for them so that everyone can improve the delivery of public services.
 - We hope you will take a look at the information on the Levin Center website, especially the section in the final report on the full list of best practices.
- Full Text of Report
https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf
- Maps
<http://stateoversightmap.org/>

Oversight of Gubernatorial Action

- Some legislatures must proactively confirm gubernatorial appointees; in other states if no legislative action is taken, the appointee is confirmed by default.
 - We encourage legislatures to vet appointees even in one-party states.
- Recent gubernatorial executive orders to control the spread of COVID-19 raises questions about oversight of these actions.
 - Typically executive orders to evacuate when hurricanes or forest fires threaten public welfare are not subject to legislative debate and deliberation. Decisions to protect the state against explosive spread of this disease appear similar to these disaster responses.
 - Decisions to reopen states are more complicated. There is more time for debate and deliberation, and there is value in working with the legislature.
 - But, we support Senator Levin's commitment to "bipartisan, evidence-based, solution-driven oversight." Much of the legislative oversight with respect to reopening states and with respect to maintaining closures has occurred between a legislature and a governor's from opposing political party. This runs the risk of politicizing public health and does not meet the standard of "good" oversight.

Thank You

Thank you for listening and, possibly to some of you, thank you for helping us with information about your state.

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RESOURCES



CSG Midwest

Power of Auditing, Committees Helps Check Executive Branch and Ensure Adequate Legislative Oversight” | June 2020 Edition of *Stateline Midwest*

- <https://www.csgmidwest.org/policyresearch/0620-leg-oversight.aspx>

Wayne State University

“Checks and Balances in Action: Legislative Oversight Across the States”

- https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf
- <http://stateoversightmap.org/>

For further information or research assistance, contact Tim Anderson at CSG Midwest: tanderson@csg.org

LOOKING BEYOND THE PANDEMIC WEBINAR SERIES

Thank you for joining us today!

Future Webinars:

- The Pandemic's Impact on Midwestern State & Provincial Budgets
July 9 | 10:00 a.m. CDT
- Lessons Learned: Preparing for the Next Public Emergency
July 16 | 10:00 a.m. CDT
- Back to Business: Assessing Economic Reopening Strategies
July 23 | 10:00 a.m. CDT

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