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State Legislative Oversight: **Alabama**



Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	Minimal
Oversight through the Appropriations Process:	Limited
Oversight through Committees:	Limited
Oversight through Administrative Rule Review:	Limited
Oversight through Advice and Consent:	Minimal
Oversight through Monitoring Contracts:	Moderate
Judgment of Overall Institutional Capacity for Oversight:	Moderate
Judgment of Overall Use of Institutional Capacity for Oversight:	Moderate

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Legislative Oversight in Alabama

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Summary Assessment

At first glance, Alabama would seem to possess a reasonably useful set of tools for oversight, particularly with respect to financial oversight. However, these tools are not always used effectively. There are no performance audits and little performance measurement. More staff resources are needed for the legislature to effectively oversee the work of state agencies. And even the current powers of the legislature, such as administrative rule review, are hamstrung by the lack of staff.

Major Strengths

Alabama's legislature has a formal role in monitoring state contracts, which is more than most state legislatures have. These powers are somewhat limited and may be used only intermittently. But there is evidence of some oversight of the fiscal side of state contracts. Alabama's comprehensive sunset laws mean that agencies are at least routinely reviewed. The administrative rule review process also gives the legislature a fair degree of power over agency promulgation of rules. In both cases, however, limited staff resources increase the likelihood that reviews are cursory. The legislature is to be commended for creating a committee to review gubernatorial nominees, but here again the power does not appear to be used extensively.

Challenges

The oversight process in Alabama is beset by several issues. Ongoing efforts to defund or undermine the analytic bureaucracy, the lack of performance auditing, the power of special interests like sheriffs to prevent the adoption of necessary legislation, and the severe lack of discretion afforded to legislators vis-à-vis the budget and appropriations all hamper the exercise of effective oversight in Alabama. The need for more staff to aid with rule review is clear given the volume of rules being promulgated. In addition, the lack of minutes, audio tapes, or video increases the uncertainty surrounding oversight in Alabama legislative committees.

Relevant Institutional Characteristics

The National Conference of State Legislatures¹⁷ classifies Alabama's legislature as a hybrid, meaning that the job of legislator takes more than two-thirds the time of a full time job but the pay typically requires secondary employment. Alabama legislators receive compensation equal to Alabama's median annual household income, which is currently \$44,765. A 2012 law that ties legislators' pay to the state's median income resulted from a backlash in 2007 against the legislature's controversial decision to increase its own compensation by 61% and establish a system of automatic annual raises (Associated Press, 2014; Chandler, 2012). Previously, "the state reported a trivial per diem—US\$10 per day—that was generously supplemented through various mechanisms and the resulting larger sum that members actually pocketed was not captured by the professionalization measure" (Squire, 2017). Legislators no longer receive a set per diem but are reimbursed "per diem in accordance with rates and procedures applicable to state employees"¹⁸(NCSL, 2017). At least in part because of these changes, Squire now ranks Alabama's legislature as 34th in the country in terms of professionalism; previously it had been ranked at 45th (Squire, 2017). The legislature has 408 staff members, 349 of which are permanent.¹⁹ There are no limits on the number of terms, consecutive or otherwise, a legislator may hold. Alabama's legislative session is defined by statute. There are 30 legislative days that must take place within a 105 calendar-day period.²⁰ (NCSL, 2010). The governor is empowered to call the legislature into special sessions (Haider-Markel, 2009), but these special sessions are limited to 12 days in a 30-day period. Moreover, only legislators germane to the topics specified by the governor in his (her) call for the special session may be passed with a simple majority vote. Other topics require a 2/3rd majority to pass.²¹

In many states, a weak legislature is paired with a strong governor. But Alabama's governor is not especially strong. Ferguson (2013) ranks Alabama's governor as 22nd in the nation with respect to gubernatorial powers. The governor has line-item veto power, but the legislature can overturn this veto with a simple majority vote in both houses. Moreover, the executive branch is not especially unified: the governor, the lieutenant governor, and eighteen other executive positions are all elected separately. According to Haider-Markel (2009), "[t]his system of multiple elected officials, all of whom have some claim to an electoral mandate, is seen as part of a system of essential checks and balances." Yet according to Ferguson (2013), Alabama's governor has substantial control over the political party. So the one-party tendency of southern state politics (Heard, 1949) appears to contribute to the governor's power in ways that institutions and legal prerogatives do not.

An above average percentage of Alabama's population, 13.2%, is employed in the state or local government, with a disproportionate share of that number, 6.7%, in the education sector. By contrast, the public safety, social services, and other sectors each account for less than 2%,

¹⁷ <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>, accessed 7/20/18.

¹⁸ <http://www.ncsl.org/research/about-state-legislatures/2017-legislator-compensation-information.aspx>, accessed 7/20/18.

¹⁹ <http://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>, accessed 7/20/18.

²⁰ <http://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx>, accessed 7/20/18.

²¹ <http://www.legislature.state.al.us/aliswww/default.aspx>, accessed 9/4/18.

while 2.6% are engaged in the welfare sector (Edwards, 2006).

Political Context

Despite having a political culture that is characterized by “a high concentration of conservative, evangelical Christians, who have played an increasing role in shaping public debates and policymaking” (Haider-Markel, 2009), over the past 50 years, Democrats in Alabama controlled both its house and senate until 2012, when Republicans took control of both chambers (NCSL, 2017). The two major parties alternated control of the governor’s office until 2003. Republicans have dominated the governor’s seat since that time (NGA, 2017).²² Currently, the Alabama House is not especially polarized, ranked at 29th. According to Haider-Markel (2009), “[m]ost voters tend to ‘vote the candidate’ not the party, so clear lines between the parties are not always evident, particularly given the conservative bent of many of the state’s Democrats and the roles that interest groups play.” This is probably contributes to the low level of polarization in the Alabama House. The senate, on the other hand, is the 16th most polarized upper chamber in the nation (Shor & McCarty, 2015).

Dimensions of Oversight

Oversight Through Analytic Bureaucracies

Alabama has multiple analytic bureaucracies, each of which is described below. These include the Department of Examiners of Public Accounts (created in 1947), the Legislative Services Agency (reorganized in 2017 to combine three other legislative support activities), and state auditor, who is directly elected and does not answer to either the legislature or the governor. All of these bureaucracies indicate that they do extensive fiscal auditing. There is no indication on any of these three state government websites of performance audits.

The Department of Examiners of Public Accounts (DEPA), created in 1947, is managed and directed by a chief examiner. It derives its authority from the Code of Alabama S. 41-5.²³ The Legislative Committee on Public Accounts²⁴ (LCPA) appoints the chief examiner to a seven-year term. The LCPA, a 12-member legislative committee comprised of five house members, five senators, the lieutenant governor, who serves as chair of the committee, and the speaker of the house, who serves as vice chair. The LCPA directs DEPA’s activities.²⁵ The LCPA meets annually, for no more than 10 days, “for the purpose of receiving the report and recommendations of the chief examiner. The chief examiner shall attend such meetings and give such evidence, make such reports and perform such duties as the committee may direct” (Code

²² <https://classic.nga.org/cms/FormerGovBios>, accessed 7/20/18.

²³ <https://law.justia.com/codes/alabama/2015/title-41/chapter-5/>, accessed 7/20/18.

²⁴

http://www.legislature.state.al.us/aliswww/ISD/JointIntCommResults.aspx?OID_COMM=2900&COMMITTEE=Legislative%20Committee%20On%20Public%20Accounts, accessed 7/20/18.

²⁵ <http://www.examiners.state.al.us/about.aspx>, accessed 7/20/18.

of Alabama S. 41-5-19).²⁶ According to an employee of the Alabama State House, transcripts and minutes from committee meetings, including those of the LCPA are not made publicly available online. Similarly, there are no publicly available archived recordings of committee hearings. This makes it difficult to assess how the chief examiner's reports and testimony are used.

DEPA's state appropriation was around \$13 million in 2015 (NASACT, 2015),²⁷ and the Department consists of a number of different divisions, including a Legal Division and divisions tasked with operational, state, education, and county audits.²⁸ Although by some estimates DEPA employs approximately 170 people (Coker, 2015), that excludes 19 support staff, bringing the NASACT reported staff size to 189 positions in 2015 (NASACT, 2015).

DEPA is empowered to perform financial and legal compliance audits, not only of public agencies, but also of private entities that contract with the Alabama State Government.²⁹ Although the majority of its work appears to focus on financial reports, DEPA also conducts operational audits, which "are not normally comprehensive, but focus on particular aspects of operations." Additionally, DEPA conducts sunset reviews.

In 2017, DEPA produced approximately 480 audit reports on variety of state and local agencies.³⁰ Some of these audits "go beyond . . . traditional audits and address economy, efficiency and effectiveness of operations." According to a representative from DEPA, operational audits consist of legal review and sunset audits. However, DEPA does not conduct performance audits according to "yellow book" standards, and there is no other auditing agency in Alabama that conducts performance audits. Looking at the posted audits for 2018 reveals that in the first eight months of the year under the category of state audits, DEPA produced 54 audits. None of these state audits examine a state agency. With the exception of one—the state's single audit—all of these 54 state audits examine county entities, special districts, hospital associations, probate courts for a county, universities, and similar entities that are local, regional or specialized. We found no audits of state agencies in 2018.

A lack of comprehensive audits has generated frustration among private citizens in the state, as evidenced by an open letter from a large law firm about the need to create an oversight board. Referring to a DEPA audit of Alabama's Department of Revenue, the authors of the letter note that "[t]he report only consisted of five pages, three of which merely explained that the department has a commissioner appointed by the governor . . ." The letter goes on to point out that the audit did not discuss the department's capacity to adequately collect revenues.³¹

DEPA does provide a check on the financial accuracy of various state-funded entities and local entities, and its reports are publicized through local news outlets. For example the Montgomery Advertiser ran a story about a scathing DEPA report about Alabama State University. The report noted several problems at the institution, including contract and travel expense irregularities, and misuse of resources by the university's president (Moon, 2015).

Despite its ability to detect financial problems, DEPA has been described as "weak" and "subject to the whims of politicians, hamstrung by the threat of a bullying legislature" (Archibald, 2013). In recent years, DEPA has faced attacks on its autonomy. In 2013, SB122,

²⁶ <https://codes.findlaw.com/al/title-41-state-government/al-code-sect-41-5-19.html>, accessed 7/20/18.

²⁷ <http://budget.alabama.gov/wp-content/uploads/sites/9/2018/01/BudDoc20192.pdf>, accessed 7/20/18.

²⁸ <http://www.archives.alabama.gov/officials/rdas/examinerpublicaccount-new.pdf>, accessed 7/20/18.

²⁹ <http://www.examiners.state.al.us/about.aspx>, accessed 7/20/18.

³⁰ https://examiners.alabama.gov/audit_reports.aspx, accessed 7/20/18.

³¹ <http://www.gtandslaw.com/wp-content/uploads/2014/05/Who-Is-Auditing-the-Department-of-Revenue.pdf>, accessed 7/20/18.

2013 proposed making three changes to DEPA's governance:³² 1) placing DEPAs under two legislators rather than 12 representatives, 2) removing state auditors from the merit system, and 3) abolishing the LCPA (Archibald, 2013; Britt, 2013). While that bill failed, attempts to undermine DEPA continued. In 2015, Alabama State Auditor Jim Zeigler advocated defunding DEPA in order to cut expenditures (Coker, 2015).

The comptroller, who is appointed by the director of the Department of Finance, produces the Comprehensive Annual Financial Review (CAFR). DEPA reviews the CAFR. DEPA has sometimes identified issues with these comptroller-produced reports. For example, in 2016, Chief Examiner Ronald Jones sent a letter to the governor, Alabama's acting finance director, the state comptroller, and the comptroller's director of financial reporting indicating that ongoing problems with the State of Alabama Accounting and Resource System (STAARS) were delaying the implementation of the Statewide Single Audit (Britt, 2016b; Jones, 2016). As controversy over the system heated up, Alabama's Acting Finance Director Bill Newton was criticized for "order[ing] agency heads to threaten State personnel not to speak to the media, and report any contact with the media to him immediately, or else" (Britt, 2016b). Despite DEPA's warnings, "inadequacies" in the implementation of the STAARS system ultimately meant that the State of Alabama was not able to issue its CAFR by the March 31, 2016 deadline (Jones, 2017).³³ This failure demonstrates the limits of DEPA's oversight power—it lacks a mechanism to enforce compliance with its recommendations and findings.

Some legislators have also begun to question the degree to which DEPA reports are being effectively utilized. Requests for information about particular audits are made by committees, but this only happens occasionally (interview notes, 2018). Another source maintained that DEPA was "under-utilized," and noted that there has been recent legislation³⁴ intended to "beef up" and "revamp" the organization (interview notes, 2018). This proposed restructuring would give the chief examiner new powers to conduct investigations and an "expanded reach" to audit any entity that takes state money. Another source claimed that the proposed changes increase penalties for failing to provide information to DEPA when requested, but do nothing to substantially enhance the agency's powers (interview notes, 2018).

Alabama also has a Legislative Services Agency (LSA), created in October 2017.³⁵ The LSA replaced and combined the Legislative Reference Service, the Legislative Fiscal Office, and the Alabama Law Institute. The latter worked "to clarify and simplify the laws of Alabama, to revise laws that are out-of-date and to fill in gaps in the law where there exists legal confusion."³⁶ The LSA inherited all the powers of these former entities. Currently, the LSA consists of the Fiscal Division, the Law Revision Division, and the Legal Division. Together, they provide non-partisan professional advice to the Alabama Legislature. The director of the LSA is appointed by the Legislative Council, and the heads of each division are appointed by the Director (Act 2017-214 SB4).

The Fiscal Division analyzes budget, tax, and revenue proposals issued by the executive branch, provides fiscal information to various legislative committees regarding revenues, expenditures, financial forecasts, and estimates on the costs of particular bills. Additionally the Fiscal Division produces annual reports on state tax expenditures and publishes the *Legislator's*

³² <https://legiscan.com/AL/text/SB122/2013>, accessed 7/20/18.

³³ <http://www.alreporter.com/media/2016/05/Ron-Johnson-letter-5.4.16.png>, accessed 7/20/18.

³⁴ <http://arc-sos.state.al.us/PAC/SOSACPDF.001/A0012400.PDF>, accessed 7/20/18.

³⁵ <http://lsa.state.al.us/>, accessed 7/20/18.

³⁶ <http://lsa.alabama.gov/ALI/Purpose.aspx>, accessed 7/20/18.

Guide to Alabama Taxes, which explains “the most basic information about Alabama’s taxes and revenues.”³⁷ The Fiscal Division has the authority “to request and receive from the Department of Revenue or any other state or local agency or official any information necessary” to complete its annual report, which is presented to the legislature.³⁸ Furthermore, recently passed legislation mandates performance-based budgeting for several state agencies, under the direction of the Fiscal Division of the LSA.³⁹

Finally, Alabama also has a state auditor, which is an elected position that does not answer directly to the legislature or to the governor. The state auditor’s duties include producing an annual report for the governor “showing the audited receipts and disbursements of the government for the last fiscal year as shown by the records and documents in the office of the Department of Finance. These duties are mandated by the constitution. As part of this mandate, the state auditor audits the Department of Finance. The state auditor’s report shall also include the results of his audit of all taxes and revenues collected and paid into the Treasury and shall give the results of all other audits”⁴⁰ (Code of Alabama S 36-16-1). The emphasis for the state auditor’s reports is financial compliance.

Even though none of Alabama’s analytic bureaucracies produce performance audits, financial audits contribute to legislative efforts to oversee state government entities. For example DEPA provided the legislature with information about a policy allowing sheriffs to keep unspent state funds appropriated for feeding prisoners in county jails. The sheriffs were making money by consistently spending less than was budgeted and pocketing the remainder (Reeves, 2008). The legislature failed to end this practice despite trying to in 2009. During the debate on the bill (HB559) “[t]he state’s sheriffs’ ‘flooded’ committee rooms” and the bill was indefinitely postponed. The bill’s sponsor described this experience as getting “run over” by the opposition (Clines, 2017). Recently, the issue returned to the spotlight after revelations that one sheriff invested tens of thousands of dollars he had “saved” on prisoners’ food into a used car lot (Clines, 2017). A judge ordered that the prisoners’ food improve (Elliott, 2017). Responding to public controversy over the “Depression-era practice” (Opelika-Auburn News, 2018), Alabama’s governor issued a directive to the comptroller “that payments of certain funds related to jail food ‘no longer be made to the sheriffs personally.’ Instead . . . the money must be paid to county general funds or official accounts” (Blinder, 2018). Even though the legislature failed to eliminate this use of state funds, its efforts contributed to public outcry over this policy, and DEPA’s information triggered legislative interest and other efforts. Rather than an adversarial relationship between the legislative and executive branches, the governor aided legislative efforts to restrict the sheriffs’ behavior.

Oversight Through the Appropriations Process

Alabama has a large permanent joint committee that holds budget hearings and assesses Alabama’s fiscal health.⁴¹ Called the Finances and Budget Committee, its membership consists of the lieutenant governor, all members of Senate Committee on Finance and Taxation, all

³⁷ http://lsa.alabama.gov/PDF/LFO/TaxGuide/2016_Tax_Guide.pdf, accessed 7/20/18.

³⁸ <https://codes.findlaw.com/al/title-29-legislature/al-code-sect-29-5a-46.html>, accessed 7/20/18.

³⁹ <https://legiscan.com/AL/bill/SJR77/2018>, accessed 7/20/18.

⁴⁰ <https://codes.findlaw.com/al/title-36-public-officers-and-employees/al-code-sect-36-16-1.html>, accessed 7/23/18.

⁴¹ <https://codes.findlaw.com/al/title-29-legislature/al-code-sect-29-2-80.html>, accessed 7/24/18.

members of the House Ways and Means Committees, plus other senators chosen by the lieutenant governor and other representatives chosen by the house speaker. The only limit on the size of this committee is that it cannot include more than 36 house members (Alabama code sections 29-2-80 and 29-2-81).

One of the ways legislators try to exert control over the budget process is to pass the budget as late as possible in the legislative session. This is a strategy to avoid gubernatorial vetoes. While Alabama's governor can veto line items in the budget, this power can only be used when there are more than five days left in the legislative session (Haider-Markel, 2009).

Despite this maneuver the legislature has a very small role in allocating state money because so much of the state's budget is earmarked. In 2017 93% of Alabama's tax revenue was earmarked for specific purposes, as opposed to an average of about 25% in other states (Alabama Policy Institute, 2017).⁴² Ultimately, the "rigidity" built into the system "means that much of the state's spending is done by default or 'autopilot,' and in some cases, without a high degree of scrutiny or performance indicators for the offices or agencies receiving the funds" (Robertson, 2014).⁴³ Lawmakers are, therefore, often "largely unfamiliar with—except in a very broad sense—how most tax dollars are being spent."⁴⁴

Earmarking does not appear to have been part of a deliberate attempt to hamstring lawmakers. Rather, according to one lawmaker, "whenever a new tax was approved, its proceeds were earmarked for one specific purpose or another. Some of these earmarks are constitutional, which means the voters . . . dedicated the taxes to an agency, initiative, or spotlighted need during referendum elections" (Ainsworth, 2015). Despite the constraints of these earmarks, legislators are responsible for "ensur[ing] that funds are properly spent" (interview notes, 2018).

It is unclear how rigorously legislators pursue misuse of funds even though hearings are held and testimony taken. For example, state media reports that "[e]very year, a joint legislative conference grills agency heads about their budget, but it's mostly for show. During the last joint budget oversight committee hearing, Acting Finance Director Bill Newton was aggressively questioned about the failed STAARS system. However, he was allowed to dance around the subject by offering a vague mea culpa" (Britt, 2016a). The outcome of these hearings was negligible: "Gov. Robert Bentley looked the other way while lawmakers appeared satisfied by his promises that, all will be well" (Britt, 2016a).

In an effort to improve its capacity to monitor the use of state funds, the Alabama House in 2017 created the Fiscal Responsibility Committee⁴⁵ that "will focus on combating waste and abuse of taxpayer dollars." According to an interviewee, the creation of this committee represents a step towards a more "performance-based" budget process in Alabama, which the state otherwise lacks. The interviewee noted, however, that the committee is still fairly new and has not yet gotten "up to speed" in its activities (interview notes, 2018). The creation of this new committee does, however, suggest that legislators are serious about their responsibility to oversee appropriate use of state funds.

⁴² <https://www.alabamapolicy.org/wp-content/uploads/2017/11/GTI-EARMARKS.pdf>, accessed 7/13/18.

⁴³ <https://www.alabamapolicy.org/2014/09/20/budget-basics-legislatures-limitations-need-reform/>, accessed 7/23/18.

⁴⁴ <https://www.alabamapolicy.org/wp-content/uploads/2017/11/GTI-EARMARKS.pdf>, accessed 7/23/18.

⁴⁵

http://www.legislature.state.al.us/aliswww/ISD/HseCommittee.aspx?OID_ORGANIZATION=3215&COMMITTEE=Fiscal%20Responsibility, accessed 7/31/18.

Oversight Through Committees

Since no performance audits are conducted in Alabama, interested committee members rely on the LSA, in particular its Fiscal Division, to investigate financial issues arising in executive branch agencies. If and when issues are uncovered, they are raised with the agencies, but the legislature has no real recourse to address such problems apart from attempting to pass legislation, which can be difficult to do.

The structure of Alabama's committee system places the Legislative Council, which is composed of members from both legislative chambers, in a gatekeeper role. This is the same Legislative Council that appoints the director of the Legislative Services Agency (LSA). The Legislative Council approves budget requests, provides accounting services, and deals with purchasing, among other things.⁴⁶ (Code of Alabama S. 29-6). It also reviews administrative rules and develops policy proposals for consideration by the full legislature. Importantly for oversight, the Legislative Council is responsible for determining whether state and local governments are operating effectively.

In addition to its other duties, the Legislative Council also oversees the legislature's joint interim committees. Currently there are 41 interim committees listed on the legislature's webpage. These range from the Alabama Oil and Gas Study Committee to the Joint Interim Committee on County Government to the New National Veterans Cemetery Joint Legislative Committee. In other words, the range of topics covered by these committees varies from specific industries to general government to highly specific government activities. Descriptions for each committee refer to specific statutes, the Alabama Code, or other sources of authority authorizing these committees. Some committees include legislators and non-legislators. In the case of the Alabama Oil and Gas Study Committee, for example, non-legislative members are chosen by legislative leaders from the Alabama-Mississippi Division of the Mid Continent Oil and Gas Association, "resident[s] of an oil and gas producing county knowledgeable in the oil and gas field," and the Alabama Petroleum Council.⁴⁷

In addition to these joint interim committees, Alabama's legislature has numerous permanent standing committees—34 in the house and 21 in senate. Standing committees, except those dealing with local legislation, are designated as interim committees when the legislature is not in session. This permits them to meet to consider matters requiring attention between sessions.

There are two committees specifically tasked with oversight responsibilities: 1) the permanent Joint Legislative Committee on Finances and Budget, discussed in the section on oversight through the appropriations process and 2) a Contract Review Oversight Committee discussed in more detail below in the section on Oversight through Monitoring State Contracts. The degree of effective oversight exercised by other committees is difficult to ascertain. Committee webpages merely list the committee members without links to meeting minutes or any information about the committee's jurisdiction. An interviewee confirmed that neither minutes nor transcripts are published online (interview notes, 2018).

According to an interviewee, some mechanisms exist to conduct oversight, but "the strength to analyze problems is equal to the strength of the chair," and many committees are largely ineffective (interview notes, 2018). If and when issues are uncovered, they are raised with the agencies, but the legislature has no power to alter agency behaviors or practices apart

⁴⁶ <https://law.justia.com/codes/alabama/2017/title-29/chapter-6/>, accessed 7/23/18.

⁴⁷ <http://www.legislature.state.al.us/alisWWW/ACTS/1986-753.pdf>, accessed 7/23/18.

from attempting to pass legislation. As described before, attempts to pass legislation are often stymied, even in the face of revelations that one sheriff was “essentially starving prisoners while keeping something like \$750,000 for himself” (interview notes, 2018). With such a small percentage of the budget (7%) that is discretionary, the power of the purse to motivate agency compliance is diluted in Alabama. The only other recourse available to legislators when malfeasance is uncovered is to refer the matter to the attorney general for possible prosecution.

Oversight through the Administrative Rules Process

Alabama’s Joint Committee on Administration Regulation Review (JCARR) can review proposed rules. The membership of JCARR is the Legislative Council—yet another way in which this committee dominates legislative processes in the state. Within 45 days of the promulgation of a rule, JCARR must notify the agency proposing the rule whether the rule has been approved or not. If no notice is given within 45 days, the rule is automatically approved⁴⁸ (Code of Alabama S. 41-22-23). The committee may also propose amendments to any rule and return it to the agency for reconsideration. If JCARR objects to a rule, an agency may appeal that decision to the lieutenant governor, who has 15 days to either sustain the objection or to approve the rule. If the lieutenant governor overrides JCARR and approves the rule, the legislature, if it still wants to block the rule, must adopt a joint resolution overruling the lieutenant governor. If the legislature fails to pass this joint resolution, the rule will take effect after the adjournment of the next regular legislative session.

JCARR has broad discretion in the rule review process (Schwartz, 2010), but it can only delay the rule. The full legislature must pass a resolution to reject a rule. JCARR’s assessment of administrative rules must be based on both the costs and benefits of having the rule compared to the costs and benefits of not having the rule. Specifically, the effect of the rule on public health, safety, and welfare, as well as the direct and indirect costs of the rule are factors that JCARR is legally required to consider. JCARR also determines whether less restrictive rules would be acceptable and whether the rule protects the public. Moreover, JCARR can choose any other criteria it considers to be appropriate.

JCARR recommends to the legislature whether the rule should be approved or rejected. But de facto, JCARR makes the determination because the legislature overwhelmingly defers to JCARR’s recommendation (Schwartz, 2010). In practice, JCARR lacks the time and resources to carefully review administrative rules. In the first three monthly meetings during 2018 (January, February, and March), there were a total of approximately 210 rules that were certified for adoption. This means that JCARR would need to review roughly 70 rules per month.⁴⁹ Given the long list of criteria and mandated reports and analyses, it would be difficult for JCARR to process this volume of material even if it did not have other responsibilities. But, as we noted above, JCARR’s members are also the Legislative Council membership, and that committee is the crucial gatekeeper for all other legislative committees. Schwartz (2010) reports that JCARR responds to public outcry about rules. Rules that trigger a strong public reaction are carefully considered and analyzed in public meetings. But for other rules, the review is cursory at best. Although fiscal notes are prepared, they are not publicly available. Most rules are adopted after the 45 day waiting period without public information about their analysis, and JCARR does not

⁴⁸ <https://codes.findlaw.com/al/title-41-state-government/al-code-sect-41-22-23.html>, accessed 7/24/18.

⁴⁹ <http://www.alabamaadministrativecode.state.al.us/monthly.html>, accessed 9/4/18.

document its reasons for rejecting a rule.

Oversight Through Advice and Consent

The Alabama Senate has the power to accept or reject gubernatorial appointments. All nominations and appointments must be “referred to, and be reported from the Committee on Confirmations before consideration by the entire senate. A rejection by the Committee on Confirmations of any nomination or appointment shall be considered a rejection by the entire senate” (Senate General Rule of Order and Procedure).⁵⁰ Alabama voters directly elect 18 cabinet-level positions that would be appointed by the governor in many other states. So, gubernatorial appointment powers are “checked” by the electorate rather than the legislature for most state agency directors. Furthermore, while the senate does have the power to reject gubernatorial nominees, in practice this almost never happens (interview notes, 2018).

Historically, Alabama’s governor has used the power to issue executive orders with some frequency. Since coming to office in 2017, current Governor Kate Ivey has issued 13 such orders⁵¹ (Office of the Governor, 2018). Her predecessor, Robert Bentley, issued 79 executive orders between 2011 and 2017⁵² (Alabama Department of Archives & History, 2018). The legislature has no ability to block executive orders (interview notes, 2018). Many of these orders are not controversial and are time sensitive. For example, Gov. Ivey issued an order in September 2018 about the imminent landfall of Tropical Storm Gordon.

One area where the legislature can exercise oversight is in agency reorganization. While executive orders have typically provided the impetus for such initiatives, the legislature must act to create or reorganize agencies⁵³ (Alabama Department of Archives and History, 2018). For example, Gov. Ivey’s third executive order, Executive Order No. 705 posted on July 12, 2017, dissolved all committees, commissions, councils, task forces, and other such entities that had been established through executive order by her predecessor. The legislature could, if it chose, pass legislation reconstituting some of these entities.

Oversight Through Monitoring State Contracts

One of Alabama’s joint standing committees is the Contract Review Oversight Committee, which meets at least once a month. Its eight members include four legislators from each chamber. These members are the chair of the Senate Finance and Taxation General Fund Committee, the chair of the House Ways and Means General Fund Committee, the chairs of the House and Senate Judiciary Committees, both the speaker and the speaker pro tempore of the house (or their designees), the president pro tempore of the senate (or a designee), and the lieutenant governor (or a designee). According to Section 29-2-41 the Alabama State Code, this committee “shall have the responsibility of reviewing contracts for personal or professional

⁵⁰ http://www.legislature.state.al.us/aliswww/ISD/Senate/Rules_General.aspx, accessed 7/24/18.

⁵¹ <https://governor.alabama.gov/newsroom/executive-orders/>, accessed 7/24/18.

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<http://digital.archives.alabama.gov/cdm/search/collection/executive/field/creato/searchterm/Bentley,%20Robert%20J.,%201943-/mode/exact>, accessed 7/24/18.

⁵³ <http://www.archives.alabama.gov/reorganization/index.html>, accessed 7/24/18.

services with private entities or individuals to be paid out of appropriated funds, federal or state, on a state warrant issued as recompense for those services. Each state department entering into a contract to be paid out of appropriated funds, federal or state, on a state warrant which is notified by the committee is required to submit to the committee any proposed contract for personal or professional services.”⁵⁴ The committee “reviews and comments” upon proposals within 45 days, and “[a]ny contract made by the state or any of its agencies or departments in violation of this section and without prior review by the committee of either the contract or the letter of intent to contract shall be void ab initio. If the committee fails to review and comment upon any contract or letter of intent to contract within the aforementioned 45-day time period, such contract shall be deemed to have been reviewed in compliance with this section.” The committee, however, only has the power to review and comment upon contracts. DEPA is also involved in the auditing of state contracts to ensure fiscal responsibility (interview notes, 2018).

The Alabama Legislature’s website prominently features a contract review agenda, which appears to be quite detailed. However, the degree of actual oversight is unclear. The \$41 million STAARS system, described earlier, was adopted in a no-bid process, and “not only caused a meltdown in the State’s ability to pay its bills in a timely fashion, or properly process inter-agency payments, leaving hundreds of millions of dollars in a software limbo.” However, the STAARS contract was never submitted to the Contract Review Oversight Committee before being implemented, calling into question how effective the committee’s oversight actually is (Moon, 2017). Ultimately, the state auditor was forced to file suit against the governor, alleging “the massive no-bid contract violates Alabama’s bid laws and the software does not work” (Moseley, 2016).

More recently, in March of 2018, the Contract Review Committee delayed a contract with Wexford Health Sources worth \$130 million per year to provide medical and mental health services to 20,000 Alabama prison inmates. The committee chair expressed concerns about a scandal in Mississippi involving Wexford and also Wexford’s use of a former Mississippi state legislator, Cecil McCrory, as a lobbyist. McCrory pled guilty to bribery charges in Mississippi. Although the committee cannot terminate the contract, it can delay it for 45 days, at which time Gov. Ivey will make the final decision (Lyman, 2018). This recent delay of the Wexford contract suggests that within the limits of its power, Alabama’s legislature is exercising oversight over state contracts. Its formal powers in this area are stronger than those possessed by many other state legislatures.

Oversight Through Automatic Oversight Mechanisms

Alabama has comprehensive sunset laws. DEPA has a Sunset Committee, which consists of seven members, drawn from the house and the senate. The Sunset Committee reviews the operations of state agencies scheduled for review and recommends that the agency either continues (with or without modifications) or is terminated. The agencies that are reviewed are specified in the Code of Alabama (S. 41-20-3)⁵⁵ and are reviewed every four years. The sunset of licensing boards and other enumerated agencies are reviewed according to specific timetables. Once DEPA has conducted its evaluation, the matter is referred to the appropriate standing committee. If a program is slated for termination, it ceases operation as specified in the specific

⁵⁴ <https://law.justia.com/codes/alabama/2017/title-29/chapter-2/article-3/>, accessed 7/24/18.

⁵⁵ <https://law.justia.com/codes/alabama/2017/title-41/chapter-20/section-41-20-3/>, accessed 7/24/18.

sunset clause for no later than October 1 of the following year. Interviewees indicate that the October 1 deadline is usually adhered to, though legislators can introduce bills to sunset a program early if there are concerns that the deadline might not be met (interview notes, 2017). In practice, however, agency sunsetting happens very infrequently – only two or three times in the past ten years, and only when a specific program has become outdated.

Administrative rules are also subject to sunset review. JCARR is “authorized to review and approve or disapprove any rule adopted prior to October 1, 1982.” Otherwise, existing rules must be reviewed by each agency within five years “to determine whether the rules should be continued without change, or should be amended or rescinded” (Code of Alabama S. 41-22-23).⁵⁶

Methods and Limitations

We interviewed nine people about legislative oversight in Alabama. Alabama does not provide audio or video archives of legislative committee hearings. Moreover minutes are not available online. This makes it difficult to accurately assess the quality of oversight exercised in Alabama.

⁵⁶ <https://codes.findlaw.com/al/title-41-state-government/al-code-sect-41-22-23.html>, accessed 7/24/18.

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