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State Legislative Oversight: **North Dakota**



Capacity and Usage Assessment

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

To read the full 50 state study or to discuss the North Dakota state report, please contact Benjamin.Eikey@wayne.edu.



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Legislative Oversight in North Dakota

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Summary Assessment

Legislative oversight in North Dakota is hampered by a short legislative session and few institutional resources to support oversight. Yet legislators in the state make good use of the tools they have and seek to expand their resources. The legislature has eagerly engaged in efforts to protect its limited budgetary powers from executive branch encroachment. It has created new audit divisions within the Office of the State Auditor (OSA), and it works collaboratively with that executive branch agency to improve state agency and executive branch performance. The powerful Administrative Rules Committee (ARC) engages in rules review and occasionally rejects rules. This is impressive for a state with a citizen legislature that meets for very short sessions.

Major Strengths

North Dakota has a limited but growing capacity to produce performance audits. These audits emphasize efficiency, and examples of audits transforming government are readily available. The Legislative Audit and Fiscal Review Committee (LAFRC) is an active committee that collaborates with the OSA. Committee minutes indicate that the legislature uses OSA reports to monitor state agency performance. North Dakota's separate University System Performance Audit Division provides tailored focus on oversight of the state's institutions of higher education. Finally, the legislature pays attention to planned agency reorganization by the executive branch and insists that it be informed and consulted.

Challenges

The limited 80-day sessions constrain the legislature's ability to oversee the executive branch. Institutionally, power substantially tilts to the governor, in particular his power to call or not call emergency sessions and his strategic use of veto. The legislature has very few

opportunities to engage in Advice and Consent. Capacity for performance auditing of anything other than the University System is limited with the OSA producing only an average of one performance audit per year. The pace of investigations, however, may be increasing. Unlike other states that have audit or investigative agencies firmly ensconced in the legislative branch, North Dakota's Legislative Assembly is dependent on its informal relationship with the semi-independent Office of State Auditor, whose statutory connection to the Assembly is weak. Depending on the political affiliation of legislative leaders and the state auditor, this informal alliance could be decoupled. In budget battles, the legislature is institutionally at a disadvantage with the governor, owing to an inability to unilaterally call an emergency session.

Relevant Institutional Characteristics

North Dakota is a state that pairs one of the more institutionally powerful governors with one of the least professional legislatures. The National Conference of State Legislatures (2017) classifies North Dakota's Legislatures in the "Gold" group defined as the most citizen legislature (part-time, low pay, small staff). This means that the job requires less than half that of a full-time job and the compensation is low enough to require additional employment. North Dakota is one of only four states that fit into NCSL's "Gold" category, which applies to states with the least professional legislatures. The base salary is \$177 per session day and monthly lodging expenses of no more than \$1,682 per month.¹⁷⁸⁰ There are 80 legislative days in a session and legislative sessions are held every odd year (NCSL 2010). So every other year, North Dakota's legislators can earn slightly more than \$14,000 if the session lasts the maximum number of days.

As of 2018, North Dakota's legislature was comprised of a Senate with 47 members and a House of Representatives with 94 members.¹⁷⁸¹ North Dakota is unique compared to other states in that the State Constitution allows for the legislature's membership to expand or contract after a census. Senatorial districts can range in number between 40-54 districts and the House of Representatives can range in number between 80-108 members.¹⁷⁸² For example, in 1999 there were 49 senators and 98 representatives.¹⁷⁸³ Unlike many other states, senators and representatives both serve 4 year terms without limits on re-eligibility.¹⁷⁸⁴ Finally, North Dakota has multi-member legislative districts. Each senatorial district is represented by 1 senator and 2 representatives.¹⁷⁸⁵ North Dakota staggers the election of all senators and representatives. In 2014 two representatives and one senator from all odd-numbered districts were up for re-election and in 2016 the corresponding legislators from even-numbered districts were up for election.¹⁷⁸⁶

The legislature has 122 staff members, 37 of which are permanent (NCLS 2015). There are no limits on the number of terms, consecutive or otherwise, a legislator may hold. North

¹⁷⁸⁰ https://ballotpedia.org/Comparison_of_state_legislative_salaries, accessed 7/15/18.

¹⁷⁸¹ https://ballotpedia.org/North_Dakota_Legislative_Assembly, accessed 12/1/18.

¹⁷⁸² <https://www.legis.nd.gov/assembly>, accessed 12/1/18.

¹⁷⁸³ <https://www.legis.nd.gov/assembly/56-1999>, accessed 12/1/18.

¹⁷⁸⁴ <https://www.legis.nd.gov/assembly/65-2017>, accessed 12/1/18.

¹⁷⁸⁵ https://ballotpedia.org/North_Dakota_Legislative_Assembly, accessed 12/1/18.

¹⁷⁸⁶ <https://www.legis.nd.gov/assembly/65-2017>, accessed 12/1/18.

Dakota's legislative session is defined by the state's constitution. The Squire ranking, which compares the state legislatures to the US Congress on a wide range of variables, provides a rank of 47th "most" professional legislature (Squire 2017).

North Dakota grants an above average amount of institutional power to its governors, according to Ferguson (2015), ranking as the 5th most powerful nationally. Notably, tenure potential and budget power received the highest possible score while party control was a step just below the highest. The governor has the line-item veto. The legislature needs a two-thirds vote to override a gubernatorial veto. In addition to the usual elected executive branch positions of Secretary of State and Attorney General, the voters in North Dakota elect many executive branch officials: Superintendent of Public Instruction, Commission of Insurance, State Auditor, Commissioner of Agriculture, State Tax Commissioner, and the Public Service Commission.¹⁷⁸⁷

Political Context

In the past 50 years, North Dakota has had either Republican control of both its House and Senate or split control—majority Republican in one chamber and Democratic control in the other—but never Democratic control (NCSL 2017). While split control was somewhat common in the 80s and early 90s, since 1995, North Dakota has had a Republican trifecta.¹⁷⁸⁸ Currently, the house and the senate are rated the 38th and 39th most polarized chambers in the country based on the ideological difference between the parties in each chamber (Shor and McCarty 2015). This is attributable to the fairly conservative ideological positions of Democratic caucus members in these chambers (among the five least liberal Democratic caucuses in the country), although the Republicans in both chambers are only moderately conservative (just a bit more conservative than the median state caucus).

Dimensions of Oversight

Oversight Through Analytic Bureaucracies

North Dakota has a separately elected State Auditor that is nominally independent of the legislature. The Office of the State Auditor (OSA) statutorily provides services to the legislature, although it is an independent unit in the executive branch.¹⁷⁸⁹ There are specific laws on the books that allow the legislature to direct the state auditor to carry out certain functions, for example NDCC 54-10-01 provides that the legislature determine necessary performance audits by the state auditor. In addition, there is a selection of studies and assignments from the Legislative Audit and Fiscal Review Committee (LAFRC) that directly affect the state auditor. A corresponding law (54-10-01) approves hiring by the state auditor of a consultant to assist with

¹⁷⁸⁷ https://ballotpedia.org/Governor_of_North_Dakota, accessed 12/29/18.

¹⁷⁸⁸ https://ballotpedia.org/Governor_of_North_Dakota, accessed 12/29/18.

¹⁷⁸⁹ <https://www.nd.gov/auditor/about-us>, accessed 7/11/18.

performance audits; determine the frequency of audits of state agencies. Additional legislation determines when the state auditor is to perform audits of political subdivisions (54-10-13) and orders the state auditor to audit the accounts of any political subdivisions (54-10-15).¹⁷⁹⁰ It would seem that while formally the state auditor is independent, in practice the legislature actually has a great deal of statutory authority to direct the state auditor's work. The OSA is a fairly well funded agency with a 2017-19 appropriation of \$12.9 million, an annual budget of \$6.45 million.¹⁷⁹¹ The website for the state auditor's office does not provide a staff list, and its directory has a single, general contact. The NASACT report (2015), *Auditing in the States*, for 2015 shows there are 51 positions in the North Dakota Office of the State Auditor (OSA).

There are four divisions within the OSA: Division of State Audit, Division of North Dakota University System Performance Audit, Division of Local Government Audit, and Division of Royalty Audit, which audits federal royalty payments for fossil fuel leases. The first two of these divisions are of interest to us here.¹⁷⁹²

The OSA works closely with the Legislative Audit and Fiscal Review Committee (LAFRC). According to practitioners, either the legislature or the OSA can initiate an audit, and they are each roughly equally responsible for initiating the audits produced (interview notes 7/11/18). Survey data collected by NASACT suggests the Governor also can initiate audits, but this was not verified by practitioners (NASACT *Auditing in the States 2015*; interview notes 7/11/18).¹⁷⁹³ Once an audit is complete, the State Auditor releases reports to the LAFRC for study, review, and possible public hearings. Not all audits receive a hearing.¹⁷⁹⁴ LAFRC decides whether to hold a hearing or not. The biennial report produced by the OSA suggests that when LAFRC does hold a hearing, either OSA staff or the private CPA contracted by the OSA to create the audit report gives the presentation (page 9).¹⁷⁹⁵ The report goes on to say that most hearings focus on the findings and recommendations included in audit reports. Practitioners report that all performance audits receive hearings, but other audits and reports, e.g. financial audits, only receive a hearing when issues like non-compliance are detected. Limited time and resources are cited as the reason the committee prioritizes some reports over others (interview notes 7/11/18). All reports are sent to legislators and staff for review, including those that are not given a hearing.

The OSA's work products are documented in its biennial report.¹⁷⁹⁶ The 2017-19 report focuses on general operations and changed little from Biennium Report 2015-17.¹⁷⁹⁷ The OSA website provides a complete list of all performance audits produced since 2004, which stands at 35 total: 19¹⁷⁹⁸ on the University System and 16¹⁷⁹⁹ on other state agencies. The count does not include follow-up reports. The OSA also publishes follow-up reports that seek to checkup on the

¹⁷⁹⁰ <http://www.legis.nd.gov/assembly/64-2015/committees/interim/legislative-audit-and-fiscal-review-committee>, accessed 7/15/18.

¹⁷⁹¹ <https://www.legis.nd.gov/files/fiscal/2017-19/docs/117.pdf>, accessed 12/1/18.

¹⁷⁹² <https://www.nd.gov/auditor/about-us>, accessed 12/29/18.

¹⁷⁹³ <https://www.legis.nd.gov/cencode/t54c10.pdf>, accessed 6/26/18.

¹⁷⁹⁴ <http://www.legis.nd.gov/assembly/64-2015/interim/17-5156-02000-meeting-agenda.pdf>, accessed 7/15/18.

¹⁷⁹⁵ https://www.nd.gov/auditor/sites/www/files/documents/Reports/process_17.pdf, accessed 6/26/18.

¹⁷⁹⁶ https://www.nd.gov/auditor/sites/www/files/documents/Reports/process_17.pdf, accessed 6/26/18.

¹⁷⁹⁷ https://www.nd.gov/auditor/sites/www/files/documents/Reports/process_15.pdf, accessed 6/26/18.

¹⁷⁹⁸ <https://www.nd.gov/auditor/performance-audits-university-system>, accessed 6/26/18.

¹⁷⁹⁹ <https://www.nd.gov/auditor/performance-audits-state-agencies>, accessed 6/26/18.

status of recommendations in previous performance audits. These reports indicate this purpose in the title, and it appears that this is a tool to encourage agency compliance. In the following discussion we describe OSA audits of state agencies and then audits conducted by the University System Performance Audit Division within OSA.

The OSA produces only a small number of performance audits of state agencies—an average of about one per year-- but four performance audits were completed in 2018, three of which focused on veterans programs. For example, in 2014 and 2015 OSA produced one audit each year. In 2012, 2013, 2016 and 2017 it produced no new performance audits of state agencies. In some of those years it did follow up on previous reports, however. In 2016 two follow-ups were performed, and in 2013 one follow-up was performed. A knowledgeable source stated that the lack of performance audits or follow ups in 2017 was likely the result of three factors: a new State Auditor took over in 2016 when the previous long-serving State Auditor chose retirement rather than running for another term; substantial staff turnover in 2016; and the size and complexity of the 2018 performance audits of veterans home and veterans affairs, audits that were requested by the legislature.¹⁸⁰⁰ Another source commented on the transition, stating that the new auditor is working on implementing his vision for the OSA, which includes more performance audits that are narrowly focused, more targeted, and less dense than previous audits with greater utilization of graphics in the reports.¹⁸⁰¹ The surge in performance audits in 2018 appears to be consistent with this plan; three of the four audits focused on specific facets of veterans affairs, and these might have, under the previous auditor, been folded in to one larger audit. Sources describe relations between the legislature and OSA as typically good, but there is no way to guarantee that the legislature's and the state auditor's visions for the OSA align perfectly.¹⁸⁰² Clearly, the relationship between the elected state auditor and elected legislators could alter these dynamics given that it is an informal alliance reinforced by statutory law.

Despite the relatively small number of performance audits produced compared to other states, several examples can be easily found demonstrating that the reports are used. The first such example is a 2018 audit of travel logged by the Governor charged to taxpayers. After a routine OSA audit detected the current Governor was logging thousands of miles more in travel than his predecessor, a closer audit of his travel was conducted.¹⁸⁰³ Knowledgeable observers report that the OSA initiated both the initial review of the Governor's travel and the follow up.¹⁸⁰⁴ The audit revealed questionable use of state air travel by the governor. The audit was conducted after the Governor was publicly criticized for accepting Super Bowl tickets and other events from Xcel Energy. Amid this criticism, the Governor paid back Xcel Energy nearly \$40,000 to cover the events.¹⁸⁰⁵

The value of State Auditor's practice of following up on performance audits is illustrated by its review of the Department of Trust Lands and Energy Infrastructure and Impact Office and

¹⁸⁰⁰ Interview notes, 7/11/18.

¹⁸⁰¹ Interview notes, 7/11/18.

¹⁸⁰² Interview notes, 7/11/18.

¹⁸⁰³ <https://www.grandforksherald.com/news/government-and-politics/4432371-after-logging-nearly-50000-miles-first-year-state-auditors>, accessed 6/29/18.

¹⁸⁰⁴ Interview notes, 7/11/18.

¹⁸⁰⁵ <https://www.westfargopioneer.com/news/government-and-politics/4465489-nd-state-auditor-governors-office-stop-using-state-planes>, accessed 7/9/18.

Unclaimed Property Division. The department was not complying with recommendations from a previous audit.¹⁸⁰⁶ The department agreed to voluntarily address approximately half of the recommendations. The Legislative Audit and Fiscal Review Committee held public hearings in connection with the audit, and the legislators took an active role in the meeting questioning agency staff. We discuss the role of the committee in more detail in the section on *Oversight Through Committees*.

The mission of the OSA itself appears to evolve through the audit process. Increasingly the OSA is seen as a means for rooting out impropriety in state government. This is illustrated by the role played by OSA in responding to media reports about the governor's misuse of state funds for personal travel. As part of its evolution, the OSA and the legislature added a fourth division. In 2015, the legislature created the North Dakota University System Performance Audit Division within the OSA tasked with conducting performance audits of the ND University System and its institutions. The division was created in response to audit reports about state universities. A 2012 audit report of Dickinson State University revealed that 500 international students were granted degrees that they did not earn.¹⁸⁰⁷ A hearing by the legislative audit and review committee precipitated resignations of three university officials. In the wake of this focusing event, another audit of the University System questioned the basis for millions of dollars granted to out-of-state students in the form of tuition waivers.¹⁸⁰⁸

In response to these audits, we were told that legislators pushed for increased capacity to detect problems and provide greater controls. According to practitioners, the legislature engaged in a lengthy dialogue with the OSA about what exactly to do.¹⁸⁰⁹ The legislature knew it did not want to increase spending for the University System Internal Audit function, which it felt was not producing appreciable results. Initially the legislature wanted a parallel internal audit to the one that already existed in the University System, but through dialogue with the OSA settled on a performance audit division that could tailor reports to what was needed and could do things an Internal Audit Office could not. This division of OSA accounts for more than half of all OSA performance audits (19 of 35). In 2017, although no performance audits of state agencies were conducted, the University System Performance Audit Division produced 7 performance audits of the University System.¹⁸¹⁰

In addition to the OSA, North Dakota has a comprehensive legislative service agency, the Legislative Council governed by the Joint Legislative Management Committee, typically referred to as Legislative Management.¹⁸¹¹ It provides legislative services such as studies, legal advice, and fiscal support services.¹⁸¹² It has 20 staff, only two of which have a title that denotes an audit function. The Legislative Council does not produce performance audits or audits

¹⁸⁰⁶ https://bismarcktribune.com/news/local/audit-update-shows-department-of-trust-lands-making-progress/article_4a38bf23-7a80-59bb-9b0a-9d28fdc2f93a.html, accessed 12/30/18.

¹⁸⁰⁷ http://bismarcktribune.com/news/state-and-regional/dickinson-state-university-audit-results-in-three-resignations/article_cb42be9a-56a0-11e1-ac8b-0019bb2963f4.html, accessed 7/15/18.

¹⁸⁰⁸ <http://www.grandforksherald.com/news/education/3737565-north-dakota-tuition-waiver-audit-shows-millions-waived-out-state-students>, accessed 7/15/18.

¹⁸⁰⁹ Interview notes, 7/11/18.

¹⁸¹⁰ <https://www.nd.gov/auditor/performance-audits-university-system>, accessed 7/15/18.

¹⁸¹¹ https://ballotpedia.org/North_Dakota_Legislative_Council, accessed 7/15/18.

¹⁸¹² <http://www.legis.nd.gov/legislative-council/legislative-council-staff>, accessed 7/15/18.

generally.¹⁸¹³ Studies and reports produced by the Legislative Council deal with budget analysis, figure setting, revenue forecasts, and policy analysis (Legislative Management Report 2017 pg. 69). For example, the Legislative Council produced the Valley City State University Heating Plant Report determining that one location was more cost-effective than another.¹⁸¹⁴

Oversight Through the Appropriations Process

There is a House Appropriations Committee and a Senate Appropriations Committee. The House Committee is broken up into three units: Education and Environment Division; Government Operations Division; and the Human Resources Division.¹⁸¹⁵ The Appropriations Committees meet every day of the week when in session, and legislators assigned to these committees do not serve on any other standing committees.¹⁸¹⁶ Committee meeting minutes for certain standing committees, including appropriations, are difficult to track down. We looked at the 65th Assembly's "Committee Hearings," the page is blank other than the standard legislature's header, which is found on all the pages.¹⁸¹⁷ North Dakota is one of several states that has neither live nor archived audio or visual documentation of committee hearings.¹⁸¹⁸ A search of online news articles does not mention major oversight efforts on behalf of the Senate Appropriations or House Appropriations Committees. Practitioners gave us tips for getting at meeting minutes but they required knowledge of the bill number to investigate, which is often a difficult starting place for research.¹⁸¹⁹ Our efforts to use this approach did not yield examples of legislative oversight.¹⁸²⁰

What is apparent is that there are major contests of power between the legislature and the governor over the budget and vetoes of key provisions. One showdown occurred over a bill that would ensure regular bidding on the public employee health insurance contract. The governor used his line-item veto on a bill that would have required the insurance contract be re-bid every

¹⁸¹³ <http://www.legis.nd.gov/legislative-council>, accessed 7/15/18.

¹⁸¹⁴ <http://www.legis.nd.gov/files/resource/64-2015/legislative-management-final-reports/2017finalreport.pdf>, accessed 7/15/18.

¹⁸¹⁵ <https://www.legis.nd.gov/files/resource/65-2017/miscellaneous/2017-ndla-house-standing-committees.pdf>, accessed 6/29/18.

¹⁸¹⁶ <https://www.legis.nd.gov/research-center/library/legislative-branch-function-and-process>, accessed 6/29/18.

¹⁸¹⁷ <https://www.legis.nd.gov/assembly/65-2017/committee-hearings/c-hearing.html>, accessed 7/11/18.

¹⁸¹⁸ <http://www.ncsl.org/research/telecommunications-and-information-technology/legislative-webcasts-and-broadcasts.aspx>, accessed 7/15/18.

¹⁸¹⁹ Interview notes 7/11/18: A practitioner explained that in order to find minutes for these committees one would have to search for a specific bill and the minutes would be embedded in the bill history (interview notes 7/11/18). This practitioner explained that one needs to follow these steps to find them on the legislature's website: select "research center" from the legis.nd.gov home page, then "legislative bill histories" then select the bill (ibid). This approach is the one we followed and was only helpful to the extent that we knew what bill we were looking for. We could find audio visual links sorted by legislator, but not one of the videos worked.

¹⁸²⁰ This is an example of our efforts to use this strategy. Legislators, primarily from the Industry, Business, and Labor Committee, proposed eliminating the state's blue law that prevents stores from opening before noon on Sundays.¹⁸²⁰ Tracing the bill shows it was routed through several committees before making it out of the House,¹⁸²⁰ only to fail on a floor vote in the Senate.¹⁸²⁰ Using the bill history approach outlined by practitioners¹⁸²⁰ There was no indication of legislators engaging in oversight, i.e. calling in state officials to answer questions about the current blue law.¹⁸²⁰

two years, stating “it is an unproven hypothesis that a two-year, non-renewal contract period will produce lower rates from potential providers.”¹⁸²¹ Legislative leaders debated attempting a veto override.

The Governor vetoed parts of nine bills just before the end of session. Legislative Management publicly discussed whether to override at least some of the vetoes.¹⁸²² The regular session had only two days remaining in which to whip the votes for an override. A statutory change allows for Legislative Management to reconvene a session, but the limit for the session is still 80 calendar days.¹⁸²³ Chamber leaders, who are members of Legislative Management, considered the vetoes in light of the challenges of reconvening the legislature. One challenge in getting the votes was that the chair of Legislative Management was unavailable because he was traveling abroad. In 2017, the legislature adjourned on the 77th day, the governor issued vetoes, and Legislative Management debated whether or not to reconvene for the 78th, 79th, and 80th day. The decision not to reconvene was at least in part due to the lack of sufficient time to deliberate—the 78th day would be required to discuss reconvening the full legislature and the remaining two days was thought to be too little time to address the vetoes. Only the Governor can call the legislature in for a special session lasting beyond the 80-day limit.¹⁸²⁴

The 2017 showdown between the legislature and the governor focused on one specific appropriation.

[Republican Senate Majority Leader Rich] Wardner said the only potential veto override that “has some wheels” is a section of the budget bill for the Department of University and School Lands that sets aside \$16.1 million for townships in non-oil producing counties... [Burgum wrote in his veto letter] “Without demonstrated evidence of differentiated need or want, this exactly equal, across-the-board appropriation is both arbitrary and an inefficient use of our scarce financial resources.”¹⁸²⁵

The legislature ultimately did not reconvene for the final three days of the session and allowed the vetoes to stand unchallenged. Despite the outcome, the incident demonstrates North Dakota legislature seeks to check the governor on appropriations, though with limited effectiveness. Practitioners insist that the leverage still lies with the governor. They explain that since the legislature can’t call an emergency session, using the remaining two days to override a veto was vulnerable to another veto and without any legislative days left in the session and no way for the legislature to unilaterally call another session, the legislature would be stuck with the veto. Additionally, the governor had been using vetoes to cross out parts of legislation, altering their

¹⁸²¹ http://bismarcktribune.com/news/local/govt-and-politics/burgum-vetoes-key-provisions-of-pers-budget-bill/article_141503d5-992b-55aa-ad5d-778f4ba1a447.html, accessed 7/15/18.

¹⁸²² https://bismarcktribune.com/news/state-and-regional/north-dakota-legislators-still-mulling-whether-to-address-burgum-vetoes/article_47222bf9-a619-54f5-bb96-16ba1b555ad9.html, accessed 6/29/18.

¹⁸²³ <https://www.legis.nd.gov/research-center/library/legislative-branch-function-and-process>, accessed 6/29/18.

¹⁸²⁴ <http://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>, accessed 6/29/18.

¹⁸²⁵ https://bismarcktribune.com/news/state-and-regional/north-dakota-legislators-still-mulling-whether-to-address-burgum-vetoes/article_47222bf9-a619-54f5-bb96-16ba1b555ad9.html, accessed 6/29/18.

intent, so it's conceivable the legislature could be worse off doing a veto override than if they simply accepted the governor's initial veto.¹⁸²⁶

Given the manner in which the Governor is using line-item vetoes, the legislature decided to challenge one of the vetoes in court.¹⁸²⁷ They claimed the governor used his veto to alter legislative intent and keep the appropriation, i.e. if the governor vetoes the conditions or restrictions on funds, then he must also veto the funds. They argued that allowing the Governor to keep appropriations without the legislatively mandated restrictions undermines the branch's power of the purse. The Attorney General, a separately elected official, has joined the legislature in claiming the executive has violated separation of powers. The decision was made by Legislative Management is controversial, according to practitioners. The Governor has sued the legislature on the grounds that the legislature cannot delegate its authority to a smaller body, e.g. Legislative Management.¹⁸²⁸ The Supreme Court will have to hear the governor's suit before addressing the legislature's suit. Practitioners are unsure how either lawsuit—the legislature's or the governor's— will be decided but feel that the consequences could dramatically change separation of powers in the state.¹⁸²⁹

Special sessions are not uncommon in North Dakota, but they are typically used by the governor to get something he wants. Legislators were called into a special session in 2003 to address increases to corrections spending sought by the governor, a Republican, who was feuding with members of his own party over the appropriations.¹⁸³⁰ Another Republican governor called a special session in 2016 to pass a combination of across-the-board cuts and transfers. The first was from the budget stabilization fund and the other from profits in the state-owned bank. He had crafted these with his caucus in order to balance the budget.¹⁸³¹ The cuts and transfers came months after a 10 percent cut to most government operations to offset declining revenues from cratering commodity prices.¹⁸³²

In addition to the appropriations committees and the budget process, an important interim committee is the Interim Budget Section, comprised of 42 legislators— 25 from the Assembly and 17 from the Senate— of which 33 Republican and 9 Democrat (2018).¹⁸³³ The Budget Section meets quarterly both during session and in the interim. According to practitioners the budget section has many oversight duties both in statute and articulating legislative requests (interview notes 7/11/18). The section serves a wide variety of functions related to oversight through appropriations, including but not limited to handling transfers, receiving numerous

¹⁸²⁶ Interview notes, 2018.

¹⁸²⁷ <https://www.usnews.com/news/best-states/north-dakota/articles/2017-06-21/the-latest-panel-signals-legal-challenge-to-burgum-vetoes>, accessed 6/29/18.

¹⁸²⁸ https://bismarcktribune.com/news/local/crime-and-courts/legislature-v-burgum-rests-in-high-court-shands/article_0850924e-2ff5-5edd-aad6-5675b575a927.html, accessed 7/11/18; interview notes 7/11/18.

¹⁸²⁹ Interview notes, 7/11/18.

¹⁸³⁰ https://bismarcktribune.com/news/local/special-session-ends/article_add57ce-3623-5333-8a35-b52a95bfdc04.html, accessed 6/29/18.

¹⁸³¹ <https://www.inforum.com/news/4087841-nd-legislature-plugs-310-million-budget-gap-looks-ahead-next-session>, accessed 6/29/18.

¹⁸³² https://bismarcktribune.com/news/local/govt-and-politics/north-dakota-budgets-to-be-reduced-by-percent/article_be1fd2ea-55b8-56b9-bcc3-0918d681b381.html, accessed 6/29/18.

¹⁸³³ <https://www.legis.nd.gov/assembly/65-2017/committees/interim/budget-section>, accessed 7/11/18.

reports from a variety of sources, reviewing budget data, and authorizing certain spending amounts for certain departments.¹⁸³⁴

The Budget Section met seven times between December 2016 and September 2018. During the September 13th, 2018 meeting members of this joint committee met from 10 a.m. to 2 p.m. They listened to a presentation from the Office of Management and Budget on the biennium general fund, state economic indicators, a revised revenue forecast, oil tax revenue distributions, state agency budget requests, irregularities in the state's fiscal practices, loans to state agencies provided by the Bank of North Dakota, state agency applications for federal grants, employee bonuses, and deficiency appropriations (requests by agencies for money to cover budget shortfalls). Legislators did not ask any questions during or after these presentations. The next agenda item, Highway Patrol Purchase of Unmanned Aircraft Systems did elicit a livelier discussion with five legislators asking questions of the Colonel from the Highway Patrol making the presentation. The minutes, unfortunately, only provide the Colonel's answer to the questions, not the questions themselves. It appears that the questions primarily requested additional information rather than challenging the testimony. The motion to permit the purchase failed.

Several other presentations on specific programs and expenditures followed, all without questions from legislators. These presentations appear to merely keep the Budget Section apprised of state agency actions. Only two other presentations elicited questions from legislators. During the Game and Fish Department Land Acquisitions and Mitigation Program presentation a legislator appears to have asked about categories of mitigation credits related to wetlands restoration and to wetlands creation (based on the response from agency staff). The Department of Transportation presentation of license fees also generated a question about the cost of license plates.

It appears from these minutes that the level of oversight exercised by the Budget Section is modest. There is willingness to reject some requests and to ask some questions about expenditures that legislators do not support. But the four-hour meeting is notable for the limited number of legislator questions noted in the minutes—fewer than 10 total.

Oversight Through Committees

The 65th Legislative Assembly (2017-18) had 11 House standing committees,¹⁸³⁵ 11 Senate standing committees,¹⁸³⁶ and 27 interim committees.¹⁸³⁷ There are also 42 statutory committees, such as the “State Hospital Governing Body” and the “Multistate Highway Transportation Agreement Cooperating Committee.”¹⁸³⁸ There are also 6 procedural committees in each chamber.¹⁸³⁹ Based on Legislative Management's report, it appears that interim

¹⁸³⁴ <https://www.legis.nd.gov/assembly/65-2017/committees/interim/budget-section>, accessed 7/11/18.

¹⁸³⁵ <https://www.legis.nd.gov/assembly/65-2017/committees/house/standing>, accessed 7/11/18.

¹⁸³⁶ <https://www.legis.nd.gov/assembly/65-2017/committees/senate/standing>, accessed 7/11/18.

¹⁸³⁷ <https://www.legis.nd.gov/assembly/65-2017/committees/interim>, accessed 7/11/18.

¹⁸³⁸ <https://www.legis.nd.gov/assembly/65-2017/regular/north-dakota-statutory-committees-contain-legislative-members>, accessed 7/11/18.

¹⁸³⁹ <https://www.legis.nd.gov/assembly/65-2017/committees/house/procedural>, accessed 7/11/18.

committees are instrumental to the work of North Dakota's Legislature. Interim committees make both policy and appropriations recommendations. As we described earlier, Legislative Management is a joint committee consisting of eight senators and nine representatives, including the majority and minority leaders of both chambers plus the speaker of the house. The partisan composition of this committee reflects the number of seats each party controls in each chamber, but the minority party is guaranteed at least two seats on Legislative Management. Legislative Management can create interim committees in addition to the statutory interim committees such as the LAFRC and the Administrative Rules Committee. Practitioners noted that this committee creates all the various committees and study groups and that these committees and groups report back to Legislative Management. The Legislative Management report is an exceptionally comprehensive 376-page summary of the 2017-18 activities of the legislature.¹⁸⁴⁰

The Legislative Audit and Fiscal Review Committee (LAFRC)¹⁸⁴¹ is described by practitioners as the primary committee responsible for oversight in ND (interview notes 7/11/18). It is an interim committee that meets quarterly,¹⁸⁴² including when the legislature is out of session.¹⁸⁴³ It consists of 14 members of which 4 are from the Senate and 10 from the House. In 2018 there were 12 Republicans and 2 Democrats serving on LAFRC. As noted in the analytic bureaucracy section, this committee works closely reviewing and commissioning audits produced by the OSA. The minutes indicate that most audits are approved by the committee without a presentation from the OSA. We are told by experts that this is to focus on the audits that have uncovered issues and conserve time and resources.¹⁸⁴⁴

While there are no audio or video recording of LAFRC hearings, the Legislative Assembly's website does provide minutes of hearings. A survey of the minutes show that presentations from the OSA to LAFRC are either follow up in nature or break new ground. It hears presentations about state agency audits and about university system audits.

The University System – Purchasing Card Program performance audit was a follow up audit. It was triggered by poor compliance with recommendations from a prior audit. Out of the 11 recommendations only 5 were fully implemented, 3 were partially implemented, and 3 were not implemented.¹⁸⁴⁵ As discussed in the Analytic Bureaucracy section, past audits of the University System were a catalyst for adding a new division to OSA. Although the legislature has demonstrated a longer-term interest in improving university performance, creating a new division within OSA, it is unclear what consequences the LAFRC can use to “encourage” the universities to comply. Practitioners state that sometimes informal conversations occur with subject matter jurisdiction committees, in this case the Higher Education Committee, but in their experience these committees do not conduct oversight hearings on an audit or audit follow-up

¹⁸⁴⁰ <https://www.legis.nd.gov/files/resource/65-2017/legislative-management-final-reports/2019finalreport.pdf>, accessed 12/30/18.

¹⁸⁴¹ <https://www.legis.nd.gov/assembly/65-2017/committees/interim/legislative-audit-and-fiscal-review-committee>, accessed 7/11/18.

¹⁸⁴² <https://www.legis.nd.gov/assembly/65-2017/committees/interim/legislative-audit-and-fiscal-review-committee>, accessed 6/29/18.

¹⁸⁴³ <https://www.legis.nd.gov/assembly/63-2013/committees/interim/legislative-audit-and-fiscal-review-committee>, accessed 6/29/18.

¹⁸⁴⁴ Interview notes, 7/11/18.

¹⁸⁴⁵ <https://www.legis.nd.gov/assembly/65-2017/interim/19-5018-03000-meeting-minutes.pdf>, accessed 6/29/18.

hearings.¹⁸⁴⁶ Practitioners indicated that new audits of key activities of the University System will be made public, likely in November/December 2018.¹⁸⁴⁷

Other presentations from the University System audit division included a Space Utilization Study Performance Audit,¹⁸⁴⁸ an audit of a private contractor's report of space utilization on campuses for the State Board of Higher Education.¹⁸⁴⁹ The audit found the contractor's report was incomplete, included inconsistent information, and other problems. Legislators discussed possible explanations for the deficiencies, questioning officials from the university system. Their primary concern appeared from this discussion to be "right-sizing" campuses.¹⁸⁵⁰ This audit, however, indicates some willingness for the LAFRC to investigate contractor services, which we examine in the section on *Monitoring State Contracts*.

LAFRC members appear to have more impact on behavior the executive branch when relying on OSA's audits of state agencies. At a hearing on the OSA's audit of the governor's travel that we described earlier, LAFRC members appeared to ask pointed questions of both the OSA and Governor's office regarding gaps in how flights are approved and the procedures surrounding the staff accompanying the governor on these flights.¹⁸⁵¹ It appears that in 2019 the legislature plans to amend what one legislator called the "honesty system" to create something that improves accountability.¹⁸⁵² This suggests that members of LAFRC are utilizing the audit information provided by the OSA and that they might pass legislation to improve oversight of the governor's usage of state resources.

A hearing before the LAFRC on 2016 follow up audits of the Department of Trust Lands documented serious mismanagement, including state employees claiming meals for reimbursement that had already been paid, accepting gifts of liquor from investment firms, advising the approval of grants that didn't meet requirements, and assigning mineral tracts to the wrong trust. During the 2016 hearing on these audits before the LAFRC, there were fiery exchanges between audit staff and agency staff.¹⁸⁵³ Some legislators expressed outrage at the findings and the responses given by the agency head, while others tempered outrage with understanding, citing the recent oil boom that increased demands on a Department that did not have the resources to match. The Land Commissioner involved in the hearing was replaced the following year. The new agency head attended a follow-up hearing in 2017 before LAFRC and provided a raft of solutions to meet recommendations in a much less intense proceeding than the previous year.¹⁸⁵⁴

LAFRC activity also includes deliberation on the scope and methods a particular audit would use. For example, the March 6th meeting sought an audit of the Oil and Gas Division to

¹⁸⁴⁶ Interview notes, 7/11/18.

¹⁸⁴⁷ Interview notes, 7/11/18.

¹⁸⁴⁸ https://www.legis.nd.gov/files/committees/65-2017/19_5006_03000appendixc.pdf, accessed 6/29/18.

¹⁸⁴⁹ https://www.legis.nd.gov/files/committees/65-2017/19_5006_03000appendixb.pdf, accessed 6/29/18.

¹⁸⁵⁰ <https://www.legis.nd.gov/assembly/65-2017/interim/19-5006-03000-meeting-minutes.pdf>, accessed 6/29/18.

¹⁸⁵¹ <https://www.legis.nd.gov/assembly/65-2017/interim/19-5151-03000-meeting-minutes.pdf>, accessed 11/30/18

¹⁸⁵² <https://www.sfgate.com/news/article/Audit-on-Gov-Burgum-air-travel-might-spark-13041411.php>, accessed 7/9/18.

¹⁸⁵³ <http://www.inforum.com/news/4015283-heated-words-exchanged-over-nds-trust-lands-department-audits>, accessed 7/9/18.

¹⁸⁵⁴ http://bismarcktribune.com/news/state-and-regional/new-nd-land-commissioner-says-department-making-progress-after-critical/article_473136aa-7c14-5c62-be7f-46b3ff34b5b6.html, accessed 7/9/18.

determine the source of a discrepancy in data found on certain reports.¹⁸⁵⁵ Ultimately discussion between legislators resulted in the proposal being rescinded in favor of an information request. However, it must be noted that not all audit activity by the OSA receives this sort of scrutiny by LAFRC.

North Dakota also appears to use interim study committees to oversee the work of state agencies.¹⁸⁵⁶ One of these interim committees is The Education Funding Committee. It appears to meet both during legislative sessions and during the interim to consider school funding issues. It met seven times between July 2017 and October 2018. During its January 25th, 2018 meeting it convened at 10 a.m. and adjourned at 3:23 after listening to a presentation by Legislative Council staff on the Elementary and Secondary Education State Aid and Funding Formula Study. Other presenters included staff from the Department of Public Instruction of Information and the State Tax Commissioner, who reviewed limits on school district mill levies and on school district property tax increases. The committee also listened to presentations from the North Dakota Council of Educational Leaders and representatives of regional education associations. Committee minutes are thorough, but sadly do not record the questions asked by legislators instead giving the presenters' responses to a question by legislator X.¹⁸⁵⁷ It is therefore difficult to assess the quality of the questions legislators asked. We can attest that legislators asked questions, that many different legislators asked questions, and that the responses imply that the question requested new information or clarification of options that might be useful to solve funding problems. Legislators appeared knowledgeable, grasping funding formulas, property tax caps, and other concepts associated with school finance. In addition to these presentations, the committee listened to two other reports: one on school district employee compensation and one on the "use of teacher loan forgiveness funds received under 2017 Senate Bill no 2037."¹⁸⁵⁸ Its report, included in the Report of the North Dakota Legislative Management, is detailed and extensive. It appears that oversight is occurring through this interim study committee, but again we note that it is difficult to be confident of this.

Oversight Through the Administrative Rules Process

In North Dakota, the legislature, the attorney general and the governor share authority to review administrative rules (Berry 2017). Although the legislature can veto proposed rules, as can the attorney general, only the attorney general can void existing rules (Tharp 2001). The Governor must approve emergency rules before they can become effective.

The Joint Administrative Rules Committee (ARC) reviews all proposed rules. The Committee can object to rules (chapter 28-32) for specific reasons set out by statute, but if the committee takes no action, the rule is automatically approved. The ARC meets quarterly on

¹⁸⁵⁵ <https://www.legis.nd.gov/assembly/65-2017/interim/19-5006-03000-meeting-minutes.pdf>, accessed 6/29/18.

¹⁸⁵⁶ <https://www.legis.nd.gov/files/resource/65-2017/legislative-management-final-reports/2019finalreport.pdf>, accessed 12/29/18.

¹⁸⁵⁷ <https://www.legis.nd.gov/assembly/65-2017/interim/19-5095-03000-meeting-minutes.pdf>, accessed 12/30/18.

¹⁸⁵⁸ <https://www.legis.nd.gov/assembly/65-2017/interim/19-5095-02000-meeting-agenda.pdf>, accessed 12/20/18.

an ongoing basis—whether the legislature is in session or not.¹⁸⁵⁹ During 2017-2018 the ARC “reviewed 3,736 rules sections and 4,047 pages of rules changed” based on information in supplements prepared by Legislative Council staff.¹⁸⁶⁰ Each year a final report shows all the rules that were “voided.”¹⁸⁶¹ It appears that the vast majority of the rules and changes considered are allowed to take effect. But sometimes the ARC exerts its power to block rules. An example is a March 2018 rejection of a Board of Medicine rule about telemedicine, which was rejected based on violating legislative intent, conflicts with other state laws, and ARC’s judgment that the rule was arbitrary and capricious. Practitioners state that voiding rules is uncommon.¹⁸⁶²

Based on the 2017-2018 report, the ARC also repealed two sets of obsolete rules, and six sets of rules were listed in the category, *carried over or amended by committee approval*. This is part of the power ARC has to delay the implementation of a rule for one additional committee meeting. Given that the ARC only meets four times per year, this delays implementation of a rule for at least three months. Typically, the agency uses this time to modify the rule (Schwartz 2010). Thus, the legislature is exerting influence over state agencies by holding rules over for the next meeting. This compensates for the legislature’s lack of authority to return rules to an agency for revisions.

Given the volume of rules and rule changes the ARC reviews, it appears that North Dakota’s legislature exercises only modest oversight in this area, although its powers are formidable. Moreover, the process of rule review in the state does not include systematic or high-quality analysis of the effects of the rules. Therefore, Schwartz (2010) asserts that the review process in North Dakota does not improve regulations or maximize net benefits, but rather is based on vague assessments, such as “arbitrary and capricious.”

Oversight Through Advice and Consent

In general, the legislature does not have much capacity for advice and consent regarding appointments nor does it have the capacity to review executive orders. The lone exception is agency reorganization, which has been the battle ground historically for the legislature to place some limits on executive power.

There are only two positions that the governor appoints directly that require senate approval (Book of the States, 2014). We found no recent examples of the legislature seriously challenging a gubernatorial appointment.

Although North Dakota’s governor can issue executive orders in several specialized areas (e.g., reducing state expenditures during budget short falls and designating wildlife or other public areas), he or she cannot use executive orders to reorganize state agencies, to create study commissions or similar entities, to respond to federal requirements or to conduct state personnel

¹⁸⁵⁹ Interview notes, 7/11/18.

¹⁸⁶⁰ <https://www.legis.nd.gov/files/resource/65-2017/legislative-management-final-reports/2019finalreport.pdf>, accessed 12/29/18.

¹⁸⁶¹ <https://www.legis.nd.gov/files/resource/64-2015/legislative-management-final-reports/2017finalreport.pdf>, accessed 7/15/18.

¹⁸⁶² Interview notes, 7/11/18.

administration (Book of the States, 2014 Table 4.5). The legislature has no power to review gubernatorial orders short of passing legislation to invalidate an order. A survey of the governor's executive orders show 22 in 2017 and the actions range from declaring drought conditions to suspending the distance limit on farm license vehicles transporting livestock, hay, and water.¹⁸⁶³ The volume of executive orders has increased in the last decade. For example, in 2011 there were 46 executive orders compared to 32 total from 1963 to 2010 combined.¹⁸⁶⁴

A recent attempt at reorganization demonstrates the legislature has some capacity to push back against gubernatorial efforts to reorganize state agencies. The interim information technology committee pushed back on a reorganization plan spearheaded by the state's Chief Information Officer,¹⁸⁶⁵ a Governor Burgum appointee.¹⁸⁶⁶ The interim committee sent a public letter to the Chief Information Officer and the Governor's Office requesting that the reorganization efforts be halted until the information technology committee could be fully briefed.¹⁸⁶⁷ After meeting with the legislature, IT Department planning for consolidation continued, but with the Information Technology Committee informed of the plans.¹⁸⁶⁸ The IT Department will present its consolidation plan to the legislature in 2019.¹⁸⁶⁹ These events suggest that the executive branch occasionally tries to move forward on agency reorganization without input from the legislature, but the legislature is successful in asserting its prerogatives when it wants to do so.

Oversight Through Monitoring of State Contracts

The Office of State Auditor occasionally audits state contracts. One example is the Space Utilization Study Performance Audit¹⁸⁷⁰ discussed in the standing committee section. It reviewed a study commissioned from a private contractor¹⁸⁷¹ and found the contractors prepared a deficient report. No recommendations were made regarding the procedures in place for contracting; the committee only discussed the flaws of the report.

Practitioners told us about two other efforts to better monitor contracts: one the result of an OSA audit, the other the result of Legislative Management creating a committee.¹⁸⁷² The former is an audit of the purchasing card used by the University System which resulted in efficiencies. The latter is an effort by the legislature to better control for Information Technology costs, including and especially those incurred through contracting with vendors. It would appear that legislature is willing and interested in monitoring state contracts. Its association with the

¹⁸⁶³ <https://www.governor.nd.gov/media-center/executive-orders>, accessed 7/15/18.

¹⁸⁶⁴ <https://www.governor.nd.gov/media-center/executive-orders/executive-order-archive>, accessed 7/15/18.

¹⁸⁶⁵ <http://www.govtech.com/pcio/articles/North-Dakotas-IT-Unification-Effort-Is-No-Easy-Task.html>, accessed 7/15/18.

¹⁸⁶⁶ <https://statescoop.com/lawmakers-pause-it-consolidation-in-north-dakota>, accessed 7/15/18.

¹⁸⁶⁷ http://bismarcktribune.com/news/state-and-regional/north-dakota-lawmakers-ask-state-it-head-to-delay-reorganization/article_0beb0b34-17a0-5668-a73c-4065d9661779.html, accessed 7/15/18.

¹⁸⁶⁸ <https://statescoop.com/north-dakota-takes-another-look-at-it-consolidation-cloud-migration/>, accessed 12/30/18.

¹⁸⁶⁹ <http://news.prairiepublic.org/post/itd-working-consolidation-plans>, accessed 12/30/18.

¹⁸⁷⁰ https://www.legis.nd.gov/files/committees/65-2017/19_5006_03000appendixc.pdf, accessed 6/29/18.

¹⁸⁷¹ https://www.legis.nd.gov/files/committees/65-2017/19_5006_03000appendixb.pdf, accessed 6/29/18.

¹⁸⁷² Interview notes, 7/11/18.

state auditor gives it more opportunities for this than many state legislatures have. Yet, this does not seem to be an area of systematic investigation. Additionally, given the small number of performance audits the OSA conducts, it seems unlikely that the OSA has the budget and staff resources to help the legislature to vigorously pursue oversight of state contracts.

Oversight Through Automatic Mechanisms

North Dakota has neither sunrise nor sunset review.

Methods and Limitations

North Dakota's legislature does not provide recordings of any committee hearings—not even live recordings. This makes it difficult to assess the quality of the questions legislators ask during hearings. As we noted earlier, the strategy practitioners suggested of following the bill history did not surface examples of oversight. Therefore, we had to rely heavily on insights provided by interviewing respondents. Of the six individuals in North Dakota that we contacted for interviews, five responded.

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