

**SENATE CONFIRMATION MANUAL**

**December 20, 1991**

***(Revised August 12, 2015)***

***PEER Staff Report***



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## *PREFACE*

In 1990, PEER staff responded to a Senator's request by preparing a manual on the Senate confirmation process. A revision and update of the original text was conducted in 2002. The following is a 2015 revision and update of the 2002 text. The purpose of this manual is to:

- acquaint members of the Senate with legal requirements related to the confirmation process;
- review the confirmation process and the legislative processes with regard to appointments subject to Senate confirmation;
- explain the consequences of certain actions that may be taken by the Senate; and,
- make recommendations concerning the level of review necessary prior to making a committee recommendation on a confirmation.

In reviewing the confirmation process, PEER staff examined:

- constitutional and statutory provisions related to appointments;
- PEER files on background check procedures;
- appropriate Senate staff on the Senate committee process; and,
- the confirmation processes utilized in other states.

This manual should not be considered critical of any current or past practice employed by the Senate with regard to the confirmation process.

PEER will review its suggestions in light of any recommendations or suggestions made by the Senate Rules Committee.



## **CHAPTER ONE:**

### **OVERVIEW**

The Senate's exercise of the power to confirm is a valid exercise of legislative power and the decision to confirm or not confirm may be based on any consideration the Senate finds appropriate.

The power to confirm is derived from constitutional provisions and statutes that specifically provide for the Senate to either confirm an appointment or to advise and consent thereto. In addition to these specific provisions governing appointments, other provisions govern the appointment process, the most important of which is MISS. CODE ANN. Section 7-1-35 (1972). This section requires that certain gubernatorial appointments be made within nine months of the close of the legislative session.

In recent years, the confirmation process has been marked by considerable change. These changes have included the use of PEER Committee staff to conduct background checks (without pre-release review by the PEER Committee) and the use of extensive hearings on the quality and fitness of certain appointees. Neither background checks nor hearings are used for all appointees. In 1990, the Legislature began requiring that background checks be performed on all persons appointed to the Mississippi Gaming Commission. Because the Gaming Commission as an entity independent of the Department of Revenue did not come into existence until October 1, 1993, no legislative staff performed background checks on Gaming Commission staff until 1994. (See MISS. CODE ANN. Section 75-76-9.)

Concerning the Senate committee review process, PEER suggests that:

- All appointments to the "control agencies" subject to the advice and consent requirement should be subject to committee hearings and PEER staff background checks prior to a committee report on the appointment. These agencies include the Department of Finance and Administration, the Department of Information Technology Services, and the State Personnel Board.
- Appointments to certain agencies that are major general fund- supported agencies should be subject to a hearing and PEER background check. Such agencies include the State Board of Education, the Division of Medicaid, the Institutions of Higher Learning, the Community College Board, the Department of Mental Health, the Department of Corrections, the Department of Revenue, the Department of Public Safety, and the State Board of Health.
- The Senate should also consider conducting hearings and performing background checks on the following appointees: members of the State Parole Board, the Mississippi Development Authority Executive Director, the Department of Transportation Executive Director, and the Public Staff Director of the Public Service Commission. Hearings and background checks for such appointments are important, as these agencies have a considerable impact on the protection of the public safety and the promotion of economic development in the state.
- Hearings and background checks should be conducted on any other appointment when the committee chairman has reason to question the fitness or qualifications of an appointee.

- The Senate should not perform background checks on appointees to advisory boards, as these boards spend no money and administer no agency programs. Such advisory boards subject to the advice and consent requirement include the advisory boards for the schools for the Deaf and Blind and the Advisory Committee of Boiler and Pressure Vessel Safety.

PEER also reviewed the possible consequences of Senate action on appointments and concluded that:

- failures to confirm an appointee generally result in a vacancy in office that shall not be filled until the Senate can next meet to concur in an appointment;
- inaction by a Senate committee to which an appointment has been referred does not constitute a tacit confirmation and such inaction results in a vacancy in office that *cannot* be filled until the Senate can concur in a future appointment;
- in some instances, the Governor may not revoke an appointment prior to Senate review of the appointment; and,
- appointees with terms set by law may hold over in office if their successor is not qualified to take office.

PEER also reviewed the question of Senators' liability for tortious conduct resulting from confirmation decisions. Senators have qualified common law immunity under state law, which shields them from personal liability for the conduct of discretionary acts so long as their actions are conducted prudently. State law creates an absolute privilege for legislators in libel and slander cases. Federal law creates immunity from litigation against Senators whose allegedly illegal acts are conducted within the course of their senatorial duties.

Presumptively, the confirmation process may bring to light information that reflects on an appointee's education, work history, and fitness to hold public office. While experience shows the contrary, no reasonable person appointed to a position of trust in government should expect that a Senate committee charged with the responsibility of reviewing the appointee's fitness and qualifications would not receive and expect to receive any information relevant to the making of a prudent decision on confirmation. Senators should be careful in their dissemination of derogatory information, which could stigmatize an appointee and endanger future work opportunities. Such care should include limitation of access to information to Senators who will vote on an appointment and staff who need to know. Failure to do such could result in personal liability to Senators or possible equitable suits requiring that files be purged of derogatory material.

At each stage of the confirmation process, access to derogatory information should be restricted to those Senators who have the appointment under consideration, beginning with the chairman of the committee to which the appointment was referred, any sub-committee members who will vote on the appointment, members of the full committee who will vote on the appointment, and finally, the entire Senate prior to voting on a confirmation matter. While it is entirely appropriate for any Senator to inquire into the background of an appointee, such inquiries should be conducted in a formal manner with consideration to the other members of the Senate and the appointee.

## CHAPTER TWO:

### SENATORIAL AUTHORITY TO ADVISE AND CONSENT

The Senate's power to confirm is derived from constitutional provisions and statutes that provide for the appointment of governing board members or, in some cases, executive directors, with the "advice and consent of the Senate."

The legitimacy of this power was tested in the landmark case of *Alexander v. State ex rel. Allain*, 441 So. 2d 1329 (Miss, 1983). In this case, the Mississippi Supreme Court resolved the issue of whether statutory requirements that members of certain state agency governing boards be appointed with the advice and consent of the Senate violated Sections 1 and 2 of the MISSISSIPPI CONSTITUTION. These sections provide for the separation of powers between the three branches of government--executive, legislative, and judicial--and further bar persons from holding office in two or more of these branches.

In deciding that advice and consent requirements were not in violation of the constitution, the court applied a core functions test to determine whether the allegedly unconstitutional activity was one at the core of one of the constitutional branches but was being exercised by members or entities of another branch. The court determined that confirmation practices do not invade powers at the core of executive functions for two reasons.

First, the court reasoned that confirmation does not allow the Senate to appoint an officer of the executive branch, but confers upon the Senate a negative prerogative of refusing an appointment. Secondly, the court reasoned that confirmation does not extend to the Senate any authority over the appointee once he has been confirmed. The court further characterized confirmation as one of the checks and balances of government, which prevents any one branch of government from becoming too powerful. *Alexander v. State ex rel. Allain*, *supra* at 1346.

Language of limitation does appear in this opinion. The court warned that confirmation should be limited to top discretion-exercising officials in executive or administrative agencies and that such power should never be extended to core functions of such agencies. The court further noted in dictum that advisory bodies and personal staffs of elected state executive officers would not be subject to confirmation. *Alexander v. State ex rel. Allain*, *supra* at 1346.

#### Meaning of the Term "Advice and Consent"

Statutes providing for Senate confirmation of officers confer this power on the Senate by providing that the appointment be made with the advice and consent of the Senate. This term has not been defined by any case law or statutes in Mississippi. A search for implicit meaning or standards to govern the Senate's review of appointees' fitness to hold office reveals that the majority of jurisdictions that have been confronted with the question of meaning have concluded that "advice and consent" means a formal approval. *Kerr-McGee Nuclear Corp. v. New Mexico Environmental Improvement Board*, 637 P. 2d 38, 44 (N.M. 1981); *In Re. Opinion of the Justices*, 78 N.E. 311, 312 (Mass. 1906) (affirmatively states meaning). The decision to advise and consent or not to advise and consent may be derived from any reasonable method to arrive at a proper conclusion for action. *Murphy v. Casey*, 15 N.E. 2d 268, 271 (Mass. 1938).

While the preceding statement requiring a “reasonable” method may be construed to place some limit on a deliberative body’s power to act in any manner or fashion, subsequent decisions have held that the decision to advise and consent or not to advise and consent for any reason is not in violation of any standard implicit in the term “advice and consent,” *Leek v. Theis*, 539 P. 2d 304, (Kansas 1975); *Passaic County Bar v. Hughes*, 260 A. 2d 261 (N.J. Sup, 1969); *Kligerman v. Lynch*, 223 A. 2d 511 (N.J. Sup, 1966); *See McChesney v. Sampson*, 23 S.W. 2d 584 (KY, 1930) (where the Kentucky Supreme Court stated that the Senate could reject an appointment summarily).

In dictum, the Mississippi Supreme Court has noted that the Legislature could approve or reject an appointment for any reason. *Alexander v. State ex rel. Allain, supra* at 1345.

### **Senatorial Powers of Advice and Consent**

In determining how it should collect information associated with the confirmation process, the Senate has broad authority. Generally, the Senate may use the investigative authority conferred under the Constitution to obtain the information it deems necessary to make a confirmation decision. Such may be obtained through the subpoena process or through voluntary testimony of witnesses. Committees may also request information from an appointee or any other person who may have such relevant information. Authority to do such is vested in the Legislature through Section 60 of the MISSISSIPPI CONSTITUTION, which provides:

*No bill shall be so amended in its passage through either house as to change its original purpose, and no law shall be passed except by bill; but orders, votes, and resolutions of both houses, affecting the prerogatives and duties thereof, or relating to adjournment, to amendments to the Constitution, to the investigation of public officers and the like, shall not require the signature of the governor, and such resolutions, orders, and votes may empower legislative committees to administer oaths, to send for persons and papers, and generally make legislative investigations effective.*

In addition to specific constitutional authority, some authorities have concluded that investigative authority of the Legislature and its committees is inherent in the legislative process and is not derivative of any particular provision of a constitution. *See Am. Jur.* 2d States, section 48, p. 447.

While legislative investigative authority is extensive, there are some limitations on the authority to investigate. While no Mississippi case law or other material directly related to the limits of the Mississippi Legislature’s authority to investigate exists, there is case law from the United States Supreme Court relevant to permissible bounds of legislative inquiries. In *Gibson v. Florida Legislative Investigation Committee*, 372 U. S. 539, 83 S. Ct. 889 (1963), the court was confronted with the issue of whether a legislative committee’s decision to cite a person for contempt violated the person’s associational freedoms protected by the first and fourteenth amendments. Briefly, the committee was investigating communist infiltration of the Miami Branch of the NAACP. Officers of the Miami branch were subpoenaed along with their membership lists. The court, in reversing the conviction for contempt, held that while legislative authority to investigate is broad, it may not extend to a requirement that an organization’s membership lists be turned over to a legislative committee when there is no substantial relationship between the information sought and a subject of overriding and compelling state interest, *Gibson, supra* at 894. In this case, the state failed to meet this test, as it

could not establish that there was a substantial relationship between a list of NAACP members and the state's compelling interest in investigating Communists. This case appears to be good support for the proposition that there must be a tight linkage between the purpose of the committee's activity and the information it is requesting whenever the request for information could threaten or chill the exercise of first amendment associational freedoms. Such a request might constitute questions to a witness who is known to be a member of a subversive organization and requests for membership lists of organizations known to be subversive in nature. Such problems are unlikely to affect the activities of Senate committees conducting confirmation hearings in the present political environment.

Additionally, *Gibson* should be viewed as a limitation on a Legislature's power to impose sanctions on a recalcitrant witness rather than a restriction on legislators' authority to inquire into matters within the traditional sphere of their authority. Such inquiries are generally immune from legal and equitable judicial restrictions. *Supreme Court of Virginia v. Consumers Union, infra; Star Distributors LTD v. Marino, infra.*

### Summary

The power to advise and consent on executive appointments, when so prescribed by statute or constitutional provision, is a valid exercise of power by the Legislature. Most authorities which have reviewed the meaning of the term "advice and consent" have concluded that the term clothes deliberative bodies with such authority to approve or disapprove formally any confirmation matter before them, and to base decisions of confirmation or rejection on any basis they find appropriate.

In determining what process it shall use to obtain information relative to a particular confirmation, the Senate has broad investigative authority derived from the Constitution and inherent in the Legislature. This authority may extend to voluntary and involuntary testimony, the collection of documents, and requests of information from private or public entities. While this authority is broad, there are limitations, particularly regarding any activity that may abridge a person's associational or other freedoms protected under the first and fourteenth amendments of the United States Constitution.

**CHAPTER THREE:**  
**THE APPOINTMENT PROCESS**

Appointments are made in accordance with constitutional and statutory provisions. These provisions can be classified in two categories: specific provisions that create state agencies and specifically provide for the appointment of board members and directors and general provisions that apply to all agencies with regard to timing appointments and filling vacancies.

**Specific Provisions**

At present, several constitutional and statutory provisions relate specifically to the creation of state agencies and require advice and consent of the Senate. These provide for the structure of governing boards, terms for board members and, in some cases, for the appointment and confirmation of agency executive directors. These provisions are outlined in Appendix A, page 29, and Appendix B, page 39, of this manual.

**General Provisions**

In addition to the above-mentioned provisions of constitutional and statutory law, certain general provisions govern the process by which appointments are made to fill positions in executive agencies.

Section 103 of the MISSISSIPPI CONSTITUTION provides:

*In all cases, not otherwise provided for in this constitution, the legislature may determine the mode of filling all vacancies, in all offices, and in cases of emergency provisional appointments may be made by the governor, to continue until the vacancy is regularly filled; and the legislature shall provide suitable compensation for all officers, and shall define their respective powers.*

In accordance with this section, MISS. CODE ANN. Section 7-1-35 (1972) provides:

*The governor shall fill by appointment, with the advice and consent of the senate, all offices subject to such appointment when the term of the incumbent will expire within nine months after the meeting of the legislature, and also vacancies in such offices occurring from any cause during the session of the senate or during the vacation of that body. All such appointments to offices made in vacation shall be reported to the senate within ten days after the commencement of the session of that body for its advice and consent to the appointment, and the vacancy shall not be filled if caused by the senate's refusal to confirm any appointment or nomination, or if it do not occur during the last five days of the session, by the appointment of the governor in the vacation of the senate, without its concurrence. Any appointment in vacation to which the senate shall refuse to consent shall be thereby annulled from that date, but the acts of the appointee prior thereto shall not be affected thereby.*

This section is critical to the appointment process, as it delineates the constraints on the timing of gubernatorial appointments and describes consequences of legislative action.

This section applies to three types of appointments: those that occur as a result of an incumbent's term ending within nine months of the legislative session, those that occur as a result of vacancy in office for "any reason," and those that are made during the last five days of the legislative session.

- *Appointments Made to Fill Offices When the Incumbent's Term Ends Within Nine Months of the Legislative Session*--MISS. CODE ANN. Section 7-1-35 (1972) is specific on this point. The section provides:

*The governor shall fill by appointment, with the advice and consent of the senate, all offices subject to such appointment when the term of the incumbent will expire within nine months after the meeting of the Legislature...*

The language of this section requires that when the term of a gubernatorial appointee expires within nine months after the meeting of the Legislature, the Governor must submit a name to the Senate prior to the expiration of the incumbent's term. Practice developed over time has been for appointments to be made in vacation and submitted to the Senate during the following session even when the appointee's position became vacant during the nine-month period after the Legislature adjourns. This practice is in direct contravention of Section 7-1-35.

- *Appointments Made During the Session and in Vacation of the Senate*--CODE Section 7-1-35 also provides:

*. . .and also vacancies in such offices occurring from any cause during the session of the senate or during the vacation of that body.*

This portion of Section 7-1-35 provides for filling vacancies during the session and in vacation. Vacation appointments may be made and submitted to the Senate for confirmation the next time the Senate convenes. This provision is intended to embrace those appointments in vacation that occur as result of resignations, removals, or other unforeseeable occurrences that give rise to vacancies occurring in offices. The section is silent on when appointments made during the session should be submitted to the Senate, but by inference, such appointments should be reported to the Senate for advice and consent during the session in which they are made. This inference is drawn from a specific provision in this section that allows for the filling of vacancies during the last five days of the session without Senate confirmation until the next time the Senate can convene to review the appointment. Were it not contemplated that appointments made during the session would be submitted during that same session, such a provision would not be necessary to exclude late session appointments from review by the Senate.

Specifically related to this matter is the Mississippi Supreme Court decision in *Brady v. Howe*, 50 Miss. 607 (1874). The Mississippi Supreme Court announced the policy behind the forerunner of present MISS. CODE ANN. Section 7-1-35 (1972) and stated:

*Clearly the governor cannot appoint to a vacancy which happens during the session of the senate without its concurrence unless, as provided in the last clause of the section, it took place during the last five days of the session; nor can he fill a vacancy caused by the refusal of the senate to confirm any appointment or nomination.*

Further, *Brady* states:

*Only when it is impracticable for the senate to unite with the governor does the constitution and statute intend that the governor alone can make an appointment. The statute regulates the subject on that theory.*

- *Effects of Filling Vacancies, Senate Failures to Confirm Appointments, and Appointments Made to Vacancies That Arise in the Last Five Days of the Session--Section 7-1-35 further provides:*

*All such appointments to offices made in vacation shall be reported to the senate within ten days after the commencement of the session of that body for its advice and consent to the appointment, and the vacancy shall not be filled if caused by the senate's refusal to confirm any appointment or nomination, or if it do not occur during the last five days of the session, by the appointment of the governor in the vacation of the senate, without its concurrence. Any appointment in vacation to which the senate shall refuse to consent shall be thereby annulled from that date, but the acts of the appointee prior thereto shall not be affected thereby.*

In an opinion dated February 16, 1995, the Attorney General informed the Legislature that the failure of the Governor to appoint a person to a vacancy occurring during vacation of the Senate by the first ten days of the session would be tantamount to a failure to confirm. Consequently, the Governor's failure to make an appointment to the Executive Directorship of the Department of Corrections within ten days of the Senate's convening in 1995 resulted in a vacancy in office. Because the declaration of a vacancy occurred during the session of the Legislature, the Governor could name a new appointee to the position so long as the appointee was reported to the Senate for its advice and consent. Assuming that the Governor withdraws an appointee's nomination, the nominee cannot be sworn in or legally participate in any meetings. *Miss. Att'y Gen. Op. No. 2002-0241* (April 26, 2002).

Of greater importance is the language governing the effects of failure to confirm appointments. Simply stated, any failure on the part of the Senate to confirm an appointment or a nomination shall result in a vacancy in the position for which the appointment or nomination was made. This vacancy may not be filled without the concurrence of the Senate. Thus vacancies will remain vacant until the Senate again convenes to consider an appointment.

This section also provides for appointments to fill vacancies that occur in the last five days of the session. It appears that this provision was inserted to enable filling vacancies that arise in the last five days of the session as if they were vacation appointments, thus exempting these appointments from review

by the Senate during the closing days of the session. Such appointments must be reviewed during the next session of the Senate.

Further, this section provides that appointments made in vacation that are not confirmed shall be annulled from the date of the Senate's failure to confirm, but prior acts of the appointee shall be valid and binding on all parties thereto. This language prevents legal attacks on the validity of votes or other actions taken by an appointee who was not confirmed and raises to a statutory level a common law doctrine borrowed from the law of agency known as the *doctrine of the de facto officer*.

In summary, this section is perhaps the most important provision of law governing gubernatorial appointments. It clearly requires submission of appointments prior to their taking office when the office they are to accept will become open to them within nine months of the close of the legislative session. This allows the Legislature to review such persons for fitness and competency to hold office prior to their taking office.

Because some vacancies will arise that are unexpected or by operation of law to become effective after the close of the legislative session, this section does provide for vacation appointments, which must be confirmed the next time the Senate meets.

#### **Matters Not Governed by MISS. CODE ANN. Section 7-1-35**

While MISS. CODE ANN. Section 7-1-35 (1972) governs most appointments, two classes of executive appointments will not fall within the scope of this section. They are:

- appointments that require advice and consent but are not made by the Governor; and,
- appointments that do not require advice and consent of the Senate.

No specific legal standards govern the timing of these appointments or the effects of Senate action on those that do require confirmation.

#### **Other Provisions and Matters Related to Appointments**

##### *Convening the Senate in Vacation, Emergency Appointments, and Removals*

Other provisions in constitutional and statutory law relate to appointments, although their applicability to routine appointments is minimal. MISS. CODE ANN. Section 7-1-37 (1972) provides:

*The governor may convene the senate in the vacation of the legislature for concurrence in appointments by giving ten days' notice thereof by proclamation by mail to each of the senators.*

This section essentially allows for special sessions of the Senate for the purpose of Senate confirmation.

In addition to providing that the Legislature may prescribe methods of filling vacant positions, Section 103 of the MISSISSIPPI CONSTITUTION also provides for gubernatorial emergency appointments to positions. No cases construe this provision; however, it may not extend for those positions for which the law provides a mechanism for filling vacancies, such as those provided for by the Legislature in MISS. CODE ANN. Section 7-1-35 (1972). (*See Etheridge, Mississippi Constitutions*, p. 220.)

While not directly addressing appointments, Section 175 of the MISSISSIPPI CONSTITUTION and MISS. CODE ANN. Section 25-1-5 (1972) address the subject of when appointments may be removed from office. Section 175 provides:

*All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.*

MISS. CODE ANN. Section 25-5-1 (1972) similarly provides for removal of officers upon conviction of certain felonies.

#### *Interim Appointments*

It is not unusual for appointing authorities to temporarily place persons in charge of agencies as interim or acting directors. However, a 1995 opinion of the Attorney General makes it clear that such appointments may not be considered for filling the position permanently if the appointment did not conform to the provisions of CODE Section 7-1-35. The opinion involves the Governor's 1994 appointment of an Interim Corrections Commissioner. While the Governor made the interim appointment during recess of the Legislature, he did not make a permanent appointment to the Commissioner's position within the first ten days of the 1995 session as required by Section 7-1-35.

The Attorney General opined that because no appointment was made to the position within the first ten days of the session, the interim appointment of the Commissioner of Corrections was vacated. Because this position was vacated by operation of law, the Governor was free to fill the vacancy with any person, including the former Interim Commissioner.

This opinion should not be viewed as barring appointing authorities from placing persons temporarily in charge of agencies regarding the former Board of Human Services' authority to place a person temporarily in charge of the department pending a permanent appointment. *See Att'y Gen. Op. No. 1991-0920* (December 5, 1991). However, the opinion makes clear that if such appointments are to be considered permanent, they must conform to the requirements of Section 7-1-35. This opinion would not be applicable to appointments not controlled by Section 7-1-35 (non-gubernatorial appointments; see previous section).

#### *Vacation Appointments*

In some cases, an appointing authority, usually the Governor, will make appointments in vacation of the Senate. Section 7-1-35 only contemplates this being done in cases in which a vacancy has occurred for unforeseeable reasons (e.g., death, resignation) or by operation of law (e.g., a new board comes into existence on July 1, two months after sine die). Often questions arise as to the legal authority of appointees who

are awaiting confirmation, but have begun to carry out their duties and responsibilities. Such appointees are treated as *de facto* officers with the legal authority to act on behalf of their agency. *Miss. Att’y Gen. Op.* No. 2001-0612 (October 5, 2001); *Miss. Att’y Gen. Op.* No. 2000-0295 (June 12, 2000) (note that this opinion does raise questions as to whether these appointees may be paid for their services).

#### *Vacancies Created By Changes of Status*

Many provisions of law require that appointees represent a particular county, congressional district, or be actively engaged in a particular occupation or profession. During the course of a person’s term it is possible that the appointee will move to another location or cease to be actively engaged in the profession that qualified the appointee to serve as an appointee. In cases in which a change of status takes an appointee out of conformity with the law, the position becomes vacant. *Miss. Att’y Gen. Op.* No. 2000-2086 (June 2, 2000).

#### **Judicial Proceedings Relative to the Appointment Power**

While such matters are not pertinent to legislative confirmation of appointees, they do have an impact on the appointment process and are therefore discussed herein.

#### *Actions in the Nature of a Writ of Quo Warranto*

Prior to the adoption of the *Mississippi Rules of Civil Procedure*, two statutory procedures existed for testing a person’s right to perform the duties of a public officer. These actions were the public and private actions for writs of quo warranto. Since the adoption of the *Mississippi Rules of Civil Procedure* in 1982, these writs were abolished. However, the substantive principles found in statutes that had governed proceedings for these writs prior to 1982 are still cited by courts as determining a party’s right to a remedy against a person who is allegedly performing the duties of an office without legal right to do so. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1323 (Miss, 1996); *Dye v. State ex rel. Hale*, 507 So 2d 332 (Miss, 1987). The aforementioned principles are found in MISS. CODE ANN. Section 11-39-1 et seq.

In *State ex rel. Holmes v. Griffin, supra*, the Mississippi Supreme Court discusses the differences in the two actions. In public actions, the Attorney General or a district attorney petitions the court for a writ barring a person from holding office. This remedy is sought when the Attorney General or the district attorney believes that an appointee fails to comply with some provision of law regarding appointee qualifications for office and therefore has no right to office. The private action is brought by a person who claims to have some right or claim to an office against a holdover officer. See *State ex rel. Holmes v. Griffin, supra* at 1225. Other private parties lack standing to bring a private quo warranto action.

These matters are relevant for discussion here because it is through the modern quo warranto proceeding that the rights of a person to hold office are tested. Once confirmed, this is the only vehicle for testing whether an appointee meets the legal requirements to hold office.

#### *Proceedings to Compel Gubernatorial Action*

In recent years litigation has tested the Governor's discretion in making appointments. In these matters, plaintiffs have sought the remedies of mandamus and injunction to compel the Governor not to submit certain appointments to the Senate for confirmation. In decisions rendered in July 1996, the Mississippi Supreme Court dismissed proceedings for both remedies filed in the chancery and circuit courts of Hinds County. The basis for these dismissals was that the courts lack the equitable or legal authority to compel action by the Governor. This reaffirms a well-established doctrine in Mississippi law that such remedies are not available against the Governor. See *In Re Fordice* (Unreported, 96-M-0717) citing *Fordice v. Thomas*, 649 So. 2d 835 (Miss, 1995); *Vicksburg R. Co. v. Lowry*, 61 Miss. 102 (1883); *Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008).

These unreported cases reaffirm an established doctrine under which extraordinary remedies to compel action are unavailable against the Governor. The effect of this doctrine is that the courts lack the authority to entertain petitions for extraordinary relief compelling the Governor to appoint or not appoint particular persons to state agency boards. In light of these decisions, the only checks on gubernatorial appointments lie with the Senate through the confirmation process and with the courts in quo warranto proceedings discussed above.

### *Incompatible Offices*

It is well understood that ours is a tripartite system of government with specific responsibilities assigned to the executive, legislative, and judicial branches of government. Under the doctrines announced in *Alexander v. State ex rel. Allain, supra*, it is well understood that a member of one branch may not simultaneously perform functions in another branch. While generally incompatible office issues have arisen with respect to legislators performing functions in the executive branch of government, such problems may arise in other settings. By example, a justice court judge appointed to a position on an executive commission would have to choose between one or the other because otherwise he would be performing functions in the judicial and executive branches of government. Several years ago, the Attorney General opined that a member of a county board of supervisors could not also serve on the Medicaid Commission because the commission is in the executive branch of government and supervisors are in the judicial branch. See *Miss. Att'y Gen. Op.* No. 1980-1123 (January 28, 1980).

While service in two branches of government violates the doctrine of separation of powers, the holding of multiple posts in the same branch of government is not a violation of the doctrine. See *Att'y Gen. Op.* No. 98-0172 (April 17, 1998) (wherein the Attorney General opined that a professor at the University of Southern Mississippi could also hold an appointment in the Commission on Marine Resources).

### **Summary**

All gubernatorial appointments requiring confirmation are governed by the provisions of MISS. CODE ANN. Section 7-1-35 (1972), which requires that an appointment for any position that will become vacant within nine months of the close of a legislative session be submitted for confirmation. This section also discusses the effects of failures to confirm. See "Failures to Confirm" on page 15.

## **CHAPTER FOUR:**

### **SENATORIAL ACTION**

Senatorial action on an appointment commences when the Governor or appointing authority sends a message to the Senate docket room announcing that an appointment has been made. After the receipt of such message, the appointment may be assigned to the appropriate committee, as in the case of bill assignments.

Once an appointment is assigned to a committee, no set standards govern the process or method of committee review. Two trends have developed over the past few years that have affected the committee process. These trends are the increased use of PEER background checks addressing an appointee's fitness to hold public office and the use of formal hearings at the committee or sub-committee level regarding appointee fitness.

- *PEER Background Checks*--The PEER Committee staff performs background checks on any appointee who must be confirmed by the Senate when the Chairman of the Senate Committee to which the appointment is assigned requests such a check on forms prescribed and provided by the PEER Committee staff. These checks are performed only when requested by the proper Senate committee chairman. Briefly, these checks include:
  - a review of resumé information provided by the appointee for the purpose of determining the appointee's qualification to hold office; and,
  - a review of state and federal court records, police and sheriff's office records, and records kept by the Bureau of Narcotics and the Department of Public Safety. These record checks reveal whether an appointee has a criminal record or outstanding civil judgments. Satisfied civil judgments are also reported.

The above check is commonly referred to as a "routine" background check. When specifically requested, the PEER Committee staff will also conduct detailed background checks on appointees. Such checks include all of the previously described steps and reviews of other evidence the Senate Committee Chairman requests. In the past, such requests have required PEER staff to interview persons regarding their work experiences with the appointee, the appointee's work performance, and specific information related to the appointee's character.

PEER checks are limited to summaries of facts found during the background check process. Except in those instances wherein a statute requires that an appointee have a specific education and work experience and PEER finds whether the appointee has such, no conclusions are drawn about the fitness or quality of the appointee. If such conclusions are to be drawn, they must be drawn by the Senate. Consequently, a background check under no circumstances should be considered tantamount to a recommendation for or against Senate confirmation.

- *Sub-committee or committee hearings*--In recent years, some committees have decided to conduct hearings on appointees' backgrounds and fitness. Hearings have been used extensively by the Senate Public Health and Welfare Committee, which has established a sub-committee to conduct such hearings.

These hearings have been formal, consisting of specific questions asked by committee members to sworn witnesses. In some cases transcripts have been made of the hearing testimony. Such hearings are useful for compiling information about an appointee's background, experience, and philosophy of management, but are time-consuming. Full hearings for all appointments would take considerable time from Senators during their relatively short ninety-day sessions.

Committees not using hearings on appointees have used a faster method, which has consisted of a review of a PEER background check, informal discussion of an appointment, and a committee vote. This method is less time-consuming than a hearing process, but may not bring to light the detailed information on a person's fitness to hold public office.

Subsequent to the completion of the fact-finding method employed by the Senate committee reviewing an appointment, the committee takes action. This action may consist of a committee recommendation "Do Advise and Consent," "Do Not Advise and Consent," or "Return to Governor." The committee may also choose to take no action at all. The effects of such a decision will be discussed later in this report under "Failures to Confirm," page 15.

Any of the above-mentioned reports effectively remove the appointment from the committee's authority and place the appointment before the entire Senate. Rules governing motions, votes, and other aspects of parliamentary procedure that govern votes on other matters also govern procedures on floor actions respecting confirmations. For PEER staff suggestions on the use of background checks and hearings, see Appendix A, page 29.

### **Summary**

The process of confirmation used in Mississippi does not vary considerably from that used in other states (see Appendix B, page 39). At present our Senate has no standing policy governing as to when it will employ hearings or request background checks.

## CHAPTER FIVE:

### CONSEQUENCES OF SENATE ACTION

This section discusses provisions of law governing failures to advise and consent, vacancies in office, liabilities of Senators for actions taken, holding over in office, and the effect of withdrawals on the office to which an appointment was made.

#### Confirmation

When the Senate confirms an appointee, that appointee will continue in office until the appointee's term ends. Many statutes set a fixed term for appointees. Officers without fixed terms fall within the scope of MISS. CODE ANN. Section 25-1-1 (1972), which provides for a four-year term for officers whose term is not set by law. Other appointees who are not officers have no fixed term and may be removed at the will and pleasure of their appointing authority.

#### Failures to Confirm

As noted above, the Senate may act on an appointment as it deems appropriate. In some cases it will find it appropriate to not confirm an appointee.

- *Failure to Confirm*--As noted earlier, MISS. CODE ANN. Section 7-1-35 (1972) provides that failure to confirm results in a vacancy in office that may not be filled until the Senate can meet to review a subsequent appointment. Exceptions to this would be appointment to fill vacancies that occur during the last five days of the session and non-gubernatorial appointments, to which this section does not apply.

Should such failure to confirm occur in an appointment to an executive directorship, the agency affected would most likely operate with an acting director appointed by the agency's governing board or by the governor in those instances in which the agency has no governing board.

When the Senate fails to confirm an appointee to a governing board, provisions under law allow an incumbent whose term has expired to "hold over" until such time as an appointee has been duly qualified. For more on this matter, see "Holding Over in Office," page 18.

- *Inaction on the Part of a Committee or the Senate*--In some cases, a Senate Committee or the Senate may choose to take no action on an appointment. Such inaction will not result in a confirmation by default.

The Mississippi Supreme Court, in the case of *Witherspoon v. State*, 138 Miss. 310, 103 So. 134 (1925), noted that to be effective, a confirmation must be duly reflected in the Senate Journal. If no affirmative action is taken, there can be no journal evidence of a confirmation. Consistent with this is an opinion of the Attorney General issued March 21, 1977. *Att'y Gen. Op. to Senator Theodore Smith* (March 21, 1977). The opinion was prepared in response to the following questions.

1. *If the Senate takes no action whatsoever, can the Governor subsequent to the adjournment of the*

*Legislature reappoint the individual to the position to which the appointee was made?*

2. *If the Senate Public Health and Welfare Committee holds hearings on these appointees and no further action is taken, can the Governor reappoint the individual to the position subsequent to the adjournment of the legislature?*
3. *If the appointments are assigned to a sub-committee for study, consideration, and evaluation and no further action is taken, can the Governor reappoint the individual to the position originally made subsequent to the adjournment of the Legislature?*

The opinion correctly notes that Section 103 of the Constitution provides the means for filling vacancies when not otherwise provided for by the Constitution. *Id.* at 1. While not quoted at length in the opinion, the section reads as follows:

*In all cases, not otherwise provided for in this constitution, the legislature may determine the mode of filling all vacancies, in all offices, and in cases of emergency provisional appointments may be made by the governor, to continue until the vacancy is regularly filled; and the legislature shall provide suitable compensation for all officers, and shall define their respective powers.*

The opinion further cites and quotes on page 2 from MISS. CODE ANN. Section 7-1-35 (1972), which governs gubernatorial appointments and provides:

*The governor shall fill by appointment, with the advice and consent of the senate, all offices subject to such appointment when the term of the incumbent will expire within nine months after the meeting of the legislature, and also vacancies in such offices occurring from any cause during the session of the senate or during the vacation of that body. All such appointments to offices made in vacation shall be reported to the senate within ten days after the commencement of the session of that body for its advice and consent to the appointment, and the vacancy shall not be filled if caused by the senate's refusal to confirm any appointment or nomination, or if it do not occur during the last five days of the session, by the appointment of the governor in the vacation of the senate, without its concurrence. Any appointment in vacation to which the senate shall refuse to consent shall be thereby annulled from that date, but the acts of the appointee prior thereto shall not be affected thereby.*

The opinion proceeds to note that under MISS. CODE ANN. Section 7-1-35, if an appointment is not confirmed by the Senate, the office to which the appointment was made shall remain vacant in the vacation of the Senate, *Id.* at 4. This would apply to confirmations that have not matured through the Senate confirmation process, *Id.* The opinion further notes that there are no

cases on point from Mississippi applying to this section to failures to confirm. This is still true.

The position taken in this significant opinion was reaffirmed in Attorney General's opinions in 1991, 1996, and 2002. In these later opinions, the Attorney General opined that inaction by the Senate constitutes a rejection of an appointment. These opinions also make it clear that appointees rejected by Senate action or inaction may not be reappointed during vacation of the Senate. To allow such would frustrate the purpose of Section 7-1-35. See *Miss. Att'y Gen. Op.* No. 1991-0418 (April 18, 1991); *Miss. Att'y Gen. Op.* No. 96-0214 (March 27, 1996); and *Miss. Att'y Gen. Op.* No. 2002-0241 (April 26, 2002).

While no court decision from Mississippi specifically address this point, the Alabama Supreme Court, in *Dunn v. Alabama State Board of Trustees*, 628 So. 2d 519 (Ala, 1993), took the position that a failure to report out of committee appointments to a university board of trustees was tantamount to a rejection by the entire Senate. See *Dunn, supra* at 515.

Related to such matters is the case of *Mississippi Marine Conservation Commission v. Misko*, 347 So. 2d 355 (Miss., 1977). In *Misko*, the Mississippi Supreme Court held that an assistant inspector for the Marine Conservation Commission, who was never confirmed by the Senate as required by law, was at most a de facto officer and could be dismissed by the commission without action from the Governor or any form of hearing.

- *Return to Governor:* Sometimes the Senate will choose to return an appointment or appointments to the Governor. This return is accomplished by the Committee to which the appointment was referred to adopt a report "return to Governor" and for the Senate to adopt such a report. The legal effect of a return to governor is identical to that of a committee's failure to act or of the Senate's failure to act on an appointment. The appointment is annulled from the date of the Senate's action and the Governor may make a new appointment. See *Miss. Att'y Gen. Op.* No. 2000-0030 (January 18, 2002); *Miss. Att'y Gen. Op.* No. 2004-0063 (February 13, 2004).

### **Gubernatorial Revocation of Appointments**

Questions have sometimes arisen over whether the Governor may revoke an appointment prior to Senate action. Mississippi statutes are silent on this point, as is Mississippi decisional law. In other jurisdictions, this matter has been adjudicated.

There is authority to support the position that once an appointment is made, it cannot be revoked by the appointing authority unless that authority has the legal mandate to remove the appointee at any time (will and pleasure appointments). While there is no Mississippi case specifically on point, in *Smith v. State*, 200 Miss. 184, 26 So. 2d 543 (1946), *Witherspoon v. State, supra*, and *Brady v. Howe, supra*, the Mississippi Supreme Court has stated that once an appointment is made, the power of the appointing authority is exhausted with regard to the appointment. By inference, it is consistent with this position that once an appointment is made it cannot be revoked by the appointing authority. See *Cook v. Botelho*, 921 P. 2d 1126 (Alaska, 1996) (in which the Alaska Supreme Court took the position that once the appointment power is exhausted, an appointment cannot be revoked and cites considerable authority for this position).

This position was also taken by the Kentucky Court of Appeals in the case of *McChesney v. Sampson*, 23 S.W. 2d 584 (Ky, 1930), a case often cited as the leading authority on the matter of appointment revocation. In this case, a general rule was announced stating that appointments are not revocable without expressed statutory authority to remove.

*McChesney* notes a distinction between those officers who are appointed, commissioned, and performing their duties and those who are nominated to take an appointment and are awaiting confirmation or the occurrence of another legally significant occurrence, such as the conclusion of a predecessor's term of office, prior to performing the duties of an appointive position. In the latter case, a nomination may be substituted at the will of the person with the authority to make the nomination. In Mississippi, no court has rendered a decision on whether a legal distinction exists between appointments and nominations and the revocability of either.

Subsequent to Senate confirmation, the authority of a governor to revoke an appointment or remove an appointee would be restricted by removal statutes or constitutional provisions. The question of whether a confirmed appointment could be removed was posed to the Attorney General by former Governor Cliff Finch in 1978. In an opinion issued by the Attorney General on October 24, 1978, the Attorney General noted that once the appointive power is exhausted by filling a position, no gubernatorial authority exists to revoke the confirmed appointment. Under such circumstances, the appointee would have an office for whatever term is specified under law absent the commission of an act giving rise to removal. This is inapplicable to a will and pleasure appointment.

### **“Holding Over” In Office**

When an appointment is not confirmed, MISS. CODE ANN. Section 25-1-7 (1972) provides for officers to “hold over” in office until their successors are duly qualified. Specifically, this section provides:

*If any person elected or appointed to any state, state district, levee board, county, county district, or municipal office shall fail to qualify as required by law on or before the day of the commencement of his term of office, or for any cause any such officer shall hold over after his regular term of office expires under the authority given him to hold over until his successor is appointed, elected and qualified, a vacancy in such office shall occur thereby and it shall be filled in the manner prescribed by law as provided by Section 103 of the Constitution for filling vacancies in such offices, unless the failure to qualify arises from there being no officer to approve the bond of such officer-elect, and except the Governor-elect when the Legislature fixes by resolution the time of his installation. This section shall not be applicable to any coroner who fails to qualify as provided in Section 19-21-105.*

This section authorizes officers with a set term of office to “hold over” until their successors are qualified. Officers with terms include those persons who have a term fixed by statute or those who have no fixed term and are not will and pleasure appointees. Such officers have a term of office of four years. See MISS. CODE ANN. Section 25-1-1 (1972). Section 25-1-7 requires that a person must have the statutory authority to hold over. See *Miss. Att’y Gen. Op.* No. 2010-0006 (January 19, 2010). “Some examples of specific officers that are statutorily authorized to ‘hold over’ until their

successors are elected or appointed and qualified are: (1) state, state district, county and county district officials elected at the general statewide election every four years (Section 23-15-193); (2) municipal elected officials (Section 21-15-1); (3) Tombigbee Valley Authority Board members (Section 51-13-1); (4) Pearl River Basin Development District Board of Directors (Section 51-11-5); (5) Mississippi Prepaid Affordable College Tuition Program (MPACT) Board of Directors (Section 37-155-7 [2])” *Id.*

Opinions of the Attorney General dated April 11, 1977; May 10, 1978; and June 3, 1981, confirm this position. In the three opinions, the principal question posed was whether certain governing board members could hold over in their positions, as their successors were not confirmed. The Attorney General concluded that such officers could hold over after the conclusion of their terms until their successors were qualified. Such may not be applicable if an officer who could hold over has abandoned his duties as a public officer. Abandonment occurs when an officer discontinues the performance of his duties or acquiesces in what may be a wrongful separation of himself from his duties. *See* C.J.S. Officers, Section 100. Regardless of the authority in law to hold over, courts have held that once an appointment is legally made by the governor, the authority to hold over is extinguished. *See Seeman v. Kinch*, 606 A 2d 1308 (R.I. 1992); *See Miss. Att’y Gen. Op. No. 2006-00125* (April 14, 2006) (which further clarifies that the statutory code giving power to Ms. Dept of Information Technology Services (25-53-7) does not provide any authority for board members to hold over).

### **Other Issues**

This section relates to certain legal consequences of the use of hearings and legal liabilities of Senators for actions taken with respect to confirmation matters.

#### *Immunity of Witnesses Sworn at Confirmation Hearings*

Some legislative committees conducting hearings on an appointee prior to a committee recommendation on confirmation might wish to take sworn testimony of persons who have information relative to an appointee’s fitness to hold office. While this is permissible and in some cases advisable, committees should be aware of some legal consequences flowing from swearing witnesses and receiving testimony.

MISS. CODE ANN. Section 5-1-25 (1972) provides committee witnesses with immunity from certain criminal prosecutions:

*A person sworn and examined as a witness before either house, without procurement or contrivance, on his part, shall not be held to answer criminally, or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor shall any statement made, or book, document, or paper produced by any such witness be competent evidence in any criminal proceeding against such witness other than for perjury in delivering his evidence; nor shall such witness refuse to testify to any fact or to produce any book, document, or paper touching which he is examined, on the ground that he thereby will criminate himself, or that it will tend to disgrace him or render him infamous.*

This section provides transactional immunity to persons who testify before legislative committees. While the section speaks to protection of witnesses from penalties or forfeitures as well as protection from criminal prosecutions, this section should be read

as providing witnesses with immunity from criminal sanctions only. Terms such as penalties and forfeitures appearing in similar provisions of law from other jurisdictions have been construed to mean criminal penalties and forfeitures. Thus, proceedings for damages or other civil remedies would not be barred by the immunity provided by Section 5-1-25. For an overview of similar immunity provisions that have been held to confer criminal immunity only, see *Committee on Legal Ethics of the West Virginia State Bar v. Graziani*, 200 SE 2d 353 (W. Va, 1973).

Specifically, this section applies to persons who appear before legislative committees by compulsion or by volition. See *State v. Billups*, 179 Miss. 352, 174 So. 50 (1937). Persons who testify and provide information that might alone not be sufficient to support a criminal indictment but would constitute an element of an indictable offense are protected from criminal prosecutions. *Wheat v. State*, 201 Miss. 890, 30 So. 2d 84 (1947). Additionally, a person who testifies before a legislative committee is immunized from prosecutions for any fact revealed in the course of testimony, even if the evidence revealed in the testimony is not used against the witness in a subsequent prosecution. See *Kellum v. State*, 194 So. 2d 492 (Miss, 1967).

As construed in *Kellum*, this statute provides a witness more than mere use immunity. Essentially, any witness who testifies before a legislative committee receives complete immunity from prosecution regarding any matter for which that person testifies.

Some limitations are imposed on the application of this broad immunity. In *Cassibry v. State*, 404 So. 2d 1360 (Miss., 1981), the Mississippi Supreme Court denied former Senator Cassibry immunity from prosecution for matters he discussed with an informal group of Senators. The court stated that there should be some formality to the legislative setting giving rise to the claim of immunity. The court further noted that the Senator had not been sworn to give testimony.

Consequently, a mere informal discussion with a group of Senators is not sufficient to clothe a person with legislative immunity from prosecution. A formal proceeding should be called to order for a specific legislative purpose and the witness should be sworn.

An additional limitation is the specific statutory exception for testimony provided through procurement or contrivance. In *State v. Billups, supra*, the Mississippi Supreme Court noted that witnesses would not be able to claim statutory immunity if they had through contrivance or procurement sought to testify in order to avoid prosecution. The essence of a contrivance is a plan or scheme. *State v. Davis*, 208 La. 954, 23 So. 2d 801 (1945). Procurement is direction, influence, personal exertion, interference, or other action with the knowledge or belief that such action will produce certain results, which results are produced. *Richardson v. Richardson*, 114 NYS 912, 917, (1909). Consequently, any witness who intends that his testimony will be given for the purpose of avoiding future prosecution will not be able to avail himself of the immunity created under the statute.

*Immunity of the State and Individual Senators for Tortious Acts  
Associated With Confirmation*

Since PEER staff last revised this manual, considerable changes have been made in state law providing tort immunity to the state and its officers and employees. In *Presley v. Mississippi State Highway Commission*, 608 So. 2d 1288 (Miss, 1992), the Mississippi Supreme Court held unconstitutional Section 11-46-6, which provided for the continuation of the doctrine of sovereign immunity as it was applied by the courts prior to the case of *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss, 1982). The court reasoned that the aforementioned section violated the constitutional doctrine of separation of powers as it purported to require the court to apply common law doctrines that the court had already abrogated. After the rendering of this decision, the Legislature made effective the tort claims provisions of Title 11, Chapter 46, which had been enacted in 1984, but had not become effective.

The following paragraphs discuss the immunities of the state and legislators under these provisions of law.

- *Immunity of the State*--MISS. CODE ANN. Sections 11-46-3 and 11-46-5 establish the state's policy with respect to its liability for torts and breach of warranties and implied terms of contract. Briefly, the statute retains its immunity from tort and liability except to the extent waived by Section 11-46-5. The latter section waives the immunity of the state and its political subdivisions in actions against the state, its political subdivisions or employees of same acting within the course and scope of employment when the civil action is for damages in tort.

For purposes of this section, employees are not acting within the course and scope of their employment when their acts constitute fraud, malice, libel, slander, defamation, or any other criminal offense excluding traffic violations. The definition of "employee" for purposes of Title 11, Chapter 46, is more extensive than usual. Under Section 11-46-1 (f), the term "employee" includes officers, employees, and servants of the state and its subdivisions, including elected and appointed officials. Consequently, this term is sufficiently broad to embrace members of the Senate and the Lieutenant Governor.

Section 11-46-9 (1) (a) creates an exception that should be broad enough to shield the state from any liability for the Senate's failure to confirm any appointee. This paragraph in a section establishing a list of exceptions from the Section 11-46-5 waiver of liability provides that the state and its employees acting within the course and scope of their employment shall not be liable for any claim:

*(a) Arising out of a legislative or judicial action or inaction or administrative action or inaction of a legislative or judicial nature.*

This provision protects the state and members of the Senate and the Lieutenant Governor in the event that any appointee who alleged injury from acts related to confirmation brought a tort action against members of the Senate.

In the event that an appointee sought equitable remedies against members of the Senate for failure to confirm, the provisions of Section 11-46-3, which in

effect continues sovereign immunity for suits for equitable remedies, would bar such suits.

- *Individual Liability of Senators and the Lieutenant Governor*--Such officers would be able to avail themselves of the exception in Section 11-46-9 (1) (a) cited above in the event that a suit for money damages was brought against the state for a failure to confirm or for some other alleged injury for which the confirmation process was alleged to be the proximate cause and individuals were joined as defendants. See Section 11-46-7 (2). Because this provision only protects employees acting within the course and scope of their employment and Section 11-46-7 (2) provides that acts that are fraudulent, malicious, libelous, slanderous, and defamatory do not fall within the course and scope of employment, any tort action for libel, slander, or defamation, or any action for intentional torts or one involving fraud would not fall within the scope of the exception in Section 11-46-9 (1) (a). Because there is a possibility that members of the Senate might discuss openly the contents of a background check or some other information that could reflect on the reputation of an appointee during the course of committee deliberation or floor action, the possibility of an appointee claiming that his reputation has been injured as a result of the statements or publications of Senators could give rise to an action for libel or slander. For reasons discussed below, statutory and common-law immunity would immunize the state and Senators from such actions in most instances.
- *Actions Against the State or Its Employees for Libel or Slander*--Sections 11-46-3 (1), 11-46-5 (2), and 11-46-7 (2) make it plain that the state has not waived its immunity from suits alleging slander, libel, defamation, fraud, malicious conduct, or any criminal act. Consequently, the state cannot be liable for such. As for individuals, Section 11-46-9 (1) (f) provides an exception from the waiver of liability for any action that is limited or barred by law. Common law doctrines that have been in force for decades in Mississippi would give individual members of the Senate protection from suits for libel or slander.

At common law, communications of legislators were said to be absolutely privileged. Such was to ensure that legislators conducting the public's business would be free to speak their beliefs without fear of vexatious litigation. In Mississippi, while no speech and debate clause appears in the 1890 constitution such as the one that protects members of Congress from civil actions for libel or slander, broad language in an early libel case adopts the concept of absolute privilege as a defense to an action for libel. In *Grantham v. Wilkes*, 135 Miss. 777, 100 So. 673 (1924), the court defined the contours of the absolute privilege and noted that an "absolutely privileged" communication is one made in the interest of the public or the due administration of justice and is limited to judicial and legislative proceedings and other actions of state. See also *Krebs v. McNeal*, 222 Miss. 560, 76 So. 2d 693 (1955).

This doctrine of absolute privilege would provide protection to legislators who speak or write on matters under consideration in the Senate. Because the absolute privilege is limited to proceedings of the Legislature, members should be aware that statements made outside of the legislative process would not be absolutely privileged.

### *Liability Under Federal Law*

It is possible that some persons who believe that they have been injured by a failure to confirm may consider an action in federal court to recover damages for their loss. Such actions might be brought under a theory of deprivation of due process protected by the Fourteenth Amendment to the United States Constitution or the deprivation of a constitutional right under color of law, subject to civil action under 42 U.S.C. 1983. Several doctrines that have developed over the past four decades make such suits difficult to maintain.

- *Legislative Immunity*--Federal courts have adopted as a matter of “federal common law” an immunity for legislators in their individual capacities who act allegedly to the detriment to others. In the case of *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783 (1951), the United States Supreme Court upheld a district court’s dismissal of an action for damages brought under the Civil Rights Act of 1871 (present day 42 U.S.C. 1983) against members of a California legislative committee investigating un-American activities for violations of constitutional rights under color of law. The court based its decision on a long-standing common law tradition of legislative immunity dating from the earliest days of the English Parliament. This immunity enables members of a legislative body to make decisions without fear of retributive litigation, but extends only to the performance of official duties. This tradition was known to the Congress, which passed the Civil Rights Act of 1871, and absent specific legislative history to the contrary, the court could not conclude that it was Congress’s intention to abrogate this traditional immunity. See *Spallone v. U.S.*, 493 U. S. 265, 110 S. Ct. 625 (1990); see also *U. S. v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185 (1980) (restating the absolute immunity of legislators acting within the scope of their official duties). The doctrine of legislative immunity has also been extended to suits against legislators for equitable relief. See *Supreme Court of Virginia v. Consumers Union*, 446 U. S. 719, 100 S. Ct. 1967 (1980); *Starr Distributors LTD. v. Marino*, 613 F. 2d 4 (2 Cir, 1980).

Cases give clear guidance as to the scope of legislative immunity. The act for which immunity is claimed must fall within the scope of those matters placed within the jurisdiction of a house of the Legislature and must fall into a field in which legislators have traditionally had a power to act. See *Bogan v. Scott-Harris*, 532 U. S. 44, 118 S. Ct 966 (1998); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F. 240 (3 Cir, 1998). While not exhaustive, one commentator has identified the traditional scope of legislative activity as including conducting investigations, holding hearings, issuing subpoenas, making committee appointments, enacting laws and passing resolutions, voting, urging approval of bills, judging election contests, making statements relative to bills under consideration, and releasing committee reports to the press, see annotation 57 A.L.R. Fed. 504.

Additionally, federal courts have held that legislators are afforded immunity as long as their acts are not “purely administrative” and involve some form of policymaking considerations. *Almonte v. City of Long Beach*, 478 F.3d 100 (2d Cir. 2007); *Younghood v. DeWeese*, 352 F.3d 836 (3d Cir. 2003); *Fowler-Nash v. Democratic Caucus of Pa. House of Representatives*, 469 F.3d 328 (3d Cir. 2006); *Bechard v. Rappold*, 287 F. 3d 827 (9<sup>th</sup> Cir. 2002). Policymaking considerations include actions such as eliminating funding for positions and

thereby eliminating the positions for budgetary purposes. *Youngblood*, 352 F.3d at 842. In *Youngblood*, a Pennsylvania Democratic House member, Youngblood, sued a fellow Democratic House member and the leader of the caucus, along with the House Democratic Whip. Youngblood alleged that because she dissented to party leadership, the defendants denied her adequate budget allocation for district office staffing and constituent services. *Id.* at 838. The court held that denying Youngblood's appropriation is protected by legislative immunity. *Id.* at 842. The court supported this decision by noting that the Pennsylvania Constitution gives the Legislature the authority to appropriate funds for staffing and constituent services and also gives authority to the defendants in this case to determine individual legislator amounts. *Id.* at 841.

Further, conducting and participating in legislative hearings that involve the formulation of policy affords immunity. *Almonte*, 478 F.3d at 110. In *Almonte*, three city council members met with the city attorney in secret and subsequently discontinued funding for three city employee positions, allegedly because Democrats filled the positions. *Id.* at 104. These employees brought a wrongful termination action alleging that the elimination of their position was "purely administrative" and served no policy making function. *Id.* at 103. The court held that these secret meetings that led to the discontinued funding and subsequent elimination of the position are a legislative function because the meetings involved formulation of a new budget. *Id.* at 107. The court noted, "Legislative immunity is not limited to the casting of a vote on a resolution of a bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote." *Id.*

Arising out of this principle of immunity for individual legislators for acts within the scope of their traditional legislative authority is a caveat that some acts may not be protected under this immunity, as when a legislator steps beyond the scope of his duties. In *Cole v. Gray*, 638 F.2d 804 (5 Cir, 1981), the United States Court of Appeals for the Fifth Circuit ruled that certain individual legislative defendants in an action brought under 42 U.S.C. 1983 could not avail themselves of the immunity noted above. In *Cole*, the court held that legislative defendants could be held liable for damages under 42 U.S.C. 1983. In so holding, the court reasoned that immunity granted under *Tenney* was only available to defendants acting within the scope of their traditional legislative authority and would not extend to the dissemination of allegedly defamatory information after the dissolution of the committee charged with the investigation of certain abuses within the administration of the Alabama National Guard. See also *Thompson v. Ramirez*, 597 F. Supp. 731 (D, Puerto Rico, 1989), wherein a federal district court found that legislators whose committee lacked the authority to issue a subpoena, but did so anyway, were not immunized from an action under 42 USC 1983 for injuries sustained by the person who was required to testify. The court noted that for the legislators to have immunity, they must strictly adhere to the legal procedures binding their legislative body.

Additionally, as mentioned above, "purely administrative" actions conducted by legislators are not afforded immunity. An example of a "purely administrative" action would be the firing of someone by a legislator without regard for policy considerations. *Fowler-Nash*, 469 F.3d at 340. In *Fowler-Nash*, Fowler-Nash, a legislative assistant for a State Representative, reported fraudulent conduct by the Representative. *Id.* at 330. She was subsequently

fired by the Representative for excessive telephone usage, abuses of internet privileges, and overall job performance. *Id.* Fowler-Nash subsequently filed suit based on First and Fourth Amendment violations. *Id.* at 329. The court held that the firing was “purely administrative” because the position itself was not eliminated and there were no broad policy considerations that went into the decision to fire Fowler-Nash. *Id.* at 340.

Further, no legislative immunity can be afforded even when an administrative termination is potentially justifiable. *Bechard*, 287 F.3d at 831. In *Bechard*, Bechard, an administrative assistant to the Pondera County Commissioners, was terminated three months before the end of the fiscal year. *Id.* at 828. Bechard was sent a letter at four p.m. on a Friday stating that although his termination was for budgetary reasons, “it was in the best interest of both parties to end the relationship immediately.” *Id.* Bechard was immediately escorted from the building and directed not to return. *Id.* The court held that even though the termination may have been potentially justifiable and actionable, the commission was still not entitled to legislative immunity. *Id.* at 829.

The primary reason the court did not grant this immunity is because the termination involved ad hoc decisionmaking rather than formulation of policy that only affected Bechard, rather than affecting a large number of people. *Id.* The court backed up this holding by finding no formal minutes were taken at the meeting at which the commission unanimously decided to terminate Bechard. *Id.* Further, an entry to the effect that the position had been terminated, for budgetary reasons, was made in the county minute book almost a week after the termination and not contemporaneously with it. *Id.* Lastly, the commission did not pass a formal resolution formally terminating the position until seventeen months after the termination. *Id.*

- *Lack of a Protected “Property” Interest in an Appointment*—Federal actions to recover for damages under civil rights statutes or the Constitution require a deprivation of rights, either in life, liberty, or property protected under the Constitution. Decisions reveal that there is no right in property to an appointment. Court decisions regarding property interests center their analysis on the concept of an entitlement. Such an entitlement may be the creature of state law or practices and customs.

In *Roth v. Board of Regents*, 408 U.S. 564, 92 S. Ct. 2701 (1972), a university employment case, the United States Supreme Court held that a professor on a one-year contract without further interest in his employment was not entitled to his position and could be dismissed without further hearing. The basis for this decision is that there was no state law or custom establishing a right to continued service in the plaintiff’s position. Cases subsequent to *Roth* establish that there must be a basis in local law for the conclusion that a property right exists for due process safeguards to exist. *See Treatise on Constitutional Law: Substance and Procedure*, Rotunda, Novak, and Young, section 17.5.; *See also Lollar v. Baker* 196 F.3d 603 (5 Cir, 1999).

Many of our statutes creating positions requiring the advice and consent of the Senate clearly make these positions will and pleasure positions in which no person could have a property right. Further, MISS. CODE ANN. Section 7-1-35 (1972) specifically provides that a failure to confirm an appointment results in a vacancy in office. Thus state law has not sought to create any

property interest in such appointments subject to the advice and consent requirement.

- *Eleventh Amendment Immunity*-In addition to the immunity given to legislators individually, certain jurisdictional immunities that protect the state from suits in federal court might ultimately protect the state treasury from liability. The eleventh amendment to the United States Constitution provides a jurisdictional immunity for states which, in effect, prohibits plaintiffs from bringing suits in federal court against states for money damages unless the state has chosen to waive its eleventh amendment immunity. Mississippi has not chosen to waive this immunity. See MISS. CODE ANN. Section 11-46-5 (4) (1972).

Traditionally, this immunity was not thought to protect the state or its officers acting in their official capacity from liability under 42 U.S.C 1983. See Prosser and Keeton on Torts, 4th ed. page 1043. However, in a recent decision, *Will v. Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989), the United States Supreme Court held that states are not persons for purposes of Section 1983 and are not liable for damages. Additionally, the court concluded that officers acting in their official capacity could not be liable, as this would subject the treasuries of states to claims for money damages not permitted by the eleventh amendment. See also *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991); *Skelton v. Camp*, 234 F.3d 292 (5 Cir, 2000); *Esteves v. Brock*, 106 F.3d 674 (5 Cir, 1997); *American Federation of State, County, Municipal Employees v. Tristano*, 898 F.2d 1302 (7 Cir, 1990); *Jackson v. Arizona*, 885 F.2d 639 (9 Cir, 1989).

While *Will v. Department of Public Safety* would protect the state from liability for any damage done to the reputation of an appointee, such would not insulate a legislator from personal liability for such if his dissemination of information derogatory to an appointee fell outside of a traditional legislative activity. Recently, in *Hafer v. Melo*, *supra*, the United States Supreme Court held that an elected official who dismissed an employee of the Pennsylvania Department of Audit could be held personally liable under 42 USC 1983. While this is not a case in which legislative immunity was or even could have been asserted as a defense, the court noted that absolute immunities such as legislative immunity extend to persons "whose functions or constitutional status requires complete protection from suit." See *Hafer v. Melo*, *supra* at 364; see also *Pendegrass v. Greater New Orleans Expressway Commission*, 144 F.3d 342 (5 Cir, 1998).

*Hafer* further notes, at page 364, that in some instances, an act may not be absolutely immunized even though the actor may be absolutely immune for other purposes. This appears to be a statement of the concept of traditional legislative functions which, when carried out by legislators, may not result in liability for the legislators, and should be read to mean that actions of those absolutely immune that fall outside of those acts to which immunity extends could be found personally liable for their damaging conduct.

- *Derogatory Information Collected During the Confirmation Process*-On occasion, a Senate committee will come into possession of information that is derogatory to the appointee. Questions may arise as to how this information may be used and what rights the appointee has to "clear his name" regarding the information. In most instances, concern over a decision not to confirm will be centered on a person's reputation and the possible injury it may suffer

as a result of the act of rejection and the possible dissemination of information used as the basis for the decision not to confirm. In *Paul v. Davis*, 424 U. S. 693, 96 S. Ct. 1155 (1976), an action under 42 U.S.C 1983, the United States Supreme Court held that an injury to reputation alone did not constitute a deprivation of “liberty” protected under the United States Constitution or Section 1983. The court further noted that under these circumstances, the aggrieved party could file a tort action for defamation in state court.

There is some question as to whether a person could distribute information so damaging to a person’s reputation that it could seriously curtail or hamper future professional activities or associational opportunities. In *Goss v. Lopez* 419 U. S. 565, 95 S. Ct. 729 (1975), the United States Supreme Court held that a suspension of students from school without a hearing did injure their liberty interest in their good name, as the suspension could harm future opportunities. In light of this condition, the students should have had an opportunity to clear their names prior to the imposition of any stigmatizing penalty.

What has grown out of these liberty interest cases is a doctrine that a person must demonstrate that a governmental employer has brought false charges that might seriously damage that person’s standing and associations in the community or that impose a stigma or other disability that forecloses freedom to take advantage of other employment opportunities. See *Wells v. Hico Independent School District*, 736 F.2d 243, 256 (5 Cir, 1984); *cert. denied*, 473 U.S. 901, 106 S. Ct. 11 (1985), citing *Roth v. Board of Regents*, *supra*; See also *Blackburn v. City of Marshall* 42 F.3d 925 (5 Cir, 1995) (which cites *Wells* as controlling on the question of what conduct constitutes stigmatizing infringements of a person’s liberty interest).

In *Wells*, the United States Court of Appeals for the Fifth Circuit further noted that to be protected, the liberty interest must be linked to a denial of a right or status recognized under state law, the stigmatization must be as a result of a discharge, the governmental entity must be likely to disseminate the information to the public in an intentional manner, the person must not have had a chance to clear his name in a hearing, and the information complained of must be false. See *Wells*, *supra* at 257.

While it is not likely that a rejected appointee, or any other appointee, would meet all of the above-noted criteria, and confirmation-related uses of such information would fall within the scope of the legislative immunities discussed above, the Senate should take care to ensure that information not be disseminated outside the confirmation process if it is of such a nature that it could stigmatize an appointee. See *American Civil Liberties Union v. Fordice*, 84 F.3d. 784 (5 Cir, 1996); *American Civil Liberties Union v. Mabus*, 911 F.2d 1066 (5 Cir, 1990) (as examples of the kinds of litigation the state can become involved in where records containing information injurious to persons’ liberty and privacy interests are disseminated).

Dissemination of such stigmatizing information may result in actions under 42 USC 1983 for money damages, as well as equitable proceedings to clear one’s name. *Rosenstein v. City of Dallas*, 876 F.2d 392 (5 Cir, 1989).

## Summary

Regarding gubernatorial appointments, whenever the Senate fails to confirm an appointment or takes no action on an appointment, the position will remain vacant until the Senate can meet again to confirm an appointment. This does not apply to vacancies that arise in the last five days of the session.

There is case law authority, although none from Mississippi, that holds that once an appointment is made by the Governor, it may not be revoked, unless the statute under which the appointment was made makes the appointee a will and pleasure appointee. Whenever the Senate fails to confirm an appointee, such appointee's predecessor may "hold over" in office until a successor may be duly qualified to replace him.

A considerable body of law has provided states and their officers considerable protection from legal actions that could arise from a failure to confirm.

A combination of statutory and common-law immunities would protect the state and legislators from tort actions that might arise from the confirmation process as long as members disseminate any information they obtain during the confirmation process responsibly and only for official legislative acts relative to confirmation. Malicious dissemination of information might give rise to a suit against a member if the dissemination was not associated with the process by which confirmation occurs. The state has not waived its sovereign immunity for acts of its employees or officers that are malicious, fraudulent, libelous, slanderous, or defamatory, and would not be immune from any suit alleging such conduct on the part of a member of the Senate.

Federal immunities for individual legislators provide a shield for legislators who in their individual capacity act in any manner that might cause injury to another. This immunity may not extend to the legislator who uses information obtained through the legislative process for activities unrelated to the legislative process.

Regarding property and liberty interests protected by the fourteenth amendment to the United States Constitution and 42 U.S.C. 1983, case law has established that absent a property interest created by state law, an appointee will not have a property interest in an appointment that will be subject to protection under federal law. State law does not confer property interests in appointive positions. Similarly, there is no protected liberty interest in a person's reputation alone; therefore, use of derogatory information in the confirmation process would not subject legislators to liability unless it were disseminated outside the legislative process and in some way threatened or injured a person's opportunities for other employment or associational opportunities.

Recent decisions regarding the scope of 42 U.S.C. 1983 provide the state with immunity from a suit under this provision. It is now understood that states are not persons for purposes of this section and that officers acting in their official capacity may not be sued for damages under this section, as such would result in the state being ultimately liable for the injurious acts of its officers.

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LEGAL AUTHORITY	AGENCY	POSITIONS AFFECTED	HEARINGS/ BACKGROUND CHECKS SUGGESTED
MISS. CONST. Section 202; see also CODE Section 37-3-9	Superintendent of Education	Appointed by the State Board of Education	X
MISS. CONST. Section 203; see also CODE Section 37-1-1	State Board of Education	Five members Appointed by the Governor, two each by the Speaker and Lt. Governor	X
MISS. CONST. Section 213A; see also CODE Section 37-101-3	Board of Trustees, Institutions of Higher Learning	Twelve members appointed by the Governor	X
MISS. CONST. Section 218; see also CODE Section 33-3-7	Military Department	Adjutant General appointed by the Governor	
CODE Section 11-46-18	Tort Claims Board	Chairman appointed by the Governor	
CODE Section 17-18-7	Hazardous Waste Facility Siting Authority	Five members appointed by the Governor	
CODE Section 19-5-333	Commercial Mobile Radio Service Board	Eight members appointed by the Governor	
CODE Section 25-9-109	State Personnel Board	Five members appointed by the Governor	X
CODE Section 25-9-119	State Personnel Director	Director appointed by the State Personnel Board	X
CODE Section 25-9-120	Personal Service Contract Review Board	Seven members: four appointed by the Governor, one appointed by the Secretary of State, one appointed by the Attorney General, one appointed by the Lt. Governor.	
CODE Section 25-53-7	Department of Information Technology Services	Five members appointed by the Governor	X
CODE Section 25-53-19	ITS Executive Director (Department of Information Technology Services)	ITS Executive Director appointed by MDITS Board	X
CODE Section 27-3-1	Department of Revenue	Commissioner of Revenue appointed by the Governor	X
CODE Section 27-4-1	Board of Tax Appeals	Three members appointed by the Governor	
CODE Section 27-104-8	Commission on Public Procurement Codes	Seven members Appointed by the Governor	

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CODE Section 27-104-101	Executive Director, Department of Finance and Administration	Executive Director appointed by the Governor	X
CODE Section 31-3-3	State Board of Contractors	Ten members appointed by the Governor	
CODE Section 31-13-1	State Bond Attorney	Appointed by the Governor	
CODE Section 31-31-5	Mississippi Telecommunications Conference and Training Center Commission	Eleven Members: three private sector members appointed by the Governor, two private sector members appointed by the Lt. Governor. Six Ex Officio Members: the Executive Director, MDA; the Mayor of Jackson; the President of Jackson State University; the Vice-Chancellor, University of Mississippi Medical Center; the Executive Director, ITD; and the Executive Director of the Metro Jackson Convention and Visitors Bureau	
CODE Section 35-1-1	Veterans Affairs Board	Seven members appointed by the Governor	
CODE Section 35-7-7	Veterans' Home Purchase Board	Six members appointed by the Governor	
CODE Section 37-4-3	Community College Board	Ten members appointed by the Governor	X
CODE Section 37-28-7	Mississippi Charter School Authorizer Board	Seven Members: three appointed by the Governor, three appointed by the Lt. Governor, one appointed by the State Superintendent of Public Education	
CODE Section 37-33-155	Board of Rehabilitation Services	Two members appointed by the Governor, plus five ex officio members	
CODE Section 37-63-3	Educational Television Authority	Seven members: the Superintendent of Education, four members appointed by the Governor, one member each by IHL and Community College Board	

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LEGAL AUTHORITY	AGENCY	POSITIONS AFFECTED	HEARINGS/ BACKGROUND CHECKS SUGGESTED
CODE Section 37-151-9	Office of Education Accountability	Director appointed by the State Board of Education	
CODE Section 37-155-7	Board of Directors, Mississippi Prepaid Affordable College Tuition Program	Thirteen members: five appointed by the Governor and subject to advice and consent plus four ex officio members and four advisory members, two each appointed by the Governor and Lt. Governor	
CODE Section 39-5-3	State Archives, Board of Trustees	Nine members appointed by the Archives Board	
CODE Section 41-3-1.1	State Board of Health	Eleven members appointed by the Governor	X
CODE Section 41-4-3	Board of Mental Health	Nine members appointed by the Governor	X
CODE Section 41-73-7 and CODE Section 41-73-9	Mississippi Hospital and Equipment Facilities Authority	Seven members appointed by the Governor	
CODE Section 41-95-5	Mississippi Health Finance Authority	Seven members appointed by the Governor	
CODE Section 43-1-2	Department of Human Services	Director appointed by the Governor	X
CODE Section 43-3-103	Board of Directors, Mississippi Industries for the Blind	Seven members: four appointed by the Governor, three appointed by the Lt. Governor	
CODE Section 43-13-107	Division of Medicaid	Director appointed by the Governor	X

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LEGAL AUTHORITY	AGENCY	POSITIONS AFFECTED	HEARINGS/ BACKGROUND CHECKS SUGGESTED
CODE Section 43-13-409	Board of Directors, Health Care Trust Fund and the Health Care Trust Expendable Fund	Thirteen members: seven voting members (five appointed by the Governor plus the State Treasurer or designee and the Attorney General or designee), two nonvoting advisory members of the Senate and one nonvoting advisor representative of the health care community appointed by the Lt. Governor, two nonvoting advisory members of the House of and one nonvoting advisory representative of the health care community appointed by the Speaker of the House	
CODE Sections 43-33-704 and 707	Mississippi Home Corporation	Nine members: six appointed by the Governor and three appointed by the Lt. Governor.	

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CODE Section 43-53-3	Mississippi Leadership Council on Aging	Thirteen members: a representative of the Department of Public Safety appointed by the Commissioner of Public Safety, two representatives of the Mississippi Sheriff's Association elected by the association, two representatives of the Mississippi Association of Chiefs of Police elected by the association, one representative of the Department of Human Services Division of Aging and Adult Services appointed by the Director of the Department of Human Services, two representatives of the American Association of Retired Persons elected by the Mississippi AARP Executive Committee, two representatives from community volunteer councils on aging appointed by the Governor, one Representative from the Office of the Attorney General Crime Prevention Unit appointed by the Attorney General, two representatives from the Aging Advocate Network appointed by the Lt. Governor.	
CODE Section 43-59-3	Mississippi Commission on the Status of Women	Thirteen members: four appointed by the Governor, three appointed each by the Lt. Governor, the Speaker of the House, and the Attorney General	
CODE Section 45-1-2	Department of Public Safety	Director appointed by the Governor	X
CODE Section 45-23-7	Advisory Committee for Boiler and Pressure Vessel Safety	Seven members appointed by the Governor	

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<b>LEGAL AUTHORITY</b>	<b>AGENCY</b>	<b>POSITIONS AFFECTED</b>	<b>HEARINGS/ BACKGROUND CHECKS SUGGESTED</b>
CODE Section 45-39-3	Crime Stoppers Advisory Board	Five members appointed by the Governor	
CODE Section 47-5-24	Department of Corrections	Commissioner appointed by the Governor	X
CODE Section 47-5-541	Prison Industries Board	Eleven members appointed by the Governor plus the Corrections Commissioner and the President of MS Delta Community College	
CODE Section 47-7-5	State Parole Board	Five members appointed by the Governor	X
CODE Section 49-2-4	Department of Environmental Quality	Director appointed by the Governor	
CODE Section 49-2-5	Commission on Environmental Quality	Seven members appointed by the Governor	
CODE Section 49-4-4	Commission on Wildlife, Fisheries, and Parks	Five members appointed by the Governor	
CODE Section 49-4-6	Department of Wildlife, Fisheries, and Parks	Director appointed by the Governor	
CODE Section 49-15-103	Marine Fisheries Commission	Commissioner appointed by the Governor	
CODE Section 49-15-301 and 305	Commission on Marine Resources	Five members appointed by the Governor. Executive Director appointed by the Governor.	
CODE Section 49-19-1	Forestry Commission	Ten members: eight appointed by the Governor, the Dean of the School of Forest Resources at Mississippi State University, and chairman of the advisory committee to the Mississippi Institute for Forest Inventory	

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LEGAL AUTHORITY	AGENCY	POSITIONS AFFECTED	HEARINGS/ BACKGROUND CHECKS SUGGESTED
CODE Section 49-19-403	Mississippi Institute for Forest Inventory	Eleven Members: four appointed by the Governor, three appointed by the Lt. Governor, four ex officio members (the Executive Director of MARIS, the State Forester, the MDA Executive Director, and the Director of the Forest and Wildlife Research Center of Mississippi State University)	
CODE Section 53-1-5 and CODE Section 53-1-13	State Oil and Gas Board	Three members appointed by the Governor, one each appointed by the Lt. Governor and the Attorney General	
CODE Section 57-1-5 and 57-1-52	Mississippi Development Authority	Director appointed by the Governor	X
CODE Section 57-10-167	MS Business Finance Corporation	Twenty-five members: four ex officio members, twelve appointed by Governor, five appointed by Lt. Governor, two appointed by Treasurer, one appointed by Secretary of State, one appointed by Attorney General	
CODE Section 57-21-7	State Chemist	Appointed by the President of Mississippi State University	X
CODE Section 57-67-7	Mississippi Superconducting Super Collider Authority	Executive Director appointed by the Governor	
CODE Section 59-6-5 and 59-6-7	Gulf Coast Superport Authority	Six Members: the Governor and five members appointed by the Governor	
CODE Section 61-4-7	Mississippi Wayport Authority	Director appointed by the Governor	
CODE Section 63-17-57 and 63-17-59	Motor Vehicle Commission	Six members appointed by the Governor, one each appointed by the Attorney General and the Secretary of State	

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CODE Section 65-1-9	Department of Transportation Executive Director	Appointed by the Transportation Commission	X
CODE Section 65-1-46	Appeals Board of the Transportation Commission	Five Members: one appointed by Governor, one appointed by Lt. Governor, one appointed by Attorney General, one appointed by the Commissioner of the Department of Revenue, one appointed by Executive Director of Department of Transportation	
CODE Section 65-25-101	Arkansas/Mississippi Bridge Commission	Three commissioners appointed by the Governor	
CODE Section 69-7-253	Egg Marketing Board	Five members: Commissioner of Agriculture as ex officio member and four members appointed by the Governor	
CODE Section 69-15-2	Board of Animal Health	Eleven members appointed by the Governor, plus the Commissioner of Agriculture and Commerce and the Dean of the School of Veterinary Medicine at Mississippi State University, the Head of the Animal and Dairy Science at Mississippi State University, the Head of the Poultry Science Department of Mississippi State University, and a member of the land grant staff of Alcorn State University appointed by the president of Alcorn State	
CODE Section 69-36-3	Southern Dairy Compact Commission	Five members appointed by the Commissioner of Agriculture and Commerce	
CODE Section 71-3-85	Workers' Compensation Commission	Three members appointed by the Governor	
CODE Section 71-5-107	Mississippi Department of Employment Security	Director appointed by the Governor	

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CODE Section 73-5-1	Board of Barber Examiners	Five members appointed by the Governor	
CODE Section 73-6-3	Board of Chiropractic Examiners	Six members: the Executive Officer of the State Board of Health and five members appointed by the Governor	
CODE Section 73-7-1	State Board of Cosmetology	Five members appointed by the Governor	
CODE Section 73-9-7	State Board of Dental Examiners	Seven members appointed by the Governor	
CODE Section 73-11-43	State Board of Funeral Services	Nine members appointed by the Governor	
CODE Section 73-15-9	Mississippi Board of Nursing	Thirteen members appointed by the Governor	
CODE Section 73-17-7	Board of Nursing Home Administrators	Eight members: the State Health Officer and seven members appointed by the Governor	
CODE Section 73-19-7	State Board of Optometry	Five members appointed by the Governor	
CODE Section 73-21-75	State Board of Pharmacy	Seven members appointed by the Governor	
CODE Section 73-23-41	State Board of Physical Therapy	Seven members appointed by the Governor	
CODE Section 73-29-7	Board of Polygraph Examiners	Three members appointed by the Governor	
CODE Section 73-30-5	State Board of Examiners for Licensed Professional Counselors	Five members appointed by the Governor	
CODE Section 73-34-7	Mississippi Real Estate Appraiser Licensing and Certification Board	Six members: five members appointed by Governor and the Administrator of the Real Estate Commission as an ex officio nonvoting member	
CODE Section 73-35-5	Real Estate Commission	Five members appointed by the Governor	
CODE Section 73-36-9	State Board of Registration of Foresters	Seven members appointed by the Governor	
CODE Section 73-39-55	Board of Veterinary Medicine	Five members appointed by the Governor	
CODE Section 73-43-3	Board of Medical Licensure	Nine members appointed by the Governor	

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CODE Section 73-53-8	Board of Examiners for Social Workers and Marriage and Family Counselors	Ten members: four social workers appointed by the Governor and two social workers appointed by the Lt. Governor, two marriage and family therapists appointed by the Governor and two appointed by the Lt. Governor	
CODE Section 73-67-9	State Board of Message Therapy	Five members appointed by the Governor	
CODE Section 75-76-9	Gaming Commission	Three members appointed by the Governor	X
CODE Section 75-76-15	Gaming Commission Executive Director	Appointed by the commission	X
CODE Section 77-1-15	Public Service Commission	Secretary appointed by the commission	X
CODE Section 77-2-7	Public Utilities Staff	Director appointed by the Governor	X
CODE Section 81-1-61	Department of Banking and Consumer Finance	Commissioner appointed by the Governor	
CODE Section 81-3-12	State Board of Banking Review	Five members appointed by the Governor	
CODE Section 99-18-1	Office of the State Public Defender	State Defender appointed by the Governor	
CODE Section 99-39-103	Mississippi Office of Capital Post-Conviction Counsel	Director appointed by the Governor	

SOURCE: MISSISSIPPI CODE OF 1972; PEER staff analysis.

## ***APPENDIX B***

### ***OTHER STATES' METHODS OF CONFIRMATION***

In reviewing the confirmation process, PEER contacted other states to determine the procedures they employ to choose the appropriate form of review in confirmation matters. PEER contacted the legislatures of Alabama, Arkansas, Florida, Louisiana, Minnesota, Oklahoma, Tennessee, and Virginia. Generally, these states lack formalized procedures to govern the investigative or review process preceding a committee's decision on an appointment.

Most states use background checks virtually identical to the routine background checks PEER staff performs for the Senate. In most cases, the state's law enforcement agency conducts the checks. Additionally, these states require that resumés be provided to the Senate so that it can review an appointee's qualifications for holding office. Generally, appointments are reported to the Senate and assigned to committees, much as they are in Mississippi. Alabama is an exception in that all appointments requiring Senate confirmation are assigned to the Senate Rules Committee.

None of the eight states examined have clear-cut criteria to determine when hearings should be held on appointees. Such matters are left to the committees to which the appointments are assigned. One state, Louisiana, has determined that "high visibility" appointees should be subject to formal hearings before the Senate Governmental Affairs Committee, but has not attempted to define which appointees should be considered as having "high visibility."

SOURCE: PEER staff analysis.

## **APPENDIX C**

### **CONFIRMATION AND SPECIAL SESSIONS**

Questions have arisen as to whether the Senate may consider the confirmation of an appointment during a special session of the Legislature. Section 121 of the MISSISSIPPI CONSTITUTION addresses legislative powers with respect to special sessions. This section provides:

*The governor shall have power to convene the legislature in extraordinary session whenever, in his judgment, the public interest requires it. Should the governor deem it necessary to convene the legislature he shall do so by public proclamation, in which he shall state the subjects and matters to be considered by the legislature, when so convened; and the legislature, when so convened as aforesaid, shall have no power to consider or act upon subjects or matters other than those designated in the proclamation of the governor by which the session is called, except impeachment and examination into the accounts of state officers. The legislature, when so convened, may also act on and consider such other matters as the governor may in writing submit to them while in session. The governor may convene the legislature at the seat of government, or at a different place if that shall become dangerous from an enemy or from disease; and in case of a disagreement between the two houses with respect to time of adjournment, adjourn them to such time as he shall think proper, not beyond the day of the next stated meeting of the legislature.*

This section requires the submission by a gubernatorial proclamation of those initial matters to be considered in a special session, but allows other matters to be considered if submitted by the Governor to the Legislature in writing during the special session. The Legislature has, as recently as the First Extraordinary Session of 2002, taken up gubernatorial appointments in special session when the appointments were transmitted to the Legislature.

Other appointments from persons or entities other than the Governor might not be subject to consideration during a special session unless included in the Governor's call.

SOURCE: PEER staff analysis.

## **APPENDIX D**

### **EXAMPLES OF INFORMATION THAT COULD BE FOUND TO BE STIGMATIZING**

While intended to be illustrative, but not exhaustive, the following are actual examples of information that courts have found to be stigmatizing or might have been considered to be stigmatizing if a plaintiff had met his burdens of establishing that the information complained of had been disseminated to the public or was false.

- In *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882 (1977), the United States Supreme Court held that a petitioner, a dismissed police officer, would have been entitled to a hearing to protect his liberty interest if he had proved that an allegation that he once held a pistol to his head was not true.
- In *Ishee v. Moss*, 688 F. Supp. 558 (N. D. Miss, 1987), a dismissed non-state service Forestry Commission employee who altered public records might have had a right to a name clearing hearing if the grounds for his dismissal had been disseminated outside of the agency investigative process.
- In *Rosenstein v. City of Dallas*, 876 F. 2d 392 (5 Cir, 1989), the United States Court of Appeals for the Fifth Circuit held that a former probationary Dallas police officer, dismissed for making obscene and harassing telephone calls to a female colleague, had a protected liberty interest that was violated when the city failed to allow him to offer evidence to rebut allegations against him. The dismissed officer was also entitled to recover damages under 42 USC 1983 for injury to his reputation and career when the city refused the dismissed officer an opportunity to clear his name.

These cases make it clear that dissemination of false information that is stigmatizing will entitle an injured party to an opportunity to clear his name or recover damages when the opportunity to rebut is denied.

Hypothetically it is possible that a Senator who disseminates information outside the legislative process might become personally liable for damages. Assume that a Senator obtains information that an appointee has once attempted suicide and uses this information outside the confirmation process. Subsequent to the dissemination of this information, the appointee is rejected for partnership in an accounting firm on the basis of the information disseminated. The injured party would have a claim under 42 USC 1983 for damages against the Senator that could not be defeated by a claim of legislative immunity if the injured party can show that the information disseminated is false and that he has been given no opportunity to rebut the information.

Additionally, assume that the Senate does not have a clearly stated rule or policy prohibiting the dissemination of information outside of the confirmation process and obtains information showing that an appointee has a history of making obscene telephone calls. The appointee contends that this is false and that it is stigmatizing. Arguably the appointee would be entitled to require that the Senate include in its files information rebutting this allegation if the information is to be made public.

SOURCE: PEER staff analysis.

