University of Houston Law Center
Initially Prepared for:
Seminar on the Law and Higher Education
Professor Dona Hamilton
Presented/Defended April 30, 2004

SUNSHINE LAWS IN UNIVERSITY PRESIDENTIAL SEARCHES: DO THEY REALLY ENCOURAGE OPENNESS?

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* At the time of writing, the author was a third-year student at the University of Houston Law Center. Many thanks are in order for the valuable insight and contributions provided by Kathryn B. Grant; Professor Dona Hamilton, Past General Counsel for the University of Houston System and the University of Houston; Regent David J. Grant, past member of the Utah State Board of Regents and father of the author; and President Steven D. Bennion, Past President of Southern Utah University and the author's father-in-law.

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I. INTRODUCTION

"Laws do not persuade just because they threaten."[1] Ironically, many times a law actually promulgates an outcome for which its enactment was intended to discourage. This paradox is debatably present when sunshine laws are applied to public university presidential searches.[2]

This paper will look at whether this incongruity exists by first, explaining the general practices used in selecting a president at state institutions of higher education. Next, it will provide a general elucidation of sunshine laws and their application to the presidential search process; more specifically, it will discuss the rationales for and against allowing public access to the presidential search process. The article will then study the 2002 presidential search at the University of Tennessee ("UT") which "went awry,"[3] by considering the search's

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[1] Lucius Annaeus Seneca (4 B.C. – A.D. 65).

[2] Michael J. Sherman, "How Free is Free Enough? Public University Presidential Searches, University Autonomy, and State Open Meetings Acts," 26 J.C. & U.L 665 at 688 (Spring 2000) (asserting that "Paradoxically, these attempts at openness may get us even further away from the spirit of openness and accountability that sunshine laws were supposed to obtain in the first place.").

[3] John Pulley, "How a 'Textbook Search' Went Awry," Chron. Higher Educ., Sept. 26, 2003 at 44 (reporting the flawed 2002 presidential search at the University of Tennessee and its subsequent fallout).

shortcomings in relation to applicable laws on public openness. The case study will also discuss UT's 2004 presidential search, examining the unprecedented use of stringent sunshine laws.[4] In conclusion, the paper will offer three legal recommendations, bent on producing a more effective search procedure, while also advancing the spirit of openness beyond that now achieved through present policies.

II. PRESIDENTIAL SEARCH PROCESS AT STATE UNIVERSITIES

It is often said that selecting a new president is the most important duty entrusted to a governing university board.[5] Thus, most presidential searches at

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[4] *See* Randy Kenner, "Top UT Job is Strong Draw," Knoxville News-Sentinel, Feb. 23, 2004. All of the interviews and the selection process were conducted in public. UT Trustee Andrea Loughry said, "This probably [was] the most open, most inclusive search that any public university has ever done." *Id*. Gary Daugherty, a private head-hunter who has worked on about 200 academic job searches said, "There could have been some searches more open, but I don't know of any." *Id*.

[5] John W. Nason, "Presidential Search: A Guide to the Process of Selecting & Appointing College & University Presidents," Association of Governing Boards of Universities and Colleges (1984) (*citing* Presidents Make a Difference: Strengthening Leadership in Colleges and Universities (1984), where "Clark Kerr, former president of the University of California and chairman of the former Carnegie Commission on Higher Education, contends that selection is the

universities are generally conducted using the same time-tested, similarly-formulated process.[6] This process in most cases begins almost immediately following the announcement that the current president is stepping down[7] and may continue for up to one year or more.[8] The search for a successor is almost always conducted on a nationwide scale.[9]

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second most important responsibility, the first being the creation of a presidential office that is viable and attractive.").

[6] These processes are described in a number of books, journal articles and court cases. *See, e.g.*, Nason, *supra* note 5; Charles N. Davis, "Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches," 21 J.C. & U.L. 353 (Fall 1994); Sherman, *supra* note 2; Nick Estes, "State University Presidential Searches: Law and Practice," 26 J.C. & U.L. 485 (Winter 2000). *See also*, the *Ariz. Bd. of Regents* case where Appendix A gives a detailed description of the process. *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 355 (Ariz. 1991).

[7] *Supra* note 6.

[8] Nason, *see supra* note 5 at 13. One survey revealed the amount of time taken to conduct presidential searches ranged between two and twelve months for four-year public schools with a median time of seven and a half months. Searches at two-year public schools took between one and six months with a median of four and a half months). However, "[t]he longer the search and screening, the greater the danger of losing good candidates, who are likely to be

In nearly all cases, this process begins with the governing board's appointment of a search committee, typically composed of stakeholders with constituent interest in the university, such as representatives from the governing board, faculty, staff, students, alumni and other concerned community members.[10] The search committee is charged with the responsibilities of determining search criteria, carrying out the search, narrowing the list of candidates to a number which will be manageable for the full governing board, and then passing recommendations on to the full board for final review and determination.[11] Today, many committees also employ a professional search firm, to perform the day-to-day logistics of a country-wide search.[12] Duties of the "headhunter" normally include initial communication with potential candidates,

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sought after by other institutions or who become disaffected with the uncertainty caused by long delays.". *See id*. at 34.

[9] Estes, *see supra* note 6 at 489.

[10] *Supra* note 6. *See also*, *infra* section IV.3.B.

[11] *Supra* note 6.

[12] An interesting question is whether the benefits of hiring a professional search firm actually outweigh the costs. *See infra* section IV.3.C. In the 2002 presidential search at UT, school officials paid $90,000 for "headhunter" services. J.J. Stambaugh, "Gaps in UT Search," Knoxville News-Sentinel, Aug. 10, 2003. The general rule for major professional search firms is to charge between 30% and 33% of the first year's salary of the appointee. Nason, *see supra* note 5 at 15. The benefits are much harder to estimate.

conducting of preliminary background checks, and general document management.[13]

In most searches, people are added to the pool of contenders through both self-asserted applications and being nominated by others.[14] This broad search, at major institutions, typically produces a pool of candidates with far more nominees than applicants.[15] Where so many candidates may exists, the process can of course take a lot of time; however as one search veteran noted, "It is not difficult to weed out the many who are unsuitable".[16] He said continuing, "It is more of a problem where the search and selection process must be conducted in the open and candidates cannot be so summarily disposed of as can be done when committee meetings are held in private."[17] (This idea will of course be better developed later in the paper.)

In "weeding out" or narrowing the field of candidates to those best qualified for the position, the committee will screen candidates' written dossiers and in many

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[13] *Id*.

[14] *Id*.

[15] Estes, *supra* note 6 at 489. This article used as an example, the 1990 presidential search at Arizona State University, where of 256 individuals being considered, only fifty had actually applied themselves. (*See Ariz. Bd. of Regents*, 806 P.2d 348). *Id*.

[16] Nason, *supra* note 5 at 34.

[17] *Id*.

cases conduct interviews and background checks.[18] This screening process reveals those candidates who will be forwarded on to the board; those candidates who are considered "promising" and "well qualified to serve as president at the particular institution."[19]

Finally, the school's governing board will scrutinize and interview the finalists as recommended to them by the search committee.[20] "The normal procedure at this point is to make a thorough investigation of the background and professional performance of the [remaining] individuals."[21] Although most interviews are privately conducted,[22] many candidates are invited to visit the campus, where they have the opportunity to meet with and answer questions from the schools

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[18] *Id*. at 43 to 57.

[19] *Id*.

[20] *Id*. at 59. Nason recommends forwarding five to eight candidates to the governing board for final consideration. *See also*, Estes, *supra* note 6 at 490. Estes says three to five candidates is normal. *Id*.

[21] Nason, *supra* 5 at 60.

[22] Kenner, *supra* note 4. *See also*, Estes, *supra* note 6. Footnote 16 of Estes's article points out that Florida's open meeting act requires interviews to be held in public. *Id*. *See*, *Wood v. Marston*, 442 So.2d 934 (Fla. 1983) (requiring all meetings of search committee for law school dean to be in the open). From 1993 to 1999, Michigan required the same. *See Booth Newspapers, Inc., v. Univ. of Mich. Bd. of Regents*, 507 N.W.2d 422 (Mich. 1993); and *Federated Publ'ns., Inc. v. Bd. of Trs. of Mich. State Univ.*, 594 N.W.2d 491 (Mich. 1999).

faculty, staff and students, along with other representatives from the community.[23] After completing the above processes and receiving feedback on the campus visits, the institution's governing board makes its final decision by selecting one of the finalists as president.[24] While the process, as outlined above generally applies to most public university presidential searches, the scope and scale of public disclosure varies from state to state and from institution to institution.[25]

III. WHAT IS "SUNSHINE" IN LIGHT OF PRESIDENTIAL SEARCHES?

All fifty states[26] and the District of Columbia[27] have sunshine laws, which are by and large patterned after the federal government's sunshine laws, as found in

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[23] Estes, *supra* note 6 at 491. Mr. Estes's survey of the current search processes at all of the fifty states' flagship universities reported the finding that nearly seventy percent of those schools included a public campus visit, for between two and six finalists, as part of the search process. *Id*.

[24] *Id*.

[25] *See supra* note 6.

[26] Sherman, *supra* note 2. Footnote 31 of Sherman's article lists the applicable sunshine statute for all fifty states. *Id*. For expansive analysis of each state's sunshine statutes and exemptions, *see* "Reporters Committee for Freedom of the Press," Tapping Officials' Secrets (2001).

[27] D.C. Code Ann. § 2-521 to 539 (2003).

the Freedom of included Information Act.[28] These regulations generally fit into two categories, which are both subject to certain exceptions.[29] First, they require meetings of governmental bodies to be open to the public; and second, they require access to records of public agencies, by having those agencies make documents available upon request to the public for inspection and copying.[30]

This section of the paper will (1) present examples of both open meetings and open records statutes; (2) discuss judicial determinations relating to sunshine laws and presidential searches; (3) present findings of a recent survey on actual presidential search practices;[31] and (4) evaluate the rationales for and against allowing public access to the search process, including the focal point of this paper, which is that sunshine laws may actually move the process further away from the spirit of openness.

1. Statutory Examples. The sunshine statutes for three states (Texas, Tennessee and Florida) are presented in this section to illustrate the differences

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[28] 5 U.S.C.A. 552 (West 2002).

[29] *See* Sherman, *supra* note 2 at footnote 35 ("These exceptions vary from state to state, with the result that some states have far more stringent pubic information laws than do others.").

[30] Davis, *supra* note 6 at 356 to 358.

[31] Estes, *supra* note 6. Mr. Estes, University Counsel of the University of New Mexico, conducted a survey of actual presidential search practices in all fifty states. *Id*.

in content and scope that may exist from state to state.[32] For each of the three states, both open meetings statutes and open records statues will be provided.

A. Texas sunshine statutes. Texas's sunshine statutes and applicable statutory exceptions read as follows (note particularly the express exception to the open records statute specifically relating to presidential searches):

Texas open meetings: "Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter."[33] "This…does not prohibit the governing board of an institution of higher education...from holding an open or closed meeting by telephone conference call."[34] "Closed meetings" or executive sessions are statutorily provided for to permit the confidential discussion of certain matters.[35]

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[32] These three states were selected not only to demonstrate specific interstate differences that may exist, but also because (1) the paper is written for a University of Houston Law Center seminar, making Texas law particularly pertinent; and (2) situations involving both Tennessee and Florida will be covered in greater depth later on.

[33] Tex. Code Ann. § 551.002 (Vernon 2003).

[34] Tex. Code Ann. § 551.121(b) (Vernon 2003). Sub-paragraphs (c)-(f) lay out notice and other accommodation requirements for telephone conference call meetings. *Id*.

[35] *See, e.g.*, Tex. Code Ann. § 551.071 (Vernon 2003) (consultation with attorney); Tex. Code Ann. § 551.072 (Vernon 2003) (deliberation regarding real property); Tex. Code Ann. § 551.073 (Vernon 2003) (deliberation regarding

Texas open records. "[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees…The provisions of this chapter shall be liberally construed to implement this policy."[36]

"Public information is available to the public at a minimum during the normal business hours of the governmental body."[37] "The name of an applicant for the position of chief executive officer of an institution of higher education is excepted from the requirements, except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person."[38] Other statutory

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prospective gift); Tex. Code Ann. § 551.077 (Vernon 2003) (personnel matters); and Tex. Code Ann. § 551.076 (Vernon 2003) (deliberation regarding security devices).

[36] Tex. Code Ann. § 552.001 (Vernon 2003). Contains the following significant policy discussion: "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." *Id*.

[37] Tex. Code Ann. § 552.021 (Vernon 2003).

[38] Tex. Code Ann. § 552.123 (Vernon 2003).

exceptions to the public information laws exist in Texas.[39]

B. Tennessee sunshine statutes. Tennessee's sunshine statutes are similar to those of Texas; however Tennessee's provide for fewer exceptions, thereby making the statutes more broad. The statutes read as follows:

Tennessee open meetings. "The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret."[40] "All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee."[41]

Tennessee open records. "Except as provided for in § 10-7-504(f),[42] all state, county and municipal records and all records … shall at all times during business hours, be open for personal inspection by any citizen of Tennessee, and those in

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[39] *See, e.g.*, Tex. Code Ann. § 552.101 (Vernon 2003) (confidential information); Tex. Code Ann. § 552.102 (Vernon 2003) (personnel information); Tex. Code. Ann. § 552.109 (Vernon 2003) (certain private communications of an elected office holder); Tex. Code Ann. § 552.110 (Vernon 2003) (trade secrets, certain commercial or financial information); Tex. Code Ann. § 552.114 (Vernon 2003) (student records); and Tex. Code Ann. § 552.115 (Vernon 2003) (birth and death records).

[40] Tenn. Code Ann. § 8-44-101 (2003).

[41] Tenn. Code Ann. § 8-44-102 (2003).

[42] Tenn. Code Ann. § 10-7-504(f) (2003). This list of statutory exceptions only relates to personnel records of government employees. *Id*.

charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law."[43]

C. Florida sunshine statutes. Florida's sunshine statutes are generally considered to be the broadest of any state.[44] The statutes read as follows:

Florida open meetings. "All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution,[45] at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting."[46]

Florida open records. "It is the policy of this state that all state, county, and municipal records shall be open for personal inspection by any person."[47] Certain limited statutory exemptions to open records laws also exist in Florida.[48]

2. Judicial Determinations. In determining whether and to what extent sunshine laws apply to state university presidential searches, several state courts

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[43] Tenn. Code Ann. § 10-7-503 (2003).

[44] *See infra* note 47

[45] *See infra* note 23.

[46] Fla. Stat. Ann. § 286.011 (West 2004).

[47] Fla. Stat. Ann. § 119.01 (West 2004).

[48] *See, e.g.*, Fla. Stat. Ann. § 119.07 and 119.071 (West 2004). These, like Tennessee's statutes generally apply to employee records. Personal medical records and criminal records of minors are also mentioned. *Id*.

have weighed in on the issue.[49] Until recently, the interesting questions in this area related to open records statutes and whether they required the disclosure of finalists' identities.[50] However in recent years, the discussion has expanded to asking whether all candidates' identities should be fair game, and whether the interviews and search committee meetings themselves should all be publicly accessible. This section will chronicle that evolution by briefly providing the issues, facts and holdings for several defining cases in this area.

A. Texas: *Hubert v. Harte-Hanks Texas Newspaper* (1983). The good ol' "Sovereign State of Texas" was the first state to rule on whether sunshine laws applied to university presidential searches. Its Court of Appeals granted the petition of Harte-Hanks, a newspaper, by ordering the release of records from Texas A&M University's 1981 presidential search.[51]

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[49] *See*, *e.g*., *Ariz. Bd. of Regents*, 806 P.2d 348, *Bd. of Regents of the Univ. System of Ga. v. Atlanta Journal*, 378 S.E.2d 305 (Ga. 1989); *Booth Newspapers, Inc.*, 507 N.W.2d 422; *Federated Publ'ns., Inc*., 594 N.W.2d 491; *Lexington Herald-Leader Co*., v. *Univ. of Ky. Presidential Search Comm*., 732 S.W.2d 884 (Ky. 1987); *Minn. Daily v. Univ. of Minn*., 432 N.W.2d 189 (Minn. Ct. App. 1989); *Univ. and Comty. Coll. Sys. of Nev. v. Dr. Partners*, 18 P.3d 1042 (Nev. 2001); and *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 557 N.W.2d 447 (Minn. Ct. App. 2003).

[50] *See supra* notes 4 and 21.

[51] *See Hubert v. Harte-Hanks Texas Newspaper, Inc*., 652 S.W.2d 546 (Tex. Ct. App. 1983).

The court recognized that based on personal privacy law, the records of applicants may be withheld from the public if they contain "highly intimate or embarrassing facts which, if publicized, would be highly objectionable to a reasonable person…and is not of legitimate concern to the public"[52] The court held that the names of presidential candidates were not "highly intimate or embarrassing facts" and that the public had a legitimate concern in having them made public.[53] Thus the list of all applicants' names was given to the newspaper.[54] As provided in the section above, the Texas legislature later minimized the effect of this decision through amending the state's Open Records Act.[55] The amendment only allowed public access to applicants' names during the twenty-one-day period, immediately proceeding final voting.[56]

B. Minnesota: *Minn. Daily v. Univ. of Minn*. (1989). The Minnesota Daily sought injunctive relief to compel the University of Minnesota Presidential Search Advisory Committee to hold open meetings.[57] According to Minnesota statutes all meetings of government boards and bodies, where public business is transacted,

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[52] *Id*. at 550, citing *Industrial Found. Of the S. v. Texas Indust. Accident Bd*., 540 S.W.2d 668 (Tex. 1976), cert. denied.

[53] *Hubert*, 652 S.W.2d 546, 550.

[54] *Id*.

[55] Tex. Code Ann. § 552.123 (Vernon 2003).

[56] *Id*. *See supra* section II.1.A.

[57] *See Minn. Daily*, 432 N.W.2d 189, 190.

are required to be open to the public.[58] The court explained that the Minnesota Open Meeting Law was enacted to further "three purposes: (1) to prevent public bodies from acting secretly without the public having an opportunity to detect improper influences, (2) to assure the public's right to be informed, and (3) to afford an opportunity for members of the public to present their views."[59]

The trial court denied the newspaper's prayer for injunctive relief.[60] The appeals court affirmed the district court, holding that the Presidential Search Advisory Committee was not committee of a government body because none of its members were also members of the Board of Regents.[61] Further, it defined a "governing body" as one whose member(s) have "the power to decide, as opposed to the right to recommend."[62] The court found that the advisory committee did not hold the power to decide, thus should not be considered a government body.[63] Additionally, the court said that "the procedure adopted in

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[58] *Id*. at 191, *citing* Minn.Stat. § 471.705, *subd.* 1 (1986).

[59] *Minn. Daily*, 432 N.W.2d 189, 190, *citing St. Cloud Newspapers, Inc*. *v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn.1983), quoted in *Itasca Country Bd. of Commissioners v. Olson*, 372 N.W.2d 806-07 (Minn.Ct. App.1985).

[60] *See Minn. Daily*, 432 N.W.2d 189, 190.

[61] *Id*. at 192.

[62] *Id*., quoted in Minnesota Education Association v. Bennett, 321 N.W.2d 395, 397 (Minn.1982).

[63] *See Minn. Daily*, 432 N.W.2d 189, 190.

this case seem[ed] to balance the public's right to information with efficient administration."[64]

C. Georgia: *Bd. of Regents v. Atlanta Journal* (1989). Pursuant to Georgia's Open Records Act,[65] two newspapers requested, from the Board of Regents, the resumes, letters of recommendation, vitae, and all other compiled information on all candidates considered for the presidency of Georgia State University.[66] The trial court ordered production of record's pertaining to candidates, except for evaluations prepared by the board members and their staff and confidential evaluations by third parties, such as letters of recommendation.[67] The board eventually appealed to the Supreme Court of Georgia.

Georgia's open records statutes encompass "all state, county and municipal records,"[68] to which records of the Board of Regents apply,[69] providing an

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[64] *Id*. at 194 (concluding it was proper for the Board of Regents to listen to a group of non-regents on important matters, "But warning that a governing body cannot abdicate its responsibility to make difficult decisions to an outside panel and should not adopt such a panel's recommendation without affording an opportunity to the public to react to the recommendation."). *See Moberg v. Independent School District No*. 281, 336 N.W.2d 510, 517 (Minn.1983).

[65] OCGA § 50-18-70.

[66] *Bd. of Regents of the Univ. System of Ga. v. Atlanta Journal*, 378 S.E.2d 305 (Ga. 1989).

[67] *Id*.

[68] *Id*. *See* OCGA § 50-18-70.

exception for records consisting of "confidential evaluations submitted to…a governmental agency and prepared in connection with the appointment or hiring of a public officer or employee."[70] The supreme court held that: (1) the applications submitted by candidates and resumes and vitae that were products of applicant's themselves were not evaluations, exempt from disclosure, and (2) the preference for privacy, considered to be desirable for attracting qualified applicants, did not constitute a public interest that could be balanced against the Open Records Act's disclosure requirements.[71]

D. Arizona: *Bd. of Regents v. Phoenix Newspapers* (1991). The Board of Regents sought declaratory judgment, that it was justified in withholding from the media, the names and resumes of all candidates who were in the prospect pool to become the president at Arizona State University.[72] Newspapers answered, counterclaiming for relief under state public records law and seeking production of resumes of all people in the pool of applicants.[73] The trial court ordered the disclosure of names and resumes of all candidates. The board and newspapers appealed to the Supreme Court of Arizona.

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[69] *See Atlanta Journal*, 378 S.E.2d 305. *See* OCGA §20-3-20(a). *See also*, *Macon Telegraph Publishing Co. v. Bd. of Regents of the Univ. System of Georgia*, 350 S.E.2d 23 (1986) (holding the Board of Regents is a state agency).

[70] *Atlanta Journal*, 378 S.E.2d 305. *See* OCGA § 50-18-72(a)(5).

[71] *See Atlanta Journal*, 378 S.E.2d 305.

[72] *See Ariz. Bd. of Regents*, 806 P.2d 348.

[73] *Id*.

Arizona's public records statute reads as follows: "Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."[74] While the court recognizes that records of the board of regents are included in this statute, it also recognizes that substantial and irreparable harm might be done if they are forced to turn over the requested information.[75] Also, the court held that individuals who were being considered for the position were not candidates, but were prospects.[76] Candidates were those seriously being considered for the job, while prospects were people in the initial large group being mulled over to advance as candidates.[77] The prospect may not have even known she was nominated and may have found it embarrassing and harmful to her career to be disclosed.[78] Finalists, as the court defined them, were

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[74] *Ariz. Bd. of Regents*, 806 P.2d 348. *See* A.R.S. § 39-121.

[75] *Ariz. Bd. of Regents*, 806 P.2d 348, 257. *See Carlson v. Pima County*, 687 P.2d 1242, 1246 (1984) ("While access and disclosure is the strong policy of the law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interest of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection. Such discretionary refusal is subject to judicial scrutiny.").

[76] *See Ariz. Bd. of Regents*, 806 P.2d 348, 258.

[77] *Id*.

[78] *Id*.

those persons actually submitted to the full board for consideration.[79] Because of the foregoing reasons, the court held the board was justified in withholding the names and resumes of persons who were in the prospect pool, but not of persons who were finalists for the position.[80]

E. Michigan: *Booth Newspapers v. Bd. of Regents* (1993). Two newspapers sued the University of Michigan Board of Regents claiming the board violated Michigan's Open Meetings and Freedom of Information Acts in connection with selecting its new university president.[81] The trial court granted summary judgment for the board and the newspapers appealed. The appeals court affirmed in part and reversed in part, remanding the case to the trial court. Review was granted by the Supreme Court of Michigan.[82] The court held that the presidential selection procedure used by the board of regents violated both the Open Meetings and Freedom of Information Acts as the University of Michigan was a pubic body[83] and presidential searches were actions which fell within the statutes' meanings.[84]

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[79] *Id*.

[80] *Id*.

[81] *See Booth*, 507 N.W.2d 422.

[82] *Id*.

[83] *Id*., c*iting* Const. 1963, art. 8, § 5; *Univ. of Michigan Regents v. Employment Relations Comm.*, 204 N.W.2d 218 (1973); *Peters v. Michigan State College*, 30 N.W.2d 854 (1948) (holding a state university is considered an "incorporated public board," and as such, subject to the workers' compensation act in spite of

F. Michigan: *Federated Publ'ns., Inc. v. Bd. of Trustees* (1999). Six years after the *Booth* decision, as discussed immediately above, another newspaper publisher brought suit against Michigan State University's Board of Trustees, alleging that its procedure used to select a university president violated the state's Open Meetings Act.[85] The trial court granted summary judgment in favor of the trustees and the publisher appealed. The court of appeals reversed in part and affirmed in part,[86] and the trustees appealed, with the Supreme Court of Michigan granting leave.[87]

The Supreme Court explained that the Michigan Constitution confers a unique status on its public universities, giving their boards the constitutional power to supervise themselves.[88] The court ruled on the side of the dissent in *Booth*,

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the constitutional provisions giving the board control of college funds); and *Branum v. Univ. of Michigan Regents*, 145 N.W.2d 860 (1966) (holding the Board of Regents, in spite of its independence, is a part of state government and subject to the waiver of governmental immunity by the state).

[84] *See Booth*, 507 N.W.2d 422.

[85] *See Federated Publications*, 594 N.W.2d 491.

[86] *Id*., *citing* 561 N.W.2d 433.

[87] *See Federated Publications*, 594 N.W.2d 491.

[88] *Federated Publications*, 594 N.W.2d 491, 495, *citing* Const 1963, art 8, §§ 4, 5 & 6; and *Bd. of Regents of the Univ. of Michigan v. Auditor General*, 132 N.W. 1037 (1911). *See also*, *Federated Publications*, 594 N.W.2d 491, 496, *quoting Branum v. Bd. of Regents of the Univ. of Michigan*, 145 N.W.2d 860 (1966)

concluding that the application of the Open Meetings Act in this context was unconstitutional.[89]

G. Nevada: *University and Community College System v. DR Partners* (2001). A newspaper sought to prohibit the search committee from holding a closed meeting to interview applicants for the position of president of Nevada's community college.[90] The trial court agreed with the newspaper, issuing both a preliminary and permanent injunction, against which the University and Community Colleges System appealed.[91] The issue went before the Supreme Court of Nevada.[92]

On their face, Nevada's open meetings statutes appear to contradict one another, when considering the issue of whether presidential candidates can be interviewed in closed sessions. For example, one statute reads, "Nothing contained in this chapter prevents a public body from holding a closed meeting to consider the character, alleged misconduct, professional competence, or

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(recognizing that universities are not exempt from all regulation in saying that "there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.").

[89] *Id*. at 495, *citing Booth*, 507 N.W.2d 422.

[90] *See University and Community College System of Nevada v. DR Partners*, 18 P.3d 1042 (2001).

[91] *Id*.

[92] *Id*.

physical or mental health of a person,"[93] and another statute says it does not "Permit a closed meeting for the discussion of the appointment of any person to public office or as a member of a public body."[94] To mend the apparent controversy, the Supreme Court held that a community college president was not a "public officer," thus the state's open meeting law did not prohibit the interviewing of applicants from being conducted in a closed session.[95]

H. Minnesota: *Star Tribune v. Bd. of Regents* (2003). Various print news media organizations sued the University of Minnesota's board of regents, alleging that its search process used for selecting a new university president violated the state's Open Meeting Law and Government Data Practices Act.[96] The news organizations sought to compel the disclosure of information on the unsuccessful candidates and to enjoin the board from conducting closed meetings. The trial court ordered the regents to disclose the requested data, and they appealed to the state Court of Appeals.[97]

The appeals court held that: (1) the Data Practices Act applied to the university and its procedure for selecting a new president; (2) the Open Meeting Law applied to the procedure for selecting a new president; and (3) the board's

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[93] *Id*., *quoting* NRS 241.030(1).

[94] *DR Partners*, 18 P.3d 1042, 1045, *quoting* NRS 241.030(3)(e).

[95] *See DR Partners*, 18 P.3d 1042.

[96] *See Star Tribune Co. v. Univ. of Minnesota Bd. of Regents*, 667 N.W.2d 447 (2003).

[97] *Id*.

constitutional mandate to control and manage the university was not violated.[98] The board appealed to the Supreme Court, where review was granted; however, a ruling has not yet been handed down.[99]

3. Practice in Most States. A fairly recent survey, conducted by the Office of University Counsel for the University of New Mexico, revealed that in most presidential searches at state universities, "only a limited number of candidate names are in fact disclosed."[100] Even fewer states provide open access to search committee meetings and candidate interviews.[101] This is very interesting, considering that less than half of all states have express statutory exceptions which limit disclosure of candidate names.[102]

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[98] *Id*.

[99] *Id*. (granting review on October 21, 2003).

[100] Estes, *supra* note 6 at 486. *See also*, *supra* note 22.

[101] My limited search turned out but three states which have allowed access to search meetings: Michigan and Florida (*see supra* note 21); and Tennessee (*see supra* note 4).

[102] Estes, *supra* note 6 at 496. Mr. Estes's survey of sunshine laws in all fifty states revealed twenty-two states where open records laws contained express exceptions permitting nondisclosure of candidate's names when applying for public employment. Three of the twenty-two states had exceptions applying directly to public university presidential searches. Michigan (Mich. Comp. Laws Ann. § 15.267j (West 1994)); New Mexico (N.M. Stat. Ann. § 14-2-1 (Michie 1997)); and Texas (Tex. Code Ann. § 552.123 (Vernon 2001). The other

However, the tide may be turning. With the advent of these completely transparent searches, as have recently been performed in Florida[103] and Tennessee,[104] news media publishers all over the country are licking their lips. For example, just a couple of weeks after the University of Tennessee completed its history-making transparent search, the Utah State Board of Regents announced, for the first time in history, the names of three finalists in the 2004 University of Utah presidential search.[105] It appears that instead of satisfying the

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nineteen of the states' exceptions generally applied to all applicants for public employment as executives in state government. Estes, *supra* note 6 at 496.

[103] Stephen Speckman, "U. Chief Candidates in Public Spotlight, But a Lot Still Secret," Deseret Morning News, p.A10, Apr. 27, 2004 ("Machen's [the University of Florida's new president] final interviews were broadcast live on the Internet.").

[104] *See* Davis, *supra* note 6 at 358. *See also*, *supra* section II.1.C.; *News-Press Publishing Co. v. Gadd*, 388 S.2d 276 (Fla. Dist. Ct. App. 1980), petition denied ("All documents falling within [the] scope of the Public Records Law are subject to public disclosure unless specifically exempted by an act of the legislature."); and *infra* section III.

[105] Stephen Speckman, "3 Finalists Named for Top Post at the U.," Deseret Morning News, Apr. 23, 2004. In 2002, the Utah State Board of Regents amended its rules to "make public the names of all finalists to be interviewed by the full Board. Finalist's interviews will be held in an executive session pursuant to the Utah Open and Public Meetings Act." U. High Ed. R203-4.4. This begs an interesting question: Why did the regents push this rule on themselves? It wasn't

appetites of Utah journalists, the first ever release of multiple candidate names only stimulated their hunger. A Salt Lake Tribune columnist, Holly Mullen, concluded her report about the three finalists by writing, "This time around, the community has a little piece of the pie. No matter the outcome, we at least got a taste. Next time, let's ask for more."[106]

Another local newspaper, The Deseret News, published its opinion on the matter. It wrote, "While such an announcement represents a step toward openness, it['s] a step that is much too small." In speaking of the decision which was made in a closed session, the newspaper opined, "Why not let everybody else in? Why would openness be such a bad thing?"[107] Confirming that this attitude might be more widespread than only in Utah, Sheldon Steinback, general counsel for the Washington-based American Council on Education noted, "Searches that appear to be open are not as transparent as the public would like them to be."[108]

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legislatively enacted. Was the board simply preempting any judicial contests that might have won newspapers more access?

[106] Holly Mullen, "Mullen: Public Gets Peek as U. Seeks Chief," Salt Lake Tribune, Apr. 27, 2004 (referring to the search as having only a "hint of openness" and saying the process "isn't perfect, and the term "open process" is certainly relative.").

[107] Deseret News Opinion, "Open Selection Process Best," Deseret Morning News, p.A16, Apr. 23, 2004.

[108] *See* Speckman, *supra* note 103.

4. Public vs. Private Search. Mr. Estes's survey reported that seventy percent of flagship public universities allowed for some form of public scrutiny in their presidential search processes, the extent of such scrutiny of course varying widely.[109] Conversely, in thirty percent of such searches, the governing board simply announced the individual selected.[110] In making the important decision of who their president will be, why do institutions differ so much in the degree of openness they allow? Isn't there a "best practice"? This section will discuss the considerations used by both sides in justifying their respective policies.[111]

A. Detriments of a public search. Opponents argue that open presidential searches disrupt the search committee in assembling a qualified and attractive pool of applicants for consideration.[112] This is because "according to conventional wisdom, the most qualified presidents and chancellors will not become involved in a search unless they are guaranteed anonymity until the final stage of the process."[113] Candidates may value this guaranteed anonymity for a few reasons.[114]

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[109] Estes, *supra* note 6 at 491.

[110] *Id*.

[111] *See generally*, Davis, *supra* note 6; Sherman, *supra* note 2; and Estes, *supra* note 6. These articles discuss the general pros and cons of allowing presidential searches to be conducted in the open. *Id*. *See also*, Nason, *supra* note 5.

[112] See supra note 111.

[113] Pulley, *supra* note 3 at 45.

[114] *See supra* note 111.

First, potential presidents may feel that if their candidacy becomes public knowledge, their effectiveness as a leader in their current position will be compromised. For example, if the candidate is in the middle of a large donation campaign or working closely with faculty to bring about some long-range strategic plan, news that he is pursuing a position at another institution may undermine his ability to convince benefactors and co-workers to rally around the school together. Members of important constituencies may then see him as insincere or someone ready to "jump ship".[115] Second, public rejection may be embarrassing, even if the candidate is a runner-up. Future job searches may be encumbered, if a "looser" stigma is attached to the publicly-rejected hopeful.[116] Third, prospective presidents may fear that an unbalanced media will distort or misrepresent who they are; after all, the media isn't generally known for being unbiased.[117]

Opponents to open searches may also feel that public access to the process has a "chilling" effect on the types of questions asked of candidates and the nature of discussion between decision makers.[118] Sometimes the hard questions may not be asked and the difficult issues may go un-deliberated; not because such topics are undeserving of consideration, but because it may not be

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

politically expedient for certain individuals to be involved in such public discussions.[119]

B. Benefits of a public search. Proponents of having public university presidential searches argue that open access will promote advantageous changes in governance, by allowing the public to keep an eye on the process, thereby guarding against corruption.[120] The public often claims this right, because institutions of higher education are funded largely through the use of tax dollars, contributed to the government by the people.[121] Those in favor suppose that openness increases the likelihood that the most qualified candidate will end up with the job. They also say this insures that the pool of potential presidents includes a representative number of minorities.[122]

Also, those in favor of openness may believe public searches expose any "skeletons" that candidates might have hidden in their "closets". They claim that if a candidate has skillfully hidden a tarnished past by providing resume information and personal references that cast only a favorable light on the applicant, private search methods may not be sufficient in uncovering negative news.[123]

Some argue that the very nature of a public search provides a sort of proving ground, where the candidate who is most fit for survival will be left standing, with

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[119] *Id*.

[120] *See supra* note 111.

[121] *Id*.

[122] *Id*.

[123] *Id*.

others being weeded out.[124] This idea may be sound, because a president, seen as the school's chief ambassador, will largely be successful in her duties of leading, organizing, and fundraising, only if she is capable of doing so in the public eye.[125]

Arguably, one of the most important benefits of conducting a public presidential search is that applicants are able to meet with and get to know faculty, staff and other constituents before the final decision is made.[126] This allows the potential president to evaluate his "fit" within the institution's culture, and gives constituents a look at their would-be leader, thereby fostering some level ownership in their new president before the decision is even made.[127]

C. "There aint no such thing as a free lunch."[128] Taken alone, these arguments are persuasive and even advance themselves as if they were "Matter[s] of fundamental, self-evident principle[s] of public accountability."[129] However, the

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[124] *Id*.

[125] *Id*.

[126] *Id*. "Faculty members will sometimes resent what they see as a deliberate indifference to their concerns and their judgment if they are not allowed a preview and will occasionally react with virulent hostility to the person appointed." Nason, *supra* note 5.

[127] *Id*. Some public searches provide candidates an opportunity to tour the campus and participate in question and answer sessions with faculty.

[128] Robert A. Heinlein, The Moon is a Harsh Mistress, St. Martin's Press, 1997.

[129] Estes, *supra* note 6 at 506.

desirable policy objectives served by allowing openness in presidential searches are full of trade-offs. As discussed above, if the best candidates for a position will not hold themselves out to the public as willing contenders, the cost of transparency should be counted as excessive.[130] After all, the end-goal in a presidential search should be to appoint the most capable person possible as president; it is not to entertain the populace as everyone watches the search drama unfold. "The metaphor of pulling up a carrot to see how it is growing seems apt."[131]

Proponents of public openness rebut this argument by asserting that a candidate being considered at another institution carries with herself no negative stigma in her current position. This camp sometimes takes it one step further, by suggesting that outside interest may even elevate the way current co-workers perceive their wandering-eyed friends. The statements of a Utah newspaper, writing about two state university presidents in Utah who were involved in outside searches, offer a prime example of the way these proponents think.[132] In its opinion column, the paper argued:

> "If Utah's higher education officials acted the way they have long said people everywhere act, they would be turning their backs on Utah State University president Kermit Hall right now, considering him a traitor and looking for ways to replace him.

[130] *Id*. *See also*, *supra* note 111.

[131] Estes, *supra* note 6 at 506.

[132] *See infra* section IV.2.

> "Instead, Dave Buhler, the associate commissioner of public affairs for the Utah System of Higher Education, said of Hall's recent attempt to become president of the University of Tennessee, 'It's a real compliment to Utah and to our presidents that President Hall would be so well thought of by another top-notch research university.' He said more. 'He (Hall) is a great president, and I'm sure that everyone will be glad he will be here a while longer.'
>
> "That is, of course, the way any administer should react when learning that one [of] his top people finished second in the running for another job. And it is exhibit B in the case against Utah's lingering reluctance to make its own selection process for university presidents more open.
>
> "Exhibit A was Bernie Machen, who was snatched earlier this year from his job as President of the University of Utah and installed at the University of Florida after another thoroughly open process."[133]

This position would be fine if it were not comparing "apples to oranges".[134] Let's look at a couple of pieces of fruit. First orange, the Associate Commissioner of Public Affairs, although important, is not the Commissioner of Higher

[133] Deseret, *supra* note 107.

[134] Please forgive the writer's continued use of fruits (apples and oranges), and vegetables (carrots of *supra* note 131).

Education. Furthermore, he is probably not a large-gift benefactor of the school, nor is he a member of the institution's faculty or staff, which are the three groups conventionally considered as "skidish" when learning of a president's outside job-pursuits. Besides, what else can an Associate Commissioner of *Public Affairs* say?

The second orange is identified by looking at the named schools. Although Utah State University and the University of Utah are fine institutions, they are not across-the-board comparable to the Universities of Tennessee and Florida. The Utah schools are both quite a bit smaller and arguably less prestigious than Tennessee and Florida, both of which are system-wide schools with multiple campuses each. For Presidents Hall and Machen to aspire to presidencies at these larger universities may not be such a strange idea.[135]

Information from another news piece, published by the same newspaper quoted above, even tells us that "Hall was named USU president in 2000 only after *private* meetings with the regents; finalists were not named. At the time, he said he would *not* have pursued the position had his name not been kept confidential."[136] His continued effectiveness is yet to be evaluated.

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[135] "America's Best Colleges 2004," US News & World Report, *located* at: http:// www.usnews.com/usnews/edu/college/rankings/ranknatudoc_brief.php (ranking of 248 public and private universities with doctoral programs, the Universities of Florida, Tennessee, Utah, and Utah State were ranked 48, 95, 117 and Tier 3 (ranked somewhere below 127), respectively).

[136] Speckman, *supra* note 108 (*emphasis* added).

In the spirit of "fruit cocktail", let's further compare just one more apple to one more orange before moving on to the next section. Let's contrast the Universities of Utah and Tennessee against each other. In 2004, both schools concluded extensive, nation-wide presidential searches, with UT conducting its search in open sunshine and Utah announcing only three finalists before the regents retired to a closed session to make the ultimate decision.[137] Remember, Tennessee, with 49,000 students, is a much larger school than Utah, with its 28,000 students.[138] Tennessee convinced an applicant pool of 47 candidates to undergo the scrutiny of such a public search.[139] Utah, on the other hand, pulled together 147 candidates, more than three times the number considered in Tennessee.[140] That's not to say the Utah job is in some way a stronger draw than the Tennessee job. For example, Utah will pay its new president a base salary of only $295,000 a year[141] as compared to the $380,000 yearly base salary to be earned by Tennessee's president.[142]

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[137] *See infra* section IV.2.; and Speckman, *supra* note 105.

[138] *See* Randy Kenner, "Peterson Chosen as UT's 23 President," Knoxville News-Sentinel, Apr. 22, 2004; and http://www.utah.edu/unews/facts/index.html.

[139] Randy Kenner, "UT Committee Cuts Madia, 3 Others From List; 12 Remain," Knoxville News-Sentinel, Apr. 5, 2004.

[140] Stephen Speckman, "3 Finalists Named for Top Post at the U.," Deseret Morning News, Apr. 23, 2004.

[141] Deborah Bulkeley, "Regent's Pick Young as Next U. President," Deseret Morning News, Apr. 30, 2004.

Additionally, modern search committees are generally organized to provide "considerable safeguard[s] against corruption, discrimination, or the use of profoundly flawed selection criteria."[143] Suffice it to say, the costs of open-to-the-public searches may arguably exceed the value such transparency provides to society.

IV. CASE STUDY: THE UNIVERSITY OF TENNESSEE

Within a tumultuous three-year period of time, three different presidents will have served at the helm of the University of Tennessee as its President and Chief Executive Officer.[144] The first two, Presidents J. Wade Gilley and John W. Shumaker, resigned amid allegations of an inappropriate physical relationship with a subordinate and the improper use of university property, respectively.[145] Many people have criticized the presidential search process and blame its private

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[142] Kenner, *supra* note 138. *See also*, *infra* section IV.3.

[143] Estes, *supra* note 6 at 507-08, *citing* Judith B. McLaughlin & David Riesman, Choosing a College President, Opportunities and Constraints, pp.188-90 (1990).

[144] J. Wade Gilley (1999-2001); John W. Shumaker (2002-2003); and John D. Petersen (Will be installed as president on July 1, 2004). The number of presidents within this three-year period increases from three to five, if interim presidents are included in the count. Emerson Fly (2001-2002); and Joseph Johnson (2003-2004).

[145] *See* Pulley, *supra* note 3.

nature for leading to such heartbreaking outcomes.[146] This section of the paper will present a detailed analysis of both the 2002 and the 2004 searches resulting in the hiring of President's Gilley and Shumaker, correspondingly. It will then synthesize the lessons learned from these two searches and offer legal recommendations to improve the effectiveness of university presidential searches in general.

1. 2002 Search Process. In June of 2001, J. Wade Gilley stepped down as UT's 21st president amid allegations of an improper relationship with a subordinate.[147] UT chose Gilley's successor, Mr. John W. Shumaker, using what decision makers liked to call a "textbook search".[148] They seemed to presume that the "perfect search process" would result in the hiring of the "perfect president."[149] However, this search didn't work out that way.

After a little more than one year in office, Mr. Shumaker resigned amid allegations such as "nepotism, cronyism, and conflicts of interest; fraud, greed, and fiduciary failings; lapses of judgment and breaches of the law."[150] Was the problem that even a "perfect search process" couldn't guarantee a "perfect president"? Or was it because the search wasn't so "perfect"? The answer is

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[146] *See*, Stambaugh, *supra* note 12.

[147] *See* Pulley, *supra* note 3.

[148] *Id*.

[149] *Id*. William Funk, the headhunter used in the selection process said, "In many ways, he was perceived as the savior." *Id*.

[150] *See* Pulley, *supra* note 3.

arguably yes to both questions.[151] While this search did not end up "textbook" perfect, it does, however, provide a "cautionary tale for [public] colleges looking for a [new] president."[152]

A. Cautionary tale for future searches. Having just come away from such a bad experience, the search process was laden with political pressure from the beginning.[153] Also, in January of 2001 the Nashville Division of the United States District Court ruled on a decades-old desegregation and affirmative action case, holding that "employment decisions…within the UT system must be open, fair and competitive."[154] Although this decision was primarily based on federal civil rights law and not state sunshine laws, the court's ruling stimulated the change to

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[151] *See* generally, *id*.

[152] *See* Pulley, *supra* note 3.

[153] *Id*.

[154] *Geier v. Sundquist*, 128 F.Supp.2d 519, 537 (2001) ("Every effort must be made to secure diversity in the composition of the faculty and administrative search committees unless it is impractical to do so. In those instances where a committee is formed to search for a university or college administrator at the level of dean or higher, the search committee must be racially diverse. Any candidate for hire must first be screened by the search committee before an offer of employment can be extended…[The] institution prior to a final offer of employment being extended shall certify to the staffs of the respective boards that the requirements of this section have been met.").

conducting university presidential searches in a more visible environment than those conducted earlier.[155]

UT's track record had to that point been blemished.[156] For example, the University's 1988 presidential search ended abruptly with the Trustees' surprise appointment of former two-term governor Lamar Alexander.[157] As governor, Mr. Alexander had appointed most of the Trustees who selected him to be UT's president.[158] R. William Funk, an outside consultant, wrote to the Board of Trustees that the process historically used at UT "is a subject of disdain around the state."[159] The Chronicle of Higher Education ("Chronicle") reported UT professors writing of "'faculty cynicism' and 'an atmosphere of resentment and distrust.'"[160]

The University of Tennessee's Board of Trustees selects the school's president.[161] Further, those trustees are appointed by the governor, who also sits on the board as its chairman.[162] According to the Chronicle, in 2001 Governor

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[155] *See id*. *See also,* Pulley, *supra* note 3.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *See id*.

[162] *Id*.

Don Sundquist "exploited that power to an unprecedented extent."[163] He formed the presidential search committee composed of him and seven other members of the board of trustees.[164] Later, he added the board's student trustee and one faculty representative.[165] Next, the governor turned to his aid, Steven D. Leonard, and Cathy Cole, an assistant director in the higher education commission, to help him in conducting the search. "Both played key roles in the selection of Mr. Shumaker, and both would later earn six-figure salaries working for the new president."[166] Disappointingly, the university trustees never even flinched.[167]

In general, a trustee is "the person appointed to hold and manage property in trust for the benefit of another."[168] A trustee is a fiduciary, or "a person entrusted with the duty to act for the benefit of someone else."[169] Further, the fiduciary's duty is to "exercise a high degree of care and subordinate…personal interest in the event that there is a conflict."[170] A strong case can be made that UT trustees breached their fiduciary obligation of "exercising a high degree of care" by not

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[163] Pulley, *supra* note 3.

[164] *See id*.

[165] *Id.* at 45.

[166] *Id*.

[167] *Id*.

[168] Gilbert Law Summaries, Law Dictionary, Harcourt Brace Legal and Professional Publications, Inc. 338, (1997) (*citing* the definition of "trustee").

[169] *Id*. at 118 (*citing* the definition of "fiduciary").

[170] *Id*.

questioning such an apparently flawed search process.[171] Furthermore, it can be argued that other key players, like Mr. Leonard and Ms. Cole, also owed fiduciary-like duties to the institution they were serving. If so, in accepting high-paying positions from the very person they earlier installed as president, it would appear they did not successfully "subordinate [their] personal interest[s]" to those of the school's.

In designing and implementing the search, the governor retained the services of R. William Funk, leader of the higher-education practice at KornFerry International, an executive recruiting firm. Within the recruiting industry, he has the reputation of being "the guru of higher education recruitment."[172]

Search officials, wanting the search to be impregnable, developed a two-track screening process with one track public and the other one private.[173] The public track asked for nominations from an assortment of sources, and charged a twenty-five-member advisory council with the task of sorting-through and selecting nominees. The advisory council consisted of faculty members, students

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[171] *Id*. ("'If the governor has appointed the board,' says William A. Weary, a higher-education consultant and founder of Fieldstone Consulting in Washington, D.C., 'it's a real challenge to say no'.").

[172] *Id*. (Mr. Funk has placed approximately 25% of the presidents of institutions in the Association of American Universities. "'I've done more presidential and chancellor searches than anyone in higher education,' boasts Mr. Funk.").

[173] *See* Pulley, *supra* note 3 at 44.

and alumni.[174] The designers included the public track so the process would appear more open, yet combined its use with that of the private track to maintain ultimate control in determining the search's outcome.[175]

The private track was headed by KornFerry International and Mr. Funk.[176] According to the Chronicle, it "was designed to circumvent Tennessee's open-records laws, which are among the strongest in the country."[177] As presented above, Tennessee's open-records law requires that all state records be available during regular business hours for inspection by any citizen of the state of Tennessee.[178] Because documents generated by the advisory council and board of trustees are probably considered "state records" these sunshine laws would have subjected all candidates to the public release of their names.[179] However, by delegating a portion of the search process to non-state consultants, like KornFerry International and its agent Mr. Funk, those candidates moving through

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[174] *Id*.

[175] *Id*. ("'they wanted it to look more open than in the past,' says Marla Peterson, a psychologist at the university who sat on the advisory council. 'Frankly, we were ignored'.").

[176] *See id*.

[177] *Id*.

[178] Tenn. Code Ann. § 10-7-503 (2003). *See also*, *supra* section III.1.B.

[179] Pulley, *supra* note 3 at 45.

the private-sector track were not subjected to sunshine laws, because any record of their candidacy was not state property.[180]

Mr. Funk identified several possible candidates, all but one of whom pulled out, until only one candidate on the private track remained.[181] The private track's finalist was Mr. Shumaker. On the other side, the public track identified five semifinalists from a pool of eighty candidates.[182] The finalist selected from those five, was Marlene I. Strathe, sitting president at the University of Northern Colorado. After interviewing each track's finalist, the board of trustees named Mr. Shumaker as the overall finalist.[183]

Critics of the two-track approach, however, say it was nothing but a sham.[184] The Chronicle concluded that, "in retrospect, the public track of the process may never have been intended to produce a viable presidential candidate." Even Mr. Funk admitted this to be the case. In his testimony before the Tennessee

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[180] *See id*.

[181] Pulley, *supra* note 3 at 45.

[182] *See id*.

[183] *See id*.

[184] *Id*. ("'When you inject state politics and the good-old-boy network into the selection process, anything can happen,' wrote Richard Davis, a Tennessee resident, in a letter published…in the Knoxville News-Sentinel. 'The most likely scenario is that Shumaker's selection was a done deal from the beginning and that the former governor and the selection committee conspired to pass over the other candidates.'").

legislature's Fiscal Review Committee he said, that in his experience, the public side of a two-track system had never produced a president.[185] Along the same lines, F. Michael Combs, a music professor at the Knoxville campus said, "There was an illusion that faculty members on the advisory committee had more direct input than actually turned out to be the case."[186]

B. The not-so-perfect president. John W. Shumaker appeared to have it all. He was smart, a classics scholar, and extremely charismatic.[187] Adding to his charm, he had a remarkable gift for remembering names, public speaking, "woo[ing] donors and wow[ing] crowds."[188] He had served as president at two institutions of higher education: Central Connecticut State and the University of Louisville.[189] By most accounts, his seven-year tenure as president at the University of Louisville had been a success, so much that Louisville trustees called an emergency session to find a way to keep him, when word escaped that President Shumaker was a finalist for the Tennessee job.[190] Mr. Funk said, "He was a pretty darn hot ticket."[191]

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[185] *Id*.

[186] *Id*.

[187] *See id*.

[188] *Id*.

[189] *Id*. at 46.

[190] *Id*. at 45 (According to Mr. Funk, "The test scores of entering freshman had risen; the endowment had grown to more than $500-million, up from $138-million; Mr. Shumaker built a football stadium paid for largely with alumni donations and

Mr. Shumaker was the favorite to become UT's next president. He met with the governor and a select number of trustees eleven times, according to Shumaker's former wife Lucy.[192] Ms. Strathe, the public-track finalist, met with the trustees just once, for her final interview.[193] According to the Chronicle, the final round of interviews was nothing more than a "formality".[194] "Mr. Shumaker transformed the proceedings into a performance. For most of the question-and-answer session, he was on his feet, working the room, making direct eye contact with trustees."[195] "He was very confident," said Tiffany Smith, the student trustee, as if "he already knew the answers to the questions."[196] Mr. Shumaker accepted the trustee's offer becoming the second-best-paid public-university president in the country.[197] His acceptance gave way to celebration with one trustee, John C. Thornton, even proclaiming, "I feel like we've won a national championship."[198]

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hired a star basketball coach, Rick Pitino, who a few years earlier had won a national championship at the University of Kentucky, Louisville's rival.").

[191] *Id*.

[192] *See id*.

[193] *See id*.

[194] *Id*.

[195] *Id*.

[196] *Id*.

[197] *Id*. ("Among the incentives, large and small, were annual compensation of $733,000, a $1.5-million incentive to stay for 10 years and promises to arrange voice lessons for one of Mr. Shumaker's teenage sons.").

However, the excitement was short lived. One of the first signs that something was not exactly what it had seemed to be, occurred in June 2002 when President Shumaker reported for duty alone without his wife Lucy who had rarely left his side during the recruiting process.[199] According to the Chronicle his solo arrival left some trustees feeling like they had been "snookered by a romantic charade."[200]

One year into his presidency reporters uncovered travel logs, reflecting heavy personal use, by Mr. Shumaker, of the university's airplane.[201] He reimbursed the school $30,000 with the hope of putting the incident behind him. But over the next two months a steady flow of negative stories ultimately brought him down.

It began with UT's trustees ordering an internal audit of their president's spending. Soon after both Central Connecticut State University and the University of Louisville carried out audits of Shumaker's spending while he was president at their institutions.[202] The auditors' findings were pejorative. They revealed that President Shumaker had ordered $493,000 in unauthorized

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[198] Pulley, *supra* note 3 at 46.

[199] *See id*.

[200] *Id*.

[201] *Id*. (reporting a number of personal flights to the University of Alabama at Birmingham to visit its president, Carol Z. Garrison, with whom Shumaker had worked at Louisville). *Id*.

[202] *Id*.

renovations to the president's residence and had awarded a $300,000 no-bid consulting contract to a friend and former business partner.[203]

Court records from the Shumaker's divorce trial, which were released around the same time as the audit findings, were also damning. In 1995 or 1996, he testified that while serving as president at Connecticut State University he had accepted $10,000 from Hyundai Motor Company, winner of a $110,000 training contract with the university. This payment was considered illegal by Connecticut officials.[204] Lucy's testimony during the divorce proceedings alleged that the governor's aid, Mr. Leonard, had provided her husband, in advance, with a copy of the questions he was to be asked during his triumphant interview.[205]

Such was the infamous two-track, "textbook" search, which lead to the state of Tennessee's overhauling of the search process.

2. 2004 Search Process. On April 21, 2004, John D. Peterson, was selected by the University of Tennessee's Board of Trustees as UT's 23rd president,[206] concluding what was referred to by many as "the most open presidential

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[203] *See id*.

[204] *Id*.

[205] *See id*. According to the Chronicle, both the Governor Sundquist and Mr. Leonard denied the charges. *Id*.

[206] News-Sentinel Staff Writers, "Peterson New President of UT," Knoxville News-Sentinel, Apr. 21, 2004.

selection process in the history of the country."[207] With this search, the public was provided with the names of all applicants from the time they made their candidacy official. In addition to having open records, the UT search opened up meetings to the public, including candidate interviews and council and committee meetings.[208]

This time, the process consisted of just one track and involved the participation of a nineteen-member search advisory council. The council was made up of five UT trustees, four students, four alumni, four professors, and two UT staffers who were all drawn from UT campuses across the state.[209] The council was made up in such a way to ensure most of UT's major constituencies had a say in the selecting of the school's president.[210]

The advisory council employed the professional services of headhunter, Dan Parker of the Atlanta-based executive search firm, Baker-Parker.[211] The duties Mr. Parker was responsible for performing, generally fit within those traditionally

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[207] *See, e.g.*, Stephen Speckman, "Hall a Tennessee Finalist," Deseret Morning News, Apr. 21, 2004.

[208] *Id*.

[209] *See* Duncan Mansfield, "No Favorite Yet in UT Search," Associated Press, Apr. 18, 2004, printed by Knoxville News-Sentinel.

[210] *See* Randy Kenner, "Six Take Center Stage," Knoxville News-Sentinel, Apr. 16, 2004.

[211] *See* Randy Kenner, "UT's the Island, and the Search Team Gets to Boot off the Candidates," Knoxville News-Sentinel, Apr. 4, 2004.

outsourced to professional search agencies.[212] He and his firm were responsible for reviewing candidates' credentials and backgrounds as well as recruiting candidates to enter the pool.[213] At the conclusion of his search, Mr. Parker presented a summary to the nineteen-member search advisory counsel on each candidate.[214] The summaries were of course made available to the public as well.[215] At least eighty people expressed some kind of interest in applying for the job; however, in the end Parker's courting efforts were only able to convince forty-seven people to come forward and subject themselves to this extremely open search process.[216]

Because all applications in the search process were designed to flow through only one track this time, all roads began with Mr. Parker and his firm. His participation didn't end with the handing over of candidate summaries to the search advisory council; he played a more involved, arguably even controversial role.[217] The search process was designed to require Mr. Parker to submit a list of the fifteen candidates he and his firm felt were the "most qualified" for the job,

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[212] *Id*.

[213] *Id*.

[214] *Id*.

[215] *Id*.

[216] *See* Randy Kenner, "Candidate List to Lead UT Climbs Up to 30," Knoxville News-Sentinel, Mar. 28, 2004; and Kenner, *supra* note 139.

[217] *See* Kenner, *supra* note 211.

based on all the information they had gathered.[218] Each member of the advisory council was then asked if they wanted to include any other candidates to the "most qualified" list.[219] Adding anyone, did however, require a majority of the council's votes.[220] In other words, the headhunter had the power to place any candidate in the initial pool for consideration, while anyone not favored by Mr. Parker, required a consensus of at least half of council members.

The power disparity between Parker and the advisory council in determining who would be considered was broadened by another design aspect of the process. A summary of the process, presented to the media, revealed that, "A two-thirds vote of the council members present [was] required to eliminate a person from the 'most qualified' list."[221] Thus, for a council member to add a candidate, it required the vote of a majority, while removing someone from Parker's list called for a daunting two-thirds vote. Figured another way, of the nineteen-member council, ten votes were needed to add and thirteen to remove. Unsurprisingly, members were only able to add one person to Mr. Parker's "most qualified" list.[222]

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[218] *Id*.

[219] *Id*.

[220] *Id*.

[221] *Id*.

[222] *See* Kenner, *supra* note 139 ("Committee members attempted to add seven people to the list, but only…Kenneth B. Roberts, the dean of the University of

Is it possible that much of the gate-keeping function of this incredibly "open" search process was performed in private? After all, only 47 of the 80 interested people publicly pursued the position.[223] One might even question whether the 33 people declining to come forward were intimidated by the open process, or simply warned by Mr. Parker that their chances of prevailing weren't so good.[224] Granted, these questions are highly speculative, but they do demonstrate that very large private holes might have tattered the fabric of this public search. In fact, only a few days after finding out he was the second-to-last person standing, runner-up Kermit Hall said, "The perception of openness may not, in fact, comport the spirit of openness."[225]

With its list of "most qualified" candidates procedurally limited to 16 people, the advisory council further narrowed the pool to 12 by striking 4 candidates, including Mr. Kenneth B. Roberts, who had just been added by a borderline

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Kentucky College of Pharmacy received [the required] 10 votes."). Mr. Roberts, did not, however, make the next cut. *Id*.

[223] *See supra* note 216.

[224] Another interesting question is whether headhunters are even needed in this process. Apparently, the information provided to the advisory council, by which the committee was to make these decisions, was only a "brief report" on each candidate. Parker was paid $90,000 for his services. *Id*. Why couldn't the council compile a similar "brief report" themselves? Was the headhunter used as a sort of below-the-radar, second track, as was used in the previous search?

[225] Speckman, *supra* note 103.

majority vote.[226] The council reached this point more than 2 weeks before the final decision was scheduled to be made.[227] The timing was deliberately set with this buffer-period in mind, in an effort to allow for "skeletons", if any, to be dug up.[228] At this point, the members began more extensive background checks, with a team of council members even flying around the country to visit the home-campus of each remaining aspirant.[229]

Checks brought forward some potentially negative information on two candidates. Karen R. Hitchcock, president of the University of Albany, had resigned from her position in the fall of 2003, yet continued to list on her resume that she was still president.[230] The council also found that Thomas C. Meredith, chancellor of the University System of Georgia, may have had issues involving extravagant spending at his taxpayer-financed residence in Georgia and that he was named as a defendant in a sex and age discrimination lawsuit filed in Alabama.[231]

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[226] *See* Kenner, *supra* note 211.

[227] Randy Kenner, "Members of Council Take Closer Look at Finalists," Knoxville News-Sentinel, Apr. 12, 2004.

[228] *Id*.

[229] *Id*.

[230] J.J. Stambaugh & Ericka Mellon, "Red Flags Over Two UT Picks Don't Alter Course," Knoxville News-Sentinel, Apr. 9, 2004.

[231] *Id*.

Because of these revelations, both candidates quickly removed themselves from contention (1 other candidate also withdrew, for non-background related reasons, narrowing the field to 9).[232] While their withdrawing from the process is understandable, we must recognize, to be fair, that the allegations were never substantiated nor were they even looked into deeply. Both applicants might very well have had legitimate explanations; however, the media isn't always known for its balanced, in-depth treatment of such issues. They may have been innocent, but chose to withdraw rather than wagering their reputations against continued sound bites.

In fact, Ms. Hitchcock later justified her position, saying she had not immediately resigned, but was instead on leave of absence because of family illness and that her resignation wasn't effective until June 30, so she was still president.[233] Susan Williams, a UT trustee, said of the issue, "For me, that wasn't a negative. I'm disappointed. I really had hoped she would come to the interview. She was very impressive and had a great record at Albany."[234] Was Ms.

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[232] *See* Randy Kenner, "Two Candidates for UT President Withdraw," Knoxville News-Sentinel, Apr. 12, 2004; and Randy Kenner, "Only Woman Seeking UT Job Withdraws," Knoxville News-Sentinel, Apr. 15, 2004.

[233] *Id*.

[234] *Id*. Besides that, she was the only woman left in the pool. For diversity purposes, it might have been nice for her to advance, at least to the interview stage. *Id*.

Hitchcock a victim of public openness? If so, arguably the trade-offs didn't warrant the benefits of transparency.

Whether information about Ms. Hitchcock and Mr. Meredith would have been actionable or not, the issues did bring to light another potential failing in the openness argument. It later became evident that during early stages of the search, select members of the advisory council were informed of the potential problems with Hitchcock and Meredith.[235] Apparently, the search consultants had relayed these concerns verbally to just a few. State Senator, Randy McNally, R-Oak Ridge, said of the issue, "That's not right, and the information should have been in a memo-type form. This is supposedly an open search process – it should have been out there for the public, too [not to mention the entire advisory council]." [236]

If this type of information was discussed in such side-bar meetings, might other material issues relating to candidates have been as well? Would it be naive to think that all council members had equal access to and influence with Mr. Parker, the search agent?

Of course, others felt the system was a success. With less than one week to go in the eight-month-long search process, "panelist and UT trustee Susan Williams said the hurdles of disclosure, openness and inclusion crafted for this

[235] Stambaugh, *supra* note 230.

[236] *Id*.

$252,000 search – likely the most expensive in the university's history – are working."[237]

After further reducing the list down from nine, the search advisory council forwarded six finalists to a separate search committee composed of trustees, a student and two faculty members.[238] This second-tier committee then publicly interviewed the six remaining contenders, before sending the last three on to the full UT Board of Trustees for final determination.[239] In a fourteen-to-nine vote, Dr. John D. Peterson was selected as UT's next president.[240]

Because the job of picking a university president seems to touch so very many people's lives (even if only in a small way), it is difficult to please everyone. UT's search was no different, even though it took place in "complete sunshine". Some people were pleased with the outcome and some weren't.

For example, Margaret N. Perry, a former UT-Marin chancellor who was executive director of the search said of the applicant pool, "I believe there are six sitting presidents or chancellors, three vice presidents or provosts, some deans, some business executives and some medical doctors. I think it's a better mix

[237] Mansfield, *supra* note 209.

[238] *See* Kenner, *supra* note 210.

[239] *See* Mansfield, *supra* note 209.

[240] *See* News-Sentinel Staff Writers, *supra* note 206; and Kenner, *supra* note 137.

than we would have gotten in any other kind of search."[241] When the interview process had just begun, Lacy Long, a member of the search advisory council and a third-year UT Medical School student related, "After the first candidate yesterday, I said that if every candidate is like this, we're going to have a hard decision."[242]

Conversely, in speaking about the six finalists advanced by the advisory council, republican senator Randy McNally told the Associated Press, "We should have had six outstanding individuals, and I see only two."[243] Senator McNally declined to name the two but said he wanted someone with "more Tennessee roots".[244] Joining his colleague from the other side of the political isle, Senator Steve Cohen, D-Memphis, said, "Their appeared to be 'no superstars' among the six finalists, noting there were no sitting presidents of universities with the status or the enrollment of UT. He questioned whether the open search process had discouraged such people from applying." Outside of the Tennessee state legislature, Sheldon Steinbach, general council at the Washington-based American Council on Education, described the public selection process used at

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[241] *See* Randy Kenner, "17 New Applicants Beat Deadline to Swell Field of Candidates for UT's Top Job to Total of 46," Knoxville News-Sentinel, Apr. 15, 2004.

[242] *See* Kenner, *supra* note 232.

[243] Kenner, *supra* note 210.

[244] *Id*.

UT as a "massive overreaction" to the scandals that plagued the previous two presidents.[245]

What about those candidates who were not selected? What will their future hold? Did the sunshine they exposed themselves to leave them with a nice "tan" or a severe "sunburn"? This is a multi-variable question, with no easy responses; however, the following remark might shed some light on the answer. After learning of his not getting the job at UT, Kermit Hall, president of Utah State University, said, "I have a bright future at Utah State," and that he would not "soon" be interviewing for another job.[246] He also said, "I'm truly glad to be going back to Utah State."[247] Really though, what else can he say?

3. Recommended Search Process. With one day to go before the Board of Trustees made its final decision in selecting Mr. Peterson as UT's 23rd president, leaders in the 2004 search process assured Tennessee state legislators that the process would lead to the picking of a "superstar". However, the head of the search committee also issued what she termed a "disclaimer," when asked for a promise that the new president would not create problems like the last two had. She disclaimed, "I cannot be responsible for human frailties, but as far as the process itself, I feel one-hundred percent confident we have done everything

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[245] Mansfield, *supra* note 208.

[246] Shinika A. Sykes, "Votes Are Counted: Hall Still an Aggie," Salt Lake Tribune, Apr. 22, 2004.

[247] Stephen Speckman, "Hall Won't Be Leaving Utah State Just Yet," Deseret Morning News, Apr. 22, 2004.

possible – that we have jumped through every hoop."[248] Although presidential search committees should probably not be responsible for the "human frailties" of its chosen leader, arguably the process should be tweaked to improve the likelihood of selecting a "human" with as few "frailties" as possible. Drawing from the case study and other information presented above, this section will offer three legal recommendations bent on producing a more effective process.

A. Enact specific exceptions to sunshine laws for presidential searches. When only forty-seven candidates are willing to "throw their hats in the ring" for such a prominent position, something must be wrong. The quality, which is arguably driven in part by quantity, of that initial pool of applicants is the foundation upon which an effective search will be based. If the goal is to find the most qualified person, who will most closely fit the institutions current needs, then broadening the search to include as many potential candidates as possible should be the aim of any search committee.

While all fifty states have public universities, only three have enacted specific exceptions to sunshine laws, for purposes of conducting their presidential searches.[249] Twenty-two other states appear to have exceptions that would appear to permit non-disclosure of names of applicants for public employment.[250] However, because these exceptions don't specifically refer to university

[248] Humphrey, *supra* note 245.

[249] *See supra* note 102.

[250] *Id*.

presidential candidates, these states are as vulnerable to litigation on the matter as the twenty-five states where no plausible exception exists.

It may be politically expedient for any specific statutory exception to require certain public concessions. For example, Texas's exception does not require any given number of finalists, but does require that the names of any finalists be disclosed at least twenty-one days before the governing board makes its final decision.[251] This type of concession seems to balance the trade-offs between public inclusion and effective recruiting, while also providing for a buffer-period, where any "skeletons" can be identified.

A state's appointment of a university president might be analogous to the U.S. Government's appointment of federal judges. Because sunshine laws apply to proceedings and records of the United States Senate, presidential nominees for judgeships become public knowledge.[252] Would it not be insane, however, to require the President of the United States to continually disclose those people

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[251] Tex. Code Ann. § 552.123 (Vernon 2003).

[252] *See Public Citizen v. U.S. Dept. of Justice*, 109 S.Ct. 2558 (1989) (holding that application of open meetings and records provisions to President's judicial "advisory committee" would violate separation of powers doctrine and constitutional provisions, as it potentially would inhibit the President's freedom to investigate, be informed, evaluate and consult during the federal judge nominating process. Also, public openness purposes were outweighed by the president's interest in preserving confidentiality and freedom of consultation in selecting nominees).

who are on his “short-list”? Such burning sunshine would possibly scare potential short-listees away from any form of communication with the executive branch, for fear that their garbage cans would immediately become the object of media rummaging. (Note: Arguably, as more states require open presidential searches, those which do not maintain a particular competitive advantage in recruiting.[253])

B. Set requirements for search committee composition and procedures. Where statutory exceptions preclude public presidential searches, other checks and balances become even more important. The most effective control measures, whether or not searches are performed in public, will be found in search committee composition and procedure.

The corporate-audit-committee requirements of the Sarbanes-Oxley Act of 2002[254] provide a useful parallel to requirements for presidential search committees. Section 301 of the act requires audit committee members to be directly responsible for oversight of the audit. It requires members to be

[253] Potential recruits may have the what-have-I-got-to-lose attitude and apply for a position which they would never have considered had the search been performed in the public eye. The strength of this competitive advantage may inversely relate to the level of prestige an institution has. *See generally*, *supra* note 6.

[254] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 201-209, 116 Stat. 745, 771-75 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

independent.[255] Also, the committee must have the authority to engage independent counsel and advisors if necessary.[256] In addition, sections 802, 806 and 902 provide enhanced criminal and civil penalties for committing fraud, conspiracy, cover-up activities, and other white collar crimes.[257]

Furthermore, even though a company's general shareholders have the right to know these controls are in place and functioning properly, every shareholder does not have the personal right to access and individually scrutinize corporate records.[258] The benefits of allowing perfect transparency for every shareholder would not outweigh the high costs. Doing so might expose trade secrets and other sensitive information which could be damaging in the hands of competitors.

While the analogy between audit committees and search committees is not perfect, it does provide some useful insights.[259] For example, search committee members should be independent, meaning a committee member's objectiveness

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[255] *Id*. To be considered independent for this purpose, the committee member cannot accept any type of consulting fee or advisory fee, or any other compensation from the company (other than for services rendered in her capacity as a director). Also, the member cannot be an affiliate of the company or any subsidiary of the company. *Id*.

[256] *Id*.

[257] *Id*.

[258] *Id*.

[259] Some of these responsibilities might more appropriately be applied to the institution's governing board.

should not be impaired because of a close relationship with, or something to personally gain from any selecting any one candidate. Committee members should have access to outside counsel and advice, where useful. As with audit committees, punishment should be handed out for violations of these rules and other illegal actions committed by committee members during a presidential search.

Forcing a university's governing board and its sub-committees to publicly transact sensitive business, such as selecting its president, might create more problems than it solves—as in the case of corporate boards disclosing too much information to shareholders. As corporations are only required to publish audited financial statements and reports to shareholders, in the case of university presidential searches, public disclosure of controls and assurance of their functioning should satisfy the public's right to know.

As discussed within this article, the search committee should be composed of representatives from all major university constituencies. UT did this well, by including on its search advisory council five trustees, four students, four alumni, four professors, and two staffers who were all drawn from campuses across the state.[260] While there are no magic numbers or proportions for search committee make-up, a statute or an amendment to the applicable administrative code should be enacted to make sure members of such groups are all legitimately involved in the process.

[260] *See* Mansfield, *supra* note 209.

Guidelines should also be passed to guarantee all members of such committees have equal access to relevant information and participation in the decision making process. It is unacceptable for one group of members to exert disproportionate control over committee decisions through the use of side-bar discussions and deals. Procedure should require all material inter-committee conversation about search business to be discussed only before the full committee.

C. Limit responsibilities of outside recruiting consultants. The members of a university's governing board owe fiduciary obligations to the institutions they serve. Such obligations cannot legally be given to another and should only be delegated in a carefully supervised manner.[261]

In both of the UT presidential searches, as discussed in the above case study, outside professional recruiters may have been used to partially circumvent principles of transparency, while trying to procedurally fulfill the openness requirements imposed by sunshine laws. In those public-eye searches, headhunters made it possible for potential applicants to explore their job prospects in a safe, non-public environment. However, in the case of private searches, one might ask, what job do headhunters perform that can't be performed in-house?[262]

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[261] *See* Restatement (Second) of Trusts § 170 (1959) ("Trustee has a duty personally to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others.").

[262] *See supra* note 12.

V. CONCLUSION

As the earth revolves around the sun on its spinning, tilted axis, every region of the globe is regularly touched with rays from the sun—sunshine. Sunshine's life-sustaining light and warmth is complimented, even contested by the restful shade and cool of night. While all existence demands the energy derived from sunshine, sunshine's heat can also incinerate life. Thankfully sunshine strokes earth's varying regions at different times, from different angles, and for differing amounts of time. This dissimilar treatment adds not only diversity to the world's landscape, but arguably allows the continuance of life as we know it.

Likewise, public openness is good, even essential for the proper functioning of a democratic government; yet allowing equal public involvement in all government decisions is unwise. Sunshine laws should apply to government decisions only to the extent the benefits outweigh the costs. It's not possible to have them both: in the case of public university presidential searches, sunshine will either scare off good candidates or chase away the spirit of openness.