FILED
UTAH APPELLATE COURTS

DEC 1 9 2018

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IN THE UTAH STATE SUPREME COURT

GRANT v. GOV. HERBERT	: MEMORANDUM (LETTER) IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT OF RELIEF : REQUEST FOR ADDITIONAL BRIEFING : REQUEST FOR HEARING AND ORAL ARGUMENTS Case: 20180997 SC

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1. I, Daniel Newby, acting pro se, am exercising my First Amendment right guaranteed by the Utah and federal constitutions to petition the government for a redress of grievances, and request a hearing with the court.

2. Petitioners' original filing states that, "As a registered voter, no other means is available to the Petitioner other than through an Extraordinary Writ before this Court... [The respondents] have emasculated the right of the people to exercise their co-equal legislative

power, making the Senate and the House the 'only legislative game in town,' contrary to this courts warning in *Gallivan V Walker SC 2002....*" Respondents governor Gary Herbert, lieutenant governor Spencer Cox, and director of elections Justin Leefor summarily counter that, "petitioner fails to show any real emergency demanding immediate relief or any legal basis for their requested relief in general."

3. No other means is available because Citizens can no longer effectively assert their interests, or otherwise compete, with the Legislative and Executive branches. Governor Herbert's recorded comments to an elite group of Utah lobbyists in 2016 express the pervasive, abusive undercurrent against Citizen representation. After one lobbyist questioned the appropriateness of discussing policy issues at the same time checks are handed over, Herbert replied: "However we want to do this — if we want to have multiple meetings or we sit down and talk and you give us a check later or before... Whatever you would like to do, I'll just say, I'm available. I'm Available Jones." That Herbert only issued a public apology *after* his comments were widely publicized, and thereafter remained in office, demonstrates not only the existence of a political culture of indecency and corruption, but a frightening level of acceptance by officials and resignation by an exhausted public. [EXHIBITS A & B]
4. In 2013, former South Jordan City councilmember, Chuck Newton, unwittingly offered a glimpse of the "back channels" utilized by "Available Jones" and other officials to prevent Citizen comprehension of their actions, and neutralize the efficacy of their involvement. Here are excerpts from Newton's email, courtesy of a citizen's Government Records Access Management Act (GRAMA) request: "I just got off the phone with the Governor's office who called to extend a hearty thanks **through back channels** in response to our work to

assist them in ginning up support for vetoing HB 76... I was informed that the legislature will poll their members for a veto session, after the time period has expired for the Governor to sign all the passed bills. However, given that **a number of legislators have privately communicated with the Governor's office and extended their thanks to him for doing what they were reluctant to do in putting this down**, the sense is that a veto session will not be successful. Be that as it may, **I was encouraged to proceed with an Op-ed that had previously been discussed in order to provide cover to the legislators** who are now supporting the Governor." [bold added] [EXHIBIT C]

5. These frank admissions underscore Utah's grotesque "pay-to-play" environment, enabled by secretive "back channels" and a lax, or supporting, statutory and administrative maze that prevents openness, honesty, and accountability. And Citizens lack the power within such a lost system to effectively reform and improve it.

6. Petitioner's filing briefly described the dominating influence of the Church of Jesus Christ of Latter-Day Saints, a supposed "non-profit" corporation, during the process of legislation that resulted in the obliteration of Proposition 2 (the "Utah Medical Cannabis Act"). The fact this could happen evidences how far Utah has drifted from the protections demanded by Article 1, Section 4 of the Utah Constitution: "There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions." Parties excluded from the secretive "negotiations" between Mormon corporate lobbyists and elected officials held differing religious opinions, which exclusion also violates Utah's Enabling Act, Section 3: "That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious

worship…" Citizens who refuse to obsequiously march in line with such domineering public-private arrangements, cloaked under the guise of religion or otherwise, cannot reasonably compete in this exclusionary, intolerant, and unethical political environment.

7. Citizens are even prevented from accessing the kind information that would be required to restore accountability to these processes. According to recent policy directives, legislative officials are at liberty, under shamefully-flimsy rationale, to remove and/or delete from public access nearly any email, text message, or other record they share amongst each other or within their connective lobbyist network. [EXHIBIT D] Press organizations and private citizens have filed GRAMA requests for minutes or other records of these aforementioned secret liaisons between Mormon corporate lobbyists and Utah elected officials. To date, however, the public still knows very little about what was "negotiated," or how it was "negotiated," before House Bill 3001, Substitute 6 ("HB 3001 S6"), a 220-page bill, was finally revealed to the public, and passed within hours of its release. We will likely never know what transpired in the above-mentioned meetings, because Citizens lack the ability to discover it.

8. Petitioners have asked that Citizens be able to exercise comparable powers befitting their "co-equal" status with the legislature. There is one exception: Citizens generally view government by secrecy and surprise as repugnant to the wholesome principles of a civil society. In the case of Proposition 2, Citizens willingly engaged in an intensive and animated 17-month process in full public view, debating and contesting a single 28-page document. They overwhelmingly desire that the legislature likewise conduct its business openly and

transparently, but wield no effective ability within the current power structure to justly compel it to do so.

9. Citizens also enjoy no comparable mechanism to compete with the vast sums of corporate monies funneled, often nebulously and without a clear trail between the giver and receiver, through political action and issue committees, which disproportionately impacts political issues and campaigns. Candidates the People might put forward for political office must resist the constant, insidious enticement to assimilate into the dark "Available Jones" vortex of money-driven degeneracy, and find it extremely problematic to remain untainted and simultaneously be electable (or re-electable).

10. Even were Citizens to somehow elect a larger percentage of legislators who could resist the status quo, their level of real political influence would be largely determined by the house speaker or senate president. Due to gradual alterations of legislative house rules ("HR") and senate rules ("SR"), these two politicians now jointly control:

(1) The appointment of *every* legislative committee member and committee chair (HR1-3-102(1)(j) and SR1-3-102(1)(l));

(2) legislative research's compliance with all bill and study requests (HR1-3-102(1)(k) and SR1-3-102(1)(a));

(3) the agenda and flow of *every* bill (via their hand-picked committees);

(4) Citizen access to essential parts of the bill process (via their general control over members, which, in the case of HB 3001 S6, resulted in almost complete denial);

(5) compliance of employees regarding legislative GRAMA and other requests for information (HR1-3-102(1)(k) and SR1-3-102(1)(a));

(6) direct control of key campaign funding PAC mechanisms (in this case partisan Republican PACs, which was amazingly upheld by this court in *Maxfield v. Herbert, 20110425 in 2012*);

(7) the internal polling processes to determine whether to challenge a gubernatorial veto (HR1-3-102(1)(j) and SR1-3-102(1)(l)), and,

(8) beginning in January 2019, the ability to initiate and conduct a poll, and thereafter determine whether to call a special session (Utah Constitution, newly amended Article 3).

11. Any legislators, regardless of party affiliation or intent, who wish to secure a seat at the legislative table, cannot easily buck these two *de facto* dictators, thus nullifying the concept of equal representation, and any ability to represent the People they are supposed to serve.
12. Citizens must also contend against government agencies that hire and contract professional lobbyists, including full-time employees and "public relations" corporations, to influence public opinion, legislation, administrative rules, and other policies. This network often represents multiple branches, levels of government, and private interests. It is commonplace for legislative hearings to be impacted by this network's agents, which frustrates Citizens forced to fund their appearance, while they must pause their livelihoods to go to the Capitol to resist them. These agents are frequently granted greater time and access to express their positions than are average Citizens, both in hearings and behind closed doors.
13. Citizens also face police agents, attorneys and other court officers, as well as bureaucrats from other state and local agencies and partners, who may now hold dual public office in the state legislature where they flagrantly mix and mingle taxpayer resources, duties, and interests — blurring to insignificance traditional lines of distinction between the executive,

legislative, and judicial branches. Citizens must, with limited resources and abilities under burdensome statutes, attempt to penetrate the resultant muddy mix of "back channels" and miserably engage what amounts to a slippery, mercurial, shape-shifting Leviathan.

14. Currently, Utah's judicial branch has participated in this degradation of basic ethics, including core checks and balances. For example, courts have trampled the fundamental right of Citizen juries to nullify unconstitutional and unjust statutes. Court instructions now confuse jurors with the command to only judge whether a defendant violated statute, and thereby ignore whether the statute itself is just. According to Model Utah Jury Instructions, Second Edition (MUJI 2d): "As the judge, **I will** supervise the trial, decide legal issues, and **instruct you on the law**. As the jury, **you must follow the law** as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case." (CV101 General admonitions) [emphasis added] And further: "You and I and the lawyers play important but different roles in the trial. **I** supervise the trial and to **decide** all legal questions, such as deciding objections to evidence and deciding **the meaning of the law. I will also explain the meaning of the law. You must follow that law** and decide what the facts are..." (CV102 Role of the judge, jury and lawyers.) [emphasis added]

15. Assuming conflicting roles, Utah judges and their appointed commissioners act as judge, Citizen jury, and executioner, by deciding, in dictatorial fashion and absent criminal convictions, cases dealing with the permanent termination of parental rights and the right to keep and bear arms, and even traffic tickets. In recent years, judges have begun collaborating with prosecutors as part of "clinical teams" in "drug courts" and other arenas. As a former Utah juvenile judge warned: "When acting as a member of a clinical team bent on achieving

certain outcomes, judges cannot avoid unethical ex parte communications, that is, discussion of the case with one party outside the presence of the other party. Ex parte communications are traditionally a serious ethical breach for judges, but such communications form a regular part of the therapeutic process. Further, **when judges become the central focus of the entire effort as the enforcer of the treatment team's decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. To the defendant, the judge becomes simply 'one of them.'**" [bold added] [EXHIBIT E] Citizens have not only been edged out of their vital, balancing role in court processes, but must now face an amorphous mass of accusers.

16. Against the formidable backdrop of Utah's political underworld stands the lowly Citizen Initiative and Referendum process. This underpowered, fragile, and expensive (in Citizen time and financial resources) process denies Citizens:

(1) direct power to alter the Utah Constitution or otherwise abolish this "pay-to-play" Leviathan, in direct contradiction to the Declaration of Independence, which demands, "that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness...."

(2) the power to veto statutes passed by two-thirds of the legislature, regardless of its awful and immediate effects.

(3) reasonable time to meet filing deadlines, and access technological avenues enjoyed by the Legislative and Executive branches, such as E-Signatures, that would allow citizens access

and participation without funding long travel, cost-prohibitive attorneys, printing services, and professional signature-gathering campaigners. Utah politicians have so adopted tactics similar to those associated with the former King of Great Britain: "He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures." (Declaration of Independence)

(4) the fundamental right to petition the government for redress of grievances regardless of whether one voted in a previous election cycle. By refusing to participate, I cast my vote against the illegitimacy and fraud perpetrated by Utah's indecent and corrupt political organization and culture. My form of protest does not negate my right to petition government officials, courts, or agencies *at any time of my choosing*. Will respondents next attempt to similarly restrict my right to make GRAMA requests?

17. Given the above impediments to rightful Citizen power and participation, this court's claim that, "by the initiative process [under the Utah Constitution] the people [are] a legislative body coequal in power and with superior advantages to the Legislature," (*Utah Power & Light Co. v. Provo City*) is pure fiction. The abysmal reality of our current situation is increasingly apparent to many who once harbored some faith in its mode of operation. Why has this court been AWOL (Absent With Out Leave) as so many terrible developments have transpired, and which has led us to this current crisis?

18. Anecdotally, during this court process, the most prevalent response I received was not disagreement with the petitioner's core arguments, or even proposed solutions. The vast

majority felt convinced that any appeal to this court, for any relief whatsoever, was a futile waste of time — as hollow and empty as was their vote in November 2018.

19. Regardless, this case will assist the People in comprehending *how* illegitimate and fraudulent the creature they created has become. Respondents and courts can only hide behind contorted legalese, empty rhetoric, and corruption-enabling formalities for so long before the "self-evident facts," by which respondents and courts claim to operate, are fully comprehended out here in the world of the People.

20. If this court continues to tolerate the systemic denigration, belittlement, and nullification of the People's fundamental vote, voice, and power, then it should at least muster the fortitude to finally tell some truth: Call an end to the fictional charade that Utah government is ruled by the People who created it.

21. For past court sentiments to have any positive meaning, they must be reinforced by substantive action. This court must stand with the People it claims to serve by restoring their fundamental right to act as a "coequal" branch with "superior advantages," to include:
(1) A reasonable and effective ability to alter or abolish the government they created;
(2) Striking down HB 3001 S6 for its direct assault on the People's voice and vote, and
(3) Restoring the fundamental right of all Citizens, including myself, to proudly petition the government, regardless of personal voting choices.

22. Send an undeviating, consistent message to Utah's many "Available Joneses" that the process has now commenced to check their childish excesses and harmful abuses of power.

X /S/ Daniel Newby__ DATE _December 19, 2018___

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2018, a true and correct copy of the foregoing

MEMORANDUM (LETTER) IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT OF RELIEF
REQUEST FOR ADDITIONAL BRIEFING,
REQUEST FOR HEARING AND ORAL ARGUMENTS, was deposited in the United States mail or was sent by electronic mail to be delivered to:

ERIC N. WEEKS
eweeks@le.utah.gov

TYLER R. GREEN
tylergreen@agutah.gov

STANFORD E. PURSER
spurser@agutah.gov

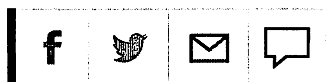
By /S/ Daniel Newby
Case No. 20180997

EXHIBIT A

The Salt Lake Tribune

In audio, Utah guv says he will 'go anywhere' to meet with campaign donors — for a check

Blunt talk • Audio sheds light on the reality of political fundraising.



By Robert Gehrke The Salt Lake Tribune

- May 16, 2016 12:34 pm

This is an archived article that was published on sltrib.com in 2016, and information in the article may be outdated. It is provided only for personal research purposes and may not be reprinted.

An audio recording of a meeting between Gov. Gary Herbert, his campaign staff and more than two dozen lobbyists and supporters highlights the governor's eagerness to raise money for his campaign and his willingness to play ball with donors.

The fundraising strategy discussed in the meeting was to schedule rounds of 20-minute, one-on-one meetings between the governor and generous donors to discuss issues of their choice.

×

"However we want to do this — if we want to have multiple meetings or we sit down and talk and you give us a check later or before. However you would like to do it," Herbert said in the meeting, after one lobbyist questioned the appropriateness of discussing policy issues at the same time checks are handed over. "I'll just say, I'm available. I'm Available Jones."

"Available Jones" is apparently a reference to a character from the old-time comic strip Li'l Abner, a hillbilly from the town of Dogpatch who was always looking to make a buck and was available for a price.

Later, a baseball pitcher who was available to pitch with little rest used also the nickname.

The recording obtained by The Tribune demonstrates Herbert's willingness to do what it takes to raise money for his re-election campaign against Republican challenger Jonathan Johnson, to the point that, he told attendees at the Alta Club breakfast last month, he would be turning over to others day-to-day operations of the state.

"Just so you know, this will be unprecedented for me, because I will be going on the high giddy-up campaign trail for the next few weeks. The state's going to be run by Justin [Harding, the governor's chief of staff] and the lieutenant governor," Herbert said. "So I will go anywhere. I will meet with people. We'll come to your office, you bring them in and we will give them quality time, but we've got to raise the money, there's no ifs, ands or buts, we've got to raise the money somehow."

Herbert's campaign finance director, Liv Moffat, said in the recording that the campaign wants to raise $1 million by June 1, and pressed the lobbyists in attendance to get checks that had been promised for the governor's annual gala in September to the campaign as soon as possible.

Moffat also laid out a fundraising arrangement that the campaign had used with Doug Foxley, a prominent lobbyist now working on the Herbert campaign, where lobbying clients of Foxley's apparently paid for 20-minute meetings with the governor.

"We gave [Foxley] two hours, we paraded seven clients in at [Foxley's] office, we went to [his] office, 20 minutes, collecting checks and talking specifically about their issues," Moffat said. "We're not going to do that for $1,000. But that's something. We'll schedule it, you can come have 15 to 20 minutes with the governor."

Later, Moffat said she has complete control of the governor's schedule and can make the fundraising meetings happen.

Campaign finance disclosures identify at least five of Foxley's clients who gave donations to the governor's campaign on the same day: Big West Oil gave $4,500; Peak Minerals, $5,000; Gold Cross Ambulance, $5,000; Maverik convenience stores, $7,500; and the Utah Association of Financial Services, $5,000.

Assuming the other two clients gave comparable amounts, the campaign likely raised more than $37,000 in the two-hour span.

In the recording, one lobbyist appears to bristle at the idea.

"I have a question regarding talking about issues and giving money at the same time," said lobbyist Jodi Hart. "My clients would not be comfortable doing that."

Hart has not returned phone calls about the event and her objections, and was not the source of the recording.

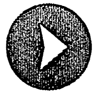
Lobbyist Spencer Stokes, who is also working on the Herbert campaign, responded to Hart's expression of concern by joking that the governor doesn't want to meet with Hart's clients, anyway, drawing laughs. Lt. Gov. Spencer Cox, the state's chief election officer who oversees campaign finance laws, then steps in.

"We need to be very careful about that and that's a very, very good point," he said," This isn't a 'Come give us a check as a condition ...' "

Herbert interrupts: "There's no quid pro quo at all."

Herbert said he may disagree with their clients on the issues "but if nothing else, we'll give you the results that you want."

Listen below to two clips from the Alta Club breakfast. See the box on this page for a transcript.



Rachel Piper

Audio: Herbert, others discuss need for campaign money

Share

2

TRACKS

Campaign fundraiser Liv Moffat: "Anything we can do to get that gala money in."	2K
Herbert: "However you would like to do it ... I'm available."	2.1K

Cookie policy

Johnson said reading reports of the Alta Club meeting was bad, but hearing the recording of the meeting was stunning.

"I'm shaking, that tape makes me so mad," Johnson said. "That's what's wrong with career politicians. They will do anything to stay in office. To hear the guffawing coming from the wooden-door Alta Club from a group of elite insiders, that just disgusts me.

"It may not be illegal under Utah law, but that's not the threshold we should hold our governor to," Johnson said. "It's complete pay-for-play and it's the kind of reason that non-politicians don't run for office."

Herbert said in a statement that the "harsh reality" is that campaigns for public office are extremely expensive to run.

"If you are super-wealthy, you can self-fund your campaign. That is not an option for me or for most Utahns who are willing to serve," Herbert said. "Like the vast majority of candidates, I have built a broad base of support and spend a significant amount of time fundraising during each election cycle. I strictly adhere to election laws and full disclosure requirements.

"As someone who holds high office and seeks re-election, I hold myself to the highest standards of integrity required to earn and maintain the public trust," the governor said.

Herbert then took a jab at Johnson, who's board chairman of Overstock.com and has had the majority of his campaign paid for by Overstock CEO Patrick Byrne and from Johnson's personal wealth.

"The real question about fundraising that ought to be asked in this campaign is: What are the motivations of Patrick Byrne and what are the obligations of Jonathan Johnson in allowing hundreds of thousands of dollars in a contributions from a single funder?" Herbert said.

Johnson acknowledged that Byrne has paid for "about half" of his campaign, but said he has been left with few options because potential donors fear that if they support Johnson's campaign, the governor will punish them.

"It's hard to be a challenger," Johnson said. "I've talked to many people, probably many who are clients of those well-heeled lobbyists, who said, 'Jonathan, you need to win, I support much of what you're doing.' And when I say, 'How about a check?' they say, 'I can't, because when the governor sees my name on your donor list, the hammer will come down. I have contracts in front of the state. I have business in front of the state.'"

Herbert and Johnson are battling for the Republican nomination, heading into the June 28 primary election. Johnson beat Herbert at the Utah Republican Convention, 55 percent to 45 percent, setting the stage for the primary. A recent poll showed Herbert leading Johnson 74 percent to 19 percent among registered Republicans in the state.

gehrke@sltrib.com

Twitter: @RobertGehrke

Transcript of portions of a breakfast meeting Gov. Gary Herbert had at the Alta Club last month with donors and supporters

First excerpt:

Liv Moffat (Campaign fundraiser): • I just want to get very specific: $1 million dollars before June 1. So I need gala money in before June 1. Commitments that have been made, like Merit Medical and Questar, we need it in now. We have some awesome events coming up. Our golf tournament is sold out, we just scheduled another one for June 13. We have a brand new health care roundtable that SelectHealth will be a major sponsor of. Leavitt Partners is hosting and Dave [Gessell, executive vice president of the Utah Hospital Association] and Dirk [Anjewierden, director of the Utah Health Care Association] are helping me plan that, as well. I also want to thank Spencer Stokes and Paul Rogers for paying for your breakfast this morning and arranging for that.

Doug Foxley, we gave him two hours, we paraded seven clients in at his office, we went to their office, 20 minutes, collecting checks, talking specifically about their issues. We're not going to do that for a thousand dollars, but that's something. Talk to me, we'll schedule it. You can come and have 15 to 20 minutes with the governor and anything we can do to get that gala money in.

Second excerpt:

Gov. Gary Herbert: • Just so you know, this will be unprecedented for me, because I am going to be on the high giddy-up campaign for the next few weeks. The state's going to be run by Justin [Harding, Herbert's chief of staff] and the lieutenant governor [Spencer Cox]. So I will go anywhere. I will meet with people. I will come to your office, you bring them in and we will give them quality time, but we've got to raise the money, there's no ifs ands or buts; we've got to raise the money somehow.

Jodi Hart (lobbyist): • I have a question regarding talking about issues and giving money at the same time, my clients would not feel comfortable doing that.

Spencer Stokes (lobbyist and campaign staffer): • He doesn't really want to talk to those clients, either. [Laughter]

Herbert: • However [it] works for your folks.

Lt. Gov. Spencer Cox: • We need to be very careful about that, and that's a very, very good point. This isn't, 'Come give us a check as a condition ...'.

Herbert: • There's no quid pro quo at all. We may disagree with some things with your clients, but I hope we all understand we don't want to be one-issue-oriented people. There's a plethora of issues out there and, again, probably the only person in this room that agrees with me on 100 percent of the issues is me, and even that may be questionable. So again, we're not going to agree on everything. But if nothing else, we'll give you the results that you want. So however we want to do this, if we want to have multiple meetings or we sit down and talk and you give us a check later or before. However you would like to do it, I'll just say I'm available. I'm Available Jones.

EXHIBIT B (RECORDING)

EXHIBIT C

From: Chuck Newton
Sent: Thursday, March 28, 2013 1:56 PM
To: CITY_COUNCIL_EMAIL
Cc: John Geilmann; Gary Whatcott; Rob Wall; Chip Dawson; Lindsay Shepherd
Subject: HB 76 Thank you

I just got off the phone with the Governor's office who called to extend a hearty thanks through back channels in response to our work to assist them in ginning up support for vetoing HB 76, which as you will recall - pertains to Open Carry and bypassing the Concealed Weapons Permit system.

The Governor was appreciative of the letter sent by the Mayor and Police Chief, and also wanted to recognize the City Council for their support which was communicated to the Governor's office by both myself and our City Attorney.

Our city attorney also was noted for his work in assisting the ULCT to be on top of the issue, and pull together city attorneys and police chiefs across the Wasatch area to publicly support a veto for this ill-advised legislation.

Further, I was informed that the legislature will poll their members for a veto session, after the time period has expired for the Governor to sign all the passed bills. However, given that a number of legislators have privately communicated with the Governor's office and extended their thanks to him for doing what they were reluctant to do in putting this down, the sense is that a veto session will not be successful.

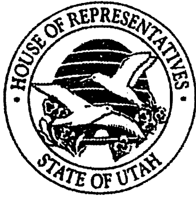
Be that as it may, I was encouraged to proceed with an Op-ed that had previously been discussed in order to provide cover to the legislators who are now supporting the Governor.

That being said, you may be interested to know that our Legislators representing South Jordan, voted for the bill. And, Rep Cunningham recently sent out an email asking for feedback on a veto session.

May I suggest our Mayor have our City Attorney re-draft the Governor's letter for our Legislators, opposing a veto session and also indicating the majority support of the City Council, and send said letter with the Mayor and Police Chief's signatures to each of our state legislators who represent South Jordan.

Best Regards,
Chuck Newton, Council Member
District 2
City of South Jordan

EXHIBIT D



House of Representatives *State of Utah*

UTAH STATE CAPITOL • PO BOX 145030
350 N STATE STREET, SUITE 350
SALT LAKE CITY, UTAH 84114-5030 • (801) 538-1029

December 14, 2018

Subject: Response to Your Records Request

Dear Mr. Newby:

I am writing in response to your records request, originally dated December 5, 2018, that you submitted under Title 63G, Chapter 2, Government Records Access and Management Act ("GRAMA"), and the Utah Legislature Policies and Procedures for Handling Records Requests ("Policies").

In your records request, you requested "... any written instruction, directive, recommendation, memoranda, rule, ruling, advice, formal or informal policy, operating procedure, presentation, or communication you have received from other state agencies, created yourselves, or otherwise shared with legislators regarding the storage or removal/deletion of communications conducted via public and private email, text, and other communication devices and mediums."

I have found the following records responsive to your request and included copies herewith:

- Legislative Management Policy- Utah Legislature Policies and Procedures for Handling Records Requests (including Appendix A Records Retention Schedule and Appendix B Fees for Legislative Information)

If I can help with any questions regarding this request, please feel free to call our office.

Sincerely,

M.S. Allen

Megan Selin Allen
Interim Records Officer
Utah House of Representatives

Utah Legislature Policies and Procedures for Handling Records Requests

As authorized by Utah Code Ann. § 63-2-703 (Supp. 2006), the Legislature establishes the following policies and procedures to handle requests for records and classification, designation, fees, access, denials, segregation, appeals, management, retention, and amendment of records. These policies and procedures are designed to establish fair information practices recognizing:

- the right of privacy in relation to personal data gathered by the legislative offices; and
- the public's right of access to information concerning the conduct of the Legislature's business.

These policies and procedures and the attached appendixes supersede all prior policies, procedures, memoranda, or other statements regarding the Legislature's records policy and procedures.

Policies and Procedures

Part 1. General Provisions

Section 1.1. Definitions -- Applicability of the Government Records Access and Management Act.

1. As used in these Policies and Procedures:
    a. the terms defined in Utah Code Ann. § 63-2-103 (Supp. 2006) have the same meaning; and
    b. "Draft Legislation" means a draft version of a bill, a resolution, a substitute, an amendment, or a fiscal note, along with a related document that is in the possession of the Office of Legislative Research and General Counsel or the Office of Legislative Fiscal Analyst.
    c. "Legislative office" means the:
        i. House of Representative;
        ii. Senate;
        iii. Office of Legislative Research and General Counsel;
        iv. Office of the Legislative Fiscal Analyst;
        v. Office of the Legislative Auditor General; and
        vi. Office of Legislative Printing, which includes the Bill Room.
    d.
        i. "Legislative sponsor" means the legislator who requests that a bill, a resolution, a substitute, or an amendment be prepared by the Office of Legislative Research and General Counsel or that a fiscal note be prepared by the Office of Legislative Fiscal Analyst.
        ii. A legislative sponsor of a bill or resolution may be different from a legislative sponsor of a draft substitute or draft amendment.
        iii. A legislative sponsor may direct the distribution or disclosure of that legislator's bill, resolution, substitute, amendment, or fiscal note.

2. Utah Code Ann. § 63-2-703 (Supp. 2006) reflects the principles of separation of powers and governs the applicability of Title 63, Chapter 2, Government Records Access and Management Act, to requests for records from legislative offices.

Section 1.2. Classification of records as private, controlled, or protected.

1. As authorized by Utah Code Ann. § 63-2-703(1) (Supp. 2006), the Legislature may classify records as private, controlled, or protected.
2.
    a. An electronic message, including an e-mail, instant message, voice-mail, or other digital message, is presumed to be temporary information between the sender and recipient, not rising to the level of a "record" that would require the Legislature to maintain the information and to disclose it under certain circumstances.
    b. The Legislature recognizes that an electronic message may contain information that should be classified as a public, private, protected, or controlled record, according to the contents of the electronic message.
        i. If the information is intended by a legislative recipient or legislative sender to be a classified record, the legislative sender or recipient must either save the information to a file or print the information. Based on the content of the electronic message, the electronic message record will be retained in accordance with Appendix A, Records Retention Schedule.
        ii. If the information is intended by a governmental entity recipient or sender that is not a legislative office or officer to be a classified record, the governmental entity sender or recipient must either save the information to a file or print the information and retain the item in accordance with that governmental entity's retention schedule.
    c. The Legislature does not assume responsibility for backups of electronic messages as being maintained on the system.

Section 1.3. Sharing Records.

1. Draft legislation is a protected document under Utah Code Ann. Sec 63-2-304 (22), unless made public by the legislative sponsor, consistent with Section 1.4.
2. As part of the Legislative Branch's deliberative legislative process, a legislative sponsor may make, or direct legislative staff to make, a limited distribution of draft legislation to another legislator, a government entity, a constituent, or another third party without changing the protected classification of the draft legislation, if:
    a. the legislative sponsor or legislative staff notifies the person to whom the draft legislation is distributed, that the legislative sponsor intends that the draft legislation remain protected; and
    b. the limited distribution of the draft legislation is for the purpose of allowing review and receiving comment on the draft legislation.
3. A legislator, a member of legislative staff, a government entity, a constituent, or another third party who accepts draft legislation under Subsection (2) may not distribute the draft legislation without the permission of the legislative sponsor.
4. If a governmental entity shares a private, controlled, or protected record with a legislator or legislative staff, the legislator and legislative staff will maintain that record according to the record classification of the governmental entity that shared the record.

Section 1.4. Making proposed legislation public.

1. If a legislative sponsor distributes, or authorizes legislative staff to distribute, draft legislation to a public body as defined in Title 52, Chapter 4, Open and Public Meetings Act, the legislator is considered to have made the distributed draft legislation public.
2. In addition to Subsection (1), a legislative sponsor may also elect to make a draft legislation public under Section 63-2-304(20) or (22).

Section 1.5. Retention schedule for records.
A retention schedule is attached as Appendix A.

Part 2. Requests for Records

Section 2.1. Requests -- Time limit for response and extraordinary circumstances.

1.
    a. A person making a request for a record shall furnish the records officer of the legislative office with a written request containing:
        i. that person's name, mailing address, and daytime telephone number; and
        ii. a description of the record requested that identifies the record with reasonable specificity.
    b. The records officer of the each legislative office is as follows:
        i. for the Senate, the Manager of Senate Services;
        ii. for the House of Representatives, the Administrative Assistant;
        iii. for the Office of Legislative Research and General Counsel, the Assistant Director;
        iv. for the Office of the Legislative Auditor General, the Deputy Auditor General;
        v. for the Office of the Legislative Fiscal Analyst, the Assistant Deputy Director as designated by the Legislative Fiscal Analyst; and
        vi. for the Office of Legislative Printing, which includes the Bill Room, the Office Manager.
2.
    a. As soon as reasonably possible, but no later than 10 business days after receiving a written request, or five business days after receiving a written request if the requester demonstrates that expedited response to the record request benefits the public rather than the person, the legislative office shall respond to the request by:
        i. approving the request and providing the record;
        ii. denying the request;
        iii. subject to Subsection (6), notifying the requester that it does not maintain the record and providing, if known, the name and address of the legislative office or governmental entity that does maintain the record;
        iv. notifying the requester that because the request was made during a general or special session, the legislative office shall respond within the time limits of Subsection (5); or
        v. notifying the requester that because of one of the extraordinary circumstances listed in Subsection (3), it cannot immediately approve or deny the request.

   b. A notice described by Subsection (2)(a)(iv) or (v) shall describe the circumstances relied upon and specify the date when the records will be available.
   c. Any person who requests a record to obtain information for a story or report for publication or broadcast to the general public is presumed to be acting to benefit the public rather than a person.
3. The following circumstances constitute extraordinary circumstances that allow a legislative office to delay approval or denial by an additional period of time as specified in Subsection (4) if the legislative office determines that due to the extraordinary circumstances it cannot respond within the time limits provided in Subsection (2):
   a. another legislative office or governmental entity is using the record, in which case the originating legislative office shall promptly request that the legislative office or governmental entity currently in possession return the record;
   b. another governmental entity or legislative office is using the record as part of an audit, and returning the record before the completion of the audit would impair the conduct of the audit;
   c. the request is for a voluminous quantity of records;
   d. the legislative office is currently processing a large number of records requests;
   e. the request requires the legislative office to review a large number of records to locate the records requested;
   f. the decision to release a record involves legal issues that require the legislative office to seek legal counsel for the analysis of statutes, rules, ordinances, regulations, or case law;
   g. segregating information that the requester is entitled to inspect from information that the requester is not entitled to inspect requires extensive editing; or
   h. segregating information that the requester is entitled to inspect from information that the requester is not entitled to inspect requires computer programming.
4. If one of the extraordinary circumstances listed in Subsection (3) precludes approval or denial within the time specified in Subsection (2), the following time limits apply to the extraordinary circumstances:
   a. for claims under Subsection (3)(a), the legislative office or governmental entity currently in possession of the record shall return the record to the originating entity within five business days of the request for the return unless returning the record would impair the holder's work;
   b. for claims under Subsection (3)(b), the originating legislative office shall notify the requester when the record is available for inspection and copying;
   c. for claims under Subsections (3)(c), (d), and (e), the legislative office shall:
      i. disclose the records that it has located which the requester is entitled to inspect;
      ii. provide the requester with an estimate of the amount of time it will take to finish the work required to respond to the request; and
      iii. complete the work and disclose those records that the requester is entitled to inspect as soon as reasonably possible;
   d. for claims under Subsection (3)(f), the legislative office shall either approve or deny the request within five business days after the response time specified for the original request has expired;

e. for claims under Subsection (3)(g), the legislative office shall fulfill the request within 15 business days from the date of the original request; or
f. for claims under Subsection (3)(h), the legislative office shall complete its programming and disclose the requested records as soon as reasonably possible.

5.
a. Unless an extraordinary circumstance as described in Subsection (3) exists, if a request for records is made during a general or special legislative session, the legislative office may respond as soon as reasonably possible but no later than 15 business days from the date of the original request.
b. If extraordinary circumstances exist, the legislative office may respond within the later of:
i. 15 business days from the date of the original request; or
ii. the time limits of Subsection (4).

6.
a. Subject to the other provisions of this Subsection (6), a person making a request for a record shall submit the request to the governmental entity that prepares, owns, or retains the record.
b. If a request for access is submitted to a legislative office other than the legislative office that maintains the record:
i. the legislative office shall promptly forward the request to the appropriate legislative office; and
ii. if the request is forwarded promptly, the time limit for response begins when the record is received by the legislative office that maintains the record.
c. In response to a request for a record, a legislative office may not provide a record that it has received under Utah Code Ann. § 63-2-206 (Supp. 2006) as a shared record if the record was shared for the purpose of auditing and the legislative office is authorized by state statute to conduct an audit. If a legislative office is prohibited from providing a record under this Subsection (6)(c), the legislative office shall:
i. deny the record request; and
ii. inform the person making the request that a record request must be submitted to the governmental entity that prepares, owns, or retains the record.

7. If the legislative office fails to provide the requested records or issue a denial within the specified time period, that failure is considered the equivalent of a determination of denial.

Section 2.2. Fees for records requests.

1. The Legislature may charge a fee to obtain a record as provided under these Policies and Procedures as attached in Appendix B.
2. The Legislature may fulfill a record request without charge if:
   a. the release of the record primarily benefits the public rather than the person requesting the record; or
   b. the individual requesting the record is the subject of the record or an individual specified in Utah Code Ann. § 63-2-202(1) or (2) (Supp. 2006).

Part 3. Appeals

Section 3.1. Appeal to the legislative officer.

1.
    a. Any person aggrieved by a legislative office's access determination may appeal the determination within 30 calendar days from the day on which the access determination is issued by filing a notice of appeal with the appropriate legislative officer. The legislative officers are as follows:
        i. for the Senate, the Secretary of the Senate;
        ii. for the House of Representatives, the Chief Clerk of the House;
        iii. for the Office of Legislative Research and General Counsel, the director of that office;
        iv. for the Office of Legislative Fiscal Analyst, the Legislative Fiscal Analyst;
        v. for the Office of Legislative Auditor General, the Legislative Auditor General; and
        vi. for the Office of Legislative Printing, which includes the Bill Room, the Legislative Printing Supervisor.
    b. If a legislative office claims extraordinary circumstances and specifies the date when the records will be available, and, if the requester believes that the extraordinary circumstances do not exist or that the time specified is unreasonable, the requester may appeal the legislative office's claim of extraordinary circumstances or date for compliance within 30 calendar days after the day on which written notification of a claim of extraordinary circumstances by the legislative office was issued, despite the lack of a determination or its equivalent under Subsection 2.1(7).
2. The notice of appeal shall contain the following information:
    a. the petitioner's name, mailing address, and daytime telephone number;
    b. a copy of any written request for records; and
    c. the relief sought.
3. The petitioner may file a short statement of facts, reasons, and legal authority in support of the appeal.
4.
    a. If the appeal involves a record that is the subject of a business confidentiality claim as described in Utah Code Ann. § 63-2-308 (Supp. 2006), the appropriate legislative officer shall:
        i. send notice of the petitioner's appeal to the business confidentiality claimant within three business days after receiving notice, except that if notice under this Subsection (4)(a)(i) must be given to more than 35 persons, it shall be given as soon as reasonably possible; and
        ii. send notice of the business confidentiality claim and the schedule for the appropriate legislative officer's determination to the petitioner within three business days after receiving notice of the petitioner's appeal.
    b. The business confidentiality claimant shall have seven business days after notice is sent by the appropriate legislative officer to submit further support for the claim of business confidentiality.
5.

a. The appropriate legislative officer shall make a determination on the appeal within:
    i. five business days after the appropriate legislative officer receives the notice of appeal;
    ii. 12 business days after the legislative officer sends the petitioner's notice of appeal to a person who submitted a claim of business confidentiality;
    iii. the time limits of Section 2.1(4) if the extraordinary circumstances described in Section 2.1(3) occur; or
    iv. if a notice of appeal is filed during a general or special legislative session, five business days in addition to the time period specified in this section to comply with any other obligation imposed under this section on the legislative officer.
b. If the legislative officer fails to make a determination within the time specified in Subsection (5)(a), the failure shall be considered the equivalent of an order denying the appeal.
c. Notwithstanding the provisions of this Subsection (5), the petitioner and appropriate legislative office may agree to extend the time periods specified in this Subsection (5).

6. The appropriate legislative officer may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private or protected if the interests favoring access outweigh the interests favoring restriction of access.
7. The legislative office shall send written notice of the determination of the appropriate legislative officer to all participants. If the appropriate legislative officer affirms the denial in whole or in part, the denial shall include:
    a. a statement that the petitioner has the right to appeal the denial to the Legislative Records Committee;
    b. the time limits for filing an appeal; and
    c. the name and business address of the director of the Office of Legislative Research and General Counsel.
8. A person aggrieved by a legislative office's classification or designation determination under these Policies and Procedures and who is not requesting access to the records, may appeal that determination using the procedures provided in these Policies and Procedures. If a nonrequester is the only appellant, the procedures provided in this section shall apply, except that the determination on the appeal shall be made within 30 calendar days after receiving the notice of appeal.

Section 3.2 Appeals to the Legislative Records Committee.

1. A petitioner who participated in the appeal to the appropriate legislative officer may appeal a determination by the appropriate legislative officer to the Legislative Records Committee by filing a notice of appeal with the director of the Office of Legislative Research and General Counsel no later than:
    a. 30 calendar days after the appropriate legislative officer has granted or denied the records request in whole or in part, including a denial under Subsection 3.1(5)(b) or 3.1(7); or

   b. 45 calendar days after the original request for records if:
      i. the circumstances described in Section 3.1(1)(b) occur; and
      ii. the appropriate legislative officer failed to make a determination under Section 3.1.
2. The Legislative Records Committee shall consist of:
   a. the Speaker of the House of Representatives;
   b. the Minority Leader of the House of Representatives;
   c. the President of the Senate; and
   d. the Minority Leader of the Senate.
3. The notice of appeal shall contain the following information:
   a. the petitioner's name, mailing address, and daytime telephone number;
   b. a copy of any denial of the records request; and
   c. the relief sought.
4. The petitioner may file a short statement of facts, reasons, and legal authority in support of the appeal.
5. No later than five business days after receiving a notice of appeal, the director of the Office of Legislative Research and General Counsel shall:
   a. schedule a hearing for the Legislative Records Committee to discuss the appeal which shall be held:
      i. no sooner than 15 business days after the date of the filing of the appeal; and
      ii. no later than the 52 calendar days from the date of the filing of the appeal;
   b. send a copy of the notice of hearing to the petitioner; and
   c. send a copy of the notice of appeal, supporting statement, and a notice of hearing to:
      i. each member of the Legislative Records Committee;
      ii. the appropriate legislative officer for the legislative office from which the appeal originated;
      iii. any person who made a business confidentiality claim as described in Utah Code Ann. § 63-2-308 (Supp. 2006) for a record that is the subject of the appeal; and
      iv. all persons who were a party to the appeal under Section 3.1 to the appropriate legislative officer.
6.
   a. No later than 10 business days after receiving the notice of appeal, the legislative office may submit to the director of the Office of Legislative Research and General Counsel a written statement of facts, reasons, and legal authority in support of its position.
   b. The legislative office shall send a copy of the written statement to the petitioner by first class mail, postage prepaid.
   c. The director of the Office of Legislative Research and General Counsel shall forward a copy of the written statement to each member of the Legislative Records Committee.
7.
   a. No later than 10 business days after the notice of appeal is sent by the director of the Office of Legislative Research and General Counsel, a person whose legal

interests may be substantially affected by the proceeding may file a request for intervention before the Legislative Records Committee. Any written statements of facts, reasons, and legal authority in support of the intervener's position shall be filed with the request for intervention.

b. The person seeking intervention shall provide copies of the statement to all parties to the proceedings before the Legislative Records Committee.

8. The Legislative Records Committee shall hold a hearing as scheduled in accordance with Subsection (5).
9. At the hearing, the Legislative Records Committee shall allow the parties to speak on the issues or present evidence. The Legislative Records Committee may allow other interested persons to comment on the issues.
10. Discovery is prohibited, but the Legislative Records Committee may issue subpoenas in accordance with Title 36, Chapter 14, Legislative Subpoena Powers, or issue other orders to compel production of necessary evidence.
11. The Legislative Records Committee's review shall be de novo.
12.
    a. The Legislative Records Committee may review the disputed records. The review shall be in camera.
    b. Members of the Legislative Records Committee may not disclose any information or record reviewed by the committee in camera unless the disclosure is otherwise authorized by these Policies and Procedures.
13.
    a. No later than five business days after the hearing, the Legislative Records Committee shall issue a signed order either granting the petition in whole or in part or upholding the determination of the legislative officer in whole or in part.
    b. The Legislative Records Committee may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the public interest favoring access outweighs the interest favoring restriction of access.
    c. In making a determination under Subsection (13)(b), the Legislative Records Committee shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect:
        i. privacy interests in the case of:
            A. private or controlled records; or
            B. business confidentiality interests in records classified as protected; and
        ii. privacy interests or the public interest in the case of other protected records.
14. The order of the Legislative Records Committee shall include:
    a. a statement of reasons for the decision, including citations to the provisions that govern disclosure of the record if the citations do not disclose private, controlled, or protected information;
    b. a description of the record or portions of the record to which access was ordered or denied if the description does not disclose private, controlled, or protected

information or information exempt from disclosure under Utah Code Ann. § 63-2-201(3)(b) (Supp. 2006);

   c. a statement that any party to the proceeding before the Legislative Records Committee may appeal the Legislative Records Committee's decision to district court;
   d. a brief summary of the appeals process;
   e. the time limits for filing an appeal; and
   f. a notice that in order to protect the party's rights on appeal, the party may wish to seek advice from an attorney.

15. If the Legislative Records Committee fails to issue a decision within 57 calendar days of the filing of the notice of appeal, that failure shall be considered the equivalent of an order denying the appeal. The petitioner shall notify the Legislative Records Committee in writing if the petitioner considers the appeal denied.
16. Notwithstanding the other provisions of this Section 3.2, if a notice of appeal is filed during a general or special legislative session, a legislative office, a legislative officer, or the Legislative Records Committee may take five business days in addition to any time period specified in this section to comply with any obligation imposed under this section on the legislative office, legislative officer, or Legislative Records Committee.

Section 3.3. Judicial review.

1.
   a. Any party to a proceeding before the Legislative Records Committee may petition for judicial review by the district court of the Legislative Records Committee's order.
   b. The petition described in Subsection (1)(a) shall be filed no later than 30 calendar days after the date of the Legislative Records Committee's order.
2. A petition for judicial review shall be a complaint governed by the Utah Rules of Civil Procedure and shall contain:
   a. the petitioner's name and mailing address;
   b. a copy of the Legislative Records Committee's order from which the appeal is taken;
   c. the name and mailing address of the legislative office that issued the initial determination with a copy of that determination;
   d. a request for relief specifying the type and extent of relief requested; and
   e. a statement of the reasons why the petitioner is entitled to relief.
3. The complaint shall be served on Legislative General Counsel in the Office of Legislative Research and General Counsel.
4. The proceedings in the district court shall be governed by the provisions of Utah Code Ann. § 63-2-404(3) through (8) (2004).

Appendix A
Records Retention Schedule

Appendix A
Records Retention Schedule

The following is a retention schedule for records maintained by legislative offices. The retention schedule is divided into three types of records -- permanent, scheduled for destruction/deletion, and temporary (review and discard when no longer needed). To the extent that a record is in the control of a legislative office and is listed as permanent or scheduled for destruction/deletion by this retention schedule, the record will be treated as such from the effective date of the retention schedule forward and retroactively when possible.

PERMANENT	House	Senate	OLRGC	Fiscal	Auditors
Journals	✓	✓	✓		
Laws of Utah			✓		
Utah Constitution			✓		
Bill files including introduced bills, amendments, substitutes, and enrolled copies of bills	✓	✓			
Bill files including drafts, research, amendments, introduced and substituted legislation, and enrolled legislation			✓		
Bill status			✓		
Interim committee histories including notices, agendas, minutes, handouts, and audio recordings of meetings			✓		
Standing committee histories including notices, agendas, minutes, handouts, and audio recordings of meetings	✓	✓			
Legal opinions of the OLRGC			✓		
Litigation files			✓		
Fiscal notes and fiscal note research				✓	
Appropriations committee histories including notices, agendas, minutes, and handouts				✓	
Appropriations bill files including drafts, research, and amendments				✓	

PERMANENT	House	Senate	OLRGC	Fiscal	Auditors
Auditors committee histories including notices, agendas, minutes, and handouts					✓
Audits including master files of audit reports with working papers, requests for audits, outlines or parts of any audit survey plans or audit programs with working papers, and final audit reports					✓
Publications, *e.g.*, items published for the public	✓	✓	✓	✓	✓
Audio recordings and video of House and Senate floor debates	✓	✓			

SCHEDULED FOR DELETION/DESTRUCTION	House	Senate	OLRGC	Fiscal	Printing	Auditors
Utah Code Unannotated (1 year)	✓	✓	✓	✓	✓	✓
General correspondence, including constituent letters (shorter of 3 years or when the legislative need ends)	✓	✓	✓	✓	✓	✓
General accounting ledgers including accounts payable ledger, accounts receivable ledger, or other general ledgers (7 years)	✓	✓	✓	✓	✓	✓
Bank deposits, bank statements, check registers, and checks (3 years)	✓	✓	✓	✓	✓	✓
Invoices and warrants (3 years)	✓	✓	✓	✓	✓	✓
Inventory ledger (3 years)	✓	✓	✓	✓	✓	✓
Payroll records (4 years)	✓	✓	✓	✓	✓	✓
Petty cash records (3 years)	✓	✓	✓	✓	✓	✓
Travel expense records (3 years)	✓	✓	✓	✓	✓	✓
Employee records, including promotion reports, retirement, and pension records (65 years after termination)	✓	✓	✓	✓	✓	✓
Accident reports, claims, and statements (5 years)	✓	✓	✓	✓	✓	✓

SCHEDULED FOR DELETION/DESTRUCTION	House	Senate	OLRGC	Fiscal	Printing	Auditors
Disability and illness reports (5 years)	✓	✓	✓	✓	✓	✓
Employee applications (shorter of 6 months or when the administrative need ends)	✓	✓	✓	✓	✓	✓
Employee time records (3 years)	✓	✓	✓	✓	✓	✓
Bids and awards (3 years)	✓	✓	✓	✓	✓	✓
Contracts (6 years from date contract is completed)	✓	✓	✓	✓	✓	✓
Research (shorter of 3 years or when administrative need ends)			✓	✓		✓

TEMPORARY	House	Senate	OLRGC	Fiscal	Printing	Auditors
Research requests and results			✓	✓		✓
Electronic messages, including e-mail, voice mail, instant messages, as provided for electronic messages in Subsection 1.2(2) of the Policies and Procedures	✓	✓	✓	✓	✓	✓
Internal policy, procedural, or training documents	✓	✓	✓	✓	✓	✓
Mailing lists	✓	✓	✓	✓	✓	✓
Press releases	✓	✓				
Papers which have short-term use and comprise the background records such as preliminary studies, drafts, analysis, and notes	✓	✓	✓	✓	✓	✓

Appendix B
Fees for Legislative Information

Appendix B
Fees for Legislative Information

The following information is available to the public at the prices noted:

1. Photocopying costs:
   $.10 per sheet (self serve) non-color copies
   $.40 per side for color copies (limited quantities only)

2. Faxing documents:
   $1 per page

3. Staff time for providing the record, information, or service
   Up to $25 per hour

4. Mailing all interim committee agendas, minutes, and enclosures
   $50 per interim

5. Mailing a task force's minutes and agendas
   $20 per year

6. Utah Constitutions
   $2 each

7. Utah Legislative Directory
   $6 each

8. Utah State Government: A Citizen's Guide
   $10 each

9. Rules of the Legislature
   $3 each

10. Redistricting Committee Report
    $5 for CD version
    $25 for hard copy

11. Legislative Drafting Manual
    $15

12. Copies of public legislative committee meetings or floor debates
    $2 for tape, plus staff time to run copy
    $5 for CD, plus staff time to run copy
    $7 for VHS, plus staff time to run copy
    $10 for DVD, plus staff time to run copy

13. Computer-based version of the Utah Code
    $1,000 for the entire Utah Code
    $50 minimum for a title of the Utah Code

14. Copies of printed, numbered bills
    $.10 per sheet
    $300 for all original and substitute bills filed during the 45-day session

15. Copies of printed amendments
    $.10 per sheet

16. Daily printed bill status
    $2 for each day or
    $65 for the 45-day session

17. Bound version of Senate or House journal
    $45 each per year

18. House and Senate daily journal
    $1.50 for each journal per day or
    $85 for the set for the 45-day session

19. General Session package of printed numbered bills, daily bill status, and House and Senate daily journals
    $450

20. Laws of Utah
    $50 per year

21. Mailing costs
    $2 minimum

22. Briefing Papers (for copies in addition to one free copy to a person or state agency)
    $5 each

23. Digest of Legislation (for copies in addition to one free copy to a person or state agency)
    $10 each

24. Pocket Guide of Legislative Directory
    $2 each

25. Utah State Government Organization Summary Chart (for copies in addition to one free copy to a person or state agency)
$3 each

26. Legislative Interim Report (for copies in addition to one free copy to a person or state agency)
$5 each

A person or a state agency may have one free copy of the following documents:

House of Representatives
A Young Citizen's Guide to the Utah State Legislature
Activities Book
Citizen's Guide to the Utah State Legislature
Commercial and Free Speech Activities in the Legislative Area of the Capitol Hill Complex
Daily Agenda
Guidelines for Lobbyists
How a Bill Becomes Law
Roster of Senators and Representatives
Take the Challenge

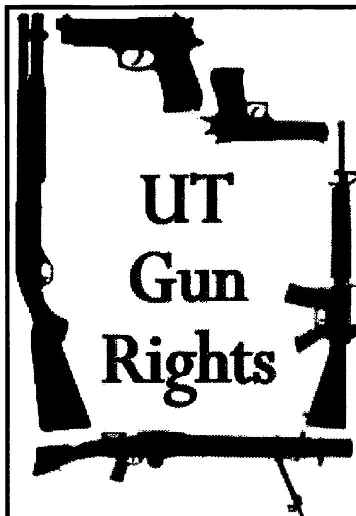
Utah State Senate
A Young Citizen's Guide to the Utah State Legislature
Activities Book
Citizen's Guide to the Utah State Legislature
Commercial and Free Speech Activities in the Legislative Area of the Capitol Hill Complex
Daily Agenda
Guidelines for Lobbyists
How a Bill Becomes Law
Roster of Senators and Representatives
Take the Challenge

Office of Legislative Printing
Commercial and Free Speech Activities in the Legislative Area of the Capitol Hill Complex
Committee schedules
How a Bill Becomes Law
Roster of Senators and Representatives

Office of the Legislative Fiscal Analyst
Annual Appropriations Report
Appropriations Summary and Budget Highlights

Office of the Legislative Auditor General
Annual Report to the Utah State Legislature
Legislative Audit Reports

EXHIBIT E



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UT Gun Rights Note: The article below was originally published by the Sutherland Institute in January 2002. It is no longer available on their website.

Therapeutic Jurisprudence: Embracing a Tainted Ideal

By Arthur G. Christean

Read the executive summary

Therapeutic jurisprudence was a major theme at the September 2001 Utah Annual Judicial Conference. Several presentations and awards were given on this topic, including an award by the National Conference of State Court Administrators to Utah's top court administrator partly in recognition of his support and advocacy of this concept. But what is "therapeutic jurisprudence"?

Though few Utah citizens could define therapeutic jurisprudence, many may have heard favorable media reports about its most popular aspect: "drug courts," and their stated goal of dramatically reducing the high recidivism rate of drug offenders. During the past decade this new use of courts has gained popularity in many states, including Utah, fueled by the increased availability of federal grants. Therapeutic jurisprudence advocates now hope to expand this model to include such entities as "mental health courts." According to one author drug courts are the "cutting edge of therapeutic jurisprudence" and that the vision of "a courtroom unencumbered by traditional rules, a criminal justice system that focuses on the 'individual needs of the client' rather than equal justice for all, cooperative therapy rather than adversarial trials—has taken the nation by storm."1 Yet concerns about this "revolution in justice," as its advocates refer to it, have not received much attention because it has been largely perceived as benign and beneficial.

What Therapeutic Jurisprudence Is, and What it Is Not

Interesting as these legal approaches may be, it is misleading to style such efforts as *courts.* They do not represent the creation of new judicial entities at all. Utah's basic judiciary structure is established under Article VIII of its constitution where specific courts are named and established. As expressly provided by this article, new courts can only be created by the legislature. There is no mention of "drug courts" as such in either the Utah judicial code or code of criminal procedure.2 In fact, "drug court" is simply the term given to *administratively* created social service programs in which individual judges may choose to participate and use their*statutory* sentencing authority to carry out program objectives. These objectives center on the delivery of counseling and treatment services in lieu of punishment to a select group of offenders who meet certain eligibility guidelines, mostly first- or second-time offenders. Defendants who successfully complete court-ordered treatment may avoid the jail or fines they would otherwise suffer, and may even earn complete dismissal of the charges. Failure to complete prescribed treatment, or to adequately cooperate with therapists, can mean swift imposition of jail, fines, or both.

Although therapeutic jurisprudence does not represent the creation of a new court system, its mission is very different from the traditional mission of American courts. Promoters of therapeutic jurisprudence refer to it as a form of "court intervention" that focuses on the "chronic behavior of criminal defendants" in connection with the imposition of some form of treatment. While the "traditional role of courts and judges [is] *to provide a fair process*for those with a dispute or criminal charge," under a therapeutic justice model "the *process and the rules may be regarded as secondary*, and what is preeminent is the whole defendant, provision of some form of treatment, and the outcome of that treatment"3 (emphasis added). This

perspective considers success in terms of how well a defendant has altered his thoughts and behaviors, not whether he had a fair hearing and an impartial judge, or was sentenced in harmony with uniform sentencing guidelines.

The idea of therapeutic courts is not exactly new. It originated with the advent of juvenile courts in Chicago in 1899 and has been a part of most American juvenile courts ever since. It took over a half century for a juvenile court case to reach the U.S. Supreme Court in which the model of therapeutic jurisprudence was carefully examined. The Court was highly critical of it in this case holding that "good intentions were no substitute for due process."4 However, juvenile courts were, and always have been, *legislatively* created courts of limited jurisdiction, not social service programs in which judges can opt in or opt out. Indeed, Utah has had considerable experience with this model of jurisprudence with the way in which the juvenile court operated in Utah during a good part of its history, and especially during the 1941 to 1965 period. During these years the Utah juvenile court operated as a part of the executive branch of government within the state welfare department in flagrant contravention of Article V of the state constitution. It did so in complete harmony with the concepts of therapeutic jurisprudence now being advocated and possessed all the features associated with it.

Much of the impetus for therapeutic jurisprudence originated during the period of the "Great Society" of the 1960s and 1970s with its emphasis on the need to reshape American social institutions. However, it never reached the stage of maturity it has achieved during the last few years with the advent of drug courts and similar ventures. As the promoters of therapeutic jurisprudence readily acknowledge, under their model judicial *collaboration* is regarded as more important than judicial *independence*; and achieving *desired outcomes* more important than a *fair process* free of undue influence on the judge.5 They urge judges to be assertive in leading these initiatives and to "drive the train rather than just ride along." Unfortunately, they also chastise reluctant judges to be "part of the solution when a solution is presented" and that they can "either dogmatically continue to declare their traditional role, or they can change their objectives to conform to those of society, and then market the change."6

Benefits and Costs of Therapeutic Jurisprudence

This new form of jurisprudence, which offers so many promising benefits to the people of Utah, should give us pause. It poses serious threats to the judicial process because this court "intervention" distorts the judicial process and the role of judges in it. Therapeutic jurisprudence marks a major and in many ways a truly radical shift in the historic function of courts of law and the basic purpose for which they have been established under our form of government. It also marks a fundamental shift in judges' loyalty away from principles of due process and toward particular social policies. These policies are less concerned with judicial impartiality and fair hearings and more concerned with achieving particular results. Even though its advocates recognize that problems do exist with this model, they do not regard them as particularly serious, merely "disadvantages" to be overcome.7 Yet the dangers inherent in this new form of justice are indeed of a serious and fundamental nature.

Therapeutic justice advocates have four main justifications for these programs:

> * They work—individuals successfully treated do not re-offend, or do so at a much lower rate, thus saving money and public resources;
>
> * They require and promote collaboration by courts and judges with other agencies and professionals;
>
> * They compel individuals to respect the system and participate in the treatment services offered or face swift consequences, which is regarded as a superior form of accountability to traditional sentences; and
>
> * Their claimed successes are enthusiastically trumpeted by the media, thereby improving the legal system's public image.

These advantages, however, have costs. Therapeutic jurisprudence puts a tremendous strain on resources and judicial collegiality because of the one-judge/one-court concept common to this approach. Supervision of the treatment process by judges takes a great deal of court time and imposes unequal burdens on judges of the same bench. It also works against the goal of unified courts in the direction of a proliferation of specialized courts that operate on the basis of a different judicial philosophy from those of other courts within the same district and state. More importantly, though, the advantages offered by therapeutic jurisprudence take their toll on time-honored principles of the American legal system.

One, they compromise the separation of powers. While these programs may "work," defining what works and what doesn't disregards or discounts the basic constitutional doctrine of separation of powers by asking the courts to fashion solutions to social problems rather than waiting for the people to do so through their elected representatives. The line between the branch which interprets the laws and the one which implements them becomes completely blurred when courts become service providers intent on achieving specific outcomes. The judge becomes part of a treatment team and assumes oversight responsibility for the programs the team sponsors, and cannot avoid exercising executive functions as well as judicial.

Two, they compromise the objectivity and impartiality of judges. The collaborative process that therapeutic jurisprudence advocates so admire means the judge must act as part of the therapeutic team. When acting

as a member of a clinical team bent on achieving certain outcomes, judges cannot avoid unethical ex parte communications, that is, discussion of the case with one party outside the presence of the other party. Ex parte communications are traditionally a serious ethical breach for judges, but such communications form a regular part of the therapeutic process. Further, when judges become the central focus of the entire effort as the enforcer of the treatment team's decisions, rather than an independent adjudicator of the facts and the law, the appearance of bias cannot be avoided. To the defendant, the judge becomes simply "one of them."

Three, these programs substitute the judge's subjective judgement for time-honored due process checks, thereby eliminating a vital check on the abuse of government power. Judges cannot effectively act as impartial and detached magistrates to hear and rule on the competing claims of adversaries when they also function as advocates and defenders of the programs and procedures under challenge. Whether they have the background or training for it or not, judges become, in practice, official endorsers of the effectiveness of the treatment regimens they impose, which will always be justified on the basis of their beneficial intent, not their legal soundness. Thus, defendants who question the particular bias or training of the therapists, the content of the treatment or its methods, have nowhere to turn for a hearing on such matters and have little recourse but to submit to the treatment or suffer the consequences.

Fourth, therapeutic jurisprudence abandons the goal of equal justice under law. Treatment programs may make appealing news stories, but the programs will only be able to serve a limited number of those who qualify, not all defendants who would like to participate. Some defendants will consequently be treated differently than others depending on whether they are deemed worthy candidates for available program openings. The publicly reported success of this approach to justice is usually controlled by those who design and administer its programs, using criteria they choose to employ, which provides considerable incentive to screen out difficult or resistant candidates. The sentencing ideal of like sentences for like offenses is displaced to generate favorable media attention.

The separation of powers, due process, judicial impartiality, and equal justice under the law are among the bedrock principles of American jurisprudence, yet the therapeutic jurisprudence model compromises them all. Compounding the foregoing problems is the temptation to politicize the judicial process. Free of the traditional restraints on the judiciary which have been built into our form of government, which some find very confining, this model has an almost irresistible appeal to those who understandably yearn to find solutions to people's needs and want to "get things done." Yet this use of the judicial power, however well-meaning it may be, is basically alien to American legal traditions. In fact, the therapeutic jurisprudence model shares many characteristics with a highly foreign legal system: the legal model of the former Soviet Union.

Embracing the Soviet Model

Therapeutic jurisprudence, and recent legislation influenced by it, appears to share some of the prominent characteristics of Soviet-style law. By making this comparison I do not suggest that those who support therapeutic jurisprudence do so out of a desire to see American courts embrace the methods or ideology of the former Soviet Union's legal system. Rather, I offer these parallels to call attention to the pitfalls and dangers associated with going down this path, of which the history of the Soviet Union bears vivid testimony. When viewed in the light of these parallels, therapeutic jurisprudence seems far less innocuous and its risks and costs are brought into sharper focus.

In the former Soviet Union, courts and judges were expected to implement state policies and demonstrate loyalty to the philosophical premises supporting them. Unlike the United States Constitution, the Constitution of the USSR established the law as an instrument of the state's will—the "people's will"—not as a limitation upon the state. With such a view of the purpose of the law, it is not surprising that such a legal system would fundamentally differ from the American system.

The first major difference between Soviet and American legal systems, and the first major parallel between the Soviet system and therapeutic jurisprudence, is the separation of powers. As noted above, the therapeutic justice model undermines our traditional separation of powers. The creators of the Soviet legal system rejected the concept of separation of powers, and checks and balances between branches of government. Not even the highest appellate courts had power to declare a law unconstitutional, nor to limit the legislative or executive arms of government on the grounds that those branches had violated a fundamental law or legal principle. In addition, in practice the executive became a source of law equal if not greater than the legislative body, usurping its authority and constituting a powerful means of control through the party apparatus. The Soviet legal system employed a "civil law" system where judges applied the law in isolation from one another's decisions, whereas the United States uses the Anglo-American concept of "common law" which relies on judicial precedent. Soviet judges, who often had little legal expertise, were free to subjectively apply their own concepts of state policy to achieve an appropriate result in a given situation, but doing so created no rule of law for future cases. Basic civil rights were protected by law "except when they were exercised contrary to their social and economic purpose."[8]

And there were many exceptions. Soviet legal codes tended to include a great deal of policy pronouncements and statements of political and social theory, another area where this model resembles the therapeutic jurisprudence model but differs from the American model. Soviet courts were expected to act in harmony with policy pronouncements and to enunciate rules of public order promoting the collective welfare of the state. The state's pervasive presence in Soviet society, its complete secularization of family

life, and its hostility towards religion as an "intolerable superstition" created a need to condition people to accept state intervention in all social relationships. In contrast, aside from the occasional inclusion of expressions of "legislative intent," American legal codes have customarily eschewed extended statements of social and political theory. Instead, they traditionally focus on the rights and duties of citizens within a framework of freedom, and the penalties and remedies attached to their violation, both between individuals, and between individuals and the state. Nevertheless, notable exceptions are appearing in increasing numbers in our legal codes. The Utah Child Welfare Reform Act of 1994 contains several such sections, for example this language from the child and family services part of the Human Services Code:

> ... as a counterweight to parental rights, the state, as parens patriae, has an interest in and responsibility to protect children whose parents abuse them or do not adequately provide for their welfare. There are circumstances where a parent's conduct or condition is a substantial departure from the norm and the parent is unable or unwilling to render safe and proper parental care and protection. Under those circumstances, the welfare and protection of children is the consideration of paramount importance.**9**

The Utah Child Welfare Reform Act embodies key therapeutic jurisprudence principles such as emphasizing outcomes over processes and engaging judges as members of a therapeutic team rather than an independent arbiter. The act applies in the juvenile court system, which by law employs the therapeutic jurisprudence model, unlike "drug courts," which use that model without statutory authorization.

The Soviet legal system differed from the American legal system in several other vital ways. Soviet judges did not function under the traditional ethical standards that restrain American judges and acted with little concern for judicial impartiality and procedures that American courts refer to as "due process." Soviet judges were free to engage in ex parte communications, conduct their own interrogations and engage in prosecutorial activity. The courts had a two-stage system that began with a secret pre-trial investigation by the prosecutor followed by a public trial to verify and ratify the prosecutor's work, not to hear the defendant's case for the first time. They were not bound by traditional American rules of evidence; judges could admit hearsay evidence for a number of reasons. Soviet judges were encouraged to exercise their discretion to withhold conviction and punishment where a crime had clearly been committed, or to impose punishment even for conduct not clearly defined as criminal by the code.

In contrast, the procedural requirements in American legal codes have focused not on the need for predictable outcomes, but on trying to guarantee as far as possible an impartial tribunal, reliable evidence, and a fair process. Thankfully, even in the therapeutic jurisprudence model our American approach has not been as compromised as the Soviet system. There are, however, several disturbing parallels to this Soviet pattern in Utah's child welfare laws. State workers may enter homes without warrants, require children to be interviewed without parental consent, conduct investigations, and hold confidential hearings to "substantiate referrals," all before presenting the matter to the court. Following the initiation of court proceedings, several provisions attempt to structure and control the outcome of the judicial process, such as mandatory timetables, directives as to what evidence the court must consider and presumptions created, and review hearings requiring the court to approve treatment plans and to fix "permanency" goals.

Lastly, the Soviet system notoriously undermined judicial independence. Until after World War II the legislature both appointed and recalled judges, and even when the public did elect judges they used one-candidate ballots on which voters could vote for or against the judicial candidate. Local professional commissions, with the guidance of party members within these nominating groups, selected all judicial candidates. Despite the USSR's constitutional provision that "judges are independent and subject only to the law," and even though local officials could not intervene in the formation of an individual decision on personal grounds, this provision did not restrain intervention against a judge when a line of decisions were out of keeping with party wishes. Indeed, judges had to make decisions in accord with party policy or risk recall.**10** In the United States judicial independence has been traditionally understood quite differently. While federal judges in America have life tenure and need not fear removal except by impeachment, many state trial judges may be removed or disciplined for unpopular decisions in a manner very similar to the Soviet system. In Utah, for example, before the judicial selection process was permanently changed by the adoption of a new judicial article in 1985, juvenile court judges were appointed and removed by the governor (he had to re-appoint or decline to do so at the end of their terms) and several judges lost their positions in that manner.

The Proper Role of Therapeutic Courts

No one seriously disputes the worthiness of the goal to restore people to mental health by correcting the way they think and behave, or help them overcome destructive addictions and bad habits by teaching them how to lead more productive lives. Various social service programs, both secular and faith-based, have emerged over the past generation to meet these needs. The big problem—and one which is often overlooked—is that such a broad mission of social and spiritual redemption has not been assigned to courts and judges within our constitutional scheme of government. If our courts of law are to be refashioned to function as major social service delivery systems, with the expansive and unchecked power this represents, as well as the basic compromises with due process and judicial impartiality which go with it, this should not be done without the full knowledge and consent of the people of the state of Utah, who are after all the ultimate sovereign. At a minimum, there ought to be clear authorization by the representatives of the people in the form of legislative establishment of such "problem-solving courts"**11** with defined powers and limitations on the kinds of cases they can handle. Such a profound change in the way in which courts

operate and judges use their powers should not be brought about by the action of administrative bodies creating new courts, whether as "pilot programs" or otherwise, and however well-motivated and public-spirited the promoters of such programs may be.

Three appellate court cases from 1963 to 1982 bear on these issues. Two were decisions of the Utah Supreme Court and the third a decision of the U.S. Supreme Court. They all have one thing in common: a rejection of one or more of the basic ideas of therapeutic jurisprudence. All arose from juvenile court proceedings. That is understandable when considered in light of the fact that the juvenile court was the prototype for therapeutic jurisprudence and this concept was basically alien to other courts until the 1990's. The 1963 case rejected the claim that separation of powers was not important because the Utah juvenile court structure at that time was well designed to meet the needs of a particular class of persons (juveniles and children) and that it had achieved good results.**12** The 1967 case rejected the claim that good intentions and the benefits of social services and rehabilitative therapy justified the disregard of basic rights and due process protections, as well as traditional standards of judicial ethics, for those accused of crime who just happened to be under 18 years of age.**13** The 1982 case rejected the disregard of fundamental constitutional rights of parents on the basis of the popularity of the policy being advanced (best interest of the child) and its promotion of inter-disciplinary collaboration.**14**

The rise and popularity of therapeutic jurisprudence "... raises sobering questions about the future of American criminal justice: Is the purpose of courts to 'meet the individual needs' of defendants? Are justice and therapy one and the same thing?"**15** This recent renewal of a push for 1960s-style judicial activism should concern all Utah citizens. There is great danger to our freedoms and way of life when courts of law abandon justice and the rule of law in favor of doing things to people for their own good and because it is deemed to be in their best interest or the best interest of the state. Solutions to social problems employed by regimes without the traditions of freedom we have in this country can certainly be said to work, but that is not a good enough reason for American courts to adopt them.

There may be reason for cautious optimism. In a time of continuous prosperity and peace, and plentiful tax revenues, there is little incentive for people to get very concerned about whether some new chore assigned to a particular branch of government is suitable or not. Many citizens, if not most, are just too preoccupied with their personal lives to pay attention and too nice to say no to new social programs which will help maintain social stability and demonstrate collective compassion for the less fortunate. After all, with such a resilient economy, we can surely afford to experiment with new ways to meet unmet social needs, so the argument goes. September 11 changed all that. Priorities will now have to be carefully reexamined in the light of new realities and a declining economy. The principal threat to limited government, and the constitutional rights it seeks to protect, does not arise from a government which pursues the interests of its citizens with energy and resolve. It arises from a government which cannot tell the difference between a genuine crisis and a constituency demand, between solutions to the problems or needs of a special interest group and the core functions of government to protect life, liberty, and property. In the wake of September 11, perhaps these distinctions will become more important and there will be fewer distractions from the essential work governments must do and do well, especially courts of law.

Footnotes

1. Eric Cohen, "The Drug Court Revolution: Do we want theory rather than justice to become the basis of our legal system?" *The Weekly Standard* (December 27, 1999) 20.

2. Courts of justice are enumerated in Utah Code Section 78-1-1. There is no mention of "drug courts."

3. Conference of State Court Administrators, "Position Paper on Therapeutic Jurisprudence." Paper presented at the business meetining of the Conference of State Court Administrators, Williamsburg, Viriginia, August 5, 1999, p. 1.

4. In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967).

5. Conference of State Court Administrators, "Position Paper on Therapeutic Jurisprudence," 2, 4.

6. *Ibid,* 3.

7. Conference of State Court Administrators, "Position Paper on Therapeutic Jurisprudence," 3.

8. "Soviet and Socialist Legal Systems," *The New Encyclopedia Britannica* (1975, V. 17) 316-17. For further reading on the Soviet legal system, see E.L. Johnson, *An Introduction to the Soviet Legal System* (London: Methuen & Co., 1969) and John N. Hazard, William E. Butler, and Peter B. Maggs, *The Soviet Legal System* (Dobbs Ferry, New York: Oceana, 1977).

9. Utah Code section 62A-4a-201. While this quote is a good example, this entire subsection is a statement of legal and social theory. Available online at http://www.le.state.ut.us/~code/TITLE62A/htm/62A04024.htm

10. "Soviet and Socialist Legal Systems," 316-17.

11. The Therapeutic Justice Task Force expressed their preference for this term, "problem-solving courts" at the Conference of Supreme Court Justices on August 3, 2000.

12. In re Woodward, 384 P.2nd 110, Utah 1963.

13. In re Gault.

14. In re J.P., 648 P.2nd 1364, Utah 1982.

15. Cohen, "The Drug Court Revolution," 23.

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1 message

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Attached is my memorandum of support, request for hearing, and additional briefing, along with certificate of service.

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