

**SUNSETTING BIG GOVERNMENT: HOW
AMENDMENTS TO THE TEXAS SUNSET ACT CAN
REDUCE THE SIZE OF GOVERNMENT AND
SERVE AS A MODEL FOR THE NATION**

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I. INTRODUCTION

“No government ever voluntarily reduces itself in size. So governments’ programs, once launched, never disappear. Actually, a government bureau is the nearest thing to eternal life we’ll ever see on this earth.”¹ – President Ronald Reagan

The Texas Sunset Act (TSA) sought to change the notion that government agencies continue *ad infinitum*.² The Texas legislature enacted the TSA to control the size of state government and to conserve taxpayer resources through the periodic review and abolition of state agencies.³ To noteworthy extent, the TSA has served this purpose.⁴ “Texas has one of the most successful sunset programs due to the broad range of agencies reviewed, the ability of the state’s sunset commission to tackle major reforms, and the success in getting reforms enacted.”⁵ However, with Texas facing record budget shortfalls amidst a deep worldwide recession, elected officials in Austin find themselves in dire need of more effective tools to trim the size, scope, and cost of state government.⁶ With the appropriate revisions, including an amendment to the Texas constitution, the TSA could serve as a powerful tool to accomplish this goal and set an example for the rest of the nation—including the federal government—to follow.⁷

First, Part II of this comment provides a brief history of sunset legislation in the United States.⁸ Part III outlines the purpose and scope of the TSA, while Part IV summarizes the structure, organization, and operations of the Sunset Advisory Commission (SAC).⁹ Next, Part V explains the sunset review process, including how the SAC gathers relevant information from both the agencies and the public at large.¹⁰ Part VI analyzes the results of past SAC reviews since the enactment of the TSA, while Part VII compares and contrasts sunset legislation in the states of Colorado, Minnesota, and Florida with the TSA.¹¹ Next, Part VIII

1. Ronald Reagan, A Time for Choosing (Oct. 27, 1964), available at <http://www.reagan.utexas.edu/archives/reference/timechoosing.html>.

2. See *Frequently Asked Questions*, SUNSET ADVISORY COMM’N, <http://www.sunset.state.tx.us/faq.htm> (last visited June 17, 2012).

3. *Id.*

4. *Id.*

5. Chris Edwards, “Sunsetting” to Reform and Abolish Federal Agencies, CATO INST. (Apr. 26, 2002), http://www.cato.org/pub_display.php?pub_id=3455.

6. See Becca Aaronson, *Anticipating Budget Cuts, State Agencies Shrink*, THE TEX. TRIB. (Sept. 27, 2011), <http://www.texastribune.org/texas-economy/economy/anticipating-budget-cuts-state-agencies-shrink/>.

7. See discussion *infra* Part IX.

8. See discussion *infra* Part II.

9. See discussion *infra* Parts III–IV.

10. See discussion *infra* Part V.

11. See discussion *infra* Parts VI–VII.

examines failed attempts to enact comprehensive sunset legislation at the federal level and the Texas roots of such attempts.¹² Finally, Part IX sets forth recommendations as to how the Texas legislature can amend the TSA to make it a more effective agency-abolishing and budget-balancing mechanism.¹³

II. BRIEF HISTORY OF SUNSET LEGISLATION

In the United States, the sunset concept dates back to our Founding Fathers.¹⁴ While in Paris, serving as the United States Ambassador to France, Thomas Jefferson wrote a letter to James Madison in which he expressed concern for the ability of one generation to bind another and suggested that “every constitution . . . and every law, naturally expires at the end of 19 years,” which he considered the length of a generation.¹⁵ Interestingly, the Alien and Sedition Acts of 1798, which punished criticism of President John Adams and other government officials, included a sunset provision that provided for the automatic expiration of the Acts at the end of his term.¹⁶ This may be one of the first official usages of the sunset concept in the United States.¹⁷

Although the political right currently touts the sunset concept as an instrument to abolish superfluous agencies and reduce the size of government, modern sunset legislation traces its roots to the political left.¹⁸ In fact, Theodore Lowi, a left-leaning professor at the University of Chicago, cultivated the modern sunset concept in his 1969 book *The End of Liberalism*.¹⁹ Lowi suggested that “the only effective way to get substantive evaluation of a program or an agency” was through a “tenure-of-statutes act,” which imposed a “Jeffersonian limit from five to ten years on the life of every organic act.”²⁰

However, the sunset concept did not gain widespread use or notoriety until the mid-1970s.²¹ In fact, in 1975, Colorado was the first state in the

12. See discussion *infra* Part VIII.

13. See discussion *infra* Part IX.

14. See generally Doug French, *Book Review: Principle and Interest: Thomas Jefferson and the Problem of Debt*, LUDWIG VON MISES INST. (Oct. 31, 1996), <http://mises.org/daily/3209> (discussing the history of Jefferson’s desire for frugality).

15. *Id.*

16. See An Act Concerning Aliens (The Alien Act of 1798), ch. 58, 1 Stat. 570 (1798); An Act Respecting Alien Enemies (The Alien Enemies Act), ch. 66, 1 Stat. 577 (1798); An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States”, ch. 74, 1 Stat. 596 (1798).

17. See The Alien Act of 1798; The Alien Enemies Act; An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States”.

18. See THEODORE J. LOWI, *THE END OF LIBERALISM* 309–10 (1969).

19. See *id.*

20. *Id.*

21. See Chris Mooney, *A Short History of Sunsets*, LEGAL AFFAIRS (Jan. 2004), available at http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp.

union to enact sunset legislation, and, in 1976, President Jimmy Carter made it part of his reform agenda during his successful presidential campaign. By the early 1980s, thirty-four states had enacted some form of sunset legislation.²²

Figure 1: Status of Sunset Laws in the United States²³

Sunset Law Status	States (n=50)
Adopted (n=37)	AK, AL, AZ, AR, CO, CT, DE, FL, GA, HI, IL, IN, KS, LA, ME, MD, MN, MS, MT, NC, NE, NH, NM, NV, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, WA, WV, WY
Not adopted (n=13)	CA, ID, IO, KY, MA, MI, MO, ND, NJ, NY, OH, VA, WA
Repealed or suspended (n=12)	AR, DE, IL, MS, MT, NE, NV, NH, NC, RI, SD, WY

III. THE TEXAS SUNSET ACT

A. Purpose

The Texas legislature designed the TSA to determine the existential value of state agencies.²⁴ Enacted by the Texas legislature in 1977, Texas was an early adopter of sunset review legislation among the states.²⁵ Such legislation enables states to periodically review the necessity of state agencies and to take re-organizational steps that eliminate redundancy and inefficiency.²⁶ Since 1982, the TSA has saved taxpayers an estimated \$783.7 million.²⁷

Most government regulatory and oversight legislation concerns itself with whether an agency complies with its statutory mandate.²⁸ However, the TSA is different.²⁹ Rather than ask whether an agency complies with the law, the TSA asks the fundamental question of whether an agency

22. See *id.*

23. MARK R. DANIELS, TERMINATING PUBLIC PROGRAMS: AN AMERICAN POLITICAL PARADOX 34 (1997).

24. TEX. GOV'T CODE ANN. §§ 325.001–.024 (West 2005 & Supp. 2011).

25. Andrew Weber, *Where Did the Texas Sunset Commission Get Its Name?*, THE TEX. TRIB. (Feb. 18, 2011), <http://www.texastribune.org/texas-state-agencies/sunset-advisory-commission/where-did-the-texas-sunset-commission-get-its-name/>.

26. *What is Sunset?*, SUNSET ADVISORY COMM'N, <http://www.sunset.state.tx.us/guide.htm> (last visited June 17, 2012).

27. See *Frequently Asked Questions*, *supra* note 2.

28. See *id.*

29. See *id.*

should continue to exist.³⁰ To make this determination, the TSA created the SAC.³¹

B. Scope

Approximately 150 state agencies are subject to sunset review under the TSA.³² Agencies are typically subject to sunset review once every twelve years.³³ Each legislative session, twenty to thirty agencies undergo sunset review.³⁴ The legislature schedules agency reviews according to agency function so that similarly oriented agencies undergo review during the same legislative session.³⁵ In the absence of affirmative legislative action, the default outcome for an agency under sunset review is its abolishment.³⁶

However, certain governmental entities are not subject to TSA review.³⁷ For example, the TSA exempts the court system and state universities from the sunset review process.³⁸ Additionally, the TSA creates another class of agencies that are subject to sunset review but not subject to abolition.³⁹ Such agencies include the Board of Pardons and Paroles and the Board of Trustees of the Teacher Retirement System of Texas.⁴⁰

IV. THE SUNSET ADVISORY COMMISSION

A. Composition

The SAC is a twelve-member body composed of ten legislators and two public members.⁴¹ Of the ten legislators, five must be members of the house of representatives and five must be members of the senate.⁴² The lieutenant governor, who also serves as president of the senate, appoints the five senate members, while the speaker of the house appoints the five house

30. See TEX. GOV'T CODE ANN. § 325.011 (West Supp. 2011).

31. See [Frequently Asked Questions](#), *supra* note 2.

32. See *id.*

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.*

41. See TEX. GOV'T CODE ANN. § 325.003(a) (West Supp. 2011).

42. See *id.*

members.⁴³ Moreover, the lieutenant governor and the speaker of the house may appoint themselves to the SAC.⁴⁴

B. Term Limitations and Membership Requirements

SAC membership is not permanent and is subject to certain term limitations.⁴⁵ Legislative members serve four-year terms, while public members serve two-year terms.⁴⁶ A legislative member may not serve consecutive terms, and public members may serve no more than two consecutive terms.⁴⁷ In any event, a member is not eligible for reappointment after having served six years on the SAC.⁴⁸ However, the TSA exempts the lieutenant governor and the speaker of the house from these term limitations—who may, if they choose, serve on the SAC for the duration of their time in office.⁴⁹

Additionally, public members must not have a conflict of interest with the agencies scheduled to undergo review during a public member's term of office.⁵⁰ The conflict of interest conditions placed on public members include:

- (b) An individual is not eligible for appointment as a public member if the individual or the individual's spouse is:
 - (1) regulated by a state agency that the commission will review during the term for which the individual would serve;
 - (2) employed by, participates in the management of, or directly or indirectly has more than a 10 percent interest in a business entity or other organization regulated by a state agency the commission will review during the term for which the individual would serve; or
 - (3) required to register as a lobbyist under Chapter 305 because of the person's activities for compensation on behalf of a profession or entity related to the operation of an agency under review.⁵¹

Moreover, a public member is subject to removal from office if these conditions do not remain satisfied throughout the duration of their term of office.⁵²

43. *See id.*

44. *See id.*

45. *See* GOV'T § 325.003(b)–(c).

46. *See* GOV'T § 325.003(d).

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* GOV'T § 325.003(b).

51. GOV'T § 325.003(b)(1)–(3).

52. *See* GOV'T § 325.003(c).

C. Leadership Structure and Quorum Requirements

A chairman and vice-chairman lead the SAC as presiding officers.⁵³ The lieutenant governor and speaker of the house have appointment power over these positions subject to certain conditions.⁵⁴ First, “[t]he chairmanship and vice-chairmanship must alternate every two years between the two membership groups appointed by the lieutenant governor and the speaker.”⁵⁵ Second, “[t]he chairman and vice-chairman may not be from the same membership group.”⁵⁶ The statute does not prohibit public members from serving as presiding officers.⁵⁷

All actions taken by the SAC require a simple majority quorum.⁵⁸ Because the SAC is a twelve-member commission, the presence of seven members constitutes a quorum.⁵⁹ However, heightened quorum requirements exist for all final actions and recommendations by the SAC.⁶⁰ The statute mandates that a majority of the members appointed by both the lieutenant governor and the speaker of the house are present for passage of final actions and recommendations.⁶¹ In effect, this requirement institutes an eight-member quorum because it requires the attendance of at least four members from both membership groups.⁶²

D. Staff and Member Compensation

The staffing provision of the TSA is relatively vague and broad in scope.⁶³ It mandates that the SAC employ an executive director and authorizes the executive director to “employ persons necessary to carry out this chapter through funds made available by the legislature.”⁶⁴ As a result, the executive director has broad discretionary authority to hire the SAC staff persons deemed necessary for the SAC operations.⁶⁵ At the present time, the SAC executive director maintains a staff of thirty employees including three assistant directors, three senior managers, two senior policy analysts, one staff counsel, eleven policy analysts, and six administrative

53. See GOV'T § 325.003(i).

54. See GOV'T § 325.003(b).

55. GOV'T § 325.003(i).

56. *Id.*

57. See GOV'T § 325.003(b).

58. See GOV'T § 325.003(j).

59. See *id.*

60. See *id.*

61. See *id.*

62. See *id.*

63. See GOV'T § 325.004 (West 2005).

64. *Id.*

65. See *id.*

staff persons.⁶⁶ Moreover, the provision permits, but does not mandate, the chairman and vice-chairman of the committee to hire one staff person to assist them in carrying out their duties.⁶⁷

While membership in the SAC is not a salaried position, the SAC reimburses members for all “actual and necessary expenses incurred in performing commission duties.”⁶⁸ Legislative members receive compensation from funds appropriated to their respective houses, while public members receive compensation from funds appropriated to the SAC.⁶⁹

V. THE SUNSET REVIEW PROCESS

A. Frequency and Types of Review

Although the TSA is silent on the issue, most state agencies are subject to sunset review once every twelve years.⁷⁰ With few exceptions, agencies under sunset review are automatically abolished unless legislation is enacted that provides otherwise.⁷¹ The TSA establishes two classes of exemptions from the sunset review process: complete and partial exemptions.⁷² Agencies completely exempted from the sunset review process are subject to neither review nor abolition under the TSA.⁷³ Examples of completely exempted state agencies include the court and university systems.⁷⁴ On the other hand, a partially exempted agency is subject to review and reorganization by the SAC, but not subject to abolition.⁷⁵ Examples of partially exempted agencies include the Board of Pardons and Paroles and the Board of Trustees of the Teacher Retirement System of Texas.⁷⁶ Moreover, the SAC may, by a majority vote of members present, exempt an agency from sunset review.⁷⁷

66. See *Sunset Staff*, SUNSET ADVISORY COMM’N, <http://www.sunset.state.tx.us/staff.html> (last visited June 17, 2012).

67. See GOV’T § 325.004.

68. GOV’T § 325.003(k).

69. See *id.*

70. See *Sunset in Texas*, SUNSET ADVISORY COMM’N, 2 (Jan. 2012), <http://www.sunset.state.tx.us/suntx.pdf>.

71. See *id.* at 3.

72. See *Guide to the Sunset Process*, SUNSET ADVISORY COMM’N, 1 (Dec. 2009), <http://wayback.archive-it.org/414/20110820002326/http://www.sunset.state.tx.us/guide.pdf>.

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.*

77. See TEX. GOV’T CODE ANN. § 325.0125 (West Supp. 2011).

B. Criteria for Review

The SAC considers a wide range of factors when reviewing an agency.⁷⁸ In fact, the TSA requires that SAC members contemplate a specific set of criteria when determining the continued need for an agency.⁷⁹ These criteria include

1. How efficiently and effectively does the agency and its advisory committees operate?
2. How successful has the agency been in achieving its mission, goals, and objectives?
3. Does the agency perform any duties that are not statutorily authorized? If so, what is the authority for those activities and are they necessary?
4. What authority does the agency have related to fees, inspections, enforcement, and penalties?
5. In what ways could the agency's functions/operations be less burdensome or restrictive and still adequately protect and serve the public?
6. How much do the agency's programs and jurisdiction duplicate those of other agencies and how well does the agency coordinate with those agencies?
7. Does the agency promptly and effectively address complaints?
8. To what extent does the agency encourage and use public participation when making rules and decisions?
9. How has the agency complied with state and federal requirements regarding equal employment opportunity, the rights and privacy of individuals, and purchasing guidelines for historically underutilized businesses?
10. How effectively does the agency enforce rules on potential conflicts of interest of its employees?
11. How effectively and efficiently does the agency comply with the Public Information Act and the Open Meetings Act?
12. Would abolishing the agency cause federal government intervention or loss of federal funds?
13. Do the agency's statutory reporting requirements effectively fulfill a useful purpose?⁸⁰

78. See GOV'T § 325.011.

79. See *id.*

80. See [Sunset in Texas](#), *supra* note 70.

C. Process

1. Sunset Advisory Commission Responsibilities

The SAC and its staff work collaboratively with the agencies under review; however, both the SAC and the agencies have distinct responsibilities in the sunset review process.⁸¹ At the beginning of the process, the SAC functions primarily as an information gatherer.⁸² In addition to carefully reviewing the self-evaluation report (SER) submitted by the agency, the SAC staff solicits information pertaining to the agency under review from a variety of sources.⁸³ These sources include, but are not limited to, interest groups, professional groups, interviews of agency personnel, and the public at-large.⁸⁴ Moreover, the SAC must consult with various governmental entities to discuss the agencies financial position.⁸⁵ Such entities include the Legislative Budget Board; the Governor's Budget, Policy, and Planning Division; the State Auditor; and the Comptroller of Public Accounts.⁸⁶

As a result of these meetings, the SAC must compile a report summarizing its findings and recommendations.⁸⁷ This report, which is a matter of public record, must contain the SAC's recommendation as to the abolition or continuation of the agency.⁸⁸ In addition to this recommendation, the report may include other suggestions such as changes to the agency's statutory mandate, modifications to the agency's size and scope, and adjustments to the agency's operations or procedures.⁸⁹ Upon the completion of this report, the SAC holds an open public hearing where it formally presents its report to the agency and gathers input from the public.⁹⁰ The SAC staff compiles all suggestions set forth at the public hearing so that SAC members may consider it for the staff report.⁹¹ Finally, the SAC meets in open session to formally consider the suggested changes before submitting its staff report to the legislature.⁹²

81. See *id.* at 2–3.

82. See *id.* at 3.

83. See *id.*

84. See *id.*

85. See TEX. GOV'T CODE ANN. § 325.008(a)(2) (West Supp. 2011).

86. See *id.*

87. See *Sunset in Texas*, *supra* note 70, at 4.

88. See *id.* at 5.

89. See *id.* at 4.

90. See GOV'T § 325.009.

91. See *Sunset in Texas*, *supra* note 70, at 4.

92. See *id.*

2. Agency Input

The TSA mandates that agencies under review submit the SER to the SAC.⁹³ “The SER identifies problems, opportunities, and issues that the agency feels should be considered in the Sunset review.”⁹⁴ Additionally, the SER should address the criteria used by the SAC to evaluate the agency’s need for continued existence and overall performance.⁹⁵ The agency should use the SER to present any information it deems useful for the SAC to consider, as well as any information or data specifically requested by the SAC.⁹⁶

In addition to the written SER, the SAC demands full cooperation from agencies under review throughout the entire sunset process.⁹⁷ Examples of such collaboration may include preparing reports on a particular operation or function of the agency, compiling data and financial records, and sitting for interviews with the SAC staff.⁹⁸

3. Public Participation

Aside from the two public members on the SAC, the SAC encourages the public to become involved in the sunset review process.⁹⁹ The public can influence the sunset review process in four general ways.¹⁰⁰ First, members of the public may submit their input regarding agencies currently under review to the SAC staff.¹⁰¹ According to the SAC, the most efficient way for members of the public to submit their comments is through an input form on the SAC website.¹⁰² Second, the public may review and comment on sunset reports, which are matters of public record.¹⁰³ Documents available for review include the SERs and staff reports.¹⁰⁴ Third, the public may testify at the SAC hearings, which the SAC schedules for each agency under review.¹⁰⁵ The SAC encourages members of the public who frequently interact with such agencies, or rely upon them for services, to provide their input at these open forums.¹⁰⁶ Finally, members of the public may lobby their legislators for a particular outcome on the agency under

93. See GOV'T § 325.007.

94. See *Sunset in Texas*, *supra* note 70, at 4.

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.*

99. See *id.* at 4–6.

100. See *id.*

101. See *id.* at 5.

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.*

review as they would on any other matter or proposed piece of legislation.¹⁰⁷

VI. RESULTS OF PAST REVIEWS

A. Cumulative Results

Since its inception, the SAC has reviewed a total of 451 agencies.¹⁰⁸ On average, the SAC reviews roughly 27 agencies each legislative session.¹⁰⁹ The SAC generally comes to one of four conclusions upon reviewing an agency: continuation, abolition, reorganization, or division into multiple agencies. Overall, the SAC decided to continue an astounding 81% of all agencies that underwent sunset review.¹¹⁰ Additionally, the SAC abolished approximately 9% of the agencies reviewed and eliminated 6% of agencies only to transfer their functions to other agencies.¹¹¹

B. Financial Impact

From a financial perspective, the legislature has spent \$32.8 million to fund the SAC and to carry out the mandates of the TSA.¹¹² According to Representative Walter T. Price IV, a Republican member of the SAC from Amarillo,

“[T]he sunset review process is both beneficial and necessary. Since its inception, the Sunset process has streamlined state government, making it more efficient. Through the process, 78 agencies have been abolished earning the State about \$29 in return for every dollar spent (a positive fiscal impact in excess of \$900 million). It is vital that we examine and review each state agency and determine whether it should continue to exist, and if so, if it is operating as efficiently as it can. Optimal operation is especially important in these times of tight state budgets, and it is what taxpayers expect at all times.”¹¹³

However, considering the SAC has been in existence for roughly thirty years, these estimates indicate that savings attributable to the SAC amounts to only about \$55.6 million per legislative session.¹¹⁴ While not entirely

107. See *id.* at 6.

108. See *id.* at 12.

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

113. E-mail from Walter T. “Four” Price IV, Representative for the 87th District of Texas, to author (Jan. 26, 2012, 16:56 CST) (on file with author).

114. See *Sunset in Texas*, *supra* note 70, at 11–12.

immaterial, these savings seem comparably insignificant considering the 2009–2011 Texas state budget was \$182 billion.¹¹⁵

VII. SUNSET LEGISLATION IN OTHER STATES

Sunset laws in other states have achieved mixed levels of success.¹¹⁶ In some states, the outcome of sunset legislation has been demonstrably tenuous, while the net impact of sunset legislation in other states has been fairly positive.¹¹⁷ Ultimately, the scopes of the agencies under review, coupled with the structure of the reviewing committee, are among the most determinative success factors for sunset legislation.¹¹⁸ Although the federal government never adopted sunset legislation, many state governments view the “sunset movement” as the most consequential legislative movement of the 1970s.¹¹⁹

A. State of Colorado

As previously mentioned, Colorado was the first state to enact comprehensive sunset legislation in 1975.¹²⁰ In doing so, Colorado garnered widespread attention and ignited a nationwide sunset legislation movement.¹²¹ The Wall Street Journal and Time Magazine featured Colorado’s sunset law and touted it as a potential solution to bloated government.¹²² However, the Colorado sunset law proved to be much more attractive in theory than in practice.¹²³ The New York Times reported that Colorado spent \$212,000 to abolish a total of three small agencies—yielding a savings of less than \$7,000.¹²⁴

Much of the failure of the original Colorado Sunset Act (CSA) is attributable to its relatively narrow scope.¹²⁵ Unlike the TSA, the CSA applies only to regulatory agencies and licensing boards, while the TSA applies to almost all state agencies, with very few exceptions.¹²⁶ In part, the

115. *Texas State Budget, SUNSHINE REVIEW*, available at http://sunshinereview.org/index.php/Texas_state_budget (last visited June 17, 2012).

116. See discussion *infra* Part VII.A–C.

117. See discussion *infra* Part VII.A–C.

118. See discussion *infra* Part VII.A–C.

119. See DANIELS, *supra* note 23.

120. *Mooney*, *supra* note 21.

121. See *id.*

122. See *Are Sunset Laws the Answer?*, WALL ST. J., July 9, 1976; *Sunset in Colorado*, TIME MAG., Mar. 22, 1976.

123. See *With New Law, Colorado Spends \$212,000 to Abolish 3 Agencies*, N.Y. TIMES, Apr. 22, 1978.

124. See *id.*

125. See *Sunset Reviews Conducted by Standing Committees*, COLO. LEGIS. COUNCIL, <http://www.colorado.gov/cs/Satellite/CGA-LegislativeCouncil/CLC/1245763548773> (last visited June 17, 2012).

126. See *id.*

Colorado statute states that the purpose of the CSA is “to evaluate the need for the continued existence of existing and future regulatory bodies . . . [and] to provide for the review of such functions and boards in the most cost-effective manner.”¹²⁷ However, by restricting its scope to only regulatory agencies, the CSA is, in practice, “more nibble than bite.”¹²⁸

In addition to being cripplingly narrow in scope, the CSA vests the power to review agencies in another agency, the Department of Regulatory Agencies, rather than in an independent commission.¹²⁹ The CSA tasks the Department of Regulatory Agencies with “conduct[ing] an analysis and evaluation of the performance of each division, board, or agency or each function scheduled for termination” and with “submit[ting] its report to the office of legislative legal services for the preparation of draft legislation based solely on specific recommendations for legislation.”¹³⁰ Unlike the TSA and other states’ sunset laws, the power to review bureaucratic largesse under the CSA lies with the bureaucrats themselves.¹³¹

Ultimately, the design of the CSA destined it for failure.¹³² The administrative costs of reviewing many small, insignificant regulatory boards often exceeded the savings realized by eliminating the regulatory agencies altogether.¹³³

B. State of Minnesota

Despite the abject failure of sunset legislation in some states, the sunset concept continues to spread. In September 2011, the state of Minnesota enacted its own version of sunset legislation.¹³⁴ Like the TSA, the Minnesota Sunset Act (MSA) requires that a sunset advisory commission “periodically review state agencies and make recommendations on whether the agency should continue to exist.”¹³⁵ Also like the TSA, the MSA prescribes a schedule to review state agencies, which will automatically expire in the absence of legislative action.¹³⁶ Moreover, because the governor appoints four of the twelve members from the public

127. COLO. REV. STAT. § 24-34-104(1)(a)–(b) (2012).

128. *Colorado Sunset Law More Nibble Than Bite*, READING EAGLE (Pa.), Apr. 23, 1978, available at <http://news.google.com/newspapers?nid=1955&dat=19780423&id=ZPchAAAAIBAJ&sjid=0qAFAAAAIBAJ&pg=4100,906369>.

129. *See* § 24-34-104(8)(a)(I).

130. § 24-34-104(8)(a)(I)–(II).

131. *See* § 24-34-104(8)(a)(I).

132. *See With New Law, Colorado Spends \$212,000 to Abolish 3 Agencies*, *supra* note 123.

133. *See id.*

134. Mark Shepard, *The Minnesota Sunset Act*, HOUSE RES. DEP’T (Sept. 2011), available at <http://www.house.leg.state.mn.us/hrd/pubs/ss/sssunsetact.pdf>.

135. *Id.*

136. *See id.*

at-large who serve at his pleasure, the MSA is more vulnerable than the TSA to the political whims of the current governor.¹³⁷

However, like the CSA, the MSA is narrower in scope than the TSA.¹³⁸ Rather than apply to virtually all state agencies, the MSA has a rather long list of exemptions.¹³⁹ Moreover, the statute exempts some of the state's largest and most costly agencies from review.¹⁴⁰ Examples of such exempted agencies include education, health, transportation, commerce, and veterans' affairs.¹⁴¹

Whether or not the MSA achieves its legislative objectives remains an open question. On one hand, vesting review power in a single sunset advisory commission like the TSA bodes well for the potential effectiveness of the MSA.¹⁴² On the other hand, allowing one-third of the commission to serve at the governor's pleasure opens the door to undue political influence and may undermine the credibility and independence of the commission.¹⁴³ Moreover, the fact that the MSA exempts some of the most important and costly agencies from review prohibits the possibility of meaningful cost savings.¹⁴⁴ If the CSA is any indicator, Minnesota legislators may find that the administrative costs of conducting extensive review of small agencies substantially exceed the cost-savings yielded from such reviews.¹⁴⁵

C. State of Florida

Like Texas, Florida was one of the first states to adopt sunset legislation in 1977.¹⁴⁶ However, Florida is unique in the sense that it revisited the issue thirty years later when it enacted the Florida Government Accountability Act (FGAA) in 2006.¹⁴⁷ "There was a previous 1977 law to sunset certain boards, but the savings weren't significant enough to justify the costs"¹⁴⁸ As a result, United States Senator Marco Rubio, then Speaker of the Florida House of Representatives, included the creation of a legislative Sunset Advisory Committee in his book *100 Innovative Ideas for*

137. See MINN. STAT. § 3D.03, subs. 1, 4.

138. See [Shepard](#), *supra* note 134.

139. See *id.*

140. See *id.*

141. *Id.*

142. See § 3D.03.

143. See § 3D.03, subd. 4.

144. See [Shepard](#), *supra* note 134.

145. See *With New Law, Colorado Spends \$212,000 to Abolish 3 Agencies*, *supra* note 123.

146. DANIELS, *supra* note 23.

147. Becky Reese, *Disassembling Florida State Government May Be Easier Thanks to Technology*, FLORIDA TAXWATCH, 2 (Feb. 6, 2007), available at <http://www.floridatxwatch.org/resources/pdf/0208SunsetReportRelease.pdf>.

148. *Id.*

Florida's Future, and made it part of his reform agenda when he took office.¹⁴⁹ In his book, Rubio notes that

Florida's 2006 Legislative Sunset Advisory Committee is modeled after the Texas Sunset Review Commission, which abolished 47 agencies or programs, saving \$736.9 million in taxpayer dollars. Like the Texas Commission, the Florida Legislative Sunset Advisory Committee will systematically review ALL the duties, operations, and programs of state agencies and their advisory committees. The committee should also determine whether certain public/private entities have upheld their promises. Many agencies and programs may continue unaltered after the review; however, having been subjected to a critical review these programs will hold a greater accountability than any non-reviewed program.¹⁵⁰

The FGAA is even broader in scope than the TSA. In fact, the “process will involve [every] major state agency, from the Department of Agriculture and Consumer Services to the Executive Office of the Governor.”¹⁵¹ Moreover, Florida's law “contains a first in the nation provision,” which compels agencies to develop a performance evaluation mechanism that associates the cost of operations with the product or service performed.¹⁵² The Florida law also mandates that agencies undergo review more frequently than the TSA by requiring sunset review every ten years, as opposed to every twelve years with the TSA.¹⁵³ Florida's updated sunset law is a good example of how one state can build upon and learn from successful legislation in another state.

VIII. SUNSET LEGISLATION AT THE FEDERAL LEVEL

A. History and Texas Roots

Comprehensive sunset legislation at the federal level does not exist.¹⁵⁴ Some laws have specific provisions mandating expiration on a certain date; however, the United States Congress has not adopted comprehensive sunset legislation charged with periodically reviewing the existential need for federal agencies.¹⁵⁵ High profile examples of federal laws with such

149. MARCO RUBIO, 100 INNOVATIVE IDEAS FOR FLORIDA'S FUTURE, 50–51 (2006).

150. *100 Innovative Ideas for Florida's Future*, by Marco Rubio: *On Government Reform*, ONTHEISSUES, available at http://www.ontheissues.org/Archive/100_Ideas_Government_Reform.htm (last updated Apr. 19, 2011) (citing RUBIO, *supra* note 149).

151. *Reese*, *supra* note 147.

152. *Id.*

153. Florida Government Accountability Act (Fla.), HB 7177, § 4 (2007).

154. *See DANIELS*, *supra* note 23.

155. *See id.*

provisions include the PATRIOT Act and the so-called Bush Tax Cuts of 2001, 2002, and 2003.¹⁵⁶

However, the absence of federal sunset legislation is not because of a lack of interest from many members of Congress.¹⁵⁷ Since 1976, numerous attempts to implement sunset legislation at the federal level have failed.¹⁵⁸ In fact, members of Congress have introduced sunset legislation approximately thirty times, and each time the legislation has died in committee.¹⁵⁹ The proposal and rejection of sunset legislation has become something of a ritual-like occurrence in nearly each session of Congress.¹⁶⁰

Interestingly, a bipartisan coalition from the Texas congressional delegation led the most successful attempt to adopt sunset legislation at the federal level.¹⁶¹ In 2001, Representative Kevin Brady, a Republican from The Woodlands, and Representative Lloyd Doggett, a Democrat from Austin, co-sponsored H.R. 2373, entitled “Abolishment of Obsolete Agencies and Federal Sunset Act of 2001.”¹⁶² This legislation was significant because it had the express support of President George W. Bush, a former Texas governor himself. Not only was Representative Doggett an avid proponent of sunset legislation in the United States House of Representatives, but also he was the original author of the TSA while serving in the Texas State Senate.¹⁶³

Unsurprisingly, given the Texas roots of its co-authors, H.R. 2373 closely mirrored the TSA.¹⁶⁴ In addition to having remarkably similar criteria for review, H.R. 2373 established a twelve-member, bicameral sunset commission; required each agency submit to review “at least once every [twelve] years”; and prescribed abolishment “unless the agency is reauthorized by the Congress.”¹⁶⁵ Also like the TSA, H.R. 2373 mandated the incorporation of non-legislators into the membership of a Federal

156. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107–56, 115 Stat. 272 (2001) (codified in scattered titles of U.S.C.); *Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001*, Pub. L. No. 107–16, 115 Stat. 38 (2001); *Job Creation and Worker Assistance Act of 2002*, Pub. L. No. 107–147, 116 Stat. 21 (2002); *Jobs and Growth Tax Relief Reconciliation Act (JGTRRA) of 2003*, Pub. L. No. 108–27, 117 Stat. 752 (2003).

157. See Tiffany Danitz, *Sunset Bills Rise Over Capitol Hill*, INSIGHT (Dec. 29, 1997), available at http://findarticles.com/p/articles/mi_m1571/is_n48_v13/ai_20191334/.

158. See *id.*

159. See *H.R. 9093 (95th): Sunset Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/95/hr9093> (last visited June 17, 2012).

160. See *id.*

161. See *Abolishment of Obsolete Agencies and Federal Sunset Act of 2001*, H.R. 2373, 107th Cong. (2001).

162. See *id.*

163. See Danitz, *supra* note 157.

164. Compare TEX. GOV'T CODE ANN. ch. 325 (providing a framework for the TSA) with H.R. 2373 (proscribing a sunset program for the federal government).

165. H.R. 2373.

Agency Sunset Commission.¹⁶⁶ Moreover, H.R. 2373 required non-legislator members to have “expertise in the operation and administration of Government programs.”¹⁶⁷

However, H.R. 2373 was not without its flaws and ultimately died in committee prior to a floor vote in either chamber of Congress.¹⁶⁸ Part of the blame for the failure of H.R. 2373 may be attributable to several counterintuitive provisions that undercut its purported goal of reducing government largesse.¹⁶⁹ For example, one such provision provided for the relocation of employees who worked in abolished agencies to other federal agencies—essentially reducing the size of one agency by increasing the size of another.¹⁷⁰ Another example of such a provision was an extension clause that allowed an abolished agency to continue for a full two years after the date on which it was to cease operations; this is in addition to the one year winding down period following the completion of the sunset review.¹⁷¹ Although flawed, H.R. 2373 would have been a positive first step towards implementing the sunset concept at the federal level.

B. Future Prospects

Most recently, another prominent Texan momentarily revived the prospect of federal sunset legislation by proposing the “automatic sunset of federal regulations without congressional approval.”¹⁷² Texas Governor Rick Perry, an unsuccessful candidate for the 2012 Republican presidential nomination, set forth this proposal in his “Uproot and Overhaul Washington” plan.¹⁷³ Governor Perry’s plan required “that all federal regulations automatically sunset after seven years, unless explicitly renewed by Congress.”¹⁷⁴ Moreover, this plan mandated the use of three broad criteria to evaluate the necessity of regulations: “is it affordable, is it effective, and does it do more harm than its purported good?”¹⁷⁵ The plan mandated repeal for regulations that fail all three tests, rewrite for regulations that fail any single test, and no change for regulations that pass all three tests.¹⁷⁶

166. *See id.*

167. *Id.*

168. *See H.R. 2373 (107th): Abolishment of Obsolete Agencies and Federal Sunset Act of 2001*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/107/hr2373> (last visited June 17, 2012).

169. *See H.R. 2373.*

170. *See id.*

171. *See id.*

172. Rick Perry, *Governor Rick Perry’s 2020 Vision: Uproot and Overhaul Washington* (on file with author).

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.*

With regard to federal agencies, Governor Perry's plan stopped short of outlining specific recommendations for comprehensive sunset legislation.¹⁷⁷ His plan did call for the establishment of sunset-like legislation "that reviews and eliminates wasteful and duplicitous programs, agencies, and departments and does not allow new programs to be funded or created without thorough analysis of their cost, necessity, and benefit to the American people."¹⁷⁸ However, no other viable presidential candidates have indicated support for federal sunset legislation, and the prospect of a major effort to enact such legislation seems to have died along with Governor Perry's presidential campaign.¹⁷⁹

IX. RECOMMENDATIONS

*"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."*¹⁸⁰ –U.S. Supreme Court Justice Louis Brandeis

This comment sets forth four recommendations for changes to the TSA and the sunset process in general. The purpose of these recommendations is to increase the effectiveness of the sunset process and to establish the Texas sunset process as the gold standard among the states. If successfully implemented, these recommendations could serve as a role model for other states, as well as the federal government.

The first recommendation relates to the scope of the agencies subject to review and advocates a "no exemption" policy for all agencies.¹⁸¹ The second recommendation suggests the addition of a zero-based budgeting requirement to the TSA in order to achieve greater cost savings through the sunset process.¹⁸² The third recommendation encourages the adoption of a "sunset amendment" to the Texas Constitution to further institutionalize the sunset process and make it more difficult for legislators to circumvent.¹⁸³ Finally, the fourth recommendation proposes the privatization of the SAC's duties in order to increase the objectivity of agency reviews by removing the potential for undue political influence.¹⁸⁴

177. *See id.*

178. *Id.*

179. *See id.*

180. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting).

181. *See discussion infra* Part IX.A.

182. *See discussion infra* Part IX.B.

183. *See discussion infra* Part IX.C.

184. *See discussion infra* Part IX.D.

A. Scope of Agencies Subject to Review

In his book *A Common Law for the Ages of Statutes*, Federal Court of Appeals Judge Guido Calabresi, a distinguished legal scholar, argued that sunset laws need to be “radical” in order to “overcome the powerful inertia created by a law’s passage.”¹⁸⁵ Perhaps what Judge Calabresi meant by “radical” was that a sunset law must be broad enough in scope to subject the largest and most cost-heavy agencies to sunset review.¹⁸⁶ As mentioned earlier in this comment, narrowly written sunset legislation that exempts major agencies from review prohibits large scale cost savings.¹⁸⁷ In fact, as Colorado discovered first hand, and as Minnesota is likely to discover, the administrative cost of carrying out the sunset review process on a large number of small, relatively inconsequential agencies can actually exceed the savings realized by the abolition or consolidation of such agencies.¹⁸⁸

The TSA is indisputably broad in scope when compared with similar legislation in many other states, but Texas can do better.¹⁸⁹ In fact, the sunset legislation enacted in Florida, while built upon the foundations of the TSA, is actually broader in scope than the TSA.¹⁹⁰ Texas should consider following Florida’s lead and set a new gold standard in sunset legislation—that no agency should be exempt from sunset review, and only those agencies whose functions the Texas Constitution expressly provides for should be exempt from the threat of outright abolition.

B. Zero-Based Budgeting Requirement

Zero-based budgeting is a budgeting concept that starts an agency’s budget at zero dollars every year rather than at a level based on previous budgets.¹⁹¹ The zero-based budgeting concept achieves cost savings by forcing an agency to continually justify each item of spending and should be part of an agency’s sunset review.¹⁹² In fact, at least one Texas legislator has authored legislation to that effect.¹⁹³ State Senator Florence Shapiro, a Republican from Plano, introduced S.B. 165 during the 82nd Texas legislative session, entitled “an act relating to zero-based budgeting for state agencies as part of the sunset review process.”¹⁹⁴ Although the bill

185. [Mooney](#), *supra* note 21.

186. *Id.*

187. *See* discussion *supra* Part VII.A.

188. *See* discussion *supra* Part VII.A–B.

189. *See* discussion *supra* Part VII.

190. *See* discussion *supra* Part VII.C.

191. *Zero-Based Budgeting Definition*, INVESTOPEDIA, <http://www.investopedia.com/terms/z/zbb.asp> (last visited June 17, 2012).

192. *Id.*

193. *See* Tex. S.B. 165, 82d Leg., R.S. (2011).

194. *Id.*

ultimately died in committee, Senator Shapiro's proposed bill set forth many useful recommendations on how to incorporate zero-based budgeting into the sunset review process.¹⁹⁵

Not only did S.B. 165 amend the TSA, but it also made changes to other components of the Texas Government Code and mandated increased cooperation between the SAC and other legislative entities.¹⁹⁶ For example, S.B. 165 amended the appropriations bill statute by requiring that "[t]he budget of estimated appropriations prepared and delivered by the director under this section must provide for an allocation of zero dollars for each proposed item of appropriation for each agency that is subject to review and abolition under [the TSA] during that calendar year."¹⁹⁷ Moreover, S.B. 165 amended the TSA by compelling the Legislative Budget Board to "prepare and present to the [SAC] and to the governor a zero-based budget and performance review report," which scrutinized, justified, and ranked the relative importance of each activity carried out by the agencies under review.¹⁹⁸ On balance, S.B. 165 is a step in the right direction and adoption of similar legislation would likely advance the TSA's goal of cost savings.¹⁹⁹

C. Amendment to the Texas Constitution

1. Procedure and Political Considerations

Amending the Texas Constitution is an onerous, albeit rather straightforward, process.²⁰⁰ Article 17 of the Texas Constitution outlines the amendment procedure.²⁰¹ The first step is the adoption of a joint resolution by a two-thirds vote of both legislative chambers.²⁰² Unlike a bill, this joint resolution does not require the signature of the governor and goes directly to the secretary of state.²⁰³ However, the proposed amendment set forth in the joint resolution does not become effective until Texas voters approve it in a general election.²⁰⁴

While amending the Texas Constitution is a tedious and time consuming process, it is not an impossible one.²⁰⁵ In fact, since its adoption

195. *See id.*

196. *See id.*

197. *Id.*

198. *Id.*

199. *See id.*

200. *See* TEX. CONST. art. XVII.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See generally* HOUSE RESEARCH ORG., *Focus Report: Constitutional Amendments Proposed for November 2011 Ballot*, TEX. HOUSE OF REPRESENTATIVES (July 20, 2011), available at http://www.lrl.state.tx.us/scanned/Constitutional_Amendments/amendments82_HRO_2011-11-08.pdf.

in 1876, Texas voters have approved 474 amendments to the Texas Constitution as of the November 2011 general election.²⁰⁶ Moreover, in a conservative-leaning state like Texas, a constitutional amendment aimed at reducing the size, scope, and cost of government would likely have a respectable chance at garnering voter approval.²⁰⁷

Perhaps the most advantageous aspect of amending the Texas Constitution to include a sunset provision is that it would further institutionalize the principles of the sunset concept.²⁰⁸ A constitutional amendment would make it more difficult for legislators to circumvent the TSA by simply amending the statute, and it would provide legislators with political cover in order to make the kind of deep, unpopular spending cuts that yield substantial cost savings.²⁰⁹ Amending the Texas Constitution would give legislators plausible deniability that the elimination of an agency was beyond their control.²¹⁰ Legislators could credibly explain to their constituents that the Texas Constitution mandated the elimination or consolidation of a particular agency in accordance with the Sunset Amendment, and absent the repeal of the Sunset Amendment, no legislative action could prevent such action from occurring.²¹¹ Legislators could then remind their constituents that the citizens of Texas approved the Sunset Amendment, which mandated the abolition of the agency.²¹²

2. Proposed Ballot Language

Article 17 requires that the secretary of state prepare, and the attorney general approve, “[a] brief explanatory statement of the nature of a proposed amendment, together with the date of the election and the wording of the proposition as it is to appear on the ballot, [which] shall be published twice in each [qualified] newspaper in the State”²¹³ However, the secretary of state is responsible for authoring the exact ballot language only if the legislature neglects to do so in its joint resolution.²¹⁴ While the exact ballot wording of proposed amendments is the subject of much litigation, the courts have generally held that the legislature has broad discretion with regards to the exact language.²¹⁵ So long as “a voter of average intelligence can distinguish one proposition from another on the ballot,” the courts leave the responsibility to the voters of becoming familiar with the proposed

206. See *id.*

207. See *id.*

208. See *id.*

209. See *id.*

210. See *id.*

211. *Id.*

212. See discussion *supra* Part IX.C.1.

213. TEX. CONST. art. XVII, § 1(b).

214. See *id.*

215. *Hardy v. Hannah*, 849 S.W.2d 355 (Tex. App.—Austin 1992, writ denied).

amendments and assume that ballot language will not be the only determinative factor for their vote.²¹⁶ Accordingly, the legislature has the opportunity to describe the proposed amendment in the most favorable and persuasive light possible.

Ballot wording for proposed constitutional amendments tends to be brief, one-sentence descriptions of the purpose of the amendment.²¹⁷ Figure 2, pictured below, provides an illustration of what a voter would encounter on a constitutional amendment election ballot and sets forth suggested language for a Sunset Amendment.

Figure 2: Suggested Ballot Language for Sunset Amendment

Proposition #	“The constitutional amendment mandating the abolition of all state agencies deemed by the Texas Sunset Advisory Commission to have outlived their usefulness under the procedures set forth in the Texas Sunset Act in order to reduce the overall size, scope, and cost of government, and to eliminate needless government waste and excess.”
For _____	
Against _____	

D. Privatization of the Sunset Advisory Commission

Perhaps even more expansive than the idea of a constitutional amendment is the idea of privatizing a portion of the sunset process. Instead of tasking legislators and career bureaucrats with cutting back on the bureaucracy they created, the legislature should consider outsourcing the duties of the SAC to a disinterested private firm. Furthermore, privatization would rid the sunset process of the political pressure and backroom deal-making that goes along with eliminating and restructuring agencies. For example, the legislators who also serve as members of the SAC are likely subject to enormous political pressure from fellow legislators and lobbyists advocating for the continuation of a particular agency. Outsourcing the duties of the SAC to a private firm presents a potentially effective way to dramatically curtail the influence of special interest groups.

Moreover, using a disinterested private firm to conduct the review would likely yield more objective assessments of agencies. The public could be more confident that the recommendations were the result of frank assessments of the agencies and not merely a reflection of the political preferences of powerful legislators and lobbyists. Additionally, much like a constitutional amendment, privatization could provide legislators with the

216. *Id.* at 358.

217. *Sample Ballot*, TEX. SEC’Y OF STATE, available at <http://www.sos.state.tx.us/elections/forms/sampleballot2011.pdf> (last visited June 17, 2012).

political cover necessary to carry out tough decisions. Legislators could plausibly argue that the recommendations were not the result of the political process but rather the result of an objective analysis conducted by disinterested professionals.

X. CONCLUSION

The TSA is unquestionably one of the most effective sunset laws in the nation.²¹⁸ As a result, prominent Texans of both political parties have recognized the TSA's positive impact and have championed the sunset concept at the federal level.²¹⁹ The bipartisan support for sunset initiatives creates a unique opportunity for legislators to join together to make government more effective, more efficient, and more accountable. To paraphrase Justice Brandeis, states are the laboratories of democracy.²²⁰ Texas should strive to remain at the forefront of the sunset concept by setting a bold sunset example for the nation.

by Ry Ellison

218. See discussion *supra* Part I.

219. See discussion *supra* Part VIII.

220. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting).