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Ohio Constitutional Revision Commission

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Judiciary Report - Corrected Testimony and Member Discussion

The Commission met in House Room 11 at 10:00 a.m. on May 9. Present were Messrs. Cunningham, Carter, Montgomery, Huston, Fry, Mrs. Orfirer, Messrs Guggenheim, Skipton, Mrs. Sowle, Senator Mussey and Mr. Shocknessy. Because of the lack of a quorum, the members present constituted themselves a subcommittee for the purpose of receiving testimony on the Judiciary Committee Report, followed by discussion.

Mr. William Milligan, Chairman of the Modern Court Committee of the Ohio State Bar Association, was the first speaker.

Mr. Milligan - Speaking on behalf of the Modern Courts Committee of the Ohio Bar Association, we wish to commend the judicial subcommittee for a thoughtful, painstaking, and important report.

The official position of the Ohio State Bar Association is of course reflected in the proposed joint resolution, a copy of which is in the hands of the Commission. The Modern Courts Committee strongly endorses the subcommittee recommendation that merit selection be constitutionally adopted at the appellate and Supreme Court levels in Ohio.

Regarding unification of the courts at the county level, the Ohio State Bar Association has long been in favor of moving in this direction both at the constitutional and legislative levels. We realize that thorny problems are presented in this area, but agree that the direction recommended by the subcommittee is a proper one

The report of the subcommittee has been reviewed by the Modern Courts Committee and I have been asked to report that there is a division within the Modern Courts Committee as to the desirability of multicounty districting as a possible approach to judicial organization.

With regard to the expansion of the Supreme Court's rule-making authority for establishment of divisions within the Common Pleas structure, we realize that this is an important suggestion and all I can say about that is that the bar association does not take any specific position on that particular issue. I doubt the bar association would oppose it if it were on the ballot. My own opinion is that this would provide desirable flexibility within the Common Pleas structure. A couple of miscellaneous comments: I circulated this report to the modern courts committee which raises the question in my mind of why the use of "judicial department." I always think of department as being part of the executive branch but I do raise that question. In conclusion, I would say that the Modern Courts Committee and myself wish to commend the committee for an important and workman-like job.

Mr. Montgomery - Our next witness will be Mr. John Eckler. We will hear all the testimony and then we'll have questions.

Mr. Eckler - I am not prepared with a formal statement. I am one of those who have been working on this for a long, long time. I represent the tenacity of one who has had to face discouragements. When the Constitutional Revision Commission was appointed some years ago, it gave new hope to all of us. We're absolutely delighted with the leadership you have given in this endeavor. Any time the electorate has the opportunity to vote and make selections of candidates with whom they have no reasonable opportunity of having any acquaintanceship, it's a weakness in democracy. Europeans cannot understand this.

I think that most of the states in the east did not select their judicial officers this way. It was the thrust of democracy after the Jacksonian period, when our constitution and those of most of the middle western states picked up these concepts. If you go to the corner of Broad and High and ask the first people who come along who are the members of the Supreme Court of Ohio, almost no one could answer. And if you asked who the members of the Courts of Appeals, the same, and yet they are called upon to vote for them, so we believe that you will make a great improvement in the selection of the judiciary with these proposals and we are satisfied that the caliber of the bench and the whole judicial process will be improved in Ohio. In some states, money was passed on the side. The public became discouraged and then the merit system came through. We have never had that in Ohio and I hope we never have. We have had great political difficulties because judicial selection at the lower levels is a matter of political patronage. So, all we have had against us are the Republican and Democratic ~~chairmen~~ and all the members of the legislature. But now we believe here that what you propose is excellent. We know that being on the ballot does not mean election and you probably know that for years we have been studying the framework to organize various groups that should be interested in these ideas. As you know, people are inclined to vote against change. There is a long way to go, but your report is a big step in the right direction. The next speaker was Edwin Woodle from Cleveland.

Mr. Woodle - I am here in an individual capacity although I am confident that a large number of the bar share my views. I have been president of the Cuyahoga County Bar Association for three years, and fifteen years as chairman of our courts committee, and five years on the municipal courts committee. I have a review of the report I will leave with Mr. Montgomery. There are some comments I would like to make and I hope they will be of a constructive nature. With reference to an item that should be added, I point out the committee's comment that the jurisdiction of the Supreme Court need not be altered; that provision is satisfactory and, therefore, nothing should be done to alter the provision. In some fifty years of practice, I have handled many cases personally before that court. I refer to the provision giving the Supreme Court of Ohio jurisdiction as a matter of right in appeals arising in Ohio on questions involving the Constitution of Ohio and the Constitution of the United States. Certainly there are in this room, lawyers who have had occasion to present some constitutional question to the Court. The Constitution is so simple that nobody needs to interpret it. It says the Court shall have jurisdiction as a matter of right on appeals involving constitutional questions. This rule has not operated as it was written. For many years when Chief Justice Weygandt was presiding over that court, cases were dismissed which the court said did not involve debatable constitutional questions. When Chief Justice Taft succeeded to the Chief Justiceship of that court, the word "debatable" was changed to "substantial" and has remained so ever since. The Court now takes the position that it will not accept jurisdiction in cases in which the court says there are not substantial constitutional questions. Therefore, the Court has now added to the Constitution two words, either "debatable" or "substantial". I suggest to the members of this committee that under these circumstances the objective of the Constitution is not served by the Constitution. I recommend that that language include something to the effect that if the Court refuses to accept jurisdiction in cases involving a constitutional question and counsel believes that it does, the Court could be required to state that this question has been previously determined by and then citing the particular case which has determined the issue counsel is attempting to present. I know of literally scores of cases where counsel and the lower court have debated the constitutional question for hours or days and yet when that case reaches the Supreme Court, it received a wave of the hand and the statement that this case does not involve substantial constitutional question. I would think that on many occasions the Supreme Court of Ohio would have been somewhat embarrassed because in a large number of instances which this committee could determine very easily by research, the U. S. Supreme Court has taken those cases in and has ruled on a constitutional question which our Supreme Court has said does not exist. I, therefore, offer this comment as a subject for further exploration by the committee.

With regard to the proposal that probate courts shall not be staffed by candidates who are elected to that particular division of the court, the report of the committee talks about fragmentation of the trial courts of the state. With regard to the probate court, the term fragmentation is not properly used with reference to the courts themselves or to the candidate for the court. There is a difference between the probate court and the common pleas courts in general. I do not speak for the less populous counties of the state where the common pleas judge has acted as probate judge and has done so for many years. However in the more populous counties in the state, the situation is quite different and quite distinct. The chief function of the probate judge is supervisory and administrative. It is quite rare that the judges themselves participate in litigation. They handle questions of administration and personnel. Common pleas judges sit on the bench and decide questions of law and fact in civil and criminal litigation, which is entirely distinct from the functions of the judges of the probate court. I would regret to see the judges run not for probate court but common pleas, generally, a rule which could and would provide for rotation of common pleas judges to probate courts of the state. In a county like Cuyahoga, this would be a disastrous situation.

I have a comment with reference to the report of the committee on the ability of the local courts to adopt rules. The committee has added the word "procedure" to the word "practice". I would recommend a further addition to that language. "Courts may adopt additional rules concerning local practice and procedure in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court and which are not inconsistent with law." I have included examples in my written review of local rules found inconsistent with law.

I have a comment with reference to one of the provisions of the merit selection plan which the committee has recommended. Less than one-half of the members of a judicial nominating committee shall consist of members of the bar. Merit selection is being recommended by this subcommittee for the express purpose of improving the quality of the bench, and I can see no other reason for changing the method of selecting judges unless that is the objective. I think everyone in this room is in agreement that the reason for the adoption of the merit selection plan, of which I personally approve very heartily, is to improve the quality of the bench. I do find, however, that if the members of a nominating commission are to consist of less than one-half to be members of the bar, improving the quality of the bench will not be accomplished. I believe that lay members of a nominating commission will be affected by the same factors that lay citizens generally are affected by voting for judges under the present system. I see nothing that we can hope for if a majority of the members of the nominating commission are to be laymen. I would suggest that there are no individuals in this state who are more knowledgeable and more likely candidates for a position on the bench than the members of the bar, and I believe that the majority of the nominating commission should be members of the bar and I believe that, if they are not, the objective of this committee is likely to be seriously damaged. I also present to this committee that the number of nominations presented to the Governor should be three, not two. I served as a member of the Judicial Selection Committee of the Cleveland Bar Association that worked with Governor Gilligan. Less than that is inadequate and more than that is unnecessary. I have one other comment with regard to merit selection, and I regret I cannot give the committee a constructive recommendation. It's the one thing that has bothered me about the merit selection plan, with which I have been in accord for a number of years. That is, requiring a judge to run for reelection or confirmation after a particular period of time. The period is unimportant. It is impossible to defeat somebody with nobody. When a member on the bench runs against nobody and is running against his record, his chances of being defeated are extremely minimal. In practical effect, defeat is possible only through the newspapers. No other media is in position to stir up the people or provide sufficient knowledge. If this situation exists, it means a judge is running against his record subject to his position by the newspapers or the lack of it. I am sorry I can't offer a constructive suggestion in

place of that. I have tried to think of one for years. Nevertheless, by this committee, some improvement can be had. I will leave my report with Mr. Montgomery and I appreciate this opportunity to speak to you.

Mr. Montgomery - Thank you, Mr. Woodle. The next speaker is Robert Crane of the probate court committee of the Columbus Bar Association.

Mr. Crane - I am not here to speak officially for the Columbus Bar Association. I have no authority to do so. I merely volunteered to come here today to discuss the status of the probate court. I wish to speak of only one matter and that is the matter of abolition of the probate court as a separate constitutional court. In Columbus, the probate judge is an administrative position. The probate judge runs a large, complex, complicated structure. He administers an office. His functions are more nearly analagous to the Clerk of Courts. We feel that if this constitutional change were adopted there would be no constitutional protection against rotation of judges thrcugh the probate court and I quite agree with Mr. Woodle that it would be a disaster. You could possibly have a different judge in the probate court every six months, and you could expect total confusion.
The next speaker was Judge Milligan, Chairman of the Ohio Judicial Conference.
Judge Milligan - Mr. Chairman, I am chairman of the Ohio Judicial Conference. Most of you know that the Judicial Conference was established by the legislature to represent all of the judges of all the courts in Ohio. I simply want to assure this Commission that we see our role as a Judicial Conference in informing and educating the judges of Ohio. We can communicate to the judges very quickly, we also see our responsibility in providing a forum for debate among the various judges. I wanted to advise you that Judge Archer Reilly of the Court of Appeals has been appointed to the subcommittee that will deal with judicial reform, has requested that we be involved in the communications from the Commission. I hope that Commission can provide us with some rough time table of what they propose, and how the Judicial Conference could assist you with what we have that is important and saleable and that is experience, the capacity to deliver to your Commission judges with years of experience who are known around the nation in terms of judicial reform. We welcome your study and would be happy to cooperate.

Mr. Montgomery - Thank you very much Judge Milligan. Next we have Mrs. Brownell for the League of Women Voters.

Mrs. Brownell - In looking at our justice system, we have come up with the general feeling that Ohio should have a system that is fair and provide justice for all citizens, certainly no one could argue with that. If this report will do that, it certainly is a step forward for Ohio. We endorse your proposal for the method of selection and retention of judges. You have come up with the kind of things our members consider important - the selection of judges should be made by a commission broadly-based and carefully balanced. The commission for nomination must be bipartisan or nonpartisan, serve staggered terms, and not dominated by the legal members. We feel the elective process puts too much emphasis on those who can make headlines, raise money and the commission method will provide a way to recruit capable lawyers who are not able to compete for a seat on the bench. It increases job security. Judges can concentrate on judicial duties. The League feels that merit selection will provide them for Ohio.

The next speaker was Herman J. Weber, Greene County Judge, President of the Common Pleas Judges Association.

Judge Weber - I would like to offer the help of the Common Pleas Judges Association to this committee that may be helpful to you in establishing what the Constitution should be. The Executive Committee of the Association feels it important that there be at least one resident trial judge in each county. Secondly, I believe that in principle they agree with the unification of the trial courts. Greene County would welcome such a proposal. In fact, I speak of the trial courts and not the probate court. I think this is a most important undertaking and I compliment you for

forthrightness and your willingness to sign your name to an important document. So I say that the Common Pleas Judges Association will help you in any way that we can. I think we have demonstrated that we can accommodate change and we have proven that we are more than capable of doing the job in this state. Please feel free to call on me at any time.

The next speaker was Judge Bonford Talbert from Tiffin, Ohio, the past President of the Ohio Municipal Judges Association.

Judge Talbert - I have had the pleasure of testifying before this subcommittee in the past. I noticed Article IV, section 7, magistrates, several questions have come to my mind. We appreciate the diligence with which you have undertaken this task. I would, however, comment that there may be some discussion in the matter in which things now dealt with on the municipal bench are handled. I also raise the issue that while Section 7 says magistrates must be attorneys at law, that he need not devote his full time to judicial duties. The statute requires municipal judges to have six years experience. Section 7 does not require magistrates to be full time. I suggest that in Cuyahoga County and many of our large metropolitan counties that the method of the selection of magistrates may not be consistent with judicial reform. It may result in political appointments which we are trying to get away from in the selection process. You also indicate in your draft that the duties and manner of appointment shall be prescribed by the Supreme Court and also contains the provision that the numbers be confirmed by the General Assembly. My comments are personal and do not represent the Municipal Judges Association, but I felt that some comment was necessary.

The next speaker was Judge Daniel Connors, a part time municipal judge in Fremont, Ohio and chairman of the Municipal Judges Traffic Law Committee of the Ohio State Bar Association.

Judge Conners - I speak only for myself in relation to the matter Judge Talbert mentioned--the magistrate. There is no question that there is a need for more judges or more help on the Common Pleas Court. To assign the work which is now being done by county court judges and municipal judges who have to meet the same requirements as Common Pleas Court judges to magistrates, this appears to me to be a mistake or at least something which merits considerable reconsideration. If we need more personnel on the Common Pleas bench, and I believe we do, then let us make them full time and pay them full time salaries, and devote their full attention to it. I am presently in a situation like the magistrate would be in Sandusky County--I am a part time judge--according to the statute; I am also a full-time attorney. In Fremont we have had a big burst of business so that the court is in fact a full-time court, and I am a full time attorney. I am at the present time unable to devote full time to either job; therefore, justice throughout our community and many communities is not being served. I fully support the concept of a unified trial court system. If we do, let's not create another situation like the one we are just coming out of--justices of the peace, county courts, municipal courts, etc. The people of our state have been served in many areas which you might call part time justice. All of our county court judges are part time judges. One per cent of our municipal judges are part time judges. I know many of these gentlemen and I feel that they devote a great deal of effort very well under the circumstances. Let us elect a sufficient number of common pleas judges whose talents are needed, men who are devoting their full time to the administration of justice in the trial courts.

Mr. Montgomery - There is one other witness, William McMillan, Jr., a part time county court judge.

Judge McMillan - Our judges yesterday passed a resolution expressing our general concern and interest. We are in favor of full time judges. I think that philosophically everyone wants a full time judiciary. I think it is a mistake to have magistrates; that does create a second tier. There should be only one trial court

in a county. We believe, from a very practical standpoint, that you really have to have two tiers. I think you have established the fact that sometimes you have to yield to the practical side. Many of us would prefer only one trial court in a county. Let's not have part time judicial officers. Our position is to have a full time judiciary - on the county level, let's have two tiers, but all full time. The county would be divided and the judge only run in the area he serves. There should be at least one trial court judge in every county. I thank you for the opportunity to express our opinion as county court judges.

Mr. Montgomery - I think we should pause here for some discussion.

Mr. Fry - I think the key question is how do you get rid of a bad judge? I have found that the attorneys are very reluctant to criticize a judge. Mr. Woodle referred to this matter. I hate to leave it up to the newspapers. Is there a possibility that we could use the selection commission to determine if a judge is doing a good job? We have certain measurements that we're getting from the Supreme Court. I'd like to have discussion on that - how do you get rid of a bad judge?

Mr. Milligan - First of all, the retention elections do provide one method of removing, as you say, a bad judge. There haven't been too many judges defeated in retention elections - only about 12.It can happen. If the system is working properly, we will get good judges to start, they will continue to be good judges. If they are good judges they don't have to be removed. It is possible for a judge to be disbarred if he is unethical, takes bribes or things like that. The Supreme Court does have that authority. The problem is judges who are good to start with but somewhere along the line become bad for some reason, perhaps health. I think everyone would agree that there should be some fair, but effective, method of terminating the services of that judge. All I can say is that if this Commission can come up with a better solution to that problem, I would heartily endorse it.

Mr. Fry - Is it possible that we could use the selection commission to determine this?

Mr. Milligan - I'll give you one problem that just occurs to me. Let's suppose that you are a member of the commission and you're also a lawyer and you have a case before Judge Eckler who is the judge and he realizes that you're one of the persons who decide ultimately that he can be removed, it assumes an unfair advantage on the part of the attorney members of the commission. We don't want anyone to own the judge.

Mr. Fry - I once shared an office with a man who was handling a Judiciary bill. It really disturbs me to hear a representative say well, I'll take care of this judge because he's in my district or to hear a judge say I've got a case in which this representative is interested. This is sort of disillusioning.

Mr. Milligan - I think the problem of removal is difficult. I don't know that we have a system for it right now in Ohio, mandatory retirement is some help. I once went to school in Uruguay for some time. One of the professors was discussing the question of judicial retirement. He said when you look at Chief Justice Holmes at 90 maybe you shouldn't have mandatory retirement. Most judges are not Judge Holmes. So, on the average, mandatory retirement helps. But it does retire some who shouldn't be retired.

Mr. Carter - I'd like to ask John Eckler. The questions that have been raised most consistently on the merit system are that the merit system is tantamount to a life time appointment as in the federal system - I'm sure you're all aware of that argument- that question that Charlie asked how to get rid of a bad judge. I came across an article that I sent to the chairman of this committee on the California system. They have a constitutional commission on judicial qualifications that might be a way of implementing the proposal that we have in that regard. The other question about this problem is the nominating commission. It becomes crucial to the whole process of

selection. The problem of selecting the members of that commission will be extremely important. We heard several comments from the witnesses today. How many lawyers should it have, should it be dominated by lawyers, how should they be selected, etc. John, I would be interested in how you feel they should be selected.

Mr. Eckler - Generally, I would be in favor of the legislature having some part of it. But we have provided that it will be done according to law. So the legislature will have a part. Terms will be staggered. I might respond to that by asking whether there should be lawyers on it at all? My brothers in the bar, many of them feel it should be all lawyers. Exactly what should be done by the legislature - I think legislative hearings will resolve many of these questions.

Mr. Carter - So you would be happy not to spell it out in the Constitution.

Mr. Eckler - Exactly. I would be happy to delete one condition you have, less than one half lawyers.

Mr. Carter - What would you say, John, if they were all legislators?

Mr. Eckler - I would not be happy with that, but I would not be worried about it. I would rather have that system than no system. I hope I live long enough to see it go into effect. I think we will have many lawyers interested in judgeships if you have this system, whose names are not Brown.

Mrs. Orfirer - I have much the same question that Mr. Carter had but I would like to pursue it. I am wondering whether you have any concern about the legislature perhaps being involved in political matters, whether there's any question of a wider source of appointing authority so that it will not be possible for the legislature to do all the appointing of the members of the nominating commission. I don't know whether that would mean governor and legislature, bar and legislature or whoever. I am concerned about the legislature having a full job.

Mr. Eckler - I observed the operation of the commissions for a couple of years and it was incredible the seriousness with which the members took their jobs. So it has worked well. But I don't think we should put in the constitution that it has to be done a certain way.

Mr. Fry - I don't think the legislators should serve on the commission. We want to get people who are above politics.

Mrs. Orfirer - May I ask Mr. Fry a question? Do you feel that the legislature would not appoint legislators to the commission or that the legislature would not take upon itself the responsibility of appointing?

Mr. Fry - I think they would take the responsibility of appointing the commission but not have legislators serve on the commission. Say you're looking for judicial candidates, you're looking for the same thing as for members of this commission. There's nothing in the proposal requiring members of the nominating commission to be legislators. It's just not prohibited.

Mr. Milligan - So far as I am concerned, the danger of that occuring-and it's never occurred any place else - is not great. The customary system is for the members to be appointed by the governor. That was the voluntary system under Governor Gilligan. There are variations. In Missouri, the lawyer members are elected by the Bar. I would be willing to trust the legislature to set up the criteria for members of the commission. Maybe one of these members would be a legislator. That wouldn't bother me if he had the time to do it. Also, as they do it in Missouri, you might want to

have a member of the judiciary as a member of the commission. In Missouri, the presiding judge of the circuit is a member and chairman. I can think of many possible systems which would be satisfactory. I would be willing to leave it to the legislature. This question of removal of judges is difficult. There's a bill in Congress to provide a system for removal of a judge by a committee of judges. That's a possibility.

Mr. Woodle - When Governor Gilligan's system went into effect the two leading bar associations in Cleveland were asked to suggest members for the nominating commission. Considerable time was spent in making these recommendations. I happen to be a member of both these associations. The Governor disregarded all suggestions from them and appointed people who weren't even known to the bar at all. You can use that experience for whatever you want to make of it. I would not leave the selection of the membership of the commission to the Governor alone. I am interested in the use of the word "bad" judges. I think the judges that the gentleman is referring to are generally called "rather incompetent,"not corrupt, not necessarily lazy, but simply incompetent to perform their job. We have in the City of Cleveland now 28 judges on our trial bench. We all recognize that of the 28 there are 4 or 5 who by all standards of judicial qualification do not belong on a bench. The American Bar Association suggests that judges take seminars or courses to renew their knowledge of the law once a year or so and a number of judges do this voluntarily. The judges I mentioned would never think of such a thing. The better judges would do so. Six years ago I suggested to the Judicial Conference the incredible statute in this state setting forth qualifications for election of common pleas judges. And all that he needs to do to be a qualified candidate is to be admitted to practice - not to have practiced. I suggested this to the Judicial Conference six years ago. I think the legislature should work with you on the kind of judicial candidates you would expect to be submitted to the Governor.

Mr. Carter - You and several other witnesses have talked about the role of the probate function of the court, as being an administrative role rather than a judicial one. It comes to my mind why should we have a probate judge per se?

Mr. Woodle - Some single individual should be vested by law, with the responsibility of presiding over the kind of work probate courts do. If you left this work to a group of administrative individuals, referees, you would have no one responsible for doing the work the way it should be done. There are, of course, important questions of law which come up from time to time in the probate court and which require a person legally trained.

Mr. Guggenheim - The administrative burden in probate courts to a degree is true of domestic relations and juvenile courts. There's a question in my mind whether you have better results by election than by appointment. Perhaps we need a member of the judiciary well aware of these problems and someone who could stay there indefinitely. It isn't a question of rotating every six months. I can't see why that method of selection isn't a little better than just electing them. I've seen probate judges elected with no administrative ability.

Judge Richard B. Metcalf-Franklin County Probate Judge - I have known incompetent legislators, incompetent sheriffs--if it is so important to appoint judges, why not appoint them all? When you have judges who sit on the bench by appointment you're going to be very hard to get to. I would think it would be wrong to remove probate judges from a vote of the people.

Some years ago we sat down, 15 lawyers and there were 10 judges running for election. We scored them one to ten as to their competence. I was absolutely amazed that the public agreed with us. I don't think the public is so stupid as to allow judges to sit for a long time and I don't think it is right to take it into the hands of a few. All you're doing is taking politics away from the people and putting it in the hands of a few. The American Bar theories are worked out because people who attend are often put on permanent committees, spend lots of time with it and that's how things get through. It's not the average lawyer. What I really came to talk about is the probate area. To me it would make as much sense to rotate the county treasurer and auditor. These offices all have substantial patronage. They are specialists in their field. The guy who never takes a vacation is one to worry about. I have been on the bench for ten years and practiced law 15 years before that. I don't know anything about criminal law. I have no hope of knowing anything about domestic relations. I do know probate court.

Mr. Carter - You are going on the assumption that this system would lead to rotation?

Judge Metcalf - I can think of no other reason to eliminate the special probate court other than rotation. In my court I do take, regularly, refresher courses, at my own expense. I know some who are incompetent but some in every field are incompetent. I think most of the probate judges work very hard to know their jobs. One of the complaints we hear frequently is that someone has become senile.

Mr. Carter - Will you respond to Mr. Guggenheim's point that you could get good probate people by appointment?

Mr. Metcalf - The appointing authority is usually a small group of people and you will be beholden to them and I think you have to come back to the public. I conduct an estate planning seminar annually. We had in the Ohio Theater 1700 people who attended 5 night 10 hour lecture periods. I think it is very important that you report back to the people how things are going in your elective office. If I were an appointed judge I am not beholden to the general public. But you certainly ought to recognize the necessity of having the public inject itself into judicial office. The public generally does a good job. One of my predecessors was thrown off the bench for exactly the reasons you might suspect. I'd be glad to answer any questions.

Senator Mussey - Your criticisms are directed at the whole idea of appointing judges not just probate judges. Do you feel the same way about appellate judges and supreme court judges?

Judge Metcalf - I would never run for the Supreme Court. There's no way of getting campaign funds to get a message across. I might agree that there is good reason not to elect them.

Mr. Fry - Do you feel that most lawyers and judges will sustain your position or will most of them see this as a reform?

Judge Metcalf - It depends on what you read. If you're looking at a bar poll, one man or two men offices take very little active part. It is dominated by the large firms. Frankly, I think most lawyers think it would do to remain with the people. How many U.S. Supreme Court judges could have gotten elected to office? How many lawyers like the federal judges as well as the state?

Mr. Montgomery - Thank you, Judge, do any members wish to address questions to other witnesses?

Senator Mussey to Mr. Milligan. What is your rationale for alternating judges throughout the courts? Do you think that the probate court judge should be changed from time to time under the constitutional provisions?

Mr. Milligan - No, not necessarily. What the subcommittee report recommended was that if it were thought desirable to have a new kind of division the Supreme Court would recommend to the legislature that such a division be established and if the legislature didn't say no, then you have had division by the same formula as is being followed now for rule-making. I'm speaking only for myself because this has not been considered by the Bar Association as a whole. I think that is a good system. So far as rotating judges is concerned I'm not necessarily in favor of rotating judges. Judge Metcalf opposes appointing judges at the county level, but supposing that were considered, I'm sure Judge Metcalf would continue the probate docket. On the other hand, let's suppose for the sake of discussion--this is like a good law firm--one man has expertise in taxes. Obviously he's going to handle taxes. Somebody else specializes in trial work. We're not going to switch them around. That's inefficient. On the other hand, let's suppose in the office that I supervise that a certain type of case came up last year. This year you're not trying any. What do you do? You assign that lawyer to something else. You don't just sit there hoping that this kind of law suit will become popular again. You have to have some room to adapt as time goes on. Right now, for example, certain types of lawsuits are popular. I like the flexibility that's provided here, but not rotation.

Judge Metcalf - What Mr. Milligan says is if you get an incompetent general division common pleas judge let's give him a shot at probate. We're not going to have a period where there are no estates to settle. We are not going to have a period when we don't have juveniles. These men are specialists in their field. They all know their field. It doesn't make sense to rotate them.

Mr. Milligan - You misunderstood me. I'm not in favor of rotation.

The next speaker was Francis Talty from Cleveland.

Judge Talty - I'm the administrative judge of the probate division of the court of common pleas. I've been in the probate division for about 4½ years, and prior to that served in the court of common pleas. I agree in substance with what Dick Metcalf has said. I believe that the proposed change would in Cuyahoga County, lead inescapably to rotation in all divisions, particularly in probate. In the probate division we have some 175 employees today. Many of these are career people who worked in the court long before I was admitted to the bar. They are skillfull and highly dedicated public servants. We have 28 common pleas judges in Cuyahoga County and two in probate. Under this plan the administrative judge in Cuyahoga County would determine who the presiding judge in probate would become. The people who work in probate court now know that they are working for a presiding judge who has a six-year term. They feel comfortable under an arrangement knowing who the boss is and from whom they will be taking instructions. If we have a rotation plan, there will be rotation in Cuyahoga County at least, the employee doesn't know for whom he will be working next January and he doesn't have a sense of security of office to which he is entitled. Laying aside the specialities that are involved in the probate division, and prior to becoming probate judge I practiced law for 17 years a good bit of the time in the probate court, and the probate division is current,

our work has never been criticized, except that we had to rid ourselves of a probate judge some 15 or 20 years ago. So far as I am concerned, we would only confound a confused situation in Cuyahoga County by eliminating a probate court as a constitutional division.

Mr. Montgomery -Thank you very much, Judge.

Judge Doan - Hamilton County Municipal Court - I am a former probate judge and I must communicate something that they are not aware of. It is rotation. That's what you will get unless you specifically prohibit it. Now our forefathers back in 1850 said in the Constitution that there must be a probate judge in every county. They were wise enough to put it in. With reference to the probate court, it is important, but it is even more important to the juvenile. I know what's happening over the United States in the juvenile court field. Everywhere they followed this system they have rotated. The judge says he picks his staff and they have some security. In the juvenile field, staff is secured from all over the country. When they have a vacancy for a probation officer they try to get the best one they can, from wherever. But you can give him only six months security in Dade County, Florida, one of the best juvenile judges in the United States is now sitting hearing a damage action. Some common pleas judge tries to decide what to do with children. And this is the way it was done in Florida. The American Judicature Society said that any man who is capable of being a judge is capable of being a judge anywhere. That's just the way rotation works. Most people don't know they're getting it. Is there anyone here who has to go to the hospital next week and finds that the doctor who will handle the knife was the pediatrician last week. You talk about training judges. We in the juvenile branch started out in 1950 with the Pennsylvania Institute for Judges. Training juvenile judges, trying to teach them what facilities are available, how to work with these children, but you can't train them every six months. By the time you get them trained, they'll be rotated out of the field in which they were trained and now they'll be sitting somewhere else. So if this Commission can establish that we're not going to have rotation for sure and final and that will do more good than anything else.

Mr. Montgomery - Aren't you suggesting then, by this argument, that we should lock into the Constitution other subject-matter divisions such as domestic relations?

Judge Doan - No, but I don't want rotation.

Mr. Fry - I'd like to ask Judge Connors and Judge McMillen who mentioned the importance of keeping the judge in each county in each classification, what is the justification for that? Just so the people have a judge in their county seat? If there's not enough to keep them busy?

Judge McMillan - One reason is political. The attorneys in the county need a resident judge where they can go to sign papers. They feel strongly about it. It's a political fact of life.

Mr. Fry - We used to have the same argument about having a state representative in every county.

Mr. Montgomery - We have just a few minutes. If someone has something new, the Commission would like to hear it.

Judge Doan - Hamilton County Municipal Court. People feel cheated when you have referees, they want a judge. The people will defeat this whole concept if they can't have a full-time judge.

Mr. Montgomery -The rationale is the same rationale that exists in many professions--paramedical or parajudicial--to handle matters which are not really judicial matters.

Clem Himfelt from Butler County, a county judge, commented as follows: This gets to the point where you have a judge who does nothing and a bunch of underlings who do everything. Everything is controlled by the staff. Ninety per cent of the people who get into court which is municipal or county never get in to another court. They are given a referee who can try something that is most important to them.

Mr. Montgomery - I want to ask one final question of Mr. Woodle, who made the suggestion that the Supreme Court has in effect amended the Constitution by adding the word "substantial" and "debatable" constitutional question. How do you suggest we amend that section to avoid frivolity and the multiplicity of cases of anyone who has a gripe?

Mr. Woodle - I suggested in my remarks that one of the things the Constitution could require is that the Supreme Court state that the question properly raised has been decided in a specific case which should be mentioned in the decision of the court. I mentioned cases in the review that I prepared which try to raise a constitutional question which doesn't exist.

Mr. Montgomery - I would agree as to past decisions. Let's take the environmental question. There's not much law on these questions, which involve constitutional questions all over the place, and I can see our Supreme Court being deluged with questions on energy and civil rights and you name it. The court will have to decide what is substantial.

Mr. Woodle - I have heard that argument with regard to the work of the courts on every level for 50 years. I would respectfully suggest that this deluge will never take place.

Mr. Montgomery - We'd be glad to have anyone here submit anything to us in the way of materials. We are public servants and have spent the last year studying the judicial article. We've heard from everyone that wanted to be heard. All we want to do is the best job we can do for the State of Ohio and the administration of justice.

Recess for Lunch

Judge Clifford Brown - Judge of the 6th District Court of Appeals. My subject matter for your consideration is an amendment which would provide for a different method of electing Supreme Court justices. There is also a recommendation for making Supreme Court justice terms and for making the terms of appellate judges 10 years, which would be an improvement over the present system. However, the main purpose of this is to change the statewide election of Supreme Court judges to a system of electing them by districts, which at the present time is our way of electing appellate judges. The way this proposal would supersede the present system would be to elect two justices from districts starting with the election in 1976. Now the determination of which justices would run from which districts would be up to the General Assembly. Each two years there would be another two justices elected from districts set up by the General Assembly by virtue of this constitutional amendment. I suggest the election of 1976 to

give the General Assembly time to implement this constitutional change. You probably have a lot of questions and I think I have given you the outline of the system. I'll try to answer as many questions as I can,

Mr. Montgomery - You are aware that we have recommended merit selection. If merit selection were successful then your contribution would be moot. Can you tell us of other major industrial states which have district election of Supreme Court justices?

Judge Brown - I know of two, but have done no research on the subject. Your staff would be in a better position to obtain that information. I do know about Kentucky and Louisiana. I was a candidate for the Ohio Supreme Court and was defeated last year - I wouldn't say that this is a motivating force for this thought of mine. I am in the 6th District of the Court of Appeals. It's easier to be elected in a district than in the state because you can be better known in a district unless you happen to be an ex Governor, and I don't know that that necessarily is the best qualification for an appellate judge. At the judicial seminar last year there were two Kentucky Supreme Court Judges who were campaigning and they asked about the system in this state. One said, "If we had a system like that how would a poor country boy like me ever get on the Supreme Court? All the judges would be from Louisville." I know a Supreme Court judge in Louisiana who feels the district system is superior because people can better evaluate a justice running from one district than they can seven justices running from remote parts of the state.

Mr. Montgomery - That's one of the arguments the committee considered for supreme court justices. If we had merit selection doesn't it stand to reason that that the nominating commission would give some consideration to geography?

Judge Brown - Theoretically it would but who will select the nominating commission?

Mr. Montgomery -We would leave it to the legislature to decide.

Judge Brown - How do we divorce political viewpoints? People selected for commissions are not nonentities. They are people with influence, and not necessarily of one party or the other. As I recall, a draft that was being studied by one of the legislative committees about six years ago, was very loose. It said that the tenure, terms, selection were indefinite. The General Assembly politicians would select a commission that would also lean in the direction of the majority. How does one guarantee the absence of a political bias?

Mr. Montgomery -It has been pretty well established in other states that politics is not the primary consideration in nominating commissions.

Mr. Fry - Are you in favor of having regionalism introduced in the matter of the Supreme Court? Would one feel he had to represent its interest as opposed to the interest of the state as a whole?

Judge Brown - No, I don't think it would influence the judges. Now it is an accident of money and name on a statewide basis. You may have to wait another 10 to 50 years before you get merit selection. This is a half a loaf and better than none.

Mr. Montgomery - What's the response to the argument of the trial judges that there should be a judge resident in each county. If we go to districting by the Supreme Court where I am as an aggrieved party in the Supreme Court being judged by a great majority on the court that I didn't vote for and is not resident in my district.

Judge Brown - That should not be a consideration.

Mr. Montgomery - All a citizen is entitled to is a good judge.

Judge Brown - People seem to think there is fairness in territorial representation, by congressmen, representatives by city council frequently. Why should the court be statewide?

Mr. Montgomery - If there are no further questions, thank you for your presentation and for appearing with us today.

Mr. Carter - We can't take any formal action without a quorum. I think we ought to constitute ourselves a committee to hear discussion so I think that we'll work on those things that we can do. We can't act on the minutes of the April 10 meeting because they would require a quorum. I assume everyone has a copy of the memo stating the status of our recommendations in the General Assembly.

Mrs. Eriksson - The first three topics listed are left over from prior reports. Tandem election of Lieutenant Governor and Governor has now passed the Senate and there's every reason to believe that that will get on the ballot this fall. The question that's still up in the air and there is a difference between the House and Senate on this point is nomination. Our recommendation for payment of legislative expenses has not been introduced. The state debt proposal I doubt that this legislature will act on. (For matters currently being considered by the General Assembly, please refer to the status report.)

Mr. Carter - The members of the Commission had an opportunity during lunch to talk about what the direction of the Commission should be and I'd like to have your reactions either here at the meeting or through Ann. We have a very difficult job and every state does in communication with the public. We've had the wonderful assistance of the League of Women Voters and a number of other organizations but by and large there has been no coordinated and implemented approach in trying to communicate with the public. The thought was that we should do two things: as soon as we have completed the judiciary and, hopefully, the bill of rights, then we should direct our attention to putting together a package of recommendations in a simple form rather than all the details so that we could just acquaint people generally, and particularly the legislators, with all the work the Commission has done, where we stand. I've asked Skip and Dick Guggenheim if they would help on this to digest and get us a presentation that would appeal to one who isn't a student of the whole matter. They have both agreed.

The other problem is that we have talked a lot about public support. That's almost impossible to do when you have it scattered over a number of years. Originally our plan was to do this and get all of the proposals ready for the November election. We have run out of time. It took longer than we have anticipated and secondly a number of problems came up in the legislature that none of us had anticipated. The thought now is to talk with the legislative leaders and shoot for the June ballot. I am curious to know how other Commission members feel about it.

Mrs. Orfirer - Are you suggesting that everything be held up until June?

Mr. Carter - No, not at all. What we have to do is get things passed and try to gear them for June.

Mr. Fry talked with Vern Riffe and he agreed that the June ballot would suit him better. They would clear what they could this year for the June ballot.

Mr. Guggenheim - If the Governor's proposals get on the June ballot, anything we propose would be swamped.

Mr. Carter - How does this strike you? Jim Shocknessy was able to join us for a short time at lunch. He said we must bring a focus to our efforts. It's hard to comprehend what we've done.

Mrs. Eriksson - Members of the legislature have difficulty comprehending. They question putting a large number on at one time. Can we educate the public?

Mrs. Sowle - Is there anything else like ballot rotation which will go on the ballot next November?

Mrs. Eriksson - Ballot rotation, probably bedsheet ballot, tax exemption for recreational lands, maybe charitable bingo, and tandem election

Mr. Skipton - I would also hope we could prevail on the legislative leaders to keep other issues off the June ballot so we get a clear shot.

Discussion between Mrs. Orfirer and Mrs. Brownell about the League of Women Voter's role.

Mr. Carter - Mr. Bartunek is not here to report on the Bill of Rights. Mr. Skipton summarized the committee proceedings: We had a meeting on the Bill of Rights. It lasted about one hour. We had five witnesses. At the next meeting the committee will consider the first seven of the research reports on the Bill of Rights which the staff has prepared. We should be through in two more meetings.

Mrs. Orfirer - Will we have a report on the education article to consider? I understand that some people made some recommendations and I think the Commission should have an opportunity to react even though the committee has no recommendations.

Mr. Carter - That is the purpose of the report.

Mr. Skipton - I assume that the report will list the proposals made, and the Commission will be able to review them.

Mrs. Orfirer reported that the Local Government Committee is considering inner city problems, and would invite some experts to meet with the committee at its next meeting.

Mr. Carter - Craig Aalyson is not here to report on the "What's Left" committee. Now we're down to the Judiciary committee. I'm terribly disappointed that we have such a slim turnout today. We held the meeting today to enable the legislature to be here and we have had no one from the legislature except Senator Mussey. I do think that this is the most interesting controversial and important matter that we have taken up. The committee has done a great job. My feeling is that we should discuss it today, Don. At our next meeting we will continue this. When we set the meeting date and don't have a quorum, I think it is an imposition on the members that do come. I'm frankly a little annoyed that we don't have a better turnout today. (Discussion about date of next meeting.)

Mr. Montgomery - I will try to identify the various issues which I think are going to be troublesome. If you feel there is opposition that I have not given enough

weight to, feel free to stop me. Section 1, on page 3, says that judicial authority is vested in a judicial department. The only comment here was about "department" but no one came up with anything better. In Section 1, we establish a three tier court system. That means the elimination of all the courts of minor jurisdiction. This is far reaching. I don't know of anyone who appeared before us even though some represented the third and fourth tiers, who did not approve this. We haven't heard from the mayors, but they certainly had opportunity to be here.

The question of magistrates has been raised by the county judges, the part time judges with limited jurisdiction. There are certain functions which do not require a full-time judiciary. If they are right and more work should be classified as judicial work I think it is up to the Supreme Court and the legislature to provide for more judges. Everything doesn't have to be heard by a judge. All through federal and state governments are bodies which hear cases which are not judges and there's no reason why a magistrate or a parajudicial officer couldn't handle other things. I think that's sound ground and we don't need to spend a lot of time on it.

Mr. Guggenheim - I just wonder if we couldn't spell that out a little better in the comments. There is an awful lot of that now--referees in backruptcy and in the domestic relations courts.

Mr. Nemeth - The opposition may be partly due to a misconception that all or some county court judges would necessarily lose their jobs, if this change came about.

Mr. Guggenheim - Maybe we shouldn't use the word "magistrate." If we called them referees they might feel better about it.

Mr. Montgomery - We thought the word "magistrate" was the most descriptive. All of our judges would be full-time, but the magistrates would be part-time, and appointed by the common pleas judges of the district. They would have to be appointed under rules approved by the Supreme Court and the legislature and appointed or elected by the common pleas judges. I don't think that we have any real problem with this. Maybe we haven't presented our case as well as we should have.

Mrs. Eriksson - I agree with you. It may very well be that when we write the final report, we need to emphasize the use of parajudicial officers at the present time.

Mrs. Orfirer - Where does the small claims court fit in?

Mr. Montgomery - It's all common pleas. There's one common pleas court that handles everything. It could be a division.

Mrs. Orfirer - Could things still be handled by referees?

Mr. Montgomery - They could be by magistrates if the Supreme Court provided for it and the legislature approved it. We want to provide maximum flexibility.

Mr. Nemeth - We aren't necessarily doing away with referees and commissioners.

Mr. Skipton - What is judicial power anyway. Who has that power? What are my rights when I'm before some regulatory body? What is the access to the judiciary? What the title is, is not important.

Mr. Carter - Where it says "such special subject-matter courts having statewide jurisdiction." As I see it this would prohibit a probate court.

Mr. Montgomery - We could have a probate division of common pleas but not a separate court. It only loses its position as a constitutionally recognized division. There could be a tax court statewide and is now a court of claims.

At the bottom of page 20, the Supreme Court establishes rules for subject-matter divisions for the courts of common pleas and the assignment of judges thereto. Probate, domestic relations, or whatever subject-matter divisions there are currently can be set out by the Supreme Court and approved by the legislature and have their judge, but they are not locked in the Constitution.

The Court of Appeals, I think, is pretty clear. All we have done is just to make some sense out of it. We allow cases to be transferred. I see no problem at all with that section. Let's go to page 14 - common pleas. Here we get in again to the matter of the probate court. As you know, Issue 3 was passed in November 1973 which allowed the formation of county common pleas courts into a district by the legislature. We have nothing to do with that--we didn't take a position on it--it was passed and is now law. I don't see how we can take a position contrary to what the people have done so recently. And that's what we have been asked to do--erase all that and provide that you can't do that any more, even though, in fact, no district has been created by the legislature. So the arguments that have been presented to us about districting are not germane to what we are doing. That's an argument that should be presented by the legislature. I think that 14 witnesses this morning admitted that it was legislative matter. The question of probate court specialization has been very well presented today. There's no question about it, the probate court probably does a preponderance of administrative work. A minor part is really judicial. It would be an easy way out to leave it like it is but once you start down that road of recognizing one subject-matter division in the Constitution, I can see no end to it. You can make the same argument for juvenile.

Mr. Skipton - You don't have to call it a court at all. It is just an administrative function. It doesn't have to be performed by a judge.

Mrs. Sowle - Is there any answer in the arrangement proposed to the problem of expertise? Is it possible within an area to have a judge remain, even though he is available for other things?

Mr. Montgomery - I don't think there's any question about it. I think we're going to talk about whether we're going to have merit selection in counties or not. If it's a local option we're not going to have it. We're going to have an elected system so all common pleas judges within a county or counties in a district will be elected to a multiple judge common pleas court. Now the Supreme Court has to set up the rules on subject-matter divisions and the General Assembly has to approve that, so we are assuming that they will come up with some sensible guidelines on whether it's rotation or selection. But when it comes right down to it three or more judges have to work together for a long, long time. I think history in other states has proven that they become specialists. A young judge is elected, the chairman would probably try him out to see what his interests are and what he does best. I think that's better than the people deciding who will be the best juvenile judge. I think we're going to get specialization but we're not going to lock it in the constitution.

Mr. Skipton - The problem is going to be that everybody is going to want to be a probate judge. The probate judge is probably the easiest assignment. You don't have to be a good judge in order to run a probate court. Also you make all these appointments, appraisers, administrators,all these people working for you.

Mr. Montgomery -That relates to the base of judges as a whole, because they would all be common pleas employees.

Mr. Skipton Everybody is worried about how do I assure myself a good assignment. And this is how rotation comes about. My opinion is that rotation comes about because all the other judges want a crack at it.

Mrs. Sowle - But you don't let them redo the whole office every time you rotate?

Mr. Montgomery - I haven't practiced law in a long time but any good legal secretary could probate most estates, so no one is going to sell me on the idea that there has to be a probate judge.

Mr. Carter - "Each county shall have one or more resident judges or two or more shall be combined into a district as may be provided by law." Does "as may be provided by law" apply to both clauses?

Mr. Montgomery - No. They should have one resident judge unless the legislature provides for districting which they have not done.

Mr. Carter - Wouldn't it be better to say each county shall have one resident judge unless as may be provided by law?

Mr. Montgomery - Ann thinks this phraseology is sticky. Do you still think so, Ann?

Mrs. Eriksson - I think it is sticky because this was the Issue 3 and it is the part the Local Judges group wants changed. If we open up that phraseology, we open up the possibility of further attack by that group.

Mr. Montgomery - For strategic reasons we should leave it alone.
Let's go to Section 5. There hasn't been any real opposition to the expansion of the Supreme Court's administrative powers to keep score, keep records, establish criteria and make recommendations to the legislature. One Court of Appeals judge said they have very little to say about their rules, and that's true. There is no place where it says the Courts of Appeals have any input into their own rules. We know as a practical matter that the Supreme Court does consult with them. I don't think it's a substantial criticism. I think our scheme here as outlined on page 20 and 21 with reference to letting the Supreme Court set up criteria and making recommendations to the legislature is good and apparently everyone else does too.

Mr. Carter - Where are we talking about? I have a problem with phraseology on page 21.

Mr. Montgomery - Section 5. This is phraseology and we will redraft it. We haven't done any redrafting as yet. Section 6 brings us to merit selection.

Mr. Carter -Before we leave the probate and juvenile question, we had a letter from Judge Forrest in Seneca County. I called and talked to him because I wasn't at all sure what his objections were. I didn't know from his letter what he was objecting to. I find out after talking to him that his concern is that juvenile activity that he is involved in--he has been very successful. He has done a fine job as has the man that Nolan talked about. I just raise the question, Is it your conclusion that recognizing any of these would be opening Pandora's box?

Mr. Montgomery - Yes, I think these subject-matter divisions will change. I know a situation where there are three guys who are too old for the job of dealing with children and maybe you might find someone who can do the job.

Mr. Carter - The only thing we're taking away is the right of the people to vote for that man as juvenile judge.

Mrs. Sowle - There is another side to that coin too. There are small areas in the state in which it isn't possible to find someone who wants to run for juvenile judge. There aren't a lot of lawyers and it's hard to get people to run.

Mrs. Eriksson - I wonder if I may interject Mr. Mansfield's comments. He also stresses objections to the removal of the probate as a special field and is in favor of the one-judge per county concept.

Mr. Montgomery - Now, as to merit selection. I think everyone supports the merit selection for the Supreme Court and the Court of Appeals. Does anyone disagree with that? I have heard no opposition testimony. We should get down to the question of whether we should have local option on merit selection as to trial courts. How do you feel about that? We heard testimony today. Maybe we should just eliminate the provision for local option. Wouldn't that make the common pleas judges elective?

Mr. Carter - I think there are two separate questions involved. My feeling from the people I've talked to, which is a very few, is that we should introduce merit selection at the appellate level where it is most needed and leave local option alone. It would eliminate a lot of static. If we remove the merit selection option, that doesn't have anything to do with the other question. If we eliminate merit selection for common pleas judges, everybody has to be elected.

Mr. Nemeth - But not necessarily to a division.

Mr. Montgomery - We're satisfying half of the opposition. I don't think the probate opposition is as strong as the other.

Mr. Carter - I think the concept of merit selection is more persuasive statewide and less persuasive in a small town.

Mr. Montgomery - I'll tell you what I would like to see us do. I would like to see the Commission adopt a provision that the legislature could remove the local option provision if they want to, the same way they can create or not create districts.

Mr. Nemeth - There's another argument, however, about where it's most important to have the best judges. There are some people who feel that the trial court is the most important place, because if a case is tried correctly or otherwise disposed of correctly, you won't have cause for appeal.

Mr. Carter - Is the elective system an effective way of getting to the trial court level?

Mr. Montgomery - It's a question of how fast we get to the ultimate goal so as not to spoil the trip. Everyone thinks it's a good idea for appellate judges, but not at the local level so we should start this way. It could be mandatory all the way, through, but we said we would make it optional locally. I think this is a sound proposition.

Mrs. Sowle - One thing that I like about the option is that this is a drastic change and there's a lot of opposition by entrenched people. This gives the possibility of experimentation, to show whether it would work or not, if it would get through. If it works in two or three places then the tendency would be for it to spread.

Mr. Carter - If I had the power I would be in favor of it locally. I can see the headlines--you are taking away the right to local election of judges.

Mrs. Sowle - As a practical matter, how much threat would a local option be to people who are entrenched? I'm thinking of a little community like Athens county. I can't imagine that the local option would go through. They've been working for a city charter for a long time, and it doesn't have a prayer, so I wonder whether this will engender much opposition in the sense that I'm not sure that anyone would think it has a chance.

Mr. Carter - I'd be curious as to John Skipton's thoughts on merit selection.

Mr. Skipton - I object to the term "merit." I think we ought to stick to that term appointive-elective. It's going to be very controversial. I think the problem is leaving to the legislature to decide composition of the nominating commissions.

Mr. Montgomery - Who should have the authority to appoint the nominating commission and what are the restraints. We have provided "the number of judicial nominating commissions and their organization, the number, expenses, compensation, qualification and terms of office of each commission and filling of vacancies shall be established by law; provided, that not more than one-half of the members of the commission shall be of the same political party and not less than one-half shall be members of the bar." Staggered terms. A public officer may serve. There is quite a consensus that members of the legislature should not be eligible to serve. We haven't done anything with that. I personally think it is a good idea to write that in, that they are not eligible to serve. Other public office holders could serve. Of course the Governor makes the appointment on the recommendation of the commission. Do you want the Governor involved in any way or do you want the bar association involved in any way? There are just three bodies that recommend members of the commission--the Governor, the legislature, and the organized bar - countrywide.

Mr. Nemeth - There are some provisions where judges are members by virtue of their office. It's usually provided in the constitution. They aren't appointed by anyone.

Mr. Montgomery - Does our phraseology follow the patterns of other constitutions?

Mr. Nemeth - Ours gives more latitude to the legislature.

Mr. Montgomery - If we want to set the framework in the Constitution, how do we want to do it?

Mr. Skipton - The Governor will be the appointing authority, so what's the point in having him appoint a commission?

Mr. Montgomery - I agree. And I think we should exclude members of the legislatuve such as city council members on local nominating commissions.

Mr. Nemeth - How about a member of a lower legislative body, such as city council members, on local nominating commissions?"

Mr. Carter - No, the conflict Don is identifying is the legislature that sets up the commission.

Mr. Skipton - There is a tendency even now to appoint themselves to administrative bodies. They never want to let go. It's like Congress giving the President authority and then saying he can exercise that authority if we approve it within five days.

Mrs. Orfirer - I think that's a minimum, to exclude the legislature.

Mr. Nemeth - And the Governor?

Mr. Skipton - As a matter of fact the General Assembly can pass on the creation of judgeships, so they should not sit on the nominating Commission.

Mr. Montgomery - What do you think of letting the bar association recommend the members of the bar? Some constitutions allow the bar association to do this.

Mr. Nemeth - Just guessing I think the bar association would prefer not to be mentioned in the constitution.

Mr. Montgomery - Should the Chief Justice have a role?

Mrs. Eriksson - It would seem to me that there is some kind of conflict there but in some states the court is specifically designated a role. You could exclude them from commissions established to nominate that kind of judge.

Mr. Montgomery - The bar association proposal calls for at least one half the members to be lawyers but not recommended by a bar association.

Mr. Carter - The problem with the way it is written "not more than - and "less" does not apply to "less"?

Mrs. Sowle - It changes the meaning. It could be exactly half.

Mr. Montgomery - We want it to be less than half. We want it to be a citizens committee with judicial and legal input.

Mr. Carter - Maybe we could say "a majority"

Montgomery - Either a comma or put in the word "that".

Mr. Skipton - You see attacks on regulatory bodies all the time today - realtors sitting on a board that determines their qualifications, etc. The charges are that that the regulatory bodies are captives of their constituency. That's why you need a consumer protection agency.

Mr. Montgomery - We'll ask the staff to prepare a memo on possible participation of judges.

Mr. Carter - This question of running for re-election on their record. Some say that's the equivalent to life-time appointment, like federal judges. Shouldn't we make it a little tougher for the judge to be retained?

Mr. Montomgery - Illinois has an extraordinary majority requirement for retention, but they don't have a nominating process. The other avenue you can take is to give official recognition to the score-keeping of the Supreme Court, but that's a quantitative measure. There's no measure of quality. We know the bar association conducts a poll and I have some measure of confidence in that poll. It produces good results. The other method suggested is to give the nominating commission itself some follow through authority to review a man's performance. Here, the risk is creating an agency of government that is all-powerful.

Mr. Carter - How about creating a second commission to review performance?

Mrs. Orfirer - Mr. Woodle objected to the fact that it would all depend on newspapers, but my feeling is that that is what we do now.

Mr. Montgomery - We have a tradition of weeding out at least the dishonest in this state.

Mrs. Sowle - May I ask why the committee didn't adopt the Illinois approach? The approach eliminates the problem of who serves on the commission. You run and get elected and then stand for retention. What is the virtue of the appointive method?

Mr. Nemeth - The superior screening process, at least theoretically.

Mr. Montgomery - We thought we had taken a partial step in this direction by providing a probationary or provisional term of two years.

Mrs. Sowle - The other problem in my mind is, in order to get a judgeship, you have to get through that commission.

Mr. Carter - Nolan feels, as I understand it, that if a lawyer wants to be a judge he ought to be able to run for it. This denies an opportunity.

Mr. Skipton - That's what makes the commission so crucial. Unless you can explain to people what this is that you're substituting for the voters, they won't buy it.

Mrs. Orfirer - We've taken care of the legislature not appointing themselves to the Commission but they still set it up. Suppose they say that the bar association appoints the members?

Mr. Montgomery - We need more research on this whole question.

Mr. Huston - On page 29, 3 (B), if a district goes to the appointive system, can they ever go back to the elective?

Mr. Montgomery - I don't think one was so provided. Perhaps it should be specified.

Mr. Huston - It might be a sales point.

Mr. Montgomery - I think we should know what the opposition is, in case we need to compromise. For the next meeting, we should have any changes ready.

Ann M. Eriksson, Secretary **Richard H. Carter, Chairman**

Ohio Constitutional Revision Commission
June 11, 1975

Summary

The Constitutional Revision Commission met on June 11, 1975 at 10 a.m. The Chairman, Mr. Carter, called the meeting to order. Present were Messrs. Aalyson, Carson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo, Skipton, Unger and Mr. Wilson, Senator Van Meter and Representative Roberto.

Mr. Carter - We have the minutes of the April 10th meeting to approve and the minutes of a committee meeting because we didn't have a quorum on May 9. The May 9th minutes were submitted twice. Does anyone have any corrections to the minutes either of April 10th or to the corrected minutes of May 9? If not they will stand approved as mailed.

Mrs. Eriksson - I would like to bring us up to date on where we stand in the General Assembly. One of our proposals is already in the hands of the Secretary of State and will definitely be on the November ballot. That is the ballot rotation proposal, H.J.R. 12. One other issue that is not ours that has already passed the General Assembly that will be on the November ballot is the recreational land proposal. Governor Rhodes has announced that he will be circulating petitions to put his four proposals on the ballot. Tandem election has passed the Senate and has been reported favorably by the House State Government committee. It's in the House Rules Committee. I think that the only decision there is whether it will go on the November ballot or be postponed until June and that's the basic decision with respect to everything else that is pending. The two taxation proposals were on the House floor last week. One of them failed. It was the one in which we had made a proposal that the General Assembly be permitted to adopt federal tax statutes prospectively by reference. Now, the present legal position is that the General Assembly can adopt federal statutes without its constituting an unconstitutional delegation of legislative powers, but the general rule is that you cannot adopt other statutes prospectively because you are in effect giving Congress power to legislate for Ohio. And it was for this reason that we proposed this provision to be put in the Ohio Constitution because the present Ohio income tax, particularly, does depend upon the federal income tax statute as it may be amended in the future. However, a substantial number of members of the House are not in favor of adopting federal statutes and they are not in favor of adopting them prospectively and they question whether or nor they want to have the people adopt such a provision in the Constitution. It was for that reason that it failed. If a sufficient number of persons can be persuaded to change their minds, the resolution may still go through as it was submitted by us. However, I think that if enough people don't change their minds, that a motion will probably be made to delete that provision and the rest of the resolution will undoubtedly pass. The Indirect Debt Limit has passed the House. The first of our elections and suffrage proposals has passed the Senate and that had a first hearing last night in the House State Government committee. There's no problem with that and the only question is will it go on in November or will it be postponed until next June. The other elections and suffrage resolutions are not quite so far along. S.J.R. 19 has been reported by the Senate committee but hasn't been on the Senate floor yet. The two Executive resolutions H.J.R. 36, and 37 have passed the House, they're now in the Senate. Three of the five county resolutions are now in House Rules Committee. I think we will get those on the House floor, but certainly not for the November ballot. One of the county resolutions was indefinitely postponed, and that's the multiple majority one. The fifth one didn't secure enough votes to get it out of the committee but perhaps we can secure those votes once we have made it very clear to the legislature that we would not propose that one for

the November ballot too. I think that will be passed although that is really not of a substantive nature.

Mrs. Orfirer - What did you mean when you said one was indefinitely postponed?

Mrs. Eriksson - It will not come out of the committee.

Mrs. Orfirer - Can we get back to them if we want to next session?

Mrs. Eriksson - Yes.

Mr. Fry - Where did the pressure for the indefinite postponement come from, the township trustees?

Mrs. Eriksson - No, not that one. Although that one, the removal of the multiple majorities requirement raised questions not only among township trustees, but among the cities also. In fact, the person who made the motion to indefinitely postpone it was Representative Baumann of Columbus, who felt that it would appear to his constituents, anyway, that the powers of the city of Columbus might be wrecked in this fashion. So that that one really did not have too much support in the committee.

Mr. Russo - It can be introduced in the Senate, though.

Mrs. Eriksson - It could be introduced in the Senate, yes, that is correct. Then we have five municipal resolutions. We had a third hearing last night on two of them and they were reported out of the House Local Government Committee. And that's H.J.R. 32 and 41. H.J.R. 32 revises the charter provisions and corresponds to one of the county resolutions. It does not affect powers, it affects procedures for adopting and amending charters. A third of the municipal ones, H.J.R. 28, will have a hearing in the Judiciary Committee tomorrow morning. That one is strictly renumbering sections. It does not do anything substantive. The other two municipal ones are in other House committees and have had no hearings so far. The initiative and referendum resolution is now pending in the House State Government Committee. It has been reported back by the subcommittee without any changes in it. Are there any questions about anything I haven't covered? As far as the debt proposals are concerned, I think there's no hope for them now.

Mr. Carter - There may very well be after November.

Mrs. Eriksson - There might be, but not before November. I don't think that they'll even have hearings on them.

Mr. Fry - That passed the House and it's in the Senate?

Mrs. Eriksson - No. There have been no hearings on the debt proposals at all.

Mr. Fry - Have you been using the chairmen of the various subcommittees of the Commission to help in the presentation of these matters?

Mrs. Eriksson - Yes, in so far as possible. Linda has testified. Dick and Katie have done some testifying. Craig Aalyson and John Skipton have done some testifying.

Mr. Fry - I think it's good. They will be seeing you a lot, and while they all have a great deal of respect for you, I think it's important that they also realize that we've got a lot of citizen input.

Mr. Carter - Those of you that read the minutes know that at the last meeting we had quite a discussion on the timing of these things. Our original hope was to get all of these things on the November ballot. Nolan, you will remember that we kind of dedicated ourselves to that task. Of course, we did not anticipate the Governor's activities, and it would seem quite clear that that is going to dominate the November ballot. Also, we have run out of time to try and complete the work, so what we're kind of hoping to do now is to encourage the legislative leadership to proceed with the activities they're now on but hopefully to get these resolutions on the June ballot, in 1976. Hopefully, with what's left of this calendar year and in the early part of next year, we can get most of these introduced and have a real package on the June ballot. The ballot rotation issue is going to be on the November ballot. Of course the Secretary of State is very anxious to get that one done and it's already scheduled. I think there may be pressure to put the tandem election on the November ballot. But, I think what we're going to do this afternoon, if the Commission will concur, is that I will address a letter to the legislative leadership asking them if it weren't possible to schedule these for the June ballot. Is there any other view on that?

Mr. Fry - Mr. Chairman, I think it's important that we really schedule all of our work so that we get it on the June ballot. I'm positive that we're going to have difficulty sustaining support for continuation if we don't have our recommendations to the legislature.

Mr. Carter - Really, the only things that are left for us to do, are, of course, the Judiciary, the major one, which we'll be discussing today. We have the matters from Craig's committee, the What's Left Committee, which is discussing a lot of the odds and ends. Joe Bartunek has a number of matters in the bill of rights, in his committee, and Linda is giving some thought to additional matters that are coming out of the Local Government Committee. I think we ought to plan to get all of our commission actions done by the end of the year. This has been, I think, just a wonderful group. They have held together for five years now and have had a great deal of dedication, but it is clear that we are going to start running out of gas. You can only ask so much from the members. And so, I think that that which we do not get done by the end of this year is likely to disappear. And the other thing, and this is particularly staff activity, and I think this is particularly important, is that there has been some wonderful research to come out of the Commission's activities, marvelous research, which is going to be of help to anyone concerned with constitutional revision for many years to come. And I think it's awfully important that we do a good job of documenting the record of the Commission and particularly the research reports and the deliberations of the Commission. So that it will be available to future people that are interested in this activity. That's a major job, and that's something that we can do after we get the activities of the Commission and the recommendations done. I would be hopeful that the legislature would see fit to fund the next biennium for the purpose of winding up all of the activities of the Commission, including a compilation of all of its research activities.

Mrs. Eriksson - As you recall, earlier in the year a question was raised about auditing our books, and a request was made to the State Auditor's office because we are a state agency and it is the responsibility of the state auditor to audit our books. We have had an auditor from the state auditor's in our office for the past three weeks and he completed his audit. I had hoped that perhaps the report would be ready so I could submit it to you today, but I will send it to you. Basically he found no problems. He made one or two suggestions but he found no problems with our balances.

I will send you a copy of the report as soon as I am able to.

Mr. Carter - Of course, it is very comforting for us to have that information. I'm not surprised at all because I have felt that this Commission has been blessed with having an extraordinarily capable staff and they have done a very careful job of handling their financial activities.

As far as the Chairman's report, I have one matter only. As you know, we had a photograph taken of the Commission and we had a good turnout that day, and it's a very nice photograph. The photographer has given us some prices now for color photographs. He took two pictures that had to be pieced together to get the whole Commission and it's a rather long, narrow, kind of a picture and the prices in the size, which would be basically 11 x 14, but actually much thinner because it doesn't come out to be eleven inches tall, would be $25 for doing the artwork and the first print, and then $6 thereafter - these would be full color prints. I would think that we certainly would want to make a copy of that for each of our commission members, both present and past. That would indicate that we probably need about 50 pictures. We're talking about an expenditure of some $300. I would not like to do that unilaterally. If there are any comments on that, I would welcome having them. What I would really like to have is the sense of the group that we could go ahead with distributing these to the members. Is there any problem that anyone sees?

Mr. Carson - Is it a proper expenditure?

Mr. Carter - I think so, Nolan, we have discussed that. Did this by any chance come up with the Auditor's office as to whether this would be a proper expenditure?

Mrs. Eriksson - No, I didn't ask him that question. Other state commissions and agencies do it. I don't think that there would be any problem with it.

Mr. Carter -We would also have a black and white made for purposes of reproduction in our final report. In our final report, of course, we can identify those who were not included, either future or past members those who were not present. Well, do I have the sense, then, to go ahead with this major project? (No one voiced any objections.) We will have committee reports now. Very briefly, the Local Government Committee, said Mrs. Orfirer, had a very interesting meeting last night. We had five gentlemen from various offices and organizations come and meet with us about what constitutional problems they felt were obstacles to the work that they were doing which were development corporations and H.U.D. agencies. We concentrated primarily in a couple of areas. What constitutes a public purpose and the lending of the state's aid and credit to development and to private corporations where this is a problem, and using federal funds. We will be meeting again in a couple of weeks in the Cleveland area and hearing from comparable agencies in that area. I would see no reason why we wouldn't be able to make our recommendations to you by the fall.

Mr. Fry - One of the things that came up last night and I think possibly the Commission should take a stance on it is whether or not we're going to have any observations or recommendations as far as the other matters that are going to be on the ballot in November.

Mr. Carter - As I recall, this matter has come up before and I would like to have the inputs of other Commission members. We have taken a position that those recommendations that are not a product of the Commission, the Commission would not take a position per se on these matters. But of course individual members of the Commission are free

to do whatever they want as individuals. This has come up a couple of times and the thought has been that unless this goes through the deliberative process of the Commission and the committees having a chance to report to the Commission and having votes taken, that it would be inappropriate for us to try and editorialize on other proposals.

Mr. Fry - I agree with that position. I just felt that it needed to be said again.

Mr. Carter - Is there any contrary view or any other approach that any member feels to be appropriate? Don?

Mr. Montgomery - Mr. Chairman, I just feel that as a matter of information that we should know what the impact of these proposals will be on the work that we have done or the work that we are contemplating doing.

Mr. Carter - No doubt about that. That I think we can handle through our staff reports to the Commission which is being done currently.

Mr. Montgomery - I'm a little apprehensive that they have left some things out that they haven't thought about that are some of the things that we've thought about. I think it might be helpful. I don't think we should just ignore it completely. I agree with our position in the past.

Mr. Carter - Are you referring to specifically the Governor's proposals?

Mr. Montgomery - Yes.

Mr. Carter - Nolan, do you want to comment on that at all?

Mr. Carson - I think that I agree with what we have done in the past and I think it would be wrong if in the full meeting of the Commission we make a decision that we're going to approve or disapprove a resolution that has been brought up. We haven't had the exhaustive committee consideration. If we see any conflict between the provision and a recommendation that we've already made, I would think that we'd want to point that out.

Mr. Montgomery - I agree. We could act as a clearinghouse for information.

Mr. Carter - Of course, we would be hopeful that people would consult with us on matters that we've already acted on, and hopefully gain the benefit of deliberations we've done or can do. But very often, people don't wish to do that. We were hopeful that some of the Governor's proposals would take into account some of the debt proposals by the Commission.

Mr. Skipton - I agree with the policy we have followed in the past . . . I believe we should treat each thing as it comes up on its merits. It may well be that there are conflicts with the recommendations of the Commission. And if at any point any of these are serious enough that a majority of the members of the Commission feel so inclined, I would not be adverse to the Commission's taking a position expressing itself if for no other purpose than informing the public.

Mr. Carter - I wonder if our committee chairmen, both past and present, might not assume that role, in cooperation with the staff, of calling some of these matters to the attention of the Commission so that we could act on them if they did need it. Ann, why don't you do that then? You, of course, are aware of what committee chairman was involved with what matter, either past or present. And if there are these conflicts, contact the chairman and let the chairman of the committee take the initiative of bringing this matter before the committee if he feels it's appropriate. The timing is so important when things can happen. And I'm sure that many of the Commission's recommendations, even though they aren't acted on or see the light of day or

the public voting on them, that a specific time may very well come along later. For example, the Governor is proposing some rather massive changes in the debt article to accomplish his objectives. I don't know what the outcome of that is going to be, when they are voted on. If they are turned down, I think that problems are severe enough that they may want to come back and reexamine the Commission's recommendation. There's a good deal of sentiment in the legislature in favor of the Commission's debt proposals but I don't think they want to do battle on the question of these vis a vis the Governor's until that matter has been resolved. So I don't think that the fact that, as Ann pointed out, the debt proposals were not currently receiving attention, it may be a different ball game after November. So I think that being politically realistic, there is a time when these things go over.

Mrs. Orfirer - Do you think we have an obligation to the public to inform them of what our proposal was and how it is affected by the Governor's proposals?

Mr. Carter - I think in the narrower sense, we are an advisory group to the legislature. While part of our charter is, however, education of the public on matters that are involved, I think it would be ill-advised if we were to get in an adversary role on some of these matters. Our job is primarily a consulting and investigative and deliberative group, and I think if we get too strongly in the advocacy role where various proposals are competing with one another, it might be self-defeating. Does anyone have any other view on that?

Mrs. Orfirer - If the Local Government Committee does come up with some recommendations, they will be dealing with the same subject-matter as the Governor's proposals. I have no idea whether they will be the same or slightly different or greatly different. The Governor's proposals certainly will be discussed here in relationship to our proposals.

Mr. Carter - Craig, do you want to give us a brief report on the What's Left Committee?

Mr. Aalyson - The What's Left Committee met a few weeks ago primarily to consider Article II, Section 20, which concerns itself with the prohibition against in-term pay raises. We were favored with a visit from several county commissioners and the administrative head of the group of county commissioners and that seems to be the only area where there is any public sentiment or semi-public sentiment against the prohibition against in-term pay raises. This arises from the fact that the county commissioners are elected for staggered terms and two will get in and a third will remain in and on occasion the legislature will pass a pay raise involving the two that are going in that will not be enjoyed by the individual who has remained in office. And these people who remain in office and do not get the raise oftentimes are the senior county commissioners who perhaps carry the greatest load with regard to the working activities of the commission and feel discriminated against. It is our plan to have a noon luncheon meeting today and to discuss the proposals which the staff has made to consider some change which might eliminate the "discriminatory" effect. We are planning to take up in the relatively near future and possibly today, the subject of mechanic's liens. We're about to run out of what's left. I would welcome suggestions from the Commission or the public as to areas of the Constitution which might merit our attention. Mr. Chairman, as you know, being a member of the committee, that we're going to wind up very shortly; certainly by fall I would hope we would be in a position to have our work finished.

Mr. Carter - Any questions of Craig? It does sound like we are nearing the end after all these years. Joe Bartunek called this morning and said he couldn't make it. Ann, would you give a brief report on the status of the Education and Bill of Rights Committee?

Mrs. Eriksson - The status is not changed from the last time because there has not been a meeting. There is a meeting scheduled for next Friday. Mr. Bartunek is planning to go over the first half of the research reports submitted on the Bill of Rights and I imagine that he is planning to schedule another meeting for the other half of the research reports and he is going to formulate and get the sense of the committee for recommendations at that time. So that I think that he is planning probably to be finished within another month or two.

Mr. Carter - Is the education report being written?

Mrs. Eriksson - The committee has completed its discussion and decisions and the education report is in the process of being written. The committee did not make any recommendations. The report will review what issues were raised.

Mrs. Orfirer - Could we ask Mr. Bartunek to present to us the thinking of the Education Committee?

Mr. Carter - Well, I assume that will be in the report.

Mrs. Eriksson - It will be reflected in the report.

Mrs. Orfirer - Which we will go through at a meeting as we have done with the others.

Mr. Carter - Let us go to the main event, the Judiciary Committee report.

Mr. Montgomery - Thank you, Mr. Chairman. Members of the Commission, I think you have all received the memorandum dated May 29 which comments on much of the testimony the full Commission received in addition to some of the letters that have commented on our committee report. Are there any questions about that memorandum? A lot of what's in there covers the discussions that we had at two previous meetings where we've gone over lightly the various sections. Some areas of debate that we have identified are the nominating commission composition for the appointive-elective system; the locking in of the probate division into the Constitution as a division of the courts of common pleas; and the third, which is probably not quite as important but still a major area, would be the section on magistrates which is a new thought. Let us take the sections one by one. If we miss any points, I hope you will call it to our attention because we don't want to leave any matters ignored.

Page 3, Section 1, Vesting of Judicial Power. I won't read the present Constitution. The committee recommends that Section 1 read as follows: "The judicial power of the state is vested in a judicial department consisting of a supreme court, courts of appeals, courts of common pleas, and such special subject-matter courts inferior to the supreme court having statewide jurisdiction as may be established by law."

The question of calling it a judicial department was raised. A judicial branch has been suggested, a judicial division. When it comes right down to it, the subcommittee and the staff couldn't come up with a more descriptive term than "department". We don't say it's perfect, but nothing any better has been suggested. Does

anyone have any comments on that?

Mr. Fry - Is that consistent with that we have an executive department, and a legislative department?

Mrs. Eriksson - The legislative is not called a department but the Constitution does refer to an executive department.

Mr. Nemeth - Article III, Section 1, referring to the executive begins; "The executive department shall consist of a governor, lieutenant governor, secretary of state" and so on.

Mr. Wilson - My only comment is your placing of the last addition in your recommendation. It may read clearer if the section were to say ". . . such special subject-matter courts having statewide jurisdiction inferior to the supreme court as may be established by law." I realize that you probably have discussed it in the past and may have some good reasons for putting it the way you did, and I'd like to know what the reason is. It would put the modifying clause closer to what it has to modify. I don't know whether it changes the meaning.

Mr. Montgomery - It doesn't. Julius, is this agreeable to you?

Mr. Nemeth - Certainly.

There was general agreement that Mr. Wilson's suggestion was an improvement.

Mr. Montgomery moved the adoption of Section 1 as a recommendation to the General Assembly.

Mr. Skipton seconded the motion.

Mr. Wilson moved that the recommendation be amended to read, "The judicial power of the state is vested in a judicial department consisting of a supreme court, courts of appeals, courts of common pleas and such special subject-matter courts having statewide jurisdiction, inferior to the supreme court, as may be established by law."

Mr. Aalyson seconded the motion.

Mr. Montgomery - Is there any discussion?

A voice vote was taken. All voted aye, there were no nays. The proposal was so amended.

Mr. Montgomery - Are we ready to vote on the passage of Section 1, Article IV as amended?

The roll was called. The following voted "YES": Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo, Skipton, Wilson and Mr. Unger. None voted "NO".
The roll call was held open until the next meeting.

Mr. Montgomery - What's our procedure where we recommend no change?

Mr. Carter - What we generally do is simply have a vote that the Commission accept the committee report indicating no change

Mr. Montgomery - Is that by roll call vote?

Mr. Carter - No. The only time we have a roll call is when we have a recommendation to the legislature for a change.

Mr. Montgomery - On page 8 is our recommendation on Section 2, the Supreme Court, which is no change. I will move that that be our position. Is there a second?

Dr. Cunningham seconded.

Mr. Montgomery - Is there any discussion? Are we ready to vote?

A voice vote was taken. All voted aye, there were no nays. The motion carried.

Mr. Montgomery - The next section deals with the courts of appeals. We provide that cases can be heard by two judges. We provide for the election of a presiding judge in a more orderly way. The question of "equal division of the vote" has been raised. This would seem to imply an equal number of judges rather than an odd number and probably should be eliminated.

Mr. Nemeth - This same phrase occurs in Section 4 in relation to the election of the presiding judge of the common pleas court. We took this language from Section 4, we wanted to make the two methods and the language, as far as possible, parallel. If we remove it from here, we probably ought to remove it from Section 4. As I recall it, the reason for wanting to remove it was that there may be other reasons than an equal division of the vote which would prevent the judges of the court from agreeing on the election of the presiding judge. The deletion of this particular phrase would, in a sense, broaden the reasons, or recognize in the Constitution that there may be other reasons than equal division of the vote.

Mr. Montgomery - Well, to get the matter before us I will move the adoption of Section 3 as it has been presented in the report. Do I have a second?

Dr. Cunningham seconded.

Mr. Guggenheim moved to amend to strike the words "because of equal division of the vote."

Mr. Carter seconded the motion.

Mr. Montgomery - Discussion.

Mr. Wilson - Is this predicated on the fact that you might have four judges, six judges or eight judges? If you go back to the first sentence where it says "a minimum of" three judges, you just have three judges.

Mr. Aalyson - Each one might vote for himself.

Mr. Carter - A judge could refuse to vote. There are a number of possibilities.

Mr. Montgomery - It's possible to have an even number.

Mr. Aalyson - I suppose there would be no occasion when all of the judges would have the same period of service. It could happen, I suppose, but it would be very rare. It says the longest period of total service. Does that mean that he served in the same capacity on an earlier occasion?

Mr. Carter - Yes, I think the word "total" means that.

Mr. Wilson - You could change that by putting the word "continuous" in there if you wanted to.

Mr. Aalyson - It leaves open the possibility that two judges could have exactly the same period of total service, although it's highly unlikely.

Mr. Montgomery - Then we flip the coin.

Mr. Russo - Could a judge serve ten years in a municipal court, and then five years in another court . . . .

Mr. Montgomery - I think it's in this court, on the court in question. Are we ready to vote on that amendment?

Mr. Skipton - Didn't one of the letters that was circulated deal with these issues?

Mr. Montgomery - Professor Hazard from Yale suggested that the Chief Justice make the appointment in such cases.

Mr. Skipton - Whenever we leave these things up in the air, subject to somebody's attitudes, I don't think it's good. I think we should make it very certain who is going to have to act.

Mr. Montgomery - Here is what Professor Hazard from Yale Law School said: "Could it not be provided instead that if they are unable to agree the presiding judge could be appointed by the chief justice of the supreme court?"

Mr. Carter - It could be handled that way. I think there is something to be said for that.

Mr. Montgomery -There is something in the Constitution now about the longest term of service, isn't there?

Mr. Nemeth - Yes, in Section 4 common pleas judges which uses the same language.

Mr. Aalyson - Another objection, it seems to me, to "the longest term of service" might be that that judge might not want to serve. If you let the Chief Justice of the Supreme Court appoint, the positions of the possible appointees can be made known to the Chief Justice, and he will take that into consideration in appointing.

Mr. Montgomery - As chairman of the subcommittee, I certainly would not oppose that at all. I don't know how the rest of the subcommittee feels about it. Dick?

Mr. Guggenheim -I think that the change is constructive. If I recall the discussion, judges have been in the habit of having the judge of oldest service appointed. There were some political aspects to the fact that his term was closest to expiration and so forth. I think we thought it would be easier and more palatable. Certainly this other method is a cleaner method.

Mr. Montgomery - It's a more complete answer. We gave part of an answer by saying that instead of the judge with the longest service be the presiding judge, that they should vote on it. So we're trying to get a man who wants to do it and who is capable of doing it. And then we turn right around and say that if they can't agree then he gets to do it anyway. It would only be a contingency. It probably wouldn't be used once in a blue moon but at least it's there. I think it's an improvement. That's my personal feeling.

Mr. Carter - If he is appointed by the Supreme Court Chief Justice, should there be some period of time that he serves? Professor Hazard says "If a presiding judge is subject to removal as such at any time, he simply cannot take the vigorous action and long range measures that good administration requires." I wonder if we should give any thought to that.

Mr. Fry - Would you say that again?

Mr. Carter - The problem is that if you have an interim appointment, the language now says "until selection is made by vote". And he feels that that's advisable to have a presiding judge with a heavy heavy hanging over his head that he couldn't function appropriately.

Mr. Evans - The statute now indicates that the presiding judge is not the judge with the longest period of service on the court but rather the judge having the shortest period of time left to serve on the current term regardless of his total prior service.

Mr. Fry - Mr. Chairman, to bring it before the committee. I'll move that we substitute for the languag' the selection by appointment of the Chief Justice.

Mr. Carter - Might I suggest Charlie that we might add for the balance of his term?

Mr. Fry - It would make him more independent.

Mr. Skipton - Well you still have the language in there, to serve at the pleasure of the other justices so actually what this does is put the pressure on to make a decision. If you don't make it somebody else will. It should read serve at his pleasure.

Mr. Montgomery - I feel compelled to present what I know is the position of the court of appeals judges, who are somewhat jealous of Supreme Court dictates. They would like to make their own rules and operate as independently of the Supreme Court as possible.

Mr. Fry - This would encourage them to make some decisions on their own.

Mr. Wilson - We could just set it up automatically so you don't have to wait for the Supreme Court to make a decision.

Mr. Nemeth - But that may not be the preferable way of doing it, because you may have a judge who is not fit for the position.

Mr. Wilson - That may be, bu. I think we should leave the Supreme Court out of it.

Mr. Montgomery - That's the way we had it originally. Being a purist, I think having the Chief Justice making the appointment is the preferable way of doing it.

Mr. Russo - What would happen to the work of the court if the presiding judge doesn't perform his duties?

Mr. Montgomery - I think they must. They are always in session. The Supreme Court could mandamus them to perform their duties.

Mr. Carter - What I would like to suggest is that the judges of each court of appeals shall select one of their number by vote to serve as presiding judge to serve for the balance of his term. If the judges are unable to make such a selection, the Chief Justice of the Supreme Court shall make such selection.

Mr. Skipton - Does anyone here know what the process is now. How are they selected? Are they selected for balance of term or term of court?

Mr. Evans - As I indicated the statute says that it shall be the judge with the shortest time left to serve in his term. As a matter of practice we discovered, in looking at several courts, it was much more a matter of which judge felt he was able or willing to assume such duties. That's how it's done.

Mr. Nemeth - So the presiding judge may not be the one who does the bulk of the administrative work.

Mr. Montgomery - We now have two points of friction as the courts of appeals would see it. First of all, allowing the Chief Justice to solve the conflict, and the other would be the power to take away the presiding judge if a man becomes unfit. They have to have a good team operation on this court, and when you lock in a man for a term, it may be difficult to achieve. They said these things or something like it when they testified.

Mr. Aalyson - I would think they would find appointment by the Chief Justice of the Supreme Court much more palatable.

Mr. Carter - Then could I go back to Charlie's thought. Leave the judges alone and change that sentence if the judges are unable to make such selection, then the Chief Justice of the Supreme Court shall make such selection. I so move.

Mr. Aalyson seconded the motion.

Mr. Montgomery -Do you all understand the motion? To do this we would also have to delete the words "the judge having the longest service on the court shall serve until a selection is made." The Chief Justice of the Supreme Court shall make such selection.

Mrs. Eriksson - Then you would have to have some way of terminating the appointment.

Mr. Carter - Because it's qualified by the first sentence which says they are unable...

Mrs. Eriksson - But if they are unable, then the Chief Justice appoints.

Mr. Carter - Perhaps the sentence could read "If the judges are unable to make such selection, the Chief Justice of the Supreme Court shall make such selection until selection is made by vote" I move to amend the amendment.

Mr. Montgomery - So if the Chief Justice appoints someone next week the judges can undo it. The point is that there will always be a presiding judge.

Mrs. Orfirer seconded the motion.

A voice vote was taken on the motion to amend the amendment and on the amendment and both carried.

Mr. Montgomery - Are there any other comments on this section?

Mr. Russo - I really think the way you originally had it was the way it should be because it would make a mockery of the system when the Chief Justice of the Supreme Court makes an appointment and then the next week the other two judges say he made the appointment. Now let's get together and appoint one of ourselves.

Mr. Fry - I think there ought to be pressure on them to make a decision.

Mr. Russo - At that point two enemies who don't speak to each other can get together just to avoid the appointment.

Mr. Carter - The important thing, in the public interest, Tony, is to make sure we have a presiding judge, elected to exercise the duties.

Mr. Russo - Well, we already have that provision.

Mr. Montgomery - Are you ready to vote on the entire section? The question has been seconded so I guess we are ready for the roll call on Section 3.

A roll call was taken on the motion. Those voting "YES" were Senator Van Meter, Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Skipton Unger and Wilson. Mr. Russo voted "NO". The motion was adopted. The roll call will be kept open until the next meeting.

Mr. Montgomery - Let's proceed to page 14, Section 4, Courts of Common Pleas. The recommendation of the committee appears on pages 14 and 15. I'd like to suggest that we might consider an amendment to add the word "compact" - page 15, line 5"combined into compact districts" rather than just "districts".

Mr. Nemeth - This is parallel language with that on courts of appeals districts.

Mr. Aalyson - Does "compact" mean small in size or contiguous?

Mr. Nemeth - I think both.

Mr. Montgomery moved the adoption of Section 4.

Mr. Russo seconded the motion.

Mr. Russo moved that the word "compact" be added in the fifth line of page 15.

Mr. Guggenheim seconded the motion.

A voice vote carried the motion.

Mr. Montgomery - This whole matter now takes us into the controversial area of districting.

Mr. Nemeth - Section 4 also presents this question of the manner of selection of a presiding judge.

Mr. Montgomery - We can solve that the same way. We have the same problem.

Mr. Carter moved that the same language be adopted as previously voted.

Mr. Wilson seconded the motion.

Mr. Montgomery - The amendment would make the language the same as that of the court of appeals.

Mr. Skipton - There is a problem here: what triggers the Chief Justice to act? And then there is this question, if he does make the appointment, what period of time is it for? I believe they have a legitimate point there. Maybe we should have more discussion of Tony Russo's point.

Mr. Russo - I think I made my point. I can see by the way the committee voted that my point wasn't well taken. I don't see any necessity for it, but I think our action was a little bit hasty. The courts of appeals should have a certain amount of autonomy. The clause that was in there originally comes into effect immediately because the senior member will be the presiding judge until there is an election. There's no problem if we left the original language. We're creating a problem by giving it to the Chief Justice in the first place because a court automatically has a presiding judge until there's an election by the senior member of the body. And there cannot be a tie since we determined earlier that it shall be on that court that someone shall have the senior position. There are different starting dates from January first.

Mr. Montgomery - Well, the subcommittee spent a year on this. We thought we touched all the bases but I guess we thought our best answer was the way we had it the first time, but I don't feel that strongly about changing it.

Following discussion, Mr. Carter withdrew the motion.

Mr. Aalyson - I think there's an area in which if the judges are unable to make such selection, you're going to have the senior judge preside. If they haven't made a selection, not because they're unable but because they simply haven't gotten to it, we should add "if they have not made a selection or are unable to make a selection."

Mr. Montgomery - Can't you phrase it "Until the judges make such selection." Let's clean this one up and we also have to delete the words "because of equal division of the vote" here.

Mr. Huston - I move that the sentence be "until the judges make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge."

Mr. Carter seconded the motion.

Mr. Montgomery - Are we ready to vote on this amendment?

Mr. Aalyson - On such court of common pleas.

It was so agreed

A voice vote was taken on the motion. The motion carried.

Senator Van Meter - I would move that we reinsert the stricken language, "and such divisions thereof as may be established by law."

Mr. Russo - I second the motion.

Mr. Carter - Reinsert the language on the probate? Is that what you're talking about? I'm not quite sure I follow what the motion is.

Senator Van Meter - In the whole section.

Mr. Montgomery - You're saying "and such divisions thereof as may be provided by law?"

Mr. Huston - That question was raised the last time as to whether or not when you delete that language you prohibit the legislature from creating divisions.

Mr. Montgomery - Our position is that we do not.

Mr. Nemeth - That "and" in the beginning of the clause that's stricken. Is it proper to call it a disjunctive word implying that the divisions of the court somehow are something separate from the court itself. It seems to be surplusage, but it is confusing. The original intent of recommending that deletion was to clarify the language, not to prevent creation of divisions of the court.

Mr. Montgomery - The testimony that we heard particularly from probate judges is that they want to continue to lock in that provision in the Constitution.

Mr. Carter - What is th objection, Don, to leaving the language in?

Mr. Montgomery - It's not good draftsmanship. There's nothing substantive.

Mr. Huston - You could correct the problem Julius mentioned by changing "and" to "with". There should be a court of common pleas with such divisions thereof as established by law, which would eliminate the disjunctive.

Mr. Nemeth - We have given the power to prescribe rules under which divisions are created by the Supreme Court. If we put this language back in its entirety then we are also making a decision to reverse that decision.

Mr. Unger - There could be divisions by Supreme Court rule and not by the state legislature?

Mr. Montgomery - But the legislature approves these rules. You have a joint decision.

Mr. Wilson - How long has this been in our Constitution?

Mrs. Eriksson - The Constitution prior to 1967 provided for a separate probate court and it was the Modern Courts Amendment which converted the probate court to a probate division. It is the only division specifically mentioned in the Constitution.

Mr. Wilson - Prior to that we had the word probate in the Constitution for how many years?

Mrs. Eriksson - Quite a long time.

Mr. Nemeth - I can't give it to you in years.

Mr. Wilson - What I am getting at is that if it has been there a long time and has worked, why are we tinkering with it?

Mr. Montgomery - Probate is one of several divisions and we think it's poor practice to single one division out, and lock it in the Constitution. We don't quarrel with divisions being constituted as the work requires. In some places we might want a domestic relations division, or a juvenile division. It doesn't seem good practice to single one division out and lock it in the Constitution. We're not saying there shouldn't be a probate division, we just don't want to lock it in the Constitution.

Mr. Wilson - There are some people who will run for judge of the probate division who would not run for any other division.

Mr. Russo - It has already been picked out and locked in the Constitution.

Senator Van Meter - I think the feeling in the legislature is getting a little uptight about rules. The rules are sent by the Supreme Court to the legislature and if the legislature doesn't act, it automatically becomes effective. With everything that goes on, rules are not specifically assigned to committees.

Mr. Montgomery - That's true of rules of superintendence but it is not true of rules of divisions. The legislature must act. This is a controversial point and in anticipation of this we have taken the liberty of drafting something which might be of interest to you. This goes to Section 5 (B) (3). That takes us to the bottom of pages 20 and 21. We are not necessarily suggesting this but just offer it as a possible compromise. "Notwithstanding any other provision of this article or of any Supreme Court rule, the General Assembly may at any time provide by law for the election of judges to specific divisions of courts of common pleas to which judges are elected or for the appointment of judges to specific divisions of courts of common pleas to which judges are appointed." This would be new material. So the General Assembly in spite of what the Supreme Court has offered in the way of rules can initiate divisions as they see fit and this could even vary by area or county.

Senator Van Meter - I assume by that that not only do we have the Supreme Court creating judges but also the General Assembly.

Mr. Montgomery - Not judges, creating divisions.

Mr. Nemeth - This would allow the General Assembly to override the Supreme Court rule even after the rule had gone into effect.

Mr. Russo - In Section 6, it allows assignment of judges to other courts and divisions. It allows them to juggle the entire court system.

Mr. Nemeth - That's only for temporary service though. Not permanent assignment.

Mr. Montgomery - They're doing that now. They are moving judges around to handle caseloads. I know of no abuse of it.

Mr. Russo - No, but if we eliminate the special status of the probate judge, that gives stronger powers.

Mr. Montgomery - This makes it very clear that the General Assembly has the last word on the assignment of judges to a division.

Senator Van Meter - Wouldn't it bring the General Assembly into conflict with Supreme Court rule?

Mr. Nemeth - Possibly.

Mr. Carter - What we're saying is that the General Assembly still has the power to set up probate courts.

Mrs. Eriksson - No, to provide for specific assignment of judges to that division. The divisions would still be established pursuant to Supreme Court rule which the General Assembly would have the power to amend. Whether the judges could be specifically assigned, is a matter the General Assembly could determine.

Mr. Carter - As a practical matter the legislature has the power to see that the probate court system could be continued as it now is.

Mr. Montgomery - And the Juvenile Judge in Hamilton County can run for juvenile judge.

Mr. Carter - But we're leaving these matters up to the legislature, rather than freezing them in the Constitution. That's the point.

Mr. Montgomery - There are several other subject matters other than probate and we do not want to lock any into the Constitution.

Senator Van Meter - Probate is a very special area and people are skilled in that. Have we had testimony that overwhelmingly shows a need for doing away with that court or taking it specifically out of the Constitution? Are they not fulfilling a purpose and are no longer needed? Isn't there enough work for them?

Mr. Montgomery - There's been no testimony on that point. I don't think any witness addressed himself specifically on that point.

Dr. Cunningham - They are just administrative courts. They are not courts of common pleas per se. They should be appointed as experts in the subject matter.

Senator Van Meter - Well, don't they run for that position because of expertise?

Mr. Montgomery - We've had testimony of course from the Bar Association and I suppose that what we recommended is incorporated in that, all we've heard specifically is the opposition.

Mr. Carter - The opposition wants the probate court left as it is. This action would not in any way prohibit that.

Mr. Nemeth - The original judgment would be with the Supreme Court as the report originally recommended. That is, it would still be within the Supreme Court's province to promulgate rules governing the creation of divisions and the assignment of judges, subject to amendment by the General Assembly. What this addition would do would be to give the General Assembly an overriding power.

Luncheon Recess

Mr. Carter moved that Section 3 of Article IV be reconsidered.

Mr. Guggenheim seconded the motion.

All concurred.

Mr. Carter then moved that the language about selection of a presiding judge be made identical to that adopted for common pleas courts.

Mr. Guggenheim seconded the motion.

Mr. Montgomery moved the adoption of Section 3 as amended.

Mr. Wilson seconded the motion.

Mr. Montgomery - To put a time limit in that the Supreme Court has to act within, that time limit would mean that there would be no presiding judge within that period of time and we think that there must always be a presiding judge, someone in charge, so we think that an automatic provision is preferable.

Mr. Fry - I'm still not persuaded, but I'll vote for the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Skipton, Unger and Wilson. Mr. Russo voted "NO".

Mr. Montgomery - I think it is a good suggestion to consider Section 5 before Section 4. The recommendations are rather extensive and start in the middle of page 19. The gist of it is that the Supreme Court being in a better position than the legislature to keep score and keep track of the caseload has been given the rule-making authority to administer the judicial system.

Mr. Russo- I just generally object from a philosophical point of view.

Mr. Montgomery - What points, Julius, were emphasized in the testimony and in the letters? Was there an issue taken with this section?

Mr. Nemeth - As Mr. Russo said, this is a philosophical question and certainly what's proposed here would transfer some power which has been traditionally regarded as the prerogative of the legislature to the Supreme Court and it's a matter of deciding whether you believe that this power should be transferred because some of the things which have been regarded as legislative are in fact internal matters for the judiciary itself. I don't recall any testimony on what is proposed here but what we have before you is what the committee hammered out or attempted to hammer out reconciling opposite points of view.

Mr. Montgomery - Alan Norris was quite instrumental in drafting this. Specifically he strengthened this section by adding some language at the bottom of page 20 to allow the General Assembly to amend the rules that cover the divisions and the assignment of judges, for example, which historically has been done by the legislature.

The Supreme Court is keeping the score and sees pretty much where the workload is occurring on a continuing basis. It is in a better position to initiate the divisions and the suggestions for assignment of judges than the General Assembly, consider all that evidence and pass judgment on it, which seems to me to make sense.

Mr. Fry - I think one of the reasons we had a lot of improvements in the court system, in the disposition of cases, etc. is that we made it possible for the Supreme Court and the Chief Justice in particular to go ahead and make these rules. I'm not bothered about it philosophically. The legislature, in the way it has reacted in recent sessions, has seemed to agree.

Mr. Montgomery - What would you think about adding the language you now have before you? To Section 5 (B) (3). This gives the legislature even more authority.

Mr. Fry - We talk about taking the courts out of politics if we can, and this invites the legislature to make this as a political decision. If Ohio were growing rapidly and we could see a lot of new population and problems that it might create, then this might be a consideration, but I think it's accepted that the population is rather stable now and I don't think this type of power is necessary.

Mr. Montgomery - Could we take a vote on Section 5? I don't think there is any major disagreement.

Mr. Unger - This new language differs at the beginning and I am not too clear as to exactly what this refers to. Does it mean the method of election or the courts to which they could be elected? Or the divisions of the courts?

Mr. Nemeth - It means that in those jurisdictions in which the common pleas judges are elected, the General Assembly would have the power to provide that judges be elected specifically to divisions. The Supreme Court would still have the rule-making authority to create the divisions, subject to legislative amendment or approval, but the General Assembly would have the power to provide that judges be specifically elected to those divisions. Despite what the rule or any provision of the Constitution provides.

Mr. Unger - Then if the divisions are set up, the legislature could provide that judges could be specifically elected to those divisions directly. But if there are no such divisions set up, then this doesn't pertain?

Mr. Montgomery - The Supreme Court cannot provide for the election of judges to divisions, only for the assignment of judges to divisions and for the divisions. This language adds a new thought, that you could be elected specifically to divisions if the General Assembly enacts an appropriate law.

Mr. Aalyson - Is it the intention of the committee that the Supreme Court shall have the exclusive function of deciding whether a particular common pleas court can or will have a particular division? Or is this a concurrent function with the legislature? Can the legislature and the Supreme Court both provide that the common pleas court will be segregated into divisions? Or can only the Supreme Court do that?

Mr. Montgomery -The Supreme Court can initiate it, but it must be approved and can be amended by the legislature.

Mr. Aalyson - But the legislature cannot initiate an action creating divisions?

Mr. Montgomery - The Supreme Court can initiate rules for the establishment of divisions in the common pleas court that can be amended, rejected, or concurred in by the General Assembly. That takes care of the creation of divisions. But the Court is not a legislative body. It cannot provide for the election of judges to those divisions. This is where the rotation argument comes in. Some have said that rotation will automatically occur. The only way you can provide for the election of judges to those divisions that have been so created is by the legislature, and that is what this proposed new language addresses itself to. It would permit persons, if the necessary legislation is enacted, to run and be elected specifically to a division.

Mr. Fry - I don't like to see this language added. We've had dramatic improvements in our courts in the last 3 or 4 years. It is because we've given our Supreme Court rule-making powers. If we had tried to do that through the legislature, we would have been unable to address ourselves to the problems. We would have had the continuation of inequities. No one denies that we have made improvements, and we have only been able to do it by permitting the Court to make some of these decisions.

Mr. Montgomery - On the question of having judges elected specifically to divisions, Nolan has the other side of the argument in that there are some people better qualified than others and the public should have the right to have their services.

Mr. Carson - Speaking for the larger counties, it has not only to do with juvenile judges but also domestic relations. This is a peculiar kind of person that can sit up there and handle 30,000 divorces a year. It's not a person who would be a normal common pleas judge. And also it has to do with the probate.

Mr. Fry - Can't the Chief Justice recognize this as well? I thought the probate judges made some very good points, but I think the right decision is more likely to be made by the Chief Justice of the Supreme Court than through the political process.

Mr. Montgomery - The Supreme Court sets up the system but the choosing of the judges to serve may be done within that group of common pleas judges. They know among themselves who is the best at this and the best at that.

Mr. Fry - They were all against the required rotation of judges, but it isn't required anywhere is it?

Mr. Carter - No. They tried to say it means required rotation but it doesn't.

Mr. Aalyson - Charlie, are you asking why the legislature should be given the authority by Constitution to oversee what the Court does?

Mr. Fry - The legislature has that opportunity after the rules of court are given.

Mr. Aalyson - Are you saying that they should not have?

Mr. Fry - Oh no. But I think that that needn't go any further than that.

Mr. Carter - I don't think that this addition is contrary to that view because this really empowers the legislature to do something in addition. I look at it as sort of a fail safe device. If the courts don't act and take the initiative, if you have a problem in the Supreme Court somewhere, there is another way of going about this.

Mr. Fry - Maybe I should say something further. I never felt very good about the way the legislature addressed itself to matters of the judiciary. I've seen them subjected to a lot of pressure and a lot of cases came into it. I know in the creation of courts, I've seen a lot of political considerations until we had the Supreme Court actually giving us some sort of a score card. If you wanted a judge in your county you had to agree to vote for this other judge in another county where he probably wasn't needed at all. I think that putting in the language that is before us here would simply open up that sort of possibility. I won't spend any more time on it but that is just the way I feel.

Mr. Skipton - Mr. Chairman, anyone who voted to approve Section 1 of Article IV to me has a difficult time supporting this amendment. Now, if we need separately elected relations judges, or probate judges, or any other kind and we're not talking about prospectively, they should have voted to amend Section 1 to say that the judicial power is vested in a judicial department consisting of a supreme court, courts of appeals, courts of common pleas, courts of domestic relations, courts of juvenile corrections or whatever you want to call them, and probate. I think this is contrary to the decision already made on Section 1.

I will move to reconsider the vote by which Section 1 of Article IV was adopted, and anyone who wants to add these other courts will have the opportunity to amend and add it in here. And I'll even vote for it. If you want probate courts, if you want domestic relations, if you want juvenile courts in this department, let's put them in.

Mr. Montgomery - We have a motion. Is there a second?

Mr. Russo seconded the motion.

Mr. Russo - I have stated my position. In essence what you are doing in the committee report is to give the Supreme Court the right that the legislators now have by saying we're going to take some action. The legislature has to react to it. In essence, you're giving them legislative powers. That's what you are doing when you say the Supreme Court may decide whether to establish an arm of the common pleas court or not. So, in essence, you are really not doing anything except giving to the Supreme Court the powers that are specifically delegated to the legislative branch of government by the people. All of their power is delegated to the legislative branch of government except for the initiative and referendum.

Mr. Fry - I haven't heard any outcry on the part of the legislature that they don't like this way of proceeding.

Mr. Russo - I'm not representing the legislative body.

Mr. Montgomery - Alan Norris drew that very provision, because he knew it was sensitive.

Mr. Russo - He led the veto for the second set of rules of the Supreme Court on the House floor.

Mr. Fry - I'd like to speak against the motion. I think if we get back into this, we're really regressing.

Mr. Montgomery - There was no intent that I know of, John, to create separate courts. I guess it's a play on words as to whether a division is a court or whether it isn't. Getting into creation of different courts is a real rats nest.

I see nothing inconsistent in Section 5 if you add this in. Frankly, I think that it is some improvement and it certainly will soften the opposition.

Mr. Skipton - We are an officially constituted group, supposedly trying to write changes in the judicial article of the Constitituion in the best interests of the people of Ohio and we should not be motivated consciously and openly and on the record by the fact that a certain number of judges appeared before us. I will not be a part of it.

Mr. Montgomery - You have to do what is practical and workable or have a theoretical document that is going to go nowhere.

Mr. Guggenheim - What Skip has brought up has gone to the heart of what the committee is trying to do in getting a unified court system. All of these objections revolve around whether you really want a unified court system or not. I think we decided very definitely that we do want a unified court system. I think the people delegate the powers in the Constitution and we are proposing that certain powers be delegated to the Supreme Court.

Mr. Carter - We do have a motion. The motion is to go back and reconsider Section 1.

Mr. Guggenheim - Do I understand that a vote to reopen section 1 means the reconsideration of the whole unified court system? which our subcommittee has already committed itself on?

Mr. Unger - Even if we decide to reopen Section 1 and decide one way or another on it, we still come back to where we are right now.

Mr. Skipton - All we're doing is giving an opportunity for everybody to go on record as to what they want in Section 1.

Mr. Russo - I'd like to withdraw my second to that motion because I don't see any support for my position.

The chairman announced that the motion to reconsider failed for lack of a second.

Mr. Montgomery - Can we vote on Section 5 which is the Supreme Court rule-making powers. We are not suggesting the additional language. If someone wishes to amend, a motion to amend would be in order. I move the adoption of the section.

Mr. Huston seconded the motion.

Mr. Russo moved to include this language in Section 5 (B) (3) to provide that the General Assembly may, by law, provide for the election of judges to specific divisions.

Mr. Carter seconded the motion.

Mr. Huston - I have some suggestions on the language of the amendment. I would suggest that it read as follows: "Notwithstanding any other provision of this article or of any Supreme Court rule, the General Assembly may, at any time, provide by law for the election or appointment of judges to specific divisions of the courts of common pleas to which judges are electedor appointed respectively."

It was agreed to so change the wording of the amendment.

Mr. Montgomery - Are we ready for a vote? Are there any questions?

Mr. Fry - I'd like to say this. If you adopt this language then I am going to have trouble with the whole section now. I know how these things are handled as a legislative matter and we're asking for political machinations on the part of the legislature in this matter of the judiciary.

Mr. Carter - Charlie, is your concern that giving the unilateral power to the legislature is likely to result in abuses?

Mr. Fry - I won't say it's an abuse but we would not have accomplished what's been accomplished in the last three years, if we had had a provision where the legislature had to initiate the change.

Mr. Huston - This doesn't say it has to. It says it has the power to do this.

Mr. Fry - It would be limiting the Court's power.

Mr. Montgomery - I agree with you 100% and I'll vote against it.

Mr. Unger - I have the same conviction. It would endanger the whole article if we accepted this amendment.

Mr. Montgomery - We drafted this mainly to get the other position before you because we thought that sooner or later we would have to decide this. And our recommendation is there so we can expedite business. Are you ready to vote?

Mr. Aalyson - One question. Without the suggested amendment or additional material, there cannot, under Supreme Court rule, be a judge elected to a specific division.

Mr. Montgomery - That is correct. I think we ought to have a show of hands on this.

The amendment was defeated.

Mr. Montgomery - Are you ready, then, for the main question--the adoption of Section 5?

Mr. Aalyson - I would like to ask whether it might be desirable to amend the present committee recommendation by providing that the Supreme Court may adopt a rule which, if approved by the legislature, would provide for election. If they can do anything else, why not provide for elections?

Mr. Montgomery - I think that's purely statutory.

Mr. Huston - I think we would be getting in a lot of trouble.

Mr. Montgomery - That would be delegating legislative powers to the judiciary.

Mr. Aalyson - Have they delegated if they have simply said, "We think this is a good idea. Do you approve?"

Mr. CarterIs it not correct that if the Supreme Court and the legislature agree, that they could provide for the election of judges to divisions?

Mr. Montgomery - Not unless it's authorized by the Constitution. That's the gut decision.

Mr. Nemeth - One thing that we have to keep in mind is that this group of rules referring to the creation of divisions and the assignment of judges is subject to amendment by the General Assembly. So the General Assembly could actually change a Supreme Court rule before it ever had gone into effect. There would be no necessity for a rule which was repugnant to the General Assembly to go into effect. There is an opportunity to change it before that happens.

Mr. Russo - Those rules can only be amended by resolution. They don't even have a hearing as ordinary legislation does in front of a committee. They are introduced in the House and given to the clerks of both the House and Senate, and if you want to read them you can read them. If you want to change them, the entire body has to be changed in one action on the floor. So consequently, they are already circumventing a procedure that is spelled out in the Constitution for the introduction and hearing a bill, and it may be wrong.

Mr. Montgomery - They are rules and not laws made by the legislature.

Mr. Fry - If they want to assign them to the judiciary committee and have hearings on them, they can do it.

Mr. Russo - They never have.

Mr. Fry - But they can do it. There was general agreement before that the rules were worthwhile. If a concurrent resolution is initiated in one house and adopted by the other, you can have hearings, full procedure, of public hearings.

Mr. Huston - The rules supersede the laws that are in derogation of them. When laws conflict, the rules would be tantamount to law.

Mr. Carson - On page 20, Section (B) (1), the provision that the Supreme Court may prescribe rules concerning the employment and duties of personnel in the judicial department. I think at the April meeting this was discussed very briefly, but I don't remember your answer. I'd like to know, number one, where this came from, what was the reason for including this, and why is that embodied in the Constitution?

Mr. Montgomery -As I recall, there is very little authority for the employment of court personnel other than the elected clerk. There is no provision for law clerks, for example. A law clerk will be employed by the court as a bailiff to do research and things like this. There is no satisfactory statute or provision any place to provide for the orderly staffing of courts' personnel. This tends to address itself to that and to provide for some uniformity among all of the districts because some of the courts do it one way and some of the courts do it another way.

Mr. Nemeth - What we found by looking at the statutes is that there is no complete system and we were informed through testimony that people are doing the same job under different titles in different courts, to circumvent the rigidity of the law. And I think there is also some testimony to the effect that the legislature has been asked on several occasions to make changes to remedy the shortcoming and it has not done so. And the committee in general has concluded that it would be in the interest of the orderly administration of the court system to have rules of this type promulgated within the system itself rather than being proposed by statute, which does not seem to be very systematic or well thought out and it is apparently difficult to change. This is one area in which the courts have tried but have not prevailed on the legislature to change.

Mr. Montgomery - To be consistent, if we are going to allow the Supreme Court to initiate the rules for the courts and the judges . . .

Mr. Carson - I would ask, who made the point? Who thought of it?

Mr. Montgomery- I don't really know how it was . . .

Mr. Carson - You are aware, of course, that you are dealing with thousands of employees who are now appointed by judges and are transferring that power directly to the Supreme Court. In our domestic relations court in Cincinnati, that is the only one I know anything about, I think they have 75 employees and the judge selects them.

Mr. Nemeth - This doesn't prevent that.

Mr. Montgomery - This just says there has to be a system.

Mr. Carson - Your language provides that the Supreme Court may provide the rules governing the employment and duties of personnel in the department, which is all of the courts in the state. The Supreme Court could, in a rule, say that no employee could be hired unless the Supreme Court approved. I think that is suggested in this.

Mr. Nemeth - It's possible, but from a practical point of view it would seem improbable that the Supreme Court would put itself in such an antagonistic position vis a vis the rest of the court system.

Mr. Carson - I just wa, to know where it came from. From the committee only?

Mr. Montgomery - Yes, I think so.

Mr. Carson - Okay.

Mr. Guggenheim - It seemed to me that the judges rather liked this for the Supreme Court, because it was a problem whom they could hire.

Mr. Montgomery -They have no guidance at all now. We thought this would make some sense out of it. I don't know how you can tighten it up and still have anything. Again, the legislature has the last word. The rules have to be reasonable and sensible. The judges certainly have a lot of input at that point and so do the people.

Mr. Aalyson - Provide that the Supreme Court may prescribe or authorize inferior courts to prescribe rules regarding personnel.

Mr. Unger - Then you would lose uniformity, though, wouldn't you.

Mr. Montgomery - Yes, you are likely to lose the uniformity. And since we are trying to provide for one pay scale for judges regardless of where they serve and this sort of thing, it seems like uniformity in the staff would be a good thing, throughout the state.

Mr. Nemeth - The whole thing, of course, ties in with the concept of state financing too since the state is going to be asked to pick up the tab for the expenses of the department, the expenses should probably be determinable by uniform rules.

Mr. Carson - It sounds to me, Mr. Chairman, like this is a little bit like the township question and maybe it ought to be a matter for the legislature rather than for the Constitution.

Mr. Montgomery - Are there any other questions on Section 5, the powers and duties of the Supreme Court: rules.

Mr. Aalyson - I have one question, Mr. Chairman, just to be sure that I understand. If this section were to be placed on the ballot and passed, then there would be no opportunity short of another constitutional amendment ever to provide for direct election to a division of a common pleas court.

Mr. Montgomery - That is my understanding.

Mr. Carter - Mr. Chairman, I would like to make a motion to amend. This is not a substantive amendment. I have great trouble with the language in sub-paragraph 4 that we are dealing with here, on page 21. And the staff has been good enough to rewrite, not a substantive change, but just to clarify the language. I would like to move the adoption of this language in lieu of the original committee recommendation. I'll read it if you wish. It's just a restatement of what is already there. "The Supreme Court shall establish by rule uniform criteria for determining the need for increasing or decreasing the number of judges, except Supreme Court justices, and for increasing or decreasing the number of magistrates and for altering the number or the boundaries of common pleas or appellate districts. Annually, before each regular session, the court shall file with the clerk of each house a report containing its findings and recommendations, if any, regarding increasing or decreasing the number of judges or magistrates or changing the number of boundaries of common pleas or appellate districts. The General Assembly shall consider such report and any findings or recommendations it may contain at the regular session following the filing of the report. No decrease in the number of judges shall vacate the office of any judges before the end of their terms."

Mr. Montgomery - Is there a second?

Mr. Unger seconded the motion.

Mr. Montgomery - Any discussion of this motion to amend?

A voice vote was taken and the ayes carried the motion.

Mr. Montgomery - Alright. Is there anything further before we vote on Section 5?

Mr. Fry - Mr. Chairman, is it necessary that we set forth the General Assembly's action? It says the General Assembly shall consider such report and any finding and recommendations it may contain. Is a joint resolution required if there is to be a change? Because you have in paragraph 3 just before this one, you say, "such rules shall take effect unless prior to that date it adopts . . .

Mr. Montgomery - These are not rules.

Mr. Nemeth - These are just recommendations. They would have to be enacted in the law, I presume, like any other law.

The roll was called on Section 5. The following voted "YES": Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Skipton and Unger. Messrs. Carson and Russo voted "NO"

Mr. Carter - As is customary, we will leave the roll call open until the next meeting.

Mr. Montgomery - Now, Mr. Chairman, we should go back and consider Section 4. Are you ready for the question of the adoption of Section 4 as amended?

Mr. Carson - A point of order, Mr. Chairman. I don't understand, we just voted on Section 5 but there was a motion pending on Section 4.

Mr. Carter - The reason was that Section 5 had to be put in context with Section 4.

Mr. Montgomery - What we did on Section 5 really has a bearing on Section 4 so the reverse order seemed to be more logical.

The roll call was taken on Section 4. Those voting "YES" were Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Skipton and Unger. Messrs. Carson and Russo voted "NO".

Mr. Carter - Again we will keep the roll call open until the next meeting.

Mr. Montgomery - That takes us to page 26, Section 6. The recommendation begins on pages 27, 28, and 29. Mr. Montgomery moved the adoption of the section and Mr. Unger seconded the motion. This is the section which provides for the merit selection of judges, mandatory at the Supreme Court,court of appeals level and optional with the common pleas court.When you get over the principle of whether you want merit selection, the big point of debate seems to be the composition of the nominating commission. We sent some material to you to give you an idea of what some of the other tates have done. They vary quite a little bit. I don't believe the subcommittee is adamant about all of these things. This is an area we could redo if you feel it needs to be redone. The review of the statutes and the constitutions of other states seems to indicate that, in general, the organized bar is not mentioned in the constitution. In many states, a judge is appointed to the commission. If it's a Supreme Court commission, the presiding judge of the Supreme Court; if a Court of Appeals, the presiding judge of a court of appeals district. As far as the legislature making appointments I think the analysis would indicate that in general the legislature is not involved in making the actual appointments of the commission but it does its job by setting up a procedure. And the appointments, by and large are made by the governor. Some are made by a judicial representative of some kind appointed by some supreme court or court of appeals judges. So they vary a lot. The recommendation, we think, of not allowing the bar to dominate these commissions is appropriate, and the testimony has been both ways on that. I think the Ohio State Bar Association did not object to it, although some individual testimony did object to that.

Before considering that, in Section 6 (A) (2) (C) and 6 (A) (2) (d) we provide for 75 days before the election for filing by the candidates and I think it was brought up that we might not want to have the 75 days in the Constitution. So we want to suggest that the General Assembly set this period so that it would be a little more flexible. Now, we have an amendment that cleans it up. Do you have copies of that?

Mr. Nemeth - In both places, the sentence begins "Not less than 75 days prior to such election", that would be deleted and the following phrase would be substituted "at such time as shall be provided by law." There is an additional recommended change, in Section 6(a)(3) (b) (1), on page 29, which provides for the optional appointive-elective system for common pleas judges. The recommendation as the committee submitted it did not have specific language in it regarding an election to reverse this decision. And I think at the last meeting there was discussion to the effect that it was advisable to provide for this specifically.

Mr. Montgomery - This means that we can quit the system if we don't like it. I'll read it to you. I think it is easier to understand if it is read. "Notwithstanding any other provision of this Article, judges of any court of common pleas may be appointed under an appointive-elective system upon the affirmative vote of a majority of the electors voting on the question within the territorial jurisdiction of the court. Elections may be held in the same manner to discontinue the practice of appointing such judges. The method of submission of either question shall be provided by law." Does someone care to make a motion for that amendment?

Mr. Carter moved to amend the report by making those changes.

Mrs. Orfirer seconded the motion.

A voice vote was taken and the ayes carried the motion, there were none opposed.

Mr. Montgomery - Is there discussion on the section?

Mr. Russo - I am vigorously opposed to merit selection.

Mr. Carter - At the last meeting we discussed two major items pertaining to this--one was the question of the make-up of the nominating commission and I think in my own mind that this is about as good as you can do. The second one though, you haven't mentioned, and that is the question of removal of judges, as to whether it would be advisable to have some sort of mechanism other than just the straight referendum election for that purpose. Has the committee given any more thought to that question?

Mr. Montgomery - We talked about the question of an extraordinary majority and this sort of thing. As far as an extraordinary majority, I think, that Illinois is the only state which provides for an extraordinary majority and they don't have judicial nominating commissions. They have retention elections. Wherever there is a nominating commission, a retention election, a simply majority vote seems to be adequate. Illinois has no nominating screening process, so this is a pretty standard provision. I'm speaking for myself now, and the rest of the committee can express themselves, as far as getting rid of judges that are not capable or shouldn't be in office, I think the experience in Ohio has been rather good and everyone seems to think it's been good. So all we have done in amending the judicial article is to get rid of extraneous ways of doing it that have never been used and are just surplusage for all practical purposes. We didn't feel that there is any compelling reason for change of the way in which judges are removed now. If the Commission feels otherwise, we will certainly entertain it. Dick, is that a fair statement?

Mr. Guggenheim - I think so.

Mr. Aalyson - On page 28, in the partial paragraph at the top of the page, what was the rationale for providing that less than one-half of the commission would be members of the bar rather than not more than one-half? I ask this question because perhaps, being biased, I feel that probably members of the bar are in a better position to judge the quality of candidates for judicial office because they are exposed to these candidates and know their competence.

Mr. Montgomery - If it it not more than, and you had an even-numbered commission, the lawyers could have an equal vote and it was decided that the people should have control of these commissions rather than the bar and the lawyers should have less than half. I think Governor Gilligan's experience has been pretty satisfactory on this, even though, by executive order, Governor Rhodes didn't want to go along with the program. The testimony we received from members of judicial nominating commissions was very good. They were laymen, they were members of both parties, politics had no bearing whatsoever, they said, at the commission level. Now, whether it did at the appointing level, that is something else. They were quite pleased by the way the system worked.

Mr. Unger - That raises a couple of questions. There's no guarantee from the constitutional provision you are recommending that there be that kind of a commission again in Ohio.

Mr. Montgomery - It is quite possible here that the legislature could establish a different sort of commission under these rules, that the legislature itself shall set up a commission. However, we mean to exclude legislators.

Mr. Unger - You mean they may not serve?

Mr. Montgomery - Yes, they may not serve. We talked about this but I don't think we formally did anything about it.

Mr. Aalyson - You mean holders of public office other than legislators may serve?

Mr. Montgomery - Yes. To exclude the whole body of public and state officials would not be good because these people are very experienced in public affairs and they are in a good position to add to the composition. The fact that they are public office holders shouldn't disqualify them. Some states take the other view that they don't want any office holders. Some states say no judges, and some include them. How about "holders of public office other than members of the Ohio General Assembly?"

Mr Russo - Is the clerk of the House or the Senate a member of the Ohio General Assembly?

Mr. Montgomery -No.

Mr. Unger - I so move.

Mrs. Orfirer seconded the motion.

Mr. Montgomery - Is there any discussion? (A voice vote was taken. All voted aye, there were no nays, and the motion was carried.)

Mr. Unger - I understand that there is real reluctance to put any overbearing responsibility, or, rather, authority in the hands of any one group, which is why you have limited it to no more than half of one political party and you have put a limitation on lawyers and members of the bar. And you have not, however, specified anything more than in general language as to how the commission would be set up. I notice in the material that you have given us from all of the other states that the great majority, if not all, have some other system, in which several different groups have a responsibility in establishing this commission. Now, conceivably, as you have this written the commission shall be established by law. This could happen, but on the other hand, this leaving it in the hands of the legislature doesn't supply any kind of guarantee that there would be any input other than from

the legislature itself. Now we have specified that they can't include themselves, but it doesn't indicate that any other body, groups, the governor, the bar, the justices, for instance, as in some of the other states would have any part in setting up the nominating commission. It seems to me that we ought to find some way to provide this responsibility with the number of members or a proportion of the members or some basis giving the governor a part of the establishment of the commission. And in the same way perhaps providing for the members of the bar to be appointed from some source as they are in other states.

Mr. Carter - Mr. Chairman, I really think that is a matter we should not deal with at this time. I have confidence in the legislature doing this properly.

Mr. Montgomery - The only danger I see, and I don't think it's a serious one, but it's a possibility, is that the legislature could provide that it makes the appointments. In most states it's done by the governor. I'm saying that it is not a probability but it is a possibility by not addressing ourselves as to who makes the appointment in the Constitution that the General Assembly could say that it will make the appointments even though it couldn't appoint legislators.

Mr. Unger - This is exactly my fear. I would like to see some kind of safeguard.

Mr. Fry -I think the best response to that is that the legislature is responsible for the appointments to this group. I would point out that as you go around the table, I don't know who originally are democrats and who originally are republicans. I think that Dick's point is well taken. Even if they do arrange for the appointment, I don't say that they will, but even if they do, with the restrictions you have in here, you're going to have an impartial group making the selection of the nominating commission. I'm not concerned about it.

Mrs. Orfirer - I respectfully disagree, Charlie. I think that it took a long time for the legislature to decide on the composition of this group. I think there was a lot of political exchanging. I think there were a lot of appointments that we have seen from the lack of attendance, were not done with the proper thought or care. I would be very leary of having the legislature have sole responsibility for appointing the commission.

Mr. Fry - I'm not saying they'll have it, but I think that giving them the right to prescribe how the commission shall be chosen - maybe they'll have the Supreme Court justice appoint one and so on.

Mrs. Orfirer - I agree. I would just personally not be happy leaving them that option, although I don't like to spell out numbers and and who makes what appointments. Could we work out something saying that the legislature could not arrange to appoint half or more of the appointed body? Then it would be up to them who they decided would do the other 51%.

Mr. Montgomery - In other words, write in the provision, no more than half of which may be appointed by the General Assembly, in case the General Assembly decided to arrange it this way.

Mr. Nemeth - That's almost an invitation for the General Assembly to do it.

Mrs. Orfirer - Yes.

Mr. Unger - That is my concern. I would like to see some safeguard, but not tag it that they would have to.

Mrs. Orfirer - Charlie, do you feel from your experience in the legislature, can you see that they would turn this over to the governor to make the appointments?

Mr. Fry - When we established the Board of Regents it was turned over to the governor. Just because the legislature prescribes how they are to be appointed doesn't mean that they are going to control.

Mr. Skipton - Mr. Chairman, I believe we are getting ahead of ourselves. Maybe to get this thing in perspective, I should make a motion that will help take this step by step. Nobody has ever convinced me of the necessity for having a nominating commission to start with. Secondly, if you have a nominating commission, nobody has ever described to me the value in having the General Assembly prescribe how they are selected. After all, the General Assembly can't decide how a nominating commission can be selected any differently than the people sitting around this table. It might be much more our responsibility to the people of this state to go ahead and make a proposal and let the people decide. I just don't see the advantage of having more debate in the General Assembly, a highly political body, to make this recommendation to the voters of Ohio that we can't make. I thought it was our obligation. And also, I have expressed myself previously, let's have certainty here. I find it very difficult to vote for this amendment if it contains a provision that did not spell out explicitly how the judiciary was going to be selected. So one way to put one of the possibilities before you, and I'm not saying that this is my absolute final choice, but I would move that we amend, starting on page 27, fourth line from the bottom, change the comma to a period. Strike out the remainder of that page.

Mrs. Orfirer - After "an appointive-elective system"?

Mr. Skipton - Right. Strike out the rest of that page and all of the 7 lines at the top of page 28. The effect of this would be to let the governor make the appointment. And this is a proposition that has been strongly urged by many a student in this field. And inasmuch as we have already discussed the possibility the General Assembly could go right back and give the governor the power to appoint the nominating commission, as far as I am concerned, it would give the governor the power to name nominating commissions, or if he wants to set up some other selective system. So I will make that motion, in order to get before the group, one of the choices that you really have.

Mr. Montgomery -Alright. We have a motion; is there a second?

The motion failed for lack of a second.

Mr. Unger - On the bottom of page 27 where, under paragraph B you start talking about the composition of the members of the General Assembly and the nominating commission, would it be possible, where we have the words "method of selection" to include a few further words which would indicate as a minimum that this selection would be by more than one organization or party. In other words, that the Assembly couldn't be the only one that would elect a method of selection by, and you might include in there, the method of selection jointly by the governor, the Assembly, and the members of the bar, bar association, or some such words which would involve more than the Assembly itself in the method of selection of the commission.

Mr. Montgomery - What do other state constitutions provide? Do they go into the specifics?

Mrs. Eriksson - For the most part, yes. They designate the composition of the nominating commission in the constitution.

Mr. Montgomery - Ours is very broad. We leave it almost entirely to the legislature. I really think we're at a point where if it's essential that we do this specifically in the Constitution we could refer it temporarily for redrafting and get some alternate language.

Mr. Unger - That would be my point and I would hope that in so doing that you would keep in mind this material which you so well provided us with on what other states are doing and use something similar.

Mr. Montgomery - I would like to have your general guidance though on the proposition of who should really make these appointments. Someone, at our last meeting I think said that it doesn't make sense to have the governor appoint the commission if he is the man to appoint the man the commission recommends. And when you review what other states have done very few states allow the legislature to make the appointments. In most states the governors do make the commission appointments and they see no conflict with the fact that he makes the ultimate selection of their recommendations. I think what we are getting down to, if you are going to follow the various trends of thought on the various systems, which is what we are down to here, is the governor of Ohio going to be making most of these appointments?

Mr. Carter - Could I come back to John's point, a little bit? John, as I understand it you aren't really arguing for the governor to make the appointments. You want to makg it specific in the Constitution?

Mr. Skipton - We are substituting something for the vote of the citizens of this state and I don't see how this group can go to the citizens of the state of Ohio and say take a pig in a poke.

Mr. Carter - Then you would support this approach then of coming back with a more specific recommendation.

Mr. Skipton so moved.

Mr. Montgomery - It's been moved that we do some more research and draft several alternate proposals, much more specific where the procedure is outlined in the Constitution itself for the selection and constitution of nominating commissions. Is there a second?

Mr. Huston seconded the motion.

Mr. Montgomery - Any discussion?

Mr. Huston - One comment. In implementing this change, if you do not have a nominating commission and you have a vacancy, how is it filled? When is this implemented? You have to have something in case you are not going to have the election of judges. Once the Constitution is changed, the governor really doesn't have the appointive power. If appointments are not made to a nominating commission and you have a vacancy, how is the governor going to appoint someone, since the Constitution says that he has to appoint someone nominated by the nominating commission?

Mrs. Eriksson - You're speaking to the fact that the General Assembly might not do this?

Mr. Huston - Yes, and then where are you? You are really in a dilemma because the Constitution says the governor can appoint only what they nominate and if there isn't any nominating committee, if the General Assembly doesn't act they you have nobody to appoint.

Mr. Fry - I would guess that you could make this apply to a lot of the powers that are given to the General Assembly where they are required to act and they usually do. I can't think of where they haven't or even delayed.

Mr. Carter - The present system continues until the commissions are established.

Mr. Huston - We need something to make sure it does continue.

Mr. Unger - I just want to make one comment about the governor appointing some members to the nominating commission. It isn't exactly the same as the governor appointing the judges themselves because the nominating commission gives the governor their own choices for the position, so it greatly restricts what he can do. And so appointing a few people to the commission, say three out of nine, or some minority, and then getting people to work with as final appointees is a considerable restriction in itself, so it doesn't bother me that the governor should also have authority to nominate some members of the commission, not all.

Mr. Russo - Someone has to appoint the majority of that commission.

Mr. Carter - As I understand what you are saying, the committee will come back with specific alternatives. Does that mean that we cannot vote on this at all today?

Mr. Montgomery - I don't see how we can.

Mr. Carter - In the absence of that, I would like to get the sense of the Commission as to how many would favor the merit plan, if the problems were resolved.

Mr. Skipton - said he would vote for it if it were specific. Mr. Fry said he liked the merit approach better than he did two years ago.

Mr. Fry - If we are going to take more time, I would like to address ourselves further to the question that you raised last month about how we get rid of a bad judge. With Supreme Court records today, we're going to have some judges that may look bad.

Mr. Montgomery - That's public information, isn't it, to let the press, bar association polls, all the indirect controls that work so well right now to operate. Choices are very few. If you set up a commission to review performance as well as selection, then you are developing an all powerful body. The cure can be worse than the disease.

about merit selection

Mr. Carter - I would like to, for my information, have the opposing views/brought out. It might be helpful to us in what we're doing.

Mr. Carson - I'll be glad to do so when we vote, Mr. Chairman.

Mr. Carter - Is there anything in your point of view that might be helpful to the committee, that might make this a better proposition? Or is it the whole idea that you find repugnant?

Mr. Carson - There are individual things that I think ought to be changed, but the concept of this appointed system written this way is totally unacceptable. If there were a way to provide that appointed judges could be removed other than to run against their record, which makes it difficult to remove, based upon their performance, I might favor it. I happen to believe we have a pretty good Supreme Court. But I wouldhate to see lifetime appointments in the courts of this state.

I consider that this plan does that. I think that a lot of judges, when they get those robes on, are totally different people than when they were lawyers. We have many very competent judges that have arisen from the elective system. In my county, I think we've had a very good record through the elective system. I just have seen Prussians, if you will, in the federal system.

Mr. Carter - Your concern, then, is that the appointive-elective system amounts to a lifetime appointment.

Mr. Carson - It is, in my judgment, unless the judge prefers not to run. I think the testimony was that 12 have been voted down in the last 35 years in the whole country. We have to recognize that for what it is. As a philosophical principle- and the Ohio State Bar Association has proposed this every time they have it before the legislature - I also oppose the idea that the presently sitting judges are kept in office under this system, are given a mandatory appointment. I know the reason for this--it is so that you can get their support in the passage of the measure. But if this commission has as its goal the improvement of the judiciary it seems to me that we ought to start right now, rather than 30 years from now when these people will all be retired. If we are people of principle, we wouldn't have a thing like that in here. Because you have people on the bench and they are never going to get off until they retire and then they are going to serve as retired judges until they die. That is what they do today. The legislature hasn't provided us with enough judges so that when judges try to retire, they are put on duty on the bench as retired judges because of the lack of bodies. These are some of my concerns. They have been generated over many years.

Mr. Carter - Perhaps I could summarize what you've said as a concern about life-time appointment and the problems of transition--that is, perpetuating the present judges.

Mr. Carson - There are other things. This Division thing I feel very strongly about. I feel that the Supreme Court should not prescribe rules telling the Hamilton County Domestic Relations division what employees they should have. That should be up to the judge.

The meeting adjourned until 1:30 p.m. on either July 8 or July 10, depending on preferences of Commission members.

Ann M. Eriksson, Secretary **Richard H. Carter, Chairman**

M I N U T E S

Ohio Constitutional Revision Commission

July 10, 1975

A meeting of the Ohio Constitutional Revision Commission was held on Thursday, July 10, 1975 in Room 11 of the House of Representatives, State House, Columbus.

Chairman Richard H. Carter presided.

Present were Senator Van Meter; Representative Roberto, Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer; Messrs. Russo and Skipton, Mrs. Sowle and Mr. Wilson.

The minutes of the June 11 meeting, as corrected were approved as submitted by mail. The correction is on page 6, the first time Mrs. Orfirer spoke, changing the first word to "Do" instead of "So".

Mr. Carter - The votes on the four matters we voted on at the last meeting are as follows: Section 1 has 22 YES votes--Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Orfirer, Russo, Skipton, Wilson, Unger, Mansfield, Norris, Roberto, Heminger, Van Meter, Maier, Mussey, Panehal, Sowle and Mc Cormack. Messrs. Bartunek, Gillmor, Carson. Mrs. Pope and Senator Zimmers voted "NO." It has, therefore been adopted.

Section 3, on the appellate courts, has been adopted with 23 votes. Those voting "YES" were Messr . Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer; Messrs. Skipton, Unger, Wilson, Mansfield, Norris, Roberto, Bartunek, Gillmor, Heminger, Carson, Mrs. Pope, Messrs. Maier and Mussey, Mrs. Panehal and Mrs. Sowle. Mr. Russo and Senators Van Meter and Zimmers voted "NO."

Sections 4 and 5 did not pass. Those voting "YES" on Section 4 were Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Skipton, Unger, Norris, Roberto, Heminger, Wilson, Maier, Mrs. Panehal and Mrs. Sowle. Those voting "NO" were Messrs. Carson, Russo, Mansfield, Bartunek, Gillmor, Van Meter, Mrs. Pope, Senators Mussey and Zimmers.

Those voting "YES" on Section 5 were Messrs. Aalyson, Carter, Cunningham, Fry, Guggenheim, Huston, Montgomery, Mrs. Orfirer, Messrs. Skipton, Unger, Norris, Roberto, Heminger, Wilson, Mussey and Mrs. Sowle. Those voting "NO" were Messrs. Russo, Carson, Mansfield, Bartunek, Gillmor, Van Meter, Mrs. Pope, Mr. Maier, Mrs. Panehal and Senator Zimmers.

Carter - I think Don would like to go through the rest of the report and then come back and see what kinds of compromises might be appropriate to get a 2/3 consensus by the Commission on the ones that have failed.

I imagine we will have the photographs by the next Commission meeting. We are getting them in color for the members and are also having some black and whites made for publicity purposes.

The one other thing I would like to ask you and that is that I think a very important part of this Commission's work is to properly document all of the research. We have some marvelous analyses of the present Constitution and there are some great

discussions both in the Commission and the committees. I feel that it is awfully important before we wind up our affairs - we are funded for the next biennium. We will be finishing our work well in advance of the biennium as far as any major activities are concerned. A good part of our work will be documenting, indexing, etc. If any of you have any thoughts on how you think that should be done we would appreciate hearing from you. As I say I think it is very important and should be useful to people long after we are gone. My thought is to microfilm the whole thing if it isn't too expensive, to have a report giving the highlights of the Commission's activity giving a list of members who have participated and giving their time for service and to include in that an index of some sort so that one could go to the archives and get what they wanted out of it. That was my thought for a final report.

Let us have committee reports now, Linda, Local Government.

Mrs. Orfirer - Our discussions have centered primarily on the problems of housing because most other problems are already being taken care of in the proposed substitutions for Sections 4 and 6 of Article VIII of Nolan's committee earlier. We came to the conclusion this morning that any further activity on our part would be a waste until we see what happens on the ballot in November. We have gone over the Governor's proposal on housing very carefully on things which we have discussed in the last year at our committee meetings. It provides a great deal more than we have talked about and we have discussed the comparative analysis. Our conclusion was not to disband the committee but to have a recess until following the election in November. Immediately following we would reconvene depending on what happens to the proposal on housing. If the Governor's proposal passes then there is nothing further that we would do. If it does not, the staff will have prepared language for us to react to in relation to any of our concerns which are not covered by the present recommendations which the Commission has in the legislature.

Mr. Carter - Is this then the remaining item?

Mrs. Orfirer - Yes, we looked into tax abatement and satisfied ourselves that that is already law. Some of the cities are already using it. Some other concerns, such as possibly the creation of land banks in the city, we would have to decide what we want to do but we are going to be inactive until November. I don't mean to imply by this that we necessarily favor the Governor's proposal but it does cover many of our concerns. It also covers many other things on which we do not take a stand one way or the other.

Mr. Carter - Bob could you give us a report on the What's Left Committee?

Mr. Huston - We haven't had a meeting since the last Commission meeting but we did get a report from the Commission staff on convict labor and that's going to be looked at. We looked at the mechanic's lien law section and decided to leave it alone.

Mr. Carter - As I recall that is one of those things that need not be in the Constitution but, being as it is there, there is not much reason to take it out. Skip, you're on the Education and Bill of Rights Committee, aren't you?

Mr. Skipton - Yes, but I didn't attend the last meeting.

Mrs. Avey - The committee studied memoranda 44A to 44G which covered various sections in the Bill of Rights. A recommendation for change in Section 9 of Article I which deals with bailable offenses that the committee wanted to see some language would not require absolute bail for repeat offenders who were awaiting trial on the first offense. Then at the next meeting sections 44H through 44L and a memorandum on the Grand Jury will be taken up and a few other matters.

Mr. Carter - Do you anticipate a lot more work for that committee?

Mrs. Avey - I would say that one more committee meeting would do it. Also on the What's Left committee, we were awaiting some comment from the Department of Correction concerning work release programs for prisoners under Section 41 of Article II. We contacted the office and they will have a recommendation for change.

Mr. Carson entered to a chorus of "Happy Birthdays."

Mrs. Orfirer - Paul Unger is on jury duty and we talked a bit about wanting something framed up for the Judiciary Committee. Did he ever talk with you about it? He felt that juries were being called upon to make decisions that were so technical that even he couldn't understand it. I think perhaps it was setting a price on property.

Mr. Carter - Ann would you just want to comment on the status of recommendations for a moment?

Mrs. Eriksson - One of the changes from the last meeting is that the Initiative and Referendum resolution has been reported favorably by the House State Government Committee so that is in Rules Committee. H.J.R. 28 has also been reported favorably. We now have three municipal resolutions and three county resolutions that have been reported favorably and are in House Rules Committee. There have been no hearings so far on H.J.R. 34 and H.J.R. 35. They simply have not been posted for hearing and I suspect they won't be unless an effort is made on our part. There will be hearings tonight on H.J.R. 10 and H.J.R. 15 in the Senate Ways and Means Committee. H.J.R 15, which originally failed in the House, has now passed with the language permitting prospective adoption of federal statutes deleted.

Mr. Carter - Would you have any feedback on why the prospective thing was taken out in the House?

Mrs. Eriksson - The members of the House were opposed to it. Many of them do not believe that the General Assembly should, by reference, adopt federal statutes, in spite of the fact that it is done with reference to the income tax as well as other taxes. Those to whom I spoke felt that we should not put it in the Constitution because it will make it easier.

Mr. Carter - You will recall that at the last meeting it was the consensus of the Commission that I contact the leaders of the legislature and advise them that because of the engulfing situation developing for the November ballot that we would have no objection to holding our issues until the June primary election. So we did get a letter off, that Ann and I prepared, and the feedback that I have so far is that they think that's fine.

Mrs.Eriksson - I think that most of them, even those that are very close to passage, (the two that are closest to passage are tandem elections, S.J.R. 4 and S.J.R. 16 which is elections and suffrage) that even those two will be postponed until June. Probably the matters that are going to be most controversial are the county proposals, particularly county powers H.J.R. 29. I spoke with Mr. Cox who is chairman of the House Local Government Committee and he indicates that he wants to do some planning before they come up for a vote, and he is thinking about whether he just wants H.J.R 29 alone to come up for a vote or to take the whole package at once.

Mr. Carter - Do these carry over until next year, or do they have to be reintroduced? So that if they are not passed, we don't have to start all over again.

Mrs. Eriksson - They can be carried over until next year.

Mr. Carter - Any other comments or questions? Ann, why don't you give us a quick run through on this memo on the Governor's proposals.

Mrs. Eriksson -You have in front of you an analysis of the Governor's proposed constitutional amendments. This was prepared for and has been discussed, part of it, by the Local Government Committee. This is not a complete analysis because what we were asked to do was make a comparison between these proposals and proposals that the Commission has already made. The first one is "Tax Abatement for Industry." The proposal does provide for tax abatements for either new or rehabilitated industrial facilities both within central cities and elsewhere--the provisions for abatements for tax relief would apply no matter where the industry locates but would be more advantageous if the industry located within a central city. And, as I said, it could be used for new construction or rehabilitation of an industrial plant which would require some measure of reconstruction. It does not, so far as we can tell, conflict with any prior Commission proposal. Perhaps it might be said to conflict with the general philosophy of the Commission in that this is really statutory in nature and a determination of a specific kind of public policy of this nature should be matters for the General Assembly. Also, as far as we can tell, to enact this kind of a program would not require a constitutional amendment. The General Assembly can exempt property from taxes and obviously what is being done here is enact a specific program for tax abatement in the Constitution. However, we do not think it conflicts with any prior Commission recommendations in the field of taxation or the field of debt.

Mrs. Orfirer - There already is provision, legislatively, for tax abatement.

Mrs. Eriksson - There are provisions, not as broad as this provision, already on the books which provide for certain types in lieu payments. Payments by persons being relieved of the property taxes in lieu of the taxes. Not all tax abatement statutes do that I believe.

Mrs. Orfirer - Is there a big difference in the years involved?

Mrs. Eriksson - I don't believe that the present provisions made any distinctions. The present provisions apply only to a limited area.

Mr. Nemeth - Only to an urban renewal area. It is a 20-year abatement.

Mr. Carter - This is a good example, Katie, of our problems on initiative and referendum. The only way you could get statutory material on the ballot directly was to do it by constitutional amendment. I think this is an example of that.

Mrs. Eriksson - The second proposal headed "Transportation" follows the traditional bond issuing constitutional amendments. It provides for the issuance of general obligation bonds of the state supported by the gasoline tax for the repayment to provide both for highway and mass transit capital improvements. There are two relationships with Commission studies. One is the general debt proposal, because

the Commission has recommended a flexible debt limit based on the revenues of the state being available in a certain percentage to pay debt. The Revision Commission's proposal is the concept that the General Assembly would determine public purpose and this would allow for incurring debt and for the purpose of lending aid and credit to private corporations. It was our concept that this would include highways just as any other capital improvements and of course the Commission has proposed the repeal of specific bond issues in the Constitution. There is a difference in philosophy as well as a specific conflict. Section 5a restricts highway user taxes to highway use. The Commission has not made a recommendation on that section. This constitutional amendment would permit the opening up of highway tax revenues to some extent for mass transportation. That's not a conflict with the Commission proposal because we made no recommendation.

The third proposal is "Capital Improvements" and this is simply a big capital improvements bond issue supported by a sales tax increase. It is quite specific about the purposes as well as the amounts which would be available to cities. It is basically geared for capital improvements in cities. Again the conflict with Commission recommendations is that our flexible debt limit, if adopted, would eliminate the need for specific bond issues because the General Assembly would determine how much and the purpose for which the money could be spent, within the specified limits.

The fourth is a little different because it is not a specific bond issue. The basic purpose of the housing proposal is to validate the legislation that has already been enacted creating the Ohio Housing Development Board which is of questionable constitutionality because the Constitution prohibits the state from lending its aid and credit to private associations and corporations. The other provision involved is the section that prohibits political subdivisions from doing the same thing. Housing does involve the lending of credit to individuals and private corporations. The Commission proposals for altering Article VIII which are in question here would permit the General Assembly to declare a public purpose to lend aid and credit and would also permit the General Assembly to permit, by law, political subdivisions to do the same. Again, the Commission has made recommendations with which this differs.

Mr. Carter - I think you will find this memorandum most instructive. It's a good summary of what's in these bond issues and points out clearly what has already been done and what the Governor's proposals are. I would hope that everyone would read it, because you'll probably be asked questions about it, being a member of this Commission. We will send it to those who are not here. Julius prepared it. Now the Judiciary Report.

Mr. Montgomery - At the last meeting we completed the first five sections of Article IV. The vote is still pending on those matters but as our chairman announced, Section 1 has now passed and Section 3 has passed also. Four and five have not passed. Let's go on through the rest of it and then we'll probably have to go back if we can find the NO votes and the reasons for them, and what changes would be acceptable. Those of you who voted "NO" I hope will cooperate with the staff so we can find out what you didn't like about this or that.

We are ready to take up Section 6. This appears on page 26 and I suppose if there is a highlight to the report, this is probably the highlight inasmuch as this is the section which has to do with the selection of judges. As you know from our previous meetings, the report does recommend that selection on a mandatory basis--the Supreme Court and the court of appeals on an optional basis for the common pleas courts. The new language appears on page 27 and I guess I'd better start through it.

Mr. Montgomery then read proposed Section 6, as it had previously been amended by the Commission. There has been quite a bit of discussion on the composition of the nominating commissions which are the real guts of the merit-selection system. You will note that on the bottom of page 27 that we have left the selection, compensation, etc. up to the legislature, and there was some support for the position that we should be more specific in the Constitution in these matters since it is basic. I don't think it would be wrong to do that, particularly as we are taking away the right of the electorate to select these judges in the first instance. It seems to me that it would be perfectly proper to be more specific so we have proposed some alternate language which is before you now. The memo is dated July 10 and perhaps you would like to read that through with me. "There shall be a judicial nominating commission for the supreme court which shall be known as the supreme court nominating commission, a judicial nominating commission for each court of appeals to be known as the appellate judicial nominating commission, and a judicial nominating commission for each common pleas court for which an appointive-elective system is adopted, to be known as a common pleas judicial nominating commission. Subject to the requirements of this section, the organization of each judicial nominating commission, its number of members, their qualifications, terms of office and compensation shall be provided by law. A minority of the members of any such commission shall be elected by persons eligible to practice law in Ohio and residing within the territorial jurisdiction of the affected court. The remaining members of any such commission shall be appointed by the governor with the advice and consent of the senate from the electors residing within the territorial jurisdiction of the court who are not eligible to practice law in Ohio. Of those appointed by the governor, not more than a majority may be members of the same political party. Members of judicial nominating commissions shall serve staggered terms as provided by law. Holders of public office except members of the General Assembly and justices and judges may serve on a judicial nominating commission." We didn't [illegible] a presiding judge.

Mr. Montgomery - Many constitutions which deal with this question automatically make the presiding judge of the court affected the nonvoting chairperson. This is strictly optional. We really didn't have enough sentiment in our subcommittee to preempt that decision. If the Commission feels it's a good idea to have a member of the court participate officially on these commissions, to vote or not to vote, it would be perfectly in order and it is done. What we're doing is to diffuse the appointing authority. It follows a pretty general pattern in other states. The election of attorneys, we think, can be handled quite simply by the Supreme Court clerk. He has a list of registered attorneys within the territorial jurisdiction of each court and the election can be conducted by mail. We think the governor should have some check on his power and the senate would have to confirm his appointments. The legislature provides other things, the number, compensation, etc. It is pretty well insulated from political interference and protection. So that is an alternate. Are there any questions?

Mr. Russo - Does that mean any member of the bar is eligible to be elected to this commission?

Mr. Montgomery - He has to reside within the territorial jurisdiction of the court.

Mrs. Hunter - The people licensed to practice law elect the attorney members of the judicial nominating commission. They submit nominations to the Clerk of the Supreme Court and ballots are prepared by the clerk who sends out the ballot along with a certificate which the attorney must sign indicating that he is a licensed member.

Mr. Russo - There is no secret vote then.

Mrs. Hunter - He returns the ballot with the certificate. There is a provision whereby the certificate is in one envelope and the ballot in another. There are two ways of nominating that I have found in the various states which provide for such an election: by nominating petition by someone who is interested and circulates his own petition, or an attorney who submits a petition nominating someone else along with a signed consent of the nominee.

Mr. Russo - This is the same as electing judges. You might as well elect the judges, so far as I am concerned.

Mr. Carson - It seems to me that the concept has been changed around from the original proposal which was that lawyers wouldn't control the commission. This seems to give lawyers the right to have a minority, one less than the number of nonlawyers.

Mr. Montgomery - This is just an alternate suggestion. We're perfectly happy with the language first drafted, but there have been discussions along this line, and we thought we ought to respond to them and point out that there are other ways to do it. Now any of these can be tempered. The governor can make all the appointments. You can do away with the election of lawyers completely. Nothing is cast in concrete. What we've done here is to recognize that there will be a separate nominating commission for each level of court. This provision is new and designates how they are to be selected - by persons eligible to practice law living in Ohio within a territorial jurisdiction and the governor is the appointing authority for nonattorney members with the advice and consent of the senate. It prohibits justices from serving. Any of these are debatable or negotiable points. As it stands now, it is in the hands of the legislature to provide for all of this. The legislature can do this on their own. It does not have to be constitutional. It can be all statutory.

Mr. Carson - Are you recommending this?

Mr. Montgomery -No, the committee report stands, but we thought we should have some alternate information available to show you what other states have done, if you didn't like the original proposal.

Mr. Russo - I think lawyers should be precluded entirely.

Mr. Montgomery - I think consideration was given to it but I don't think it is advisable. You want a commission that is capable of making an intelligent selection and members of the bar are more qualified from a technical point of view. How good am I at deciding how good a doctor is? I'm not very capable. Our area of expertise is limited and that's to recognize the value of a balanced commission.

Mr. Russo - To follow that argument, the medical board is doctors. So let's make the entire board attorneys. He just pointed out that those in the profession should know best. Let's make it 100% professional.

Mr. Nemeth - The basic concept of nominating commissions is that there are essentially three elements interested in what men serve as judges: First there are the judges themselves, the attorneys who practice before them; and public members. Presence of lay members on the nominating commissions would guarantee that the general public is represented. As far as I know, there is no nominating commission anywhere in the United States of all lawyers or just attorneys and judges. Nominating commissions have representatives of all three groups.

Mr. Russo - This precludes the judges.

Mr. Montgomery - It might be a good idea to have a nonvoting judge as chairperson to convene the group, maybe outline some of the duties that a judge might be expected to perform, orient the group. This would be perfectly in order. On the supreme court nominating commission, it could be the chief justice. For the court of appeals it could be the presiding judge of that district. Some provide that he vote only in the case of a tie. Otherwise he would have no vote at all. Remember that this commission is only selecting a panel of three. They're submitting three names to the governor. So they're not really appointing a judge. They're screening out those that would not make good judges and recommending three people who would be capable of handling it. The governor makes the final decision.

Mrs. Sowle - I notice that there is a difference between these proposals and that is the number from a given political party. The committee proposal says not more than one-half. The alternate says not more than a majority.

Mr. Wilson - Supposing you have an even number of people appointed?

Mrs. Eriksson - I did that in the draft because I think you can always figure a majority or minority. There isn't always a half.

Mr. Wilson - That means there would be at least one in the minority. That's my interpretation.

Mr. Carter - I have a problem with that language too. I was wondering if "not more than a simple majority" might not solve that.

Mr. Wilson - Not more than a majority means not unanimous. How can you appoint not more than a majority when you have only two political parties? If you appoint 3 from one party and one from the other you are appointing a majority.

Mrs. Eriksson - I would say that that would not be the normal interpretation of the word majority. If you have seven, you couldn't appoint more than four of one political party.

Mr. Wilson - 5 and 2 is a majority; 6 to 1 is a majority. The only way you could appoint a majority would be to appoint them all from the same party.

Mrs. Eriksson - I think that normally in the statutes when the expression is used it means one more than half.

Mr. Russo - Are the attorneys to be half from one political party and half from the other?

Mr. Montgomery - No, there's no logical way to screen the attorneys on politics, when they are being elected as provided here.

Mr. Carter - It also depends on what the legislature says. It says that this shall be provided by law.

Mr. Montgomery - We could have the governor make all the appointments and have him observe the over-all majority limitations. And not diffuse the appointing authority. That can be done. I wonder if we could get a consensus. The proposal now stands

that the legislature does it all. We can go through these by major items--would you prefer it that way or would you prefer to deal with it in the Constitution? How do you feel about judges serving on these commissions? A judge chairperson with no vote. Would you please raise your hands on that basis. The consensus seems to be that we would not provide for a chairperson, a justice for a chairperson. How do you feel about the bar members being elected by their brethren as opposed to being appointed by the governor? If you favor the election would you raise your hand.

Mrs. Sowle - Is there any other way that other states choose the members of the bar? Might bar associations appoint them?

Mr. Montgomery - Yes.

Mrs. Sowle - I'm not sure which I would like and I'm not sure I would like to see that frozen in the Constitution. I would like to see the General Assembly do it one way and then change it if they wished to. I would like to ask a question about members of the bar, however. You could have a majority of members of the bar, as I read it, because there is no prohibition against the governor appointing members of the bar.

It was noted that there was such a prohibition in the alternate.

Mr. Montgomery - So there is no substantial feeling for the election of attorney members.

Mr. Carter - Shall we leave it up to the legislature, or do we want to put more restrictions in the Constitution?

Mr. Montgomery - Right now, we're right back where we were originally.

Mrs. Orfirer - May I suggest that it may be more effective to take a vote on whether the Commission wants the legislature to do all of it or to divide it in some way?

Mr. Montgomery - How do you feel about that? Are you willing to let the draft stand as is and let the legislature determine all these matters, except those that we have outlined such as the political division and less than half being members of the bar and deleting members of the General Assembly from the eligible group? Can I have a straw vote on that?

Mr. Skipton - We haven't decided the basic question yet.

Mr. Montgomery - That seemed to be the basic subject so we thought to rest on it for a little while at least. Can I have a straw vote by the members who are currently in favor of letting the legislature do all these things except those things that are presently in the draft? That means then that this alternate language which was prepared this morning will not be necessary. It was to show you what could be done if you had any ideas of diffusing the appointing authority.

Mr. Wilson - I have reservations about this so-called screening commission, which is what it boils down to. But even if I'd go along with that, on page 28 of the draft Section C says the judge "shall serve an initial term of two years from the date of his appointment and until February 15 following the next general election occurring in an even-numbered years." To me that looks as if we could serve one day less than four years, as an appointive person. I don't think he should go that long without being subject to a vote of the people. You could say "or" February 15.

Mrs. Eriksson - It could be, of course, substantially more than two years. It was put in this way so that it would bring everybody's terms up even.

Mr. Wilson - Couldn't you do it with "or"?

Mrs. Eriksson - No, because then his term might be as short as two months.

Mr. Wilson - That's all right with me. That's better than one day short of four years.

Mrs. Eriksson - The reason for at least two years is that there would be an opportunity for some judgment as to his performance.

Mr. Wilson - But this could lead to one day less than four years. That's too long.

Mr. Montgomery - Well, it is six now, so you're two years better. It's two years in most instances.

Mr. Wilson - A minimum of two and a maximum of three years and 364 days.

Mrs. Sowle - Going back to the nominating commission, I'm not sure that I would like to see an exception for judges written there, because I think the idea we talked about a few minutes ago was fairly clear. We don't want to keep the General Assembly from following its option in appointing the presiding judge to serve.

Mr. Montgomery - I guess we felt that in the subcommittee that judges serving as voting members of the commission might be in a conflict of interest situation. It might be just as well if they were excluded from the vote, but their participation can be solicited.

Mr. Montgomery moved the adoption of Section 6 as presented in the report.

Dr. Cunningham seconded the motion.

Mr. Carson - Are you excluding judges from the commission?

Mr. Montgomery - No, not now.

Mr. Carson - How about members of the General Assembly?

Mr. Montgomery - Yes. We discussed this at one of our meetings and if we're going to give all the authority on the creation of these commissions to the General Assembly we didn't think it a good idea that they could appoint themselves on the commission that they create. We just felt that they shouldn't serve.

Mr. Carter - The concern was that they could pass a law that says the commission shall be members of the General Assembly. The way it is left now is that it is entirely up to the legislature. If you had the governor appoint I think that would take care of it.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer and Mrs. Sowle. Those voting "NO" were Messrs. Carson, Russo, Skipton and Wilson.

The motion was adopted by a majority of those present. The roll call will be kept open until the next meeting in order to give absentees a chance to vote.

Mr. Montgomery - All right, are you ready for the next section? This is Section 7 on page 7. The former section was repealed in 1968. "Judges shall devote their full time to performance of their official duties. The courts of common pleas may appoint magistrates from the attorneys licensed to practice law in the state and who need not devote their full time to performance of judicial duties. The number of magistrates who may be appointed by each court of common pleas and their compensation shall be prescribed by law. The manner of the appointment and removal of magistrates and their duties (we probably should add the word "powers") shall be prescribed by the supreme court pursuant to its power of general superintendence over all courts in the state." The matter of magistrates has been discussed before. We think it is necessary that minor cases be handled in this way. These are judicial officers. They do not take the place of referees and other judicial officers but they would have judicial powers and their orders would be appealable. It is not a fourth tier court, we'd like to stay with the three-tier court system, but some of the county judges now who are serving on a part time basis. This allows for magistrates to do a lot of the minor judicial work. Are there any questions?

Mrs. Sowle - When you say their decisions are appealable, you're not referring to an appeal which is really a trial de novo?

Mr. Montgomery - The Supreme Court could provide for it but I don't think that would serve any purpose. If they're going to be judicial officers, they are members of the bar and I don't think a trial de novo would be necessary. Traffic cases, minor civil matters--these could be handled this way.

Mr. Montgomery moved that Section 7 be adopted with the addition of the words "powers and" before the word "duties" in the third from the last sentence.

Mrs. Orfirer seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton and Mrs. Sowle. Mr. Carson and Mr. Russo voted "NO". The motion was adopted by a majority of those present and the roll call will be kept open until the next meeting.

Mr. Montgomery - Could I ask what your opposition is on the magistrates?

Mr. Russo - I am not clear as to how the municipal courts are affected.

Mr. Montgomery - There are no municipal courts. The trial court system incorporates the municipal courts. Municipal courts become common pleas courts. The part-time judges will become magistrates under the supervision of the common pleas court. This was created in Section 1, and we created a three-court system.

Mr. Russo - Then those judges now sitting in municipal court would stand for election.

Mr. Montgomery - They will have the opportunity to become common pleas judges. Or if they want to be part-time judges, they will be eligible to be appointed as magistrates. It's a restructuring. The municipal county court judges will staff the enlarged common pleas court.

Mr. Russo - Those judges stand for election after the adoption of this?

Mr. Nemeth - Unless the people choose otherwise.

Mr. Carson - My objection is the sentence that provides that the manner of the appointment and their powers and duties shall be prescribed by the Supreme Court. The same objection I had to a similar provision in Section 5 giving the Supreme Court control over employees. The court to which they report should have control over appointments.

Mr. Montgomery - Would you be willing to let the legislature take care of it?

Mr. Carson - The first sentence says that the court shall appoint magistrates. I don't feel that a judge of common pleas in Cuyahoga County ought to ask anybody else about his appointments. Compensation, that's OK.

Mr. Carter - Do you interpret that that way, Nolan?

Mr. Carson - It could mean that every appointment must have the approval of the Supreme Court.

Mr. Montgomery - It's a procedure. It's just so you would have a uniform way of doing it. There is no intention here to supersede the local court's appointing authority.

Mr. Carson - It could be so construed.

Mr. Montgomery - We can tighten up the language then. Do you have any objection to the general concept of magistrates?

Mr. Carson - No. I don't really understand what their duties would be or what the appellate procedures are.

Mr. Montgomery - We have the Idaho statute which spells out in great detail what magistrates can and can't do and after they get through with that they can do whatever else the supreme court thinks it would be good for them to do. It's wide open. They are being extensively used. In a three-tier court system there has to be some mechanism to handle this kind of thing. Not enough of this work is meaningful enough to pay that uniform common pleas salary. It's too expensive.

Mr. Carter - Well, I would agree with Nolan that if the language means that the Supreme Court would have the veto right on the appointment of magistrates, I'm not in favor of that either.

Mr. Montgomery - It wasn't intended that way, but that will give the staff some basis for redrafting if necessary. We said "manner of the appointment" shall be provided.

Mr. Carter - If we were to say something like "the manner of the appointment and removal of magistrates by the common pleas court." That would make it clear that local courts can decided who they want and who they don't.

Mr. Huston - Would the word "procedure" in lieu of the word "manner" be better?

Mr. Carter - Bob, I gave some thought to that too, but I don't think it really changes things.

Mr. Carson - Why is the sentence necessary?

Mr. Nemeth - The sentence was thought to be necessary because the committee didn't want magistrates to be subject to impeachment, for example, or being capable of being removed by impeachment only, or by the statutory methods or by the rules of the Supreme Court. We wanted to provide for more latitude in the removal and in the appointment concept too.

Mrs. Sowle -Could we have something like "the court of common pleas shall have sole power to remove magistrates?"

Mr. Montgomery - There are lots of ways, willy nilly of doing it. We wanted some uniformity of their duties and things like that.

Mr. Carter - That raises the question of dropping the part about the manner of removal of magistrates.

Mrs. Orfirer - Just put the powers and duties and drop the first clause.

Mr. Montgomery - Would that satisfy you, Nolan?

Mr. Carson - I do have some questions. The proposal that the majority here voted "YES" on is that the Supreme Court would not be elected by the people, and this constitutional amendment gives them the power to prescribe the duties and the powers of magistrates, to adopt rules without any guidance from the legislature, an elected body, as to what kind of powers they should have. They might be doing 90% of the work of the courts, under the rules that might be adopted.

Mr. Montgomery - You'd rather have it handled by the legislature, which is what I suggested initially. "As provided by law." The appointment of magistrates and their powers and duties shall be prescribed by law." That's a safer way of doing it. There's no question about it.

Mr. Russo - You have someone making judicial decisions who is not elected and never will be. Let's see what the vote is and if we have to redraft it, we will.

Mr. Montgomery - Let's go to Section 8 which appears on page 43. Former Section 8 was repealed in 1968. We have a new section 8. "The salaries of all judges and expenses of the judicial department shall be paid from the state general fund as provided by law. There shall be a unified judicial budget as provided by law." I think that's pretty self-explanatory. Now they have a real hodge podge. It's impossible to determine what our court system even costs at the lower levels. We know what the Supreme Court and the courts of appeals cost.

Mr. Montgomery moved the adoption of Section 8 as presented by the committee.

Dr. Cunningham seconded it.

Mr. Montgomery - Are there any questions on this section?

Mr. Carson - Since there won't be a municipal court any more, if the state is going to pay all the expenses, they ought to get all the fines and income. I suppose that is statutory and can be changed.

Mr. Montgomery - That fine business is a real nightmare if you have ever tried to trace those things among subdivisions. Another element is that the criminal law is being used as a revenue raising effort and you certainly get some conflicting goals when you do that. It's inherent in a unified budget that all the fines go to the state. If you have a municipal court in a town that's hurting, the fines are much

higher than in a town that has a balanced budget.
Mr. Skipton - Who is going to interpret the word "unified?"

Mr. Montgomery - The Supreme Court some day.

Mr. Skipton - When you have a budget someone has to put the pieces together. There is a big, big gap here as to--what you're saying is that the Supreme Court will control all funds of all courts. Everyone will know what is recommended here, that the Supreme Court will have control of all funds.

Mr. Montgomery - It gets the budget together, and presents it to the legislature.

Mrs. Eriksson - It says "as provided by law". It would mean that the General Assembly would specify how the budget was to be spent.

Mr. Skipton - I don't see how you can have one budget without the control of that budget in one pair of hands.

Mr. Russo - Can the Supreme Court mandate that budget? Or will we lack justice because the General Assembly doesn't appropriate the money?

Mr. Nemeth - The legislature traditionally has the purse string. What underlies the unified judicial budgets of other states is a recognition by the legislature of the powers, duties and prerogatives of the judicial branch, and the reverse of the powers, duties and prerogatives of the legislature by the court. There isn't any place that I know of where the budget is mandated. It's a reciprocal political process.

Mr. Russo - I want to see justice is carried out completely and I thought maybe it could be spelled out in the Constitution. You don't want to shackle the Supreme Court at all.

A roll call was taken on Section 8. Those voting "YES" were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Russo, Skipton and Mrs. Sowle. None voted "NO." The motion was adopted by those present and the roll call will be kept open until the next Commission meeting.

Mr. Montgomery - The next section is Section 13 which appears on page 47. Julius, could you tell us in a word why this is being repealed?

Mr. Nemeth - For appellate judges you won't use this procedure for filling vacancies any more. It would only be applicable to common pleas court judges and its provisions have been put in Section 6.

Mr. Russo - The sections would have to be lumped together on the ballot.

Mr. Montgomery moved the repeal of Section 13.

Mrs. Sowle seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer and Mrs. Sowle. Mr. Carson, Mr. Russo and Mr. Skipton voted "NO." The motion was adopted by those present and the roll call will be held open until the next Commission meeting.

Mr. Montgomery - Section 15 appears on page 49. The legislative committee recommended that this section be repealed as unnecessary, an outmoded restriction, requiring an extraordinary majority to add judges. We concur.

Mr. Montgomery moved the repeal of Section 15

Dr. Cunningham seconded the motion.

Mr. Carter - As I understand what you were saying, Don, is that the legislative committee thought that this should be done, and so does the judicial committee. Is that right? So we have the concurrence of both committees on this.

Mr. Montgomery moved the repeal of Section 15.

Dr. Cunningham seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton and Mrs. Sowle. Mr. Russo voted "NO". Mr. Carson abstained from voting. The motion was adopted by those present and the roll call will be kept open until the next Commission meeting.

Mr. Montgomery -The next Section is No. 17 which appears on page 50. This is a method of removing judges which has never been used, and is surplusage in the Constitution. The committee recommends its deletion. We have adequate and better ways to remove judges.

Mr. Montgomery moved that Section 17 be repealed.

Mrs. Sowle seconded the motion.

Mr. Carson - May I ask how they are removed?

Mr. Nemeth - They are subject to impeachment, of course, and they are also subject to removal under Rule 6 or a combination of Rules 5 and 6 of the Rules of Superintendence Also, in Chapter 3. of the Revised Code there is one method which applies to all public officers including judges, by which a citizen could instigate proceedings which could end up in removal of a judge. The second statutory method is outlined in Section 2701.11 and 2701.12 and applies exclusively to judges. That section sets out certain causes for which judges may be removed and it makes removal specifically subject to the rules of the Supreme Court, and that is Rule 6 that I referred to. In the statute it is provided that there shall be a commission of five judges which is also provided for under the rule, appointed by the Supreme Court, and there's another method which is purely rule-based. This applies to attorneys also. I have been informed, however,that in actual practice there are very few cases before the Board on Grievances and Discipline, and most judicial resignations come as a result of threatened action before the Board. The Board's recommendations are recommendatory and the ultimate action does rest with the Supreme Court.

Mr. Montgomery - Any other questions?

A roll call was taken on the motion. Those voting "YES" were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo and Skipton and Mrs. Sowle. None voted "NO." The motion was adopted by those present and the roll call will be held open until the next commission meeting.

Mr. Montgomery - We now are ready to consider Section 18 on page 52. We are recommending the repeal of this section as unnecessary. It became part of the Constitution in 1912. The reason for its addition is uncertain although the reason appeared to be the issuance of ex parte orders in chambers. However, since the powers of any court are derived from the Constitution, the statutes, or to a limited extent are inherent this provision is, in one sense, limiting and in another sense simply surplusage.

Mr. Montgomery moved the repeal of Section 18

Mr. Heminger seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo and Skipton and Mrs. Sowle. None voted "NO".

Mr. Montgomery - The next is section 19. Courts of conciliation do not fit the format of a three-tier court system. They have never been used. If they are ever necessary they could be created as subject-matter divisions of the common pleas court.

Mr. Montgomery moved that Section 19 be repealed.

Mr. Heminger seconded the motion.

Mr. Russo - I suppose the duties that might come under this would come under magistrates.

Mr. Montgomery - I suppose the domestic relations division of the common pleas courts would be closer. It means family, personal matters, more than courts of limited jurisdiction.

Mrs. Eriksson - There aren't any in Ohio.

Mr. Montgomery - There are in Canada, among Indians and it's coming back in the inner cities. It's a neighborhood squabble settler.

Mr. Nemeth - The committee is not recommending that these courts be established as divisions, but it could be done.

Mr. Russo - There's a fundamental principle here that says its decisions are not binding unless both parties agree to it. In front of a magistrate, the magistrate's finding shall be final unless it goes through the courts. Isn't that correct? The magistrate concept means something that the judges are too busy to handle.

Mr. Montgomery - Minor things that judges handle that don't require as much judicial skill and knowledge. This is a different kind of a court and it's never been used. It's been in there since 1912 and nothing has ever been done with it and that's probably the biggest reason for getting rid of the section.

Mr. Carson - Under the Rules of Civil Procedure, in common pleas courts, arbitration by a referee, I hope, can still go on. I wouldn't think they would want a magistrate to decide - not make arbitration binding.

Mr. Montgomery - All it does is to take constitutional recognition away and we decided as a format that we don't want any other courts, mentioned in the Constitution. We want to provide for all the courts. It conflicts with Section 1.

Mr. Montgomery moved the repeal of Section 19.

Mr. Heminger seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton and Mrs. Sowle. Mr. Russo voted "NO." The roll call was adopted by a majority of those present and the roll call will be held open until the next Commission meeting.

Mr. Montgomery - The next item is Section 20 which is a technical section and provides for the style of process only. It is unnecessary but we see no reason to change tradition. It's so much a part of legal proceedings, so all we are suggesting is to change the section number from 20 to 9. It reads "The style of all process shall be The State of Ohio and all prosecutions shall be carried on by the authority of the State of Ohio and shall conclude against the peace and dignity of the State of Ohio." This is just a renumbering.

Mr. Montgomery moved that Section 20 be amended by renumbering only.

Mrs. Sowle seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo and Skipton and Mrs. Sowle. None voted "NO". The motion was adopted by a majority of those present and the roll call will be held open until the next Commission meeting.

Mr. Montgomery - Section 22, the Supreme Court Commission. This has been used twice since 1875 but in the last century. The Legislative-Executive Committee of this Commission recommended its repeal. It was passed by the full Commission and the General Assembly but it failed in balloting. We think the people didn't understand it.

Mr. Montgomery moved the repeal of Section 22.

Dr. Cunningham seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo and Skipton and Mrs. Sowle. None voted "NO." The resolution was adopted by a majority of those present and the roll call will be held open until the next Commission meeting.

Mr. Montgomery - We have one more and we promised to conclude by 4 o'clock. Section 23--service of a judge on more than one court. This is inconsistent with the concept of a three-tier court system, and the whole rationale of our report. So we are recommending that it be repealed.

Mr. Montgomery moved the repeal of Section 23.

Mr. Heminger seconded the motion.

A roll call was taken on the motion. Those voting "YES" were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton and Mrs. Sowle. Mr. Carson abstained from voting. The motion was adopted by those present and the roll call will be held open until the next Commission meeting.

Mr. Montgomery - When we have final tallies on the section we will go through numerically and try to rephrase, redraft, so those of you who do have negative positions on these sections; we may be calling on you for a little advice and counsel as to how things could be improved.

Mr. Carson - I would like to suggest that we give Mr. Montgomery and his committee a vote of commendation for a year and a half of study and work.

Mr. Heminger seconded the motion.

A voice vote was taken on the motion, with everyone voting "AYE."

Mr. Carter - Don has done a fine job on this. It's a very arduous undertaking and it's no surprise that it did not receive overwhelming approval. No one expected it to, I am sure. We will need some time for the votes to come in. I would be hopeful that Sections 4 and 5 are not going to get a 2/3 vote of the Commission and then I think it would be appropriate to all of the members of the Commission and the committee to have a discussion of these items which have not passed to see if we can't come to a compromise, if you will, an approach that will gain the 2/3; my recommendation would be not to try to have an August meeting so that there will be time for the committee and the staff to get some input so we could have a discussion of these matters at the next meeting. Don, you may want to have a committee meeting on these and you might want to contact those who had negative votes on these.

Mr. Cunningham - When would that be?

Mr. Montgomery - It's too early to set that date.

Mr. Carter - I would think the third week of September. We'll send out cards the latter part of August to find out what would be an acceptable date.

The meeting was adjourned.

Ann M. Eriksson, Secretary

Richard H. Carter, Chairman

MINUTES

Ohio Constitutional Revision Commission

October 16, 1975

The Ohio Constitutional Revision Commission met on October 16 at 1:30 p.m. in House Room 11 in the State House in Columbus.

Present at the meeting were the Chairman, Richard Carter, Mr. Montgomery, Mr. Wilson, Mr. Huston, Representative Roberto, Representative Norris, Mr. Heminger, Mr. Skipton, Mrs. Sowle, Mr. Shocknessy, Senator Applegate, and Senator Gillmor.

The minutes of the July 10 meeting were approved as mailed.

Mr. Carter - Joe Bartunek's committee on the Bill of Rights considered the problem of grand juries and civil trial juries, and decided that they did not want to tackle these problems in the committee. Some of the members had a good deal of interest in it, and Joe strongly recommended that the Commission not overlook these questions. Al Norris has agreed to head up a special committee for this specific assignment. Just a one job committee. The people who have agreed to serve on this committee include Paul Gillmor, Bruce Mansfield, Katie Sowle, Joe Bartunek, and Marc Roberto. Al, would you like to make some comments on its purpose and what you are trying to accomplish?

Mr. Norris - It was ou feeling on the committee that there is enough controversy stirring around the use of the grand jury ..... and also the use of trial juries in civil damage cases. We would not be putting our best foot forward if we just glossed over these as a commission. We ought, at least, to investigate those areas very thoroughly. We may well decide to do nothing, but at least it has to be explored in some depth. Ann is already working on building some testimony for our meetings. I expect to have, at most, only a couple of full-day hearings, and to bring in distinguished scholars on both sides of the arguments. And then we will be in a position, I think, where we will have pretty much exhausted the thinking part and decide whether to recommend any changes.

Mr. Carter - Very good. We have received a copy from the state auditor's office of the audit of the commission. I have reviewed it and it has been sent to a couple of members who requested it. I think you were all given the opportunity to get copies if you so wish. I think it's a very satisfactory report. As I recall, their big complaint was that we had $1.76 too much in our petty cash account that wasn't properly accounted for. They found everything else to be in good shape except that the other complaint they had was that the minutes weren't properly signed in all cases, and that's certainly a very minor thing. So we came through in great shape which is no surprise. I will circulate a copy of it, and if any of you want a copy of it you're welcome to have it. I wanted to comment on the legislative program just briefly. Ann sent out a memorandum bringing everyone up to date. She pointed out to me today that there was one omission it it. HJR 37 should be added on the same status as HJR 36, both on the executive branch. As soon as the election is over, we plan a meeting with the leadership of the General Assembly and with the expectation of bringing most of these matters to a head early enough in the session so that they can get on the June ballot. Action by the General Assembly we hope will be in the first quarter of the year. It may require some support from Commission members. I'm sure it will, in those areas in which each of you have a certain degree of expertise, and would welcome any thoughts that anyone has as to how we could

expedite and make more effective the last stage of the journey as far as the commission's activities are concerned on all of those matters. Is there any comment that anyone would want to make on that area? Particularly from our two legislative members?

Mr. Norris - Representative Roberto and I, as senior House members, will volunteer to meet with the speaker. We're at your service.

Mr. Carter - That's a marvelous suggestion. We will try to see if we can set up a late afternoon or dinner meeting in the evening when it would be suitable. So we'll keep you posted of the dates. That's an excellent idea .

Mr. Norris - The General Assembly is coming back for one day in November, so you might try to swing that.

Mr. Carter - Thank you very much. It has been suggested and the chair thinks its a pretty good idea to have the commission direct its attention and perhaps issue a special report, at least a memorandum to the commission members, and hopefully a report to the legislature and to the public, on the status of state and local financing in so far as the Constitution is concerned in the State of Ohio. This is, of course, triggered by the nationwide publicity and problems that are being encountered. Our situation in Ohio is very markedly different than it is in New York and some of our sister states and we see a number of reasons why this would be done. One, as a matter of education. Secondly, as a matter of information to the public. We would hope that this would generate press releases and that sort of thing which would be of an informative nature. After the November ballot and we know what the status of the four bond issues or questions on the finances is, we can put the situation in perspective thereafter, and hopefully leading to some further legislative consideration of some of the pending proposals before it from the commission. Those are generally the objectives we have in mind. I am proposing we have the staff prepare a draft of it and submit it to various members of the commission to get their input. I've already talked to some of you about this. I'm wondering if we have any comments one way or the other from members of the commission that are here as to whether there would be any problems that they would see in so doing. Al?

Mr. Norris - Mr. Chairman, I can see us doing this and hanging our hat on some of the proposals that are pending. I'm wondering whether or not we want to do this. We have at least one non-partisan group out there - The Ohio Public Expenditure Council, they deal in this area. Would it be worth trying to interest them in a cooperative project? We would expect this to be normally a part of their general work and concern.

Mr. Carter - We're primarily talking about the constitutional aspects...

Mr. Norris - I see.

Mr. Carter - of state and local financing. Not getting into the statutory. I think it is a good thought. We ought to send them a draft of this and get their thoughts and input as to what they might want to contribute.

Mr. Montgomery - I think the Chamber (of Commerce) would probably want to be heard too. They would probably want to present testimony on that subject if it's open to hearing.

Mr. Carter - We are trying to make this more or less of a factual, scholarly report on the status of state and local financing in the state of Ohio, particularly as affected by the Constitution. It would not constitute any recommendations on the part of the Commission at all. Those have already been made.

Mr. Montgomery - What I'm saying is, as Al suggested, if you have some supportive staff, as Al suggested, in other areas that work on this almost on a daily basis, it might save a lot of time and trouble.

Mr. Carter - That's a good thought. Let's incorporate that in our thinking. Any other thoughts on the matter?

Mr. Norris - I think a study of this type would be very good, whoever does it. I don't know that we have to do it all ourselves. I think it would serve a very good purpose. I think we ought to include other people in it.

Mr. Carter - Okay. We will proceed with the committee reports. Since Craig Aalyson could not be present today, I'll handle the What's Left Committee. We have already distributed a report on the items that the committee has approved and considered to date. The pending matters include such items as the state militia, employment of persons in penal institutions, public institutions, apportionment and districting - we don't know how much we want to get involved in that, but we certainly can't ignore it, amendment of the Constitution by other than legislative means, and a number of minor items. So that this committee has some more activities ahead of it and although they are not earthshaking, except the apportionment and districting, it will be spending some time on these matters. Now on the education and Bill of Rights Committee, I am sure you will recall receiving just within the last week or so, the report on education. There are no recommend - ations for changes in the report. I happened to read it over the weekend and thought it was an excellent report and I think it does credit to the commission and its staff. With respect to the bill of rights, that report to the commission is being prepared currently. One matter has come up that Ann has circulated to all of you through the correspondence from Mr. Swope, who's a township trustee who has had a lot of thoughts and he has continued to write letters to the commission. He has some interesting points and it is too bad that they were not fed into the hopper early enough for this committee to consider them. We are going to be in touch with Joe to find out if he wants to give them committee consideration, but at the very least, we plan to make them part of the records of the commission so that they will be available to people who will be concerned with this area thereafter. Now to the question of the judiciary article, and for that purpose I will happily relinquish the chair to Mr. Montgomery.

Mr. Montgomery - As you know, we are perservering in spite of the fact that the returns on the voting have not been sufficiently positive to give us what we could call a real consensus that we can go to the legislature with.

Mr. Carter - I should have made it a matter of record as to the actual results of the voting which have to be a part of our commission records. You all have the "Status of Article IV Proposals" in front of you. This sheet identifies those sections that were passed and those that failed. Of the first group, sections 1,2,3, were passed at the July meeting. On the second page, sections 4 and 5 failed at the July meeting, so those are now ancient history. Now the votes that

were being held until this meeting then included the balance of the sections. Now as indicated, sections 8,9,17,18,19, and 22 have received the necessary 22 votes which is 2/3 of our commission membership. The ones that failed were sections 6,7,13,15, and 23. Is there anyone present who has not voted who wishes to do so?

Those voting "YES" on Section 6 were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mrs. Sowle, Mrs. Panehal, Messrs. Norris, Roberto, Mussey, Guggenheim, Aalyson, Unger, and Clerc. Those voting "NO" were Messrs. Carson, Russo, Skipton, Wilson, Maier, Gillmor, Bartunek, Zimmers, Van Meter, Mansfield, Mrs. Pope, and Mr. Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 7 were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mrs. Sowle, Mrs. Panehal, Messrs. Skipton, Wilson, Maier, Norris, Gillmor, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Clerc. Those voting "NO" were Messrs. Carson, Russo, Bartunek, Zimmers, Van Meter, Mrs. Pope, and Mr. Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 8 were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo, Skipton, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Van Meter, Clerc. Those voting "NO" were Messrs. Gillmor, Bartunek, Zimmers, Mrs. Pope and Mr. Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 9 were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Russo, Mrs. Sowle, Mrs. Panehal, Messrs. Skipton, Wilson, Maier, Norris, Gillmor, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Van Meter, Mrs. Pope, Mr. Clerc. Those voting "NO" were Mr. Bartunek, Mr. Zimmers, and Mr. Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 13 were Messrs. Carter Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Clerc. Those voting "NO" were Messrs. Carson, Russo, Skipton, Gillmor, Bartunek, Zimmers, Van Meter, Branstool, Mrs. Pope. Mr. Shocknessy passed.

Those voting "YES" on Section 15 were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Clerc. Those voting "NO" were Messrs. Russo, Bartunek, Zimmers, Van Meter, Mrs. Pope, Mr. Branstool. Messrs. Shocknessy, Carson, and Gillmor passed.

Those voting "YES on Section 17 were Messrs. Carson, Carter, Cunningham, Heminger, Montgomery, Mrs. Orfirer, Mr. Russo, Mr. Skipton, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Clerc. Those voting "NO" were Messrs. Bartunek, Zimmers, Van Meter, and Branstool. Mr. Shocknessy and Mrs. Pope passed.

Those voting "YES" on Section 18 were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Russo, Mr. Skipton, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Mrs. Pope, Mr. Clerc. Those voting "NO" were Messrs. Bartunek, Zimmers, Van Meter, Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 19 were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Gillmor, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Clerc. Those voting "NO" were Messrs. Russo, Bartunek, Zimmers, Van Meter, Mrs. Pope, and Mr. Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 22 were Messrs. Carson, Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Russo, Mr. Skipton, Mrs. Sowle, Mrs. Panehal, Messrs. Wilson, Maier, Norris, Gillmor, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Mrs. Pope, and Mr. Clerc. Those voting "NO" were Messrs. Bartunek, Zimmers, Van Meter, and Branstool. Mr. Shocknessy passed.

Those voting "YES" on Section 23 were Messrs. Carter, Cunningham, Heminger, Huston, Montgomery, Mrs. Orfirer, Mr. Skipton, Mrs. Sowle, Mrs. Panehal, Mr. Wilson, Messrs. Maier, Norris, Roberto, Mussey, Guggenheim, Mansfield, Aalyson, Unger, Clerc. Those voting "NO" were Messrs. Bartunek, Zimmers, Van Meter, Mrs. Pope, and Mr. Branstool. Messrs. Carson, Gillmor, Shocknessy, and Russo passed.

Mr. Montgomery - If you will look at the list of sections that failed, we would like to present to you some redrafts, which we feel after two committee meetings, and after some pollings of the negative or pass votes, we think some consensus could be arrived at. The committee has worded very diligently trying to effect some compromise here that most of us could recommend to the legislature. So I think we will just approach it on an item by item basis.

Mr. Carter - Don, may I interrupt you once again, it's my understanding from talking with Ann, and I think this is a matter which should be before the commission as information, that there is likely to be a minority report filed on certain aspects of the judicial article because of the earlier failure of some of the proposals before it. And that the reason I want to make that known is that some of you may want to participate or be a part of that minority report. Although it may be a majority of the commission, it's a minority in the sense of less than 2/3, and I would certainly invite you to make your wishes known in that area. You might be thinking about that as we go through these changes.

Mr. Montgomery - Do you see any inconsistency in approving some of these provisions and still sending in a minority report?

Mr. Carter - I do not. You can support, I think, whatever the Commission comes up with and still have a minority view on something you thought should have been adopted.

Mr. Skipton - Are you going to call it a minority report, or dissents, or what?

Mr. Carter - Yes, it's not a minority report in some cases, I'm sure.

Mr. Montgomery - Well, let's wrestle with that after we see what we can accomplish, to see how strong the time ought to be.

Mr. Nemeth - May I ask, before we begin, whether a motion for reconsideration would be in order at this time, or something of that nature?

Mr. Carter - We have a parliamentary procedure problem. What we have done in the past, on rather an informal basis, when something fails, is to refer it to the committee for them to give further consideration and come back with some alternative proposals. Now, what has happened in this case is that we have not had a meeting in the meantime, and I didn't think it was worth calling a special meeting to formally resubmit it to the committee. I felt everyone would want this matter to be given further consideration, so I asked the committee to go ahead and do this.

Mr. Norris - Do we have a quorum?

Mr. Carter - Yes, we do.

Mr. Norris - I could move the reconsideration, and everybody still gets to vote the way they want on the sections.

Mr. Skipton - I'd prefer to make a motion that we refer matters to the Judiciary Committee and ask them to make a report. We can do that now, and they can make the report 30 seconds later. I so move.

Mr. Norris - I'll second the motion.

The motion was adopted

Mr. Montgomery - The committee anticipated your good judgment, and we are now ready to submit a revised report. Julius, let's talk about the redraft of section 4.

Mr. Nemeth - As you will recall, in the original committee report the major change in section 4 was to remove the probate court from the constitutional status. And the transfer of the entire matter of the creation of subject-matter divisions of common pleas courts to the supreme court's rule making umbrella in Section 5. The rules were to be subject to rejection or amendment by the General Assembly. Really the votes on sections 4 and 5 for that reason were counted together. It has become obvious from the vote that the original proposal on this was not acceptable and the redraft makes several major changes. First of all, in Section 4, in section 4(C) in particular, the probate court is restored to constitutional status, or more accurately, its present constitutional status is continued. The section also requires specific election to the probate division and empowers the judges to control their clerks, employees and so on. In the same language as the present Constitution, a new subsection, (D), in capsule form, provides that whatever divisions other than the probate division are to be created are to be established pursuant to Supreme Court rules subject to amendment by concurrent resolution of the General Assembly. And the General Assembly can at any time by law provide that there shall be specific election of judges to these other divisions. In those instances where the General Assembly did not provide for specific elections, the matter of assignment of judges to these other divisions would also be governed by Supreme Court rule. So that the provision reads "Rules governing the establishment of such other divisions and the assignment of judges thereto, if judges are not specifically elected thereto, shall be filed by the court not later than the 15th day of January with the clerk of each house of the General Assembly during the regular session thereof. Such rules shall take effect on the following 1st day of July, unless prior to

such date, the General Assembly adopts a concurrent resolution of disapproval. The General Assembly may not disapprove a rule which it has amended as provided in this section. Except as provided in this section, all laws in conflict with these rules shall have no further force and effect." And the last paragraph of this new subsection simply provides that nothing in here shall be construed as limiting the power of the supreme court to assign judges to temporary duty under section 5 of division (a)(3) of this article, so there is no confusion in this regard.

There are several major changes in this draft from the prior draft. For one thing, the power of the supreme court to amend these rules regarding divisions and assignment of judges, if there are such rules, are not subject to amendment by the court, once they are filed. From there on,the matter really rests with the General Assembly. We have taken this approach in the draft because we have come to the conclusion that the reason for giving the supreme court the power to amend rules which are filed with the General Assembly in regard to procedure do not exist or are not valid as far as the rules on divisions are concerned for the following reasons: Only the supreme court has the power to amend rules of procedure. The only thing the General Assembly has the power to do is to reject the original rule. However, in regard to divisions, since the General Assembly itself has the power to make an amendment of any rule that is submitted by the Supreme Court, there is no reason to give both the court and the general assembly this power to amend. After the rules become public on January 15th when they are filed with the General Assembly, whatever public reaction there may be to these rules can be fed directly into the General Assembly, and the General Assembly as matter of fact could consider an amendment which was proposed by the court itself during the period prior to July 1st when the rules will go into effect. In practical effect, this also gives the General Assembly about 3½ months more to work on these rules because it doesn't have to wait for the possibility of having the rules that were filed on Jan. 15th amended by the court by May 1st. So that in effect it has a clear track from Jan 15th to July 1st. So this is a change in emphasis, and also strengthens the general assembly's hand in the matter, somewhat, and simplifies the process. Are there questions I could answer?

Mr. Carter - I have one. I have listened carefully, but I'm still not sure I understand the reason as to why this states that the general assembly may not disapprove a rule that it has amended as provided in the section.

Mr. Nemeth - That was originally put in with the idea that there has to be an end somewhere to the process of change. That is, if the General Assembly amends a rule instead of rejecting it, then it can't, after amending it, reject it before it goes into effect on July 1.

Mr. Carter - Let me understand this. If the Supreme Court proposes a rule on January 15th, and the General Assembly amends that rule, it still doesn't go into effect until July 1st, is that right?

Mr. Nemeth - That's correct.

Mr. Carter - Why is it necessary to prohibit the general assembly from further considering the matter pursuant to public hearings before July 1st?

Mr. Nemeth - They can consider it, but they can't disapprove it. I think the problem arises because there is this other language in here that the General Assembly has the power to disapprove a rule by concurrect resolution. And we

wanted to make an exception for that group of rules which have been amended. The rules that have been amended then can't be rejected.

Mr. Carter - Does that make sense?

Mr. Skipton - As a practical matter, if I believed the General Assembly was interested in this thing, I would not even bring the thing up for a vote during the three month period. The pragmatic approach is going to be that one house of the assembly is never going to take final action on one of these things until the last minute. I don't see the need to hamstring the general assembly. If they are in session, and they want to reconsider it, let them reconsider it.

Mr. Norris - It's not even really reconsideration because they can't do anything. When they adopt an amendment, they still have to wait until July 1st, then it becomes effective in whatever shape it happens to be in on July 1st unless the resolution is rejected. If both houses haven't passed a concurrent resolution of amendment by July 1st, then it goes into effect as it was submitted. But it doesn't do them any good to pass a concurrent amendment on April 1st, because it still won't be effective until July 1.

Mr. Carter - That's the way I look at it.

Mr. Norris - So if they pass a concurrent resolution of amendment on April 1st, I think what this language says is they couldn't come back with an amendment on April 15th or pass a concurrent resolution of rejection. That's what John is objecting to, and I guess I don't disagree.

Mr. Montgomery - Well, they should have the right to change their minds.

Mr. Norris - Well, it ought to be open season.

Mr. Montgomery - Julius, what's your response to that?

Mr. Nemeth - Well, it will open the thing up a little more than it is now. Whether the Commission wants to do that, of course, if a policy decision. It will open the rules which are submitted by the supreme court to amendment to the nth degree, to the same extent as any other law or resolution.

Mr. Norris - I think that was the intent. I think the intent was that the General Assembly could either amend or reject. So if you put that sentence in there, you're really cutting down its authority to reject.

Mr. Nemeth - At the time we put it in, I believe there was a feeling on the committee that that was an appropriate thing to do.

Mr. Norris - I'm not sure why it's in there, but we could get around it very easily. If we amended it once and then were allowed to reject it, we could choose to amend it again in such a way that we virtually reject it.

Mr. Carter - Ann, do you have any comment?

Mrs. Eriksson - If your feeling is that you don't want to restrict the General Assembly, then remove it.

Mr. Norris - It may be that what we decided is that once we amended a rule and it went into effect on July 1st, we couldn't, after July 1st, reject it. But this doesn't really say that. It says more than that. I don't know that we need to say anything.

Mrs. Sowle - What would happen if this sentence were taken out, the General Assembly amends the proposed rule, then July 1st comes, it has not adopted a resolution of disapproval of the proposal submitted to the General Assembly. Is it just assumed that because it amended it, it will not go into effect on July 1st in the original form?

Mrs. Eriksson - Yes, because it no longer is in the original form. It has been amended. It's no longer a question of their being two versions of the rule.

Mrs. Sowle - There's no problem of that one still hanging by anywhere.

Mrs. Eriksson - I don't think so.

Mr. Nemeth - The amendment then would have the same effect as if the supreme court had amended the rule. There is something in the last sentence which I wish to point out and that is the last phrase, "Except as provided in this section, all laws in conflict..." etcetera, etcetera. That refers back to the second sentence in the subsection, "The General Assembly may be law at any time provide for the election of judges specifically to such other divisions." That is that this is an exception to the finality of a rule. The matter of whether or not judges are to be elected specifically to divisions other than probate will always remain open and subject to change by law by the General Assembly.

Mr. Norris moved to amend the committee report to eliminate the sentence prohibiting the general assembly from disapproving an amended rule. Dr. Cunningham seconded the motion. The motion was adopted by the committee.

Mr. Montgomery - Is there any further discussion?

Mr. Skipton - I'd like to ask a question. You have inserted, "The General Assembly may by law at any time provide for election of judges specifically to such other divisions..." Isn't this just an invitation to create more divisions?

Mr. Montgomery - Isn't there something in the constitution now?

Mr. Norris - He's talking about election, not creation. The General Assembly could not create divisions through this section. It could only provide by law that judges be elected specifically to them instead of shifted around by the presiding judge or however the supreme court says they will.

Mr. Skipton - My difficulty is, as you know I voted against the appointive-elective system, if the thought of a majority of the members of the committee were to establish another method of selecting judges, then it seems to me that when you do it further and put something in the constitution that hasn't been in there referring to election of judges, you're just inviting them to do it.

Mr. Montgomery - Divisions have to be established by someone. You have to provide some way for divisions.

Mr. Norris - The present constitution requires that they be elected specifically to these divisions.

Mr. Skipton - Well, then, the present constitution does provide for the election of probate judges. Do you mean that if they create another division, the current constitution requires, like if they create a domestic relations judge, they must be elected to that division?

Mr. Norris - Yes. We're saying that that has to happen under the new article only if the legislature provides that you have to do that. So we're backing up somewhat.

Mr. Wilson - The redraft of section 6 says that judges of the courts of common pleas or divisions thereof shall be elected.

Mr. Nemeth - In the present constitution, this is covered in section 4 division (C), which in this redraft has been amended by striking certain language so that division (C) now refers only to probate courts and nobody else.

Mr. Wilson - I'm talking about present section 6 of Article IV. It says judges of the courts of common pleas and divisions thereof shall be elected....

Mr. Nemeth - Yes.

Mr. Wilson - You might handle that over here in section 6.

Mr. Nemeth - But that only requires the election of judges. It doesn't require the election of judges to specific divisions. That's what was accomplished in section 4, division (D) until now, and will be accomplished under this new division (D) of section 4 if it's adopted.

Mr. Norris - Mr. Chairman, if I might comment on what someone said previously. It seems that the committee was confronted with two problems in the divisions. One was the unfettered creation of divisions by the General Assembly. That's always been a threat but we can always rationalize doing it because the court structure is splintered up anyway. But once we go to a unified court system in our proposal, the creation of divisions willy-nilly, I think everybody wants to create their own divisions, housing divisions, rat-control divisions. The result would be really a catastrophe to the unified court system. The second problem is that there are some divisions that ought to be created but to which judges should not be specifically elected. Of course, we can't do that today, because anytime there is a division created, the constitution says you've got to elect judges to it. But I can see by rule of court, divisions being created for specific purposes. Maybe they are only temporary. I can see the court creating, for example, a unified municipal bench within the common pleas court and creating a criminal division. And you don't want to elect a guy to a criminal division - he'll go nuts! You want to rotate them. This gives the kind of flexibility that isn't in the present constitution, and much better management of the situation. So originally, we had thought that no judges should be elected specifically to divisions. Now we're having to retreat because we can't get the votes, because nobody wants to take the probate judge out, so we're putting the probate judge in, and having them specifically elected, and then giving the General Assembly some flexibility. The more flexibility we can give, the better, for the courts to run their own internal affairs.

Mr. Montgomery - Would any of our guests like to be heard on this subject? Any observations?

Judge Reilly - We're just here as observers, Don. We appreciate the help we have had from your staff. We're here from the Ohio Judicial Conference. Julius came over twice, once to our executive committee meeting, and the other time to answer questions from anyone who wants to come. Our situation is that we, as you all know, have judges that are probate judges, juvenile judges, court of appeals, common pleas, municipal. We have no fundamental position on any of these things. Alan Whaling, Executive Director of the Ohio Judicial Conference and myself are here to act as conduits to the executive committee of the Conference. But we really cannot take a position because there are too many positions within our own conference. But we certainly would be delighted to answer any questions. I do want to express our thanks again to the entire staff for the splendid cooperation we've had in the past.

Mr. Montgomery - I appreciate your cooperation and your attendance, Judge, thank you. Is there any further discussion? Are we ready to present this to the full commission? I will move that the committee report as amended on section 4 be adopted.

Mr. Norris seconds the motion.

Mr. Montgomery - Any further discussion?

Mr. Carter - Unless there is any other discussion, we're ready for a roll call.

The members voted as follows: Mr. Applegate, no; Mr. Norris, yes; Mr. Roberto, yes; Mr. Carter, yes; Mr. Heminger, yes; Mr. Huston, yes; Mr. Montgomery, yes; Mr. Skipton, yes; Mrs. Sowle, yes; Mr. Wilson, yes.

Mr. Carter - As is our custom, we will keep the roll call open until the next meeting of the commission.

Mr. Montgomery - We will proceed to redraft of section 5.

Mr. Nemeth - In regard to section 5, we should point out the things that have been removed. The matter of creating common pleas court divisions has been removed, and another thing that has been removed is the supreme court's rule making authority governing personnel. Many commission members we polled opposed that. The major changes from the present constitution are: the addition, in division B(1), of authority for the supreme court to prescribe rules governing the transfer of cases from one court of appeals to another. A function of this which has been pointed out in the report is to provide an alternate method of disposing of appeals cases. That is, instead of assigning judges outside the districts from now on, if this amendment is adopted, it would be possible to assign cases outside the district in which they originate. We have retained the language which placed upon the supreme court the duty to develop uniform criteria to determine the need for increasing and decreasing the number of judges, except for supreme court justices of course, and for increasing and decreasing the number of magistrates and altering the boundaries of common pleas and

appellate districts. This is not an extension of the rule making power. All this does is to give the supreme court a constitutionally recognized duty to recommend changes in these areas to the general assembly and it places a constitutional duty on the general assembly to consider the report of the supreme court . . recommendations, on a regular basis.

Mr. Montgomery - Are there any questions? Mr. Chairman?

Mr. Carter - One is the term "Magistrate". I understand it's caused some problems in terms of terminology or identification of the function. I know it is covered in section 7 which we will get to to define what this magistrate is. I'm not arguing or suggesting any changes in that. I merely would like to suggest a different word instead of magistrate. That would be "judicial associate".

Mr. Norris - We haggled over that. We discussed assistant judges, associate judges, and all have problems.

Mr. Carter - I understand there has been some problem calling them "judges" of any kind because that has a lot of complications. That's why I thought of the phrase "judicial associates" rather than identification as a judge.

Mr. Norris - I think what we are talking about is somebody that is going to rule on traffic cases. That's really what we are talking about, somebody who will be a substitute for part-time county judges and mayors. He's going to be appointed by the common pleas judge and they are really referees.

Mr. Carter - I have no quarrel at all with the concept.

Mr. Norris - If you start lifting that up to the dignity of judge..... that's how we really arrived at "magistrate".

Mr. Montgomery - It's an accurate judicial description but it ignores the practicalities of judicial pride. I'd like to read you a statement from Judge Thomas E. O'Connor of the Bellefountaine municipal court. He received a copy of the section 7 redraft which is before the Commission today. He telephoned the Commission staff yesterday and asked them to express his concern over the use of the word "magistrate" in this redraft. Because of court business he is unable to be here today. Therefore, he's asked that we bring his concern to the attention of the commission. Judge O'Connor serves on a part-time basis in a judgeship which will probably stay part-time for the forseeable future. He believes that the potential problems with changing part-time judges to magistrates would pose similar problems for all of them. Judge O'Connor's chief concern is that a magistrate, even though he would be performing the same type of work which is now performed by a part-time municipal judge would not be as effective in keeping the business of the court on an orderly and formal basis, because he could not command the respect of lawyers and litigants to the same extent. It is his view that it is especially important for people who appear in a court which handles a high volume of cases to feel that they are indeed in a court, which feeling is reinforced by the presence of a judge. He believes that the word "judge" means something to the average citizen whereas "magistrate" means little or nothing and that they would therefore be likely to show less respect for such an officer. In conclusion he states that while he realizes that the use of the phrase "associate judge" or some other term including the word "judge" in the context of section 7 may cause

some problems, these problems are not likely to be as pervasive as the use of the word "magistrate". This is rather typical of the response we got from part-time judicial officers. You have part-time municipal judges, and county judges alike that are affected by this. I think at one time the committee thought the term "associate judge" would do the job, but I think it is fair to say that the committee is not adamant about any one word. It's just what word is the most descriptive.

Mr. Norris - He's not going to have that job anyway. He's going to wind up running for the job of a full-time common pleas judge or he's going to go back to practicing law and be appointed on occasion to hear traffic cases, as a magistrate or whatever you call him.

Mr. Montgomery - But he's saying that if 90% of the people get to court, they expect a judge to preside.

Mr. Skipton - The constitution will say that all judges are full time. Let's remove that if we call these magistrates "judges" in any form. Are we engaging in semantics with the citizens of this state? I don't want to be a party to telling people that all judges are going to be full-time and someplace else saying that we've got some that aren't. That's playing games with the voters.

Mr. Montgomery - The committee has submitted the term "magistrate". That's our final conclusion. So unless there is a motion that it be modified, that's the way it will stand.

Mr. Wilson - I have no quarrel with the term "magistrate" if you define it in section 7, but if you leave it to dictionary interpretation rather than constitutional definition, I could have some objection to it.

Mr. Carter - I was aware of this argument that is being presented and that's why I came up with the term "judicial associate", which is not a judge, and yet is affiliated with the courts in such terms as the voter might understand what it really is, because "magistrate" is not a familiar term. I'll make the motion that the section be amended to say "judicial associate".

Mr. Montgomery - Is there any support for our chairman's idea?

There was none.

Mr. Carter - The second question is on the last sentence of Section 5 (B) (3), substantive comment. "The General Assembly shall consider such report, etc." Does that mean that the General Assembly has to affirm the action? Or does that mean that it shall consider? Can it reject it?

Mr. Montgomery - Yes.

Mr. Carter - It can reject it. Is that what the word "consider" means? It doesn't really say that to me.

Mr. Montgomery - It means that they shall receive it. It shall be distributed in published form.

Mr. Carter - Is the intent that the General Assembly can reject it?

Mr. Montgomery - Yes. Accept it, reject it, or do nothing.

Mr. Norris - Nothing happens unless we enact it into law.

Mr. Carter - Is this what this means?

Mr. Norris - That's what we meant by it.

Mr. Montgomery - They have to receive it.

Mr. Carter - The thing that bothers me is we used the language in the previous section, which spelled that out rather specifically....

Mr. Montgomery - That's another matter. Those rules take effect unless rejected.

Mr. Norris - Why don't we use the word "received" here?

Mr. Roberto - I think, upon reflection, that I tend to agree with you, that the words might suggest that the General Assembly would have to take some kind of affirmative action, by resolution or otherwise, in order for the matter to be considered. And I think Al is right, that the "received" might be better than "consider". I think that's what the committee intended.

Mr. Montgomery - The word "consider" means more than "receive". You can receive it and throw it in the circular file. "Consider" means that you've got to give it a fair, objective study. And that's really what is intended here.

Mr. Norris - That's what would happen.

Mr. Carter - Is the intent here to have it go into effect if the General Assembly does not act?

Mr. Montgomery - No, it's advisory only.

Mr. Carter - Oaky. That's what I wanted to know, then.

Mrs. Eriksson -The word "consider" is the word used now with respect to bills. The constitution now says that every bill shall be considered by each house. Now, the term is not defined. But I think the mere fact that the bill is presented to the General Assembly constitutes consideration. There's nothing that says that the General Assembly has to vote on every bill. That's the term that is used and to my knowledge it has not created any trouble.

Mr. Carter - For my information, then, what is meant here quite clearly is that the supreme court submits a recommendation for increasing and changing the number of judges. The General Assembly gets it and then if they take no action, that's the end of it.

Mr. Montgomery - It puts the burden to initiate on someone and we think the supreme court, which is the scorekeeper in a unified court system is in the best position to evaluate what the courts need.

Mr. Carter - Could the General Assembly do this indepently of the Supreme Court?

Mr. Montgomery - I would think so.

Mr. Carter - Okay.

Mr. Skipton - Don, I'm confused by some words here. "Annually, before each regular session, the court shall file with the clerk of each house a report." Can't we simply say that before each regular session the court shall report to the General Assembly its findings and recommendations on decreasing and increasing the number of judges, etc. etc.? I think that's where we get into this trouble of whether they have to consider. They may make no recommendations. The General Assembly has to take the initiative. Either that or you've got to say that the recommendations are going into effect unless the General Assembly acts. I think we've just got a lot of verbiage here that doesn't mean a thing unless we do one or the other. We either just make a recommendation, which doesn't mean a thing unless the general assembly wishes to act, upon it, or we're going to provide that they must act.

Mr. Norris - You're saying that you could just eliminate that last sentence. The intention here is not for the Supreme Court to do the job but to file advisory recommendations to the General Assembly which does the job. It's a shifting of authority from our previous burden.

Mr. Skipton - You have the seeds of confusion here.

Mr. Montgomery - We might have more words than we need. It could be redrafted from an editorial point.

Mr. Skipton - If it's just going to be a recommendation, let's just call it that.

Mr. Montgomery - What would you suggest as to a language change?

Mr. Skipton - I'd just say, "shall make to the General Assembly its findings and recommendations on..." The word "report" bothers me.

Mr. Huston - Why can't you say, "The court shall advise the General Assembly of its findings and recommendations"?

Mr. Montgomery - Usually, those things are required to be in writing... When you say "report" you are saying that it must be in writing.

Mr. Huston - You could say "advise in writing". That's actually what it is, "advice".

Mr. Norris - Well, it says findings and recommendations, and that is usually filed with the clerk. That's really what the civil rules procedures are, and that has some merit. I guess we don't really need the last sentence. Since it doesn't really mean anything, I don't suppose we need that sentence.

Mr. Nemeth - I think there was originally sentiment on the committee for requiring the General Assembly do something with this information.

Mr. Montgomery - I think the word "consider" adds something, myself. Just to file something is one thing, but to require someone to consider it is another. If I were a legislator and it were filed I would feel some duty

to examine and study it. And that's what we wanted to be done.

Mr. Nemeth - I think the argument can be made that if the last sentence is removed, then that whole section really becomes a nullity because the Supreme Court can advise the General Assembly now. It's not stated in the constitution, but it can do it.

Mrs. Eriksson - But they are not required to and they are not required to establish criteria.

Mr. Norris - They feel that that is improper for them to do. I've asked them many times on bills that affect their own internal operation, that we foul them up if they pass, and the court is reluctant to give us their opinion.

Mr. Skipton - Mr. Chairman, the next question is, is there anything in here that would prevent the general assembly from acting upon its own?

Mr. Nemeth - No.

Mr. Skipton - This is what bothers me here because it is surplusage. There is nothing here that says that the general assembly can't determine the need for increasing or decreasing the number of magistrates, or alter boundaries, or anything else, unless the Supreme Court has done so.

Mr. Montgomery - That's true, but it would look awfully silly to do it on their own in contradiction of obvious recommendations by the body which words in this field daily.

Mr. Skipton - Yes, but if we are going to put it in the constitution, let's have it do something.

Mr. Norris - John, if I might address myself to that question, court reform has been a little my bag over the years and these two subjects, I think, are peculiarly within the knowledge of the courts. But they will not give us ideas. They just will not do this. It's a fact. And again, I don't criticize them for it, because they feel that's interference. Bus we have wrestled and wrestled with these problems. We have two special committees now in the general assembly trying to come up with criteria for increasing the number of judges to avoid this silly pork-barreling, trading judges off, increasing them where we don't need them. We finally did get together at the last minute and get this amendment in the constitution on districting, but now we're afraid to do anything. So in both of those areas, I really think we do need guidance very badly. The court's in a unique position to develop statistical studies, and we can't do this. We can write these judges and ask them to collect statistics. But the Supreme Court can tell them to collect them in just the way they want, and then they can devise the criteria. Our last special committee that was charged with developing criteria floundered because we couldn't afford to hire the specialists we needed to go in and reside in the sample counties and collect these figures. We need the Supreme Court's help, and they don't feel they are in a position to give it now, and again, I don't criticize them for it because they feel they would be interfering with legislative function. So if you tell them that they shall establish and they shall give us recommendations, they'll do it and I think we will have accomplished a whole lot because the legislature will consider it.

Mr. Skipton - Then our objective here is to force, I don't like the word "force", but really we are requiring the court to make a recommendation, and then we are

adding the statement that says to the court that if you will make a recommendation, we will insert language saying the General Assembly is going to consider it somewhat. I guess now we know what the problem was and what we were trying to solve with the amendment, therefore, I will support it.

Mr. Norris - If you want to shorten it, I suggest you might consider saying, "The court shall file with the clerk of each house its recommendation, if any, increasing," and so forth. And then the last sentence might read, "The General Assembly shall consider such recommendations....."

Mr. Applegate - Mr. Chairman, what happens to the report with the recommendations and findings if the legislature does nothing? Nothing?

Mr. Montgomery - Yes, absolutely. That was our intent. Would one of our committee members like to submit new language?

Mr. Norris - I'll move to amend the language to eliminate the reference to the report.

Mr. Skipton seconded the motion.

Mr. Montgomery - Is there any more discussion?

Mr. Carter - Could we just ask as to how it reads now?

Mr. Norris - It says, "Annually, before each regular session of the general assembly, the court shall file with the clerk of each house its recommendations, if any, regarding increasing or decreasing the number of judges " "The General Assembly shall consider such recommendations at the regular session following the filing by the court". Is that right?

Mr. Montgomery - Well, we'll have to say 'such recommendations as it may contain", because that won't make sense either.

Mrs. Sowle - Two questions. First, it says the court shall file with the clerk its recommendations if any. Then this places no obligation upon the court to file any recommendations, does it, because it may have none.

Mr. Norris - They aren't going to be able to come up with something every year.

Mrs. Sowle - Alright. I just wanted to make sure that was the intent. Now, my second question had to do with the comment about uniform criteria and I think I understand a little bit more about what that is supposed to mean from your explanation. But this does not place upon the supreme court any obligation to do anything with these criteria.

Mr. Nemeth - No.

Mr. Norris - We have to do it. Some states, for example, Katie, have in their statutes adopted a statutory formula for increasing judges based on case load, population, and that kind of thing. That's what we floundered on. We could not collect the statistics. And that's what we mean by criteria. And we would like them to do that for us, to decide what criteria, and then we could just codify that criteria, or we could use the criteria, apply them to the counties, see what we needed and just increase the number of judges. There would be a number of alternatives, but they all start with criteria.

Mrs. Sowle - I see the purpose for the criteria. However, I don't see that this language obligates the court to transmit to the General Assembly those criteria, because it says, "The court shall file with the clerk its recommendations." This could be very specific. We think you ought to have five more here and two more there - but it doesn't obligate the transmission of the criteria, as I see it.

Mr. Carter - I think if you leave in the words "findings and" you would solve that problem.

Mrs. Sowle - And I think it might be possible to make those findings more specifically, inclusive of the criteria, but I think it might be better to say those criteria shall be transmitted. Some language that would accomplish that.

Mr. Carter - Well, if you were to say, "The Supreme Court shall establish uniform criteria", and then go on to say that the court shall file with the clerk of each house its findings and recommendations, "findings" clearly refers back to the first sentence.

Mrs. Sowle - Well, maybe. I'm not sure that it has to encompass uniform criteria. Findings might mean findings with respect to the number of cases, the number of backlog, and that sort of thing without ever getting to a uniform criteria.

Mr. Skipton - Perhaps we should keep the word.

Mr. Montgomery - Well, criteria is necessary for the making of a finding. Findings then is a fact and then the recommendations are based on this fact. Not when you are talking about increasing and decreasing the number of judges, because that has to be based on criteria.

Mrs. Sowle - But we've just been discussing the fact that increases and decreases to date have been done without the use of criteria. It seems to me that it would be most clear to the purpose of this provision and most useful to the General Assembly if, in fact, the court had to send those criteria to the General Assembly.

Mr. Montgomery - I think we do, when you say findings. We need ten more judges and here's why. Our criteria that we've set up show this...

Mr. Skipton - The word recommendation isn't really necessary. You could say "shall file its criteria and findings". Then because if you are going to go on the basis of criteria all you have to do is say, "Here is the criteria, we are using this criteria, we have these findings, therefore, this is our report."

Mr. Montgomery - Then what the latest thinking is is that we scratch all the amended language. We take the report as it was originally submitted and insert the word "criteria" in front of "findings and recommendations".

Mrs. Sowle - I would prefer that because that tells me more about what exactly the General Assembly is to receive.

Mr. Montgomery - How do the movers of the language think about that one?

Mr. Norris - I think it's alright. I realized that criteria applies to both the number of judges and districts, so if criteria works, I have no objections. I like the word "recommendations". I would really like them to recommend as well as give it.

Mr. Montgomery - I think "findings" adds something. The way we are going to do it, findings is what we've found and recommendations is what we think ought to be done about it. I think that follows, I really do.

Mr. Norris - I'll change my amendment that way, to end up "criteria, findings, and recommendations".

Mr. Montgomery - We're back to the original language.

Mr. Norris - The way it would read now, "to the clerk of each house its criteria, findings, and recommendations", and you don't need that "report" in there.

Mr. Montgomery - The first amendment fails for lack of a second? Mr. Norris is making another one now with the elimination of the word "report", but the insertion of the word "criteria" before the word "findings". Is there a second to that motion?

Mr. Roberto seconded the motion.

Mr. Montgomery - Is there any more discussion?

Mrs. Eriksson - What about the last sentence?

Mr. Norris - That would read, "The General Assembly shall consider such criteria, findings, and recommendations at the next regular session."

Mr. Montgomery - Now this is just a committee report. Committee members in favor signify by saying aye. (all voted aye). The motion has carried. I will move that the report of the Judicial subcommittee on section 5 as amended, be adopted.

Mr. Norris seconded the motion.

Mr. Montgomery - Any discussion?

Mr. Norris - I want to urge adoption of this for several reasons, but one I would like to bring to the commission's attention. If we adopt this I think we will be in a position, pretty much ideal and perhaps unique among the states in the area of the process of making rules and the involvement of both the courts and the legislature in that regard. I've just jotted down in my notes how the rule making function would break down in the state if this is adopted. You would have four kinds of rules. I think that's alright. The first kind would be the drafting and submission of rules by the Supreme Court, without any legislative involvement. An example of that is the rules of superintendence under the constitution and rules of admission to the practice of law and discipline. That's also a constitutional rule. The second kind would be rules promulgated and submitted by the Supreme Court which are subject to General Assembly rejection. An example of that are the rules of procedure we have at present, and in this particular section, section 5, paragraph (B)(1), describing rules governing the transfer of cases from one court of appeals to another. Then the third kind of rule making is what we just adopted in section 4, and that's where rules are submitted by the supreme court, which are subject to General Assembly amendment or rejection. We've talked about the creation of subject matter divisions, assignment of judges. This then adds a fourth area. The rules, if you want to call them rules, would be promulgated by the Supreme Court to be submitted to the General Assembly, but as recommendations only.

They would only be advice to the general assembly. It seems to me that runs the full gamut of the partnership we ought to have. I have argued many times since the adoption of the Modern Courts rule which we shouldn't have adopted originally that only allows the general assembly to reject. But I think that's past history and we are not going to change that here. But I think from the standpoint of logic, this will permit the different rule-making functions from now on in any of those four categories. I personally feel that this kind of advice by the Supreme Court, will be welcomed by the General Assembly. It will encourage the partnership between the General Assembly and the courts in the whole area of rule-making and hopefully take the edge off some our past experience in the rule-making where we could only reject.

Mr. Montgomery Thank you.

Mrs. Sowle - One more question about "if any". This now means that every year the court must file criteria and findings. It need not file recommendations, but every year it must file criteria and findings. Is that correct?

Mr. Montgomery - "if any" would have to refer to recommendations.

Mrs. Sowle - Yes, because otherwise, annually, they don't have to do anything.

Mr. Huston - I would say that the language there, "Criteria, findings, and recommendations", "if any", refers to all three of them.

Mrs. Sowle - Then, annually, it doesn't have to do anything, unless it wants to. Is that correct?

Mr. Montgomery - That can be read both ways.

Mrs. Sowle - That's what I'm asking.

Mrs. Eriksson - My interpretation would be, as Katie was saying, that "if any" refers only to the recommendations, because I think it was the committee's intent to require the court to make some kind of a report to it, but there might not be recommendations for increases and decreases and changes. The court should at least file its findings with the General Assembly to provide the General Assembly the result of its statistic gathering.

Mr. Montgomery - Can we put that in our commentary?

Mr. Nemeth - This would require the court to monitor the status of the judicial system on a constant basis, which is the intent.

Mrs. Sowle - Well, it seems to me that the only way this provision serves the purpose that Mr. Norris was describing is if there really is an intended obligation on the part of the courts and that's why I wanted to make sure what that "if any" means. Does it lock them out of the whole obligation every year, or does it just lock them out of the obligation on recommendations. That's what I asked.

Mr. Huston - If you want that, wouldn't you say, "Its criteria, findings, and any recommendations".

Mrs. Sowle - I like that.

Mr. Skipton - If that's your purpose, I would just say, "and recommendations it may have".

Mr. Wilson - It can all be solved by removing a comma. "its criteria, findings, and recommendations if any," without a comma between "recommendations" and "if any".

Mr. Norris - I prefer to just say "any recommendations".

Mrs. Sowle - That's clear, too.

Mr. Norris - If we are going to make them report findings and criteria, why don't we make them give a recommendation. The recommendation may be that they don't have any recommendations. Mr. Chairman, I move to amend before the word "recommendations" in both places insert the word "any", and in the sixth line, delete the words "if any".

Mr. Heminger seconds.

Mr. Montgomery - All in favor signify by raising their hands. Any opposed? (There were none). The motion is carried. Is there any more discussion?

Mr. Huston - I have a question with regard to the last sentence in paragraph C. You talk about judges of the courts established by law. Are you talking about the judges of the courts established by the legislature or by the constitution and by the legislature. "By law" to me, you're speaking of a legislative act. You could cure that by saying "judges of such courts". That's my interpretation.

Mr. Montgomery - It's intended to refer to a different group. Only those created by the legislature.

Mr. Huston - Okay, I just wanted to make sure.

Mr. Montgomery - Any further questions? Are we ready for the roll call?

The roll was called. Those voting in the affirmative were Senator Applegate, Mr. Norris, Mr. Roberto, Mr. Carter, Mr. Heminger, Mr. Huston, Mr. Montgomery, Mr. Skipton, Mrs. Sowle, and Mr. Wilson. There were no negative votes.

Montgomery - Thank you.

Mr. Carter - The roll call will be held open until the next meeting.

Mr. Montgomery - We will proceed to the redraft of section 6, which has to do with selection of justices, terms, compensation, etc.

Mr. Nemeth - The original committee report recommended the appointive-elective system for appellate judges and made it optional for common pleas judges. All of those references have been deleted. We are essentially going back to a section 6 which reads pretty much as it does now with very few exceptions. The major substantive change from existing section 6 is that the constitution would provide that the compensation of all common pleas court judges shall be the same. The other changes are principally grammatical in nature with the

exception of the phrase in division B in the sentence "Judges shall receive no fees or perquisites except such perquisites as may be provided by law." This phrase "except such perquisites as may be provided by law" is new and the intent here was to legitimatize certain perquisites which judges may be receiving now and which may be proper adjuncts of their office.

Mr. Wilson - Emoluments.

Mr. Nemeth - Yes, thank you, sir. And that's the only intention of change there. To use a specific example, if it should happen that they receive cars for official use, that is a perquisite, but it may be a perfectly legitimate one, depending on the judge's need for a vehicle in his work.

Mr. Montgomery - This gets it in the open.

Mr. Wilson - If you want to go back to something we touched on a little bit ago, I think we have a discrepancy here. Article IV, Section 4 redraft that we adopted here just a few moments ago, says "There shall be such divisions of the courts of common pleas.....The General Assembly may provide for the election of judges specifically to such...." In Article IV, Section 6, we're talking about now, it says judges of the courts of common pleas shall be elected by the electors of the county. What's the difference?

Mr. Nemeth - The difference is that this section only requires the election of judges to a court but not the election of judges to a specific division of the court. That is, all section 6 does is to require that they be elected. They could still be assigned to divisions such as the probate, juvenile, or others, unless there is another provision in the Constitution or in law which requires them to be specifically elected to those divisions.

Mr. Wilson - Section 4 could require, for example, that juvenile judges of the common pleas be elected only to the juvenile division.

Mr. Nemeth - That's correct.

Mr. Wilson - Section 6 will allow them to be elected under the common pleas umbrella and then assigned to a division.

Mr. Nemeth - That's correct.

Mr. Montgomery - It's not inconsistent. Any further questions?

Mr. Carter - One minor question. I have a problem with the punctuation in the last sentence, on the first page, "all votes for any judge". I think the commas all through that sentence should be deleted with the changes.

Mr. Nemeth - We've deleted one comma.

Mr. Carter - I think they all should be deleted. I had trouble understanding it until I got by the commas. "All votes for any judge for any elective office except for a judicial office shall be void". I don't think that first comma should be there.

Mr. Montgomery - The first one I would agree on. I think "except for judicial office" is alright. Are there any further comments?

Mr. Wilson - Why don't you just say a judge shall not run for any other office?

Mr. Montgomery - This is the current language, and we try not to change more than necessary.

Mr. Carter - If you are going to leave commas in, you should leave the comma after "office" and after "office" both places, but the first comma should be taken out.

Mr. Montgomery - I move to delete the first comma and reinsert the second one.

Mr. Roberto seconded.

Mr. Montgomery - Any discussion? All in favor signifity by saying aye. (There were no votes to the contrary.) The motion has carried. Are there any other questions or comments on the full redraft of section 6?

Mr. Norris moved that the committee report back section 6 as amended.
Mr. Roberto seconded the motion and all Committee members voted yes.
Mr. Montgomery moved that the Commission adopt section 6 as amended.
Mr. Norris seconded.

Is there any discussion? May we have the roll call. The roll was called. Those voting yes were Messrs. Norris, Roberto, Carter, **Heminger,** Huston, Montgomery, Skipton, Mrs. Sowle and Mr. Wilson. There were no negative votes.

The roll call was held open until the next meeting.

Mr. Montgomery - Alright. Thank you. We will now move to the redraft of section 7 which has to do with a subject we covered a little bit, full time judges, and where indicated magistrates.

Mr. Nemeth -The most profound substantive change in the redraft in comparision to the original committee report on this section is that the powers and duties of magistrates will be prescribed by the general assembly and not by supreme court rule. That's what the original committee recommendation was. This redraft also makes more clear that the magistrates are to be appointed by the common pleas court judges and to serve at their pleasure. This is not really a change from the original committee recommendation because I think that's what the committee originally intended anyway, but the redraft makes it more clear than the original draft did.

Mr. Montgomery - Alright. Is there any discussion?

Mr. Norris - I move that the committee report back this section.

Mr. Roberto seconded.

Mr. Montgomery - We're talking about the report as it now stands. If there any discussion? If I move the adoption of section 7 by the Commission.
Mr. Norris seconded.
The roll was called.
Voting in the affirmative were Messrs. Norris, Roberto, Carter, Heminger, Huston, Montgomery Skipton, Mrs. Sowle and Mr. Wilson.
The roll call was held open until the next meeting.

Mr. Montgomery - Thank you. Now going down our list of those that failed, we get down to section 13, filling of vacancies. The repeal of this section is not now necessary since we're going to keep the elective system. What do we do procedurally with that?

Mr. Nemeth - Nothing more needs to be done.

Mr. Montgomery -Alright. Section 15, changes in numbers of judges, courts, districts. Here we have an inconsistency. This section 15 was recommended by the full Commission for repeal previously by John Skipton's legislative committee, and this time around it failed, when the same thing was submitted by the judiciary committee. I think it was just misunderstood. I'm open for suggestions, Mr. Chairman.

Mr. Carter - What we would like to do here I'm sure is just move for reconsideration and start the roll call again. The problem is that that takes a motion for resubmission by someone who voted against. We don't really have any precedent on this to my knowledge. Would anyone take any exception?' I think as a substantive matter we would like to resubmit this to the Commission.

Mr. Skipton - Is there anyone here who voted against it?

Mr. Carter - No there is not. And ones that did not vote are not here either.

Mr. Norris - Why don't you just make it part of the committee recommendations?

Mr. Carter - In other word , just to resubmit it again.

Mr. Roberto - As a member of the judiciary committee, I move the resubmission of section 15.

Mr. Skipton seconded.

Mr. Montgomery - Any discussion? If not, all in favor signify by saying aye. (All voted aye.) The motion is carried. I move that the Commission recommend repeal. Is there a second to submit it to the Commission for reconsideration of repeal, Mr. Roberto?
Mr. Roberto - Second.

Mr. Montgomery - Any discussion? May we have the roll call?

The roll was called. Those voting in the affirmative were Messrs. Norris, Roberto, Carter, Heminger, Huston, Montgomery, Skipton, Mrs. Sowle, and Mr. Wilson. There were no negative votes.

The roll call was held open until the next meeting.

Mr. Montgomery - I don't think anything is necessary on section 23.

Mr. Nemeth - It's not mandatory that we do something. It probably would be nice in terms of cleaning up the Constitution and ridding it of sections which will in effect become surplusage if our section 1 is adopted, but if it is not removed, the failure to remove it won't be fatal to the concept. It may pose some problems of interpretation at some future time, but we don't believe that it will defeat the concept as a whole.

Mr. Montgomery asked Mr. Roberto to chair the remainder of the meeting.

Mr. Carter - Marc, couldn't we do the same thing with this that we did with the last one?

Mr. Norris moved and Mr. Skipton seconded that the judiciary committee resubmit section 23 to the Commission for repeal.

Mr. Roberto - All those in favor signify by saying aye. All voted yes. The motion is carried. Mr. Chairman, I move section 23 be adopted by the Commission for repeal.
Mr. Norris seconded.

Mr. Carter - Any discussion?

The roll was called. Those voting in the affirmative were Mr. Norris, Mr. Roberto, Mr. Carter, Mr. Heminger, Mr. Huston, Mr. Skipton, Mrs. Sowle and Mr. Wilson. There were no negative votes.
The roll call was held open until the next meeting.

Mr. Carter - The remaining item is to set the date for the next meeting.

It was agreed to hold the meeting on November 18 or November 25, according to members' preferences to be solicited.

The meeting was adjourned.

Ann M. Eriksson, Secretary **Richard H. Carter, Chairman**

Ohio Constitutional Revision Commission
November 18, 1975

Minutes

The Ohio Constitutional Revision Commission met on November 18 at 1:30 p.m. in House Room 11 of the State House in Columbus. Those present were Senators Applegate, Gillmor, McCormack, Mussey and Van Meter; Representatives Panehal, Pope, and Roberto, and public members Aalyson, Bartunek, Carter, Fry, Guggenheim, Heminger, Huston, Orfirer, Russo, Shocknessy, Sowle and Unger.

Mr. Carter called the meeting to order and passed around a picture of the full Commission that had been taken last year.

Mr. Carter - The October 16 minutes were approved as mailed. The legislature met last week for one day and in the process the House passed the county classification measure that was earlier defeated and then was open for reconsideration. It passed this time by 64 to 29. So that one is on its way to the Senate. Several of us met with the legislative leaders last week and I would like to give you a report on that meeting because it's quite meaningful. First of all the staff prepared for that meeting a summary of where we stand on all of our activities. Each of you has a copy in front of you. I think that you will find it hard to keep track of all that's going on in this Commission and it will give you an excellent overview of where we stand. And just to go through it very quickly, the main thing is the spread sheet that you have in the booklet shows all the items presently pending before the legislature,. and as you can see, they are in the various stages of progress through either the House or the Senate. H.J.R. 12 is the one that was finished at the November election as indicated, and H.J.R. 31 is the county classification that was passed by the House.

Marc Roberto and Alan Norris were present at this meeting with the leaders. Its purpose, basically, to review where we stood on all these items, and what the legislature's objectives should be for the forthcoming ballots. We have our staff and my recommendations to the legislature was that we shoot for approximately 13 issues on the June ballot. The remaining 7 would then hopefully make the November ballot. It's obvious that June is going to be a good ballot for constitutional revision. It probably looks as though there will be no other issues on the June ballot other than the constitutional issues initiated by the Commission. That may not be true, because, of course, any legislative member has the right to bring up whatever he wants and that's up to their judgment as to whether or not it will go on the June ballot. But an issue has to clear the legislature by March 10 for that ballot and it does not look as though there would be much competition, if any, on the June ballot. There was the feeling that we shouldn't have too many issues on the ballot. Senator Ocasek, who is a great supporter of constitutional revision, felt that perhaps 6 issues was as much as you could practicably expect the electorate to consider. But then it was pointed out that back in 1912 we had 41 issues on the ballot, and 33 of them passed. It was also pointed out that if we go at it no more than six at a time, with all the other complications that occur in a ballot any particular date, that it might take an awfully long time to get through not only these issues that you have before you, but also the pending issues that are further in the back of the book. So this is up for consideration, and I think the legislative people would be very much interested in what the views of the Commission would be. I would say we are talking somewhere between 6 and 12 issues. Would you think it would be a good thing to go for a dozen? Maybe even a baker's dozen. Or should we stick to a lower number. I'd appreciate comments.

Senator Van Meter - Mr. Chairman, you might also keep in mind that throughout the state there will probably also be a number of local issues on the ballot so that these might not be the only ones.

Mr. Carter - That was one of the considerations, yes.

Senator Applegate - Mr. Chairman, we did put into effect a ballot commission whose purpose is to simplify the language so that the average person can understand it in one and two syllable words. I would say that people do, as a matter of fact, take time to study these. If you mention the word "tax" you might as well forget it, but I don't think what we're talking about really gets into that area. I don't think that numbers really mean that much. I think the people are pretty intelligent and can distinguish between those they feel have good qualities and those that are going to raise the taxes. That's what it boils down to.

Mr. Carter - Doug, I would appreciate it if you would pass your views on to Oliver in this matter.

Mr. Fry - Mr. Chairman, I just ran into Speaker Riffe and he indicated that he is sympathetic to what the Commission wants to do. He raised the question as to whether we might have too many issues on the ballot in June. On the other hand, I think that if we get a number through the legislature, we've got to ask what we are going to do about the rest of them. How long are we going to keep the Commission in existence. Or are we just going to recommend them and let them die there? I think it would be interesting to know what sort of support we could get from groups throughout the state. The League of Women Voters has followed this very closely and other groups that are interested in the constitutional revision, the Chamber of Commerce. See if we can have a campaign organized where they might want to call the attention of the electorate to a number of these issues. I think we ought to look at our alternatives before we say what we would like to do.

Mr. Carter - Senator Maloney felt that perhaps there was even justification for having a special election for constitutional questions. Perhaps I should include that in the discussion. The objection to that would be that it would be quite expensive. You're talking about several millions of dollars to have a special election and the there is the question of whether that was justified. But still I felt that his point of view might be expressed here.

So that they got the proper attention, I think more than anything else.

Mrs. Eriksson - There wouldn't be anything else on the ballot.

Mr. Russo - Mr. Chairman, I think that the Commission should give that some real consideration because there is a valid argument that people voting for constitutional issues as constitutional issues only, and since we are presenting so many of them, and since it's saving money and it's revising government. I think a special election only for constitutional changes should be considered by this committee.

Mrs. Orfirer - I'd like to take issue with you on that, Tony. I think that we would have a very difficult time justifying the expenditure of such a great amount of funds, that we would automatically be angering a certain section of the voting public and putting them against what we're doing. I also think that in special elections you are much more likely to just get out the "no" vote than the "yes" vote. People are just coming out because they have very strong feelings about whatever it is you're putting on the ballot. I think we talked over a number of years here about the idea which

Mr. Fry just spoke to so well of concentrating our efforts so that we can make a push at one time, and not dissipating interest that we can arouse in constitutional revision. I don't think there is any limit, really, to what we put on as long as they're sound proposals that we can explain adequately to the public.

Mr. Carter - There is a practical consideration concerned here, too. If we were to have a special election, it clearly should include all of the activities of the Commission, so we would be talking, probably, as a practical matter, considering the problems of completing our work and getting them through the legislature of probably a year and a half to two years hence. So that I think that that would necessarily involve withholding all of the issues until you had this special election. Senator?

Senator Van Meter - I was interested in Charlie's remarks, and I think they were very well taken. But I think, from a practical standpoint, we have to consider how much attention the issues are really going to get. There is probably going to be a hotly contested presidential primary and most of the interest and emphasis is going to be in that area. I think the Commission ought to try to do two things.One, limit the number of issues they have on it, and two, line up support from different organizations to try and promote and push the issues. I think the thought of 12 issues on the ballot is really quite frankly going to be too much with everything else, mainly the presidential primaries and the interest that is going to be there. I think you would have a hard time drumming up that much interest in that many issues. I think six is plenty.

Mr. Carter - Well, we've got a wide variety.

Senator Gillmor - I'm in favor of getting as many on in June as possible. One advantage of a special election would be that it would highlight it as a constitutional reform issue, but I think we would pick up a lot of criticism for such expenditure of funds. So if we don't do that, I think we're almost limited to going to the first ballot that is comparatively clean of other issues.

Mr. Carter - That's probably June.

Senator Gillmor - And that's probably June and I don't know what the other issues are going to be next November and the following June, but it seems like there are always a number of other issues that come up that are going to be on the ballot. So I don't think we will really have too many opportunities to get on a ballot that's mostly a constitutional revision ballot.

Mr. Carter asked for a show of hands of those who thought the maximum number of issues should be placed on the June ballot, and those who thought the number should be limited to about 6. All but 2 persons indicated support for the maximum.

(Because of mechanical recording defects, the next portion of the meeting is summarized.)

The next item was the revised judiciary proposals. Mr. Carter stated that there was heavy support for most of the voting on the items, but affirmative votes are needed and only 21 persons have voted. Twenty-two are needed. Mrs. Panehal was asked if she would like to cast her vote, and she said she would like more time to study the proposals. Mr. Carter noted that Mr. Carson's vote had not been received. Mrs. Pope said that she had mailed her card but it has not been received. There was discussion about whether the vote should be held open for another meeting. Mr. Russo made a motion to hold the vote open and Senator Gillmor seconded it. Mr. Bartunek objected to holding the vote open, saying that we have to end this vote sometime. Senator Gillmor stated that he agreed, that the vote should not be held open for six months, but that a lot of work had gone into the proposals and they shouldn't be lost when they had so much support. Mr. Bartunek suggested that maybe by not sending in postcards, people were indicating that they voted No. Mr. Bartunek withdrew his objection, as long as the vote was discontinued at the next meeting.

Mr. Russo's motion carried with unanimous consent.

Mr. Bartunek then presented the Education Report of the Education and Bill of Rights Committee to the Commission. The first section, goals of education, he noted the difficulties involved in putting language in the Constitution providing education for all persons, perhaps to the limits of their capacities, and noted that there was some support from the staff and public testimony for including some such goals statement. He said that the committee had discussed the research, and particularly had noted the language incorporated in the new Illinois Constitution on this question, but had concluded that any of the very broad language proposed could have the effect of incurring costs for the state and school districts that they could not possibly afford, and that any proposals for expanding the education system should be presented to the General Assembly where all aspects of the question will be considered. He discussed other sections in the report, governance of elementary and higher education, school finance, aid to nonpublic schools, and noted that in all cases, when there was testimony, there was none to indicate the needed improvements should not and could not be accomplished by legislative action, and that constitutional revision was needed. He noted that the committee recommends no changes in Article VI. He moved the adoption of the education report and Senator Gillmor seconded it. Senator Gillmor raised a question concerning a court case in Wyandot county where a vocational school was involved in a case contesting whether the system of education was in conformity with the constitutional definition. Mrs. Eriksson was asked to comment on that, but she said she was not familiar with the present status.

Mrs. Panchal talked about a bill in the House now concerning classification of handicapped persons for educational purposes, and noted the high price tag involved confirming Mr. Bartunek's statement.

Mr. Fry suggested that Section 5 of Article VI be amended to remove references to House Bills and Senate Bills which were needed years ago, and would not change anything by being removed. There was some discussion about what the change would accomplish, but there seemed to be agreement that it was a clean-up provision more than a substantive change. Senator Gillmor noted that a similar action had been taken on an earlier recommendation, Section 13 of Article VIII. It was agreed that a change in Section 5 to remove the details would be studied, although several persons noted that they would prefer not to recommend such a change unless substantive changes were also proposed. Mrs. Orfirer asked whether the definitions in the goals statement had to be spelled out in the Constitution, or whether they couldn't be left to the legislature? Mr. Bartunek said that if the legislature failed to define the terms and the goals were stated very broadly, people could take the matter to court, where the state would be required to adhere to the constitutional mandate, which might be very broad. There was a show of hands taken on the adoption of the report (with the proviso that the obsolete language in Section 5 would be considered further) and everyone voted in favor except Senator McCormack, who said that he did not feel that he could support the omission of a goals statement dealing with education for the handicapped, and he thought the Constitution was a good place to include a statement of the state's commitment to giving these people equal and quality education.

Then the What's Left Committee report on public and private employees and officers was presented by Mr. Aalyson. The first section he discussed was Article II, Section 20, which had been amended by the committee to rectify an unfair situation concerning county commissioners. Some commissioners are elected at a different time than others and a salary increase enacted by the legislature between the time of their election

and the time they took office does not apply to the commissioners in midterm. In some cases, the senior commissioners were earning less than the newcomers to the office. The committee recommends that the section be amended to permit persons holding the same office to receive the same salary. Mr. Aalyson noted that three county commissioners were here today to speak to the proposal.

They were Mr. Dale Stacy, Seneca County, Mr. Arthur Reiff, Butler County, and Mr. James Mills, Fairfield County. All expressed the feeling that it is unfair to have unequal pay for county commissioners, especially since it frequently happens that the one commissioner with the lower salary is the most experienced, and, at least at the beginning of the new term, is called upon to devote more time to the job since he is more familiar with it. All three thanked the committee for its consideration and report, and urged the Commission to adopt the committee's recommendations.

Mr. Aalyson - Thank you. Do we have questions?

Mr. Guggenheim - What offices does this apply to other than county commissioners?

Mr. Aalyson - We heard of no one other than county commissioners nor from anyone other than county commissioners.

Mrs. Orfirer - I was going to ask whether we had any testimony from Ohio state senators.

Senator Gillmor - Mr. Chairman, that in essence is what my question was going to be, if anybody had checked to see what the offices were, because I think the Senate is obviously an example, but probably also all of the multi-member state agencies and boards that we have, the PUCO, the Industrial Commission and I would imagine we probably have dozens of situations of state offices like this.

Senator Mussey - What about the county auditors?

Senator Gillmor - This wouldn't help them.

Senator Applegate - What about township trustees, even though they were a very small group?

Senator Gillmor - Mr. Chairman, I guess my question is, then, does this language apply to all of these categories, for example, or is it just local option. Would it apply to the PUCO, would it apply to legislators, would it apply to state agencies?

Mrs. Eriksson - It would not apply to Senators because Senators are governed by a separate section in the Constitution. It would, in my opinion, apply to Public Utility Commissioners and the Industrial Commission. I think there are not too many of those bodies, however, that the persons are compensated for their service. But the Public Utilities Commission and the Industrial Commission are two.

Mr. Carter - Craig, would you like to make a motion to get this before the Commission?

Mr. Aalyson - I move the adoption of the recommendation of the committee with regard to Section 20 of Article II.

Mr. Heminger seconded the motion.

Mr. Fry - Mr. Chairman, and Mr. Aalyson, what would happen if you just eliminated all language after the semicolon, where it says "of all officers;" and leave it up to the general assembly? It seems to me we're putting language in here, first it shall affect the salary of any officer during his existing term, unless the office be abolished. And then we say,"except that an increase in salary applicable to an office shall apply to all persons holding the same office." Aren't we setting up one condition and then in the next clause, we're eliminating it? Can you think of any cases? What you're doing is locking into the Constitution a provision that dates back to 1851 or somewhere, they were trying to assure that members of the legislature who voted for salary increases would not be unduly influenced by the fact that they were voting for increases for themselves.

Mr. Carter - This section is not applicable to legislators as I understand it.

Mrs. Eriksson - Section 31 of Article II covers legislators.

Mr. Aalyson - The committee did not feel that there should be such a change that the legislators would be permitted during term to raise their own salaries.

Senator Mussey - How do we differ from commissioners?

Mr. Aalyson - You're voting for your own, rather than someone else's increase.

Mr. Fry - I'm not sure that it shouldn't be allowed. What conditions would you affect then, if you eliminated all of the language after the semicolon, and say "of all officers" period, and not lock it into the Constitution? The legislature might at some time determine that this was not a bad provision.

Mr. Aalyson - My recollection of the discussion in the committee would be that there should be no opportunity for the legislature to reduce the salary of someone in office in order to compel him to leave office. We recognize that would only be a remote possibility, probably, but one that might exist.

Mr. Shocknessy - But you're dealing in the section only with cases not provided for in the Constitution. You're not dealing with a vast array. I've come close to understanding what you're saying, Charlie, "and shall fix the term of office and the compensation in all such cases.""The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation in all such cases which are not otherwise provided for."

Mr. Aalyson - My only recollection of the discussion in this area, Charlie, was that we felt that there could be the opportunity for the legislature to drive out of office an office holder by lowering his salary.

Mr. Shocknessy - But you are dealing only with such office holders as are not otherwise provided in the Constitution. You can only deal with such a person as it not provided for in the Constitution. You're not dealing with everybody.

Mr. Aalyson - Yes, but there might be cases, we felt, which were not covered directly by the Constitution in other areas that the legislature, albeit a remote chance could decide that they wanted to get rid of someone who was holding office and would reduce his salary during term for that purpose.

Mr. Shocknessy - But the only time they could touch him is if he is not otherwise been provided for.

Mr. Aalyson - We don't know that all of them are not otherwise provided for.

Mr. Guggenheim - Would this apply to members of the Turnpike Commission?

Mr. Aalyson - If they are construed as office holders, I think it would.

Mr. Shocknessy - I have never been sure what applied to them because applications have been attempted which haven't been effectuated.

Mr. Guggenheim - I think it would apply to members of the liquor commission. I think there are a number of commissions that are appointed.

Mrs. Eriksson -It would also apply to cabinet officers,- department heads.

Mr. Bartunek - Mr. Chairman, could the legislature, for example, change the salary of a governor? If this prohibition were not retained?

Mr. Aalyson - Probably not the governor. He's covered elsewhere. But there are areas we felt where the legislature could for spite pick upon a particular individual and lower his salary in order to drive him out of office.

Mr. Shocknessy - I have trouble understanding that because I think we are counting how many angels can dance on the point of a needle and you can't always find out.

Mr. Fry - Mr. Chairman, at the top of page 3 it says "the term'officer' in the context of section 20 applies to both holders of offices provided for in the Comstitution and holders of statutorily created offices and to appointed as well as elected officers." Now, wouldn't that apply to cabinet officials, to elected state officials, legislators?

Mr. Carter - As I understand it, it says "in cases not provided for in this constitution" and the legislative compensation is provided for elsewhere in the Constitution.

Mr. Shocknessy - Yes, but we aren't dealing with that.

Mr. Carter - That's right. We're not dealing with that. I happen to be a member of this committee and I certainly concur with what Craig says, that this was, I felt, a matter of simple equity for the office holders that were involved in this. I would strongly endorse this recommendation by the committee.

Mr. Shocknessy - I don't think Mr. Fry is disagreeing with the principle. I think he is disagreeing with the language. I think the language could be improved upon.

Mr. Fry - Yes, you could say the same thing and stop after "officers." It leaves it in the hands of the legislature.

Mr. Aalyson - But if you stop after "officers," you do provide the legislature with the opportunity to reduce the salary of an in-term officer.

Mrs. Sowle - Or raise it.

Mr. Shocknessy - Only in cases not provided for in the Constitution.

Mr. Aalyson - Yes, which is everybody except the legislators, and the six elected officials and judges who are otherwise provided for. Every member of every commission, public utilities, industrial, liquor anything could conceivably be reduced in order to drive that particular office holder out of office. It's conceivable that a politically oriented legislature might choose to pick upon an office holder of the opposite party that is a member of a commission in order to get rid of them. We felt that that was not something that should be left to the legislature.

Mr. Fry - Then should we eliminate reference to "unless the office be abolished?" They could do the same thing by abolishing the office, couldn't they? The legislature could abolish the office of someone they didn't like.

Senator Mussey - Simply speaking, then, if this were to pass, the only office in the state of Ohio which would not be compensated equally would half the Senate. Judges took care of themselves a long time ago. It would be half the Senate. Now you have got to get this constitutional thing through the Senate, you know.

Mr. Aalyson - But there is a very significant difference, in that one case, the legislators would be voting for their own salary, whereas in other cases they're voting for the salaries for other people. And we felt that probably the people would not sit still for letting the legislators determine their own salaries during term.

Senator Van Meter - One thing I might say, though, is that you've got to remember that that half of the Senate that would vote for such a pay raise also has to face the electorate. Those county commissioners that would be beneficiary of a pay raise could always say that they did 't do it - the legislature gave them a pay increase. They can't help it. But the people that vote for the raise are the ones that are going to have to face the electorate, which is the, I think, breaking point.

Senator Mussey - The inconsistency that Charlie Fry referred to, simply is that we're both elected for four years, both sides of the Senate, the same as the county commissioners. Some commissioners are elected for four years, and then two years later, another commissioner is elected. So the principle is the same, really, except that we set the salary of the commissioners. But the fact is that we're still in office and have to abide by the Constitution. They are still in office and yet they can be affected by an exception in the Constitution, which is an inconsistency.

Mr. Carter - Is that an argument against this section or an argument in favor of changing another section.

Senator Mussey - Probably not against this section. I'm putting this out because this thing will go through the general assembly and there will be some discussion on it.

Senator Gillmor - I think that this section probably improves it for a lot of people. I've heard really from two sets of local government officials. The county commissioners who are, in essence, taken care of by this, and the county auditor, who is not. The auditor has a little different problem. I don't know that we can cure it constitutionally unless we take Charlie's approach. The auditor is elected two years after all the other county officials and the pay raise bills for county officials always goes through the year that most of them are running. So that the auditor, if this passes, is singled out as being the only person not the beneficiary of that pay raise. So really we don't do anything with that inequity that happens to the 88 county auditors under this approach. I don't know if this Commission did it, but I notice in going through the Constitution we have made recommendations dealing with the same problem but we took a little different approach. We took the approach of,

in essence, a two year delay, so that you're talking of people with a longer term, like a commissioner. That was done on that basis. I think under the same section, there was a previous recommendation that got at it in a little different approach, and I wonder if it might not be better. That approach, for example, would take care of the county auditor, whereas this one doesn't,

Mr. Carter - You're concern is that if this were adopted, the county auditors would end upbeing discriminated against.

Senator Gillmor - What I'm saying is I hear from two groups of local officials, and I think they both have a legitimate complaint on the inequity. One is the commissioners and one is the auditors. I think this solves it for the commissioner but not for the auditor.

Mr. Bartunek - Why wouldn't it solve it for the auditor? If you pass this, then his increase could be paid to him, just like the commissioner who has another three years to go.

Senator Gillmor - No, here's what would happen. Let's say you have an election in 1974 and an auditor is elected in 1972 and a commissioner is elected in 1972. When it comes after the 1974 election, the pay raise passes before the 1974 election, after the 1974 election, that county commissioner who was elected in 1972 receives the benefit of a higher salary. The county auditor is still serving under his 1972 salary. That's the way the pay bill practically works.

Mr. Reiff - Mr. Chairman, I think in your wisdom, you have already taken care of the auditor. In a recent pay bill that provided for an automatic 5% cost of living increase annually.

Mr. Bartunek - The salary would go into effect in January of 1975, when they took office. I don't understand why this would not apply to the auditor because the salary increase would take place on January 1, in 1975 and even if he didn't run that year, if this prohibition were taken out, he would still be able to be raised in term.

Senator Gillmor - I think if you totally eliminated the prohibition, I would agree with that, but I'm referring to a recommendation which doesn't do that. It only applies to situations where you have two individuals holding the same office, which doesn't apply to auditors.

Mr. Bartunek - Yes, you're right.

Senator Van Meter - Mr. Chairman, the only thing I was going to say is that it is a little different for the auditor is the fact that he does not take office until March, the legislature is in session, and they do have an opportunity to make a change prior to his taking office whereas the other officials usually take office at the first of January, and between the election and the first of January, the legislature is not in session and does not act.

Mr. Aalyson - Another consideration, I think is that in the case of the commission's embodying several members, you have one member compared to other members, whereas the auditors are all treated uniformly.

Mr. Shocknessy - I think we're about ready for the question.

Mr. Carter - Let's call the roll and see how we stand on this particular section.

The motion is the committee recommendation to adopt the change outlined in Section 20 of Article II in the committee's report.

Senator Mussey - What has been found with regard to the auditor then?

Mr. Bartunek - It does not apply to the auditor.

Mr. Carter - Except, as has been pointed out by Senator Van Meter, there is another couple of months that the legislature has the opportunity to correct inequities in that respect. Would you call the roll please, Ann?

Mrs. Erikson - Those voting yes were Senators Applegate and Mussey; Representatives Panehal, Pope, Roberto; Messrs. Aalyson, Carter, Heminger, Huston, Mrs. Orfirer, Mrs. Sowle and Mr. Unger. Mr. Fry, Senators Gillmor and Van Meter voted No. Mr. Bartunek, Mr. Shocknessy and Mr. Guggenheim passed.

Mr. Carter - As is our custom, we will hold the roll call open. Do you want to give us a report, Ann?

Mrs. Eriksson - We have 13 yes, 3 no, and 3 pass.

Mr. Shocknessy - You wouldn't have enough then. You need 20?

Mr. Carter - We need 22.

Mr. Fry - Why don't you see how close you come. I just think the language is sloppy.

Senator Gillmor = My problem isn't with the concept that's embodied here. My problem is with the language. I think we ought to take a look at that other language that we recommended earlier, to see if it takes care of people like the county auditor.

Senator Applegate - As far as the county auditors are concerned, it's true we gave them a raise of 5% a year for four years, which could, even though I voted for it and I think most of us here did, probably could be taken to court and ruled unconstitutional as receiving a pay raise during the term of office.

Senator Van Meter - I voted against it on that basis, that it was unconstitutional.

Mr. Shocknessy - That almost presupposes referring it back to the committee.

Senator Van Meter changed his vote from yes to No, stating he hoped better language could be presented.

Mrs. Orfirer - There's been a lot of wasted motion on this. Would it be wise to refer it back to the committee now?

Mr. Shocknessy - That's what I thought.

Mr. Aalyson - I'm indifferent. I do feel that there was an inequity with regard to the county commissioner situation. I didn't compose and have no special love for the language as it exists. I believe Charlie's recommendation would provide the opportunity which I have suggested for the general assembly to pick on a particular office holder and therefore I believe we ought to retain something which would prevent that, but I have no objection whatever to reconsidering the language and seeing if we can't come up with something that would perhaps be acceptable to all the members of the Commission which would perhaps embody all of the ideas that the Commission wants embodied.

Mr. Carter - If agreeable, we could declare the motion lost and rerefer the section to the committee.

All agreed.

Mr. Aalyson - The next section considered by the committee is Article II, Section 34, welfare of employees. This section was originally founded in the idea that inhumane conditions including inadequate wages were being paid in the state. Perhaps, in the present climate, there is no need for this particular section to remain in the constitution; however, it was the feeling of the committee that there was also no need for it to be repealed and that perhaps it would not sit well with the general public were it attempted to repeal it, so we have recommended no change. I move the adoption of the committee's recommendation in that regard.

Mrs. Sowle - I second the motion.

Mr. Carter - It does not require a roll call. We'll have a show of hands. (The motion was unanimously accepted).

Mr. Aalyson - The third item is Article II, Section 35, dealing with workmen's compensation. The idea behind this section of the constitution, of course, is that industry should bear the costs from injuries incurred by workmen in industry and there was originally, before this article was adopted, or before there were any statutes in this area, an unfair advantage to the employer when an injured workman was pitted against the employer in a court of law. The committee heard considerable argument on this section, a lot of it from the chairman of the committee, some of it from representatives of employers, although none, as I recall, from labor, and the consensus of the committee was that the article should stand as it now exists and that there should be neither any amendment or repeal. I move the adoption of the committee's recommendation with regard to workmen's compensation that there be no change.

Senator Mussey seconded the motion.

Mrs. Pope - Mr. Chairman, some of you may be aware that there has been a legislative committee appointed to look into the workmen's compensation and industrial commissions, looking into some of our statutory law. I don't know that there would be any reason to make any change in the Constitution. However, since there appears that there may be some revamping of things, I just wondered if the committee might think it advisable to hold off on a recommendation of no change until we get a chance to see what the committee may be coming up with. I haven't really heard any discussion on changing the Constitution, but it seems to recommend no change and then have another committee come up with a constitutional recommendation for change, we may be just spinning wheels for nothing.

Mr. Carter - It is true, Mrs. Pope, that this commission is an advisory group to the legislature. There's nothing that prohibits the legislature, of course, from acting independently from the Commission on any matter referring to constitutional revision I think that it was the committee's recommendation that there should be no change in this as best we could determine. There is clearly a lot of controversy in this area, but our feeling was that the Constitution was reasonably well balanced at the present time, and if changes were to be made, we weren't wise enough to come up with them. Maybe it would be better if we left this to the wisdom of the committee you're talking about.

Mr. Aalyson - I might say that the discussion that was had in the subcommittee of this Commission probably did not center on any of the areas that will probably be considered by the legislative committee. The things we discussed which might have effected a change in the Constitution are probably different areas. As a matter of fact, we came to the conclusion, I think, that those areas which might be susceptible of change in the Constitution were probably better served by legislative change then

constitutional revision.

Mrs. Pope - I have no indication that we are going to consider a constitutional change, but I do give this group a great deal of weight so far as their recommendations are concerned, and it just seems to me that it might be at loggerheads if one committee comes in with a recommendation for change, the legislative committee, and hear we have the Ohio Constitutional Revision Commission coming in with a recommendation for no change. I just thought it might be wise, if possible, to postpone the possible clashing of two opinions.

Mr. Shocknessy - We could do the same thing we did with the last one--postpone it.

Mr. Bartunek - I so move, Mr. Chairman.

Mr. Aalyson - In view of the statement, I believe I would be willing to withdraw my recommendation or my motion that the recommendations of the committee be accepted until some later time when we can consider it as a whole.

Mr. Russo - I don't think it's necessary to postpone the committee's recommendation. I just want to point out that no matter what the legislative committee does, they will be doing it after we take some action. If at the present time, we can't find anything wrong with that section on workmen's compensation, and we don't see any need for a change or any need to postpone recommending any change or nonchange, I don't see why the commission doesn't take action on the subject matter now. In the future, if there is something that the legislature determines to change, we could consider it. But at the present time, I don't see any reason to wait.

Senator Van Meter- I honestly believe the committee chairman here when he says that the areas of concern will be entirely different. Of course, if the legislative study committee wants to come up with a resolution, to put on the ballot they can do it, and should, if they feel the Constitution should be changed. But this committee has gone through the process of study, debate, decision, and they brought it before the Commission for a decision. I see no reason to hold up on it because then if the question comes up in the study committee on what the recommendation of the Constitutional Revision Commission is, we can say they recommend that there be no changes. Then if they want to go ahead and do something, they'll do it on their own, and it would be a legislative matter.

Senator Applegate - I would agree with Representative Pope that in going into a study, it never is really limited, and you don't know from one time to the next what type of recommendation they may come up with--whether it's statutory or whether it would do with t Constitution. Or it may well do with some of the subject matter that we are dealing with here. I don't see any rush to say there will be no change. We're not rushing toward any particular date, because there isn't going to be any change.

Mr. Carter - That is correct. The recommendation doesn't result in any action, so there isn't the urgency that there would be if we were recommending a change.

Mr. Aalyson - I will formally withdraw my motion.

Mr. Carter - Any other comments? I understand your point, Tony, but if it were a recommendation that's a different matter from just status quo. Craig, would you proceed?

Mr. Aalyson - The next item on the agenda is Article II, Section 37, which is on page 4 of your report, which concerns itself with the 8-hour public work day and the 48 hour public work week and purports to limit a workday or a workweek to that period of time in any area where there is public work involved or there is a political subdivision involved. We felt that if the constitutional provision ever had any viability,

it doesn't at this point and we recommend its repeal. I move the adoption of the committee's recommendation in that regard.

Mrs. Orfirer seconded.

Mr. Carter - Discussion?

Mr. Applegate - Id just like to ask Mr. Aalyson what testimony was given by various organizations that represent state employees, like AFSCME and OCA.

Mr. Aalyson - This concerns private employees engaged in state-related activities, building, perhaps a school house or a court house.

Mr. Applegate - This would be done through your union shops and they would be contractual anyway .

Mr. Aalyson - Yes, and this points out whether done by contract or otherwise. I think this thing is honored more in the breach than in the observance now and I don't know of anyone who wants it. We heard nothing from anyone in this connection and we thought it is obsolete.

Mr. Carter - Any further discussion? Would you call the roll, Ann?

The roll was called. Those voting "Yes" were: Senators Applegate, Gillmor, Mussey, Van Meter; Representatives Panehal, Pope, Roberto; Messrs. Aalyson, Bartunek, Carter, Fry, Guggenheim, Heminger Huston, Mrs. Orfirer, Russo, Shocknessy, Mrs. Sowle and Mr. Unger.

Mrs. Eriksson - Nineteen "Yes" votes.

Mr. Carter - Then we will hold the roll call open until the next meeting.

Mr. Aalyson - The next item is Section 4 of Article XV which concerns itself with who is eligible to hold office in the state. The present Constitution says, "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector." The committee has made a recommendation for amendment to this section. This was based upon discussion of the fact that the section as it presently stands tends to preclude the chance for appointment of a very well qualified person who is not an elector in this state to hold office in this state.

Mr. Carter - I think we used the example of one of our former Commission members.Hal Hovey who went to the state of Illinois to be Finance Director, obviously well qualified. Had it been the other way around, and we were trying to get him in the state of Ohio, it is doubtful whether he could have accepted this office. We felt that it was important that a person to be elected should have the qualifications of an elector but we felt that it should be possible to get a very well qualified person provided he assumed residency within the state ven though he did not have the qualifications of an elector at the time of his appointment.

Mr. Aalyson - Yes, and we made the modification in the last sentence of the recommendation "No person appointed to any office in this state shall assume office unless a resident of the state." This would permit the appointment of a person to office. It would not permit an election of a person to office, but in the event of appointment, the individual appointed would have to be a resident of the state at the time he takes office. In other words, we're saying anyone who is running for elective office must

be an elector of the state as that term is defined in the Constitution. Anyone who is sought to be appointed need only be a resident at the time he takes office. That will permit us to go outside the state to seek well qualified individuals for appointment to the state. I move that the committee's recommendation with regard to Article XV, Section 4 be adopted.

Mr. Roberto seconded.

Senator Van Meter - Then this would preclude the governor of the state bringing in an expert for a very short period of time to appoint him to a position, again, for a short period of time, unless the person assumed residency. Is that correct?

Mr. Aalyson - If he were appointed to an office. It's not just to act in an advisory capacity, I wouldn't think, but if he were appointed to an office, he would have to become a resident. Formerly, he had to be an elector.

Mrs. Orfirer - He not only had to be a resident before, he had to be an elector.

Mr. Aalyson - But he could remain a nonresident under the present provision until he assumes office.

Senator Gillmor - I don't have any objection to this, in fact, I think it goes in the right direction. I guess my question is could it go even farther. I'm trying to think of an instance where it would really be necessary to have the appointee be a resident at the exact time of assumption of office. I'm not even sure that we have to limit it that far. Obviously, in an elective office you do. So I'm not critical of the recommendation because I think it improves things, but I just wonder if it would be artful to even go further and delete the last additional sentence.

Mr. Shocknessy - That's what we had to do with Charlie Noble, if you remember. We had to appoint someone else director until Charlie Noble could get sufficient residence in Ohio to be named by the then governor, Bill O'Neill, as Highway Director.

Mr. Carter - I think that's an interesting question then, that's brought up. Have we gone far enough, basically?

Mr. Aalyson - The question that immediately comes to my mind, although I don't think we discussed it in committee, perhaps we did, I don't recall it, would be if you had a nonresident office holder who was earning a substantial salary in this state who might be avoiding paying taxes to this state, for example, because his home state taxes him and we gave him some sort of write-off. I don't know whether the situation could exist, but it seems to me unfortunate if it could.

Senator Gillmor - Mr. Chairman, I was not aware of the situation which was mentioned in the O'Neill administration where the present provision was a problem. And I think we could eliminate that problem. I'm not so concerned about that instance that was just brought up because it's hard for me to envision that happening as a practical matter. I agree that if it did happen, it would look pretty bad. It's just hard for me to envision that someone is appointed and then never resides here.

Mr. Shocknessy - I'm always sure that there are enough people in Ohio than can fill any office that we need to have filled. It's not necessary to go outside. However,...

Senator Gillmor - I certainly support this proposal and would vote for it and the only question is whether or not that might improve it.

Mrs. Sowle - As a member of the committee I don't recall that we really considered eliminating the requirement. We could accomplish this by just removing the term "or appointed" so that the section wouldn't operate as a restriction on people appointed to office. If we are concerned about the appointment of someone who was going to live in Michigan and work in Ohio it seems to me that there are political constraints against undesirable results like that, that are unnecessary to put in the Constitution. I think the committee might want to reconsider this.

Mr. Shocknessy - I could support the recommendation.

Mr. Russo - Philosophically, I would oppose anyone who is not a resident or an elector of the state of Ohio to hold a public office.

Mr. Carter - At least a resident.

Mr. Russo - I think that at least, if he's not an elector. What position in Ohio is so important that we have to go outside the state?

Mr. Aalyson

Mr. Bartunek - Is the president of a university an officer? /We felt that if a person is going to be working in Ohio and drawing a fairly substantial salary, he at least ought to be a resident of the state.

Mr. Russo - It's his duty to be an elector, too.

Mr. Aalyson - Well if he stays long enough he should be, I agree. But the impetus of our decision was that we could go outside the state to get somebody, but let's get him inside the state if we are going to pay him.

Mr. Fry - We've had to employ our director of mental health from outside the state. Apparently, it's difficult to find qualified people, certainly in the judgment of the governors and their advisors.

Mr. Carter - Is there any more discussion? I think perhaps we ought to get this matter on the table, and I think the best way is to call the roll.

The roll was called. Those voting "Yes" were Senators Gillmor, Mussey, Van Meter, Representatives Pope, and Roberto; and members Aalyson, Bartunek, Carter, Fry, Guggenheim, Heminger, Huston, Orfirer, Shocknessy, Sowle and Unger. Those voting "No" were Senator Applegate, Representative Panehal and Mr. Russo.

Mr. Carter - Again, we will hold the roll call open until the next meeting.

Mr. Aalyson - The penultimate section for our consideration in this report is Section 7 of Article XV which concerns itself with the fact that persons coming into public office shall be administered an oath. We saw no objection to that and therefore recommended no change, and I therefore move the adoption of the committee's recommendation that there be no change of Section 7, Article XV.

Mr. Carter - Do we have a second?

Senator Applegate - Yes. I second the motion.

Mr. Carter - Any discussion? This is an easy one. All those in favor raise their hands. Opposed? The motion has unanimously carried.

Mr. Aalyson - The final or ultimate section is Article XV, Section 10, concerning civil service. Again, the committee recommends no change. I move that the committee recommendation be agreed to.

Mr. Fry seconded the motion and it was unanimously adopted.

Mr. Carter - Thank you, Craig. Now we have one more matter. The Local Government Committee met and have a matter that they would like to present to the Commission.

(Copies of a proposal were distributed)

Mrs. Orfirer - Thank you, Dick. I have reported to you several times that we have been considering in the committee further matters than we had covered earlier, and we had placed them in abeyance primarily because we felt the main issue that confronted us was that of housing. We had held up on taking any action on this until we see what happened to the Governor's proposal on the ballot. While we did not all necessarily agree with everything in that proposal, it did cover everything that we were considering, and we felt that there was no point in our pursuing the matter until that had been resolved, and we left it that . . .

Mr. Shocknessy - Yes, but House Bill 870 was passed at the last general assembly, and it was under authority then existing provisions and House Bill 870 is still law, so I don't know what this is all about. Why do you need this, if you could do without this? Where did this all come from? No wonder I'm suspicious about what happens at lunch!

Mrs. Orfirer - Mr. Shocknessy, we have been discussing this for six months, not only over lunch.

Mr. Shocknessy - Yes, but H. B. 870 was on the back burner for eight months. It went on the back burner and stayed there until the fourth of November. Now, back on the front burner, it is my view that H. B. 870 is now available for constitutional interpretation as to its validity, in which I'm inclined to believe, and I'm inclined to believe that it's valid under the existing constitution. And I don't quite see why you have to put in a new provision in the Constitution at this time, until you know more about H. B. 870 than you do. Now, if these legislators here think that 870 isn't good, that's alright with me. Think what you please. But 870 was passed by the legislature and it is the law. Why do you have to have something to validate 870 if it is already on the books?

Mrs. Orfirer - Perhaps we don't, sir. My understanding from our consideration of it has been that there has not been any action undertaken under 870, that the validity of it has not been tested. Our feeling was that housing was of great importance . . .

Mr. Shocknessy - The state of Ohio can find that out a lot faster than you can get an amendment to the Constitution. The Supreme Court of Ohio is going to take a look at 870, I hope pretty quickly, because I'm advised that the Housing Authority has asked for a legal determination, through counsel, by the Supreme Court.

Mr. Fry - Mr. Chairman and Mrs. Orfirer, the Housing Commission is going to get a test case on 870, that's their intention right now. On the other hand, they would much prefer, in addition to that to have language such as this which mentions housing as a public purpose of the state and they feel that whatever happens, if 870 is declared unconstitutional or constitutional, they're better off by having this . There's one other point . . .

Mr. Shocknessy - Well I'm prepared to take the position that 870 is constitutional.

Mr. Fry - But the Supreme Court has final say.

Mr. Shocknessy - Who is "they"?

Mr. Fry - Mr. Losoncy of the Housing agency. Now, the second point is that if section 14 of Article 8 is submitted and adopted, it makes it possible for cities to go ahead and use the bloc grants. They've already lost one year.

Mr. Shocknessy - But this language isn't going to do anybody any good for at least two years whereas the constitutional determination on H.B. 870 in the next term of court, in this ensuing term of court.

Mr. Fry - If this is adopted in June, why certainly you accomplish the purposes...

Mr. Shocknessy - Charlie, you are aware that a housing amendment was turned down rather handsomely rather recently. Now, I don't know why you want to offer, yourself, a housing amendment at this time when I think H.B. 870 is adequate, and I don't think you need to go any farther.

Senator Applegate - Let me ask one question. Suppose the Supreme Court says that H.B. 870 is constitutional and the housing authority is allowed to issue bonds, et cetera, et cetera. Then we put this on the ballot and the people turn it down. Where does that leave anything?

Mr. Shocknessy - I agree with you entirely.

Mr. Carter - I might comment that this is much broader than just 870.

Mr. Shocknessy - Yes, but I might comment that I don't know that this is ready for consideration.

Senator Gillmor - Actually, I just want to raise a question too because I'm not sure. I'm wondering, for example, whether we are contemplating full faith and credit bonds or whether we're contemplating revenue bonds which are something completely different. Looking at the language, and the reason I ask, Charlie, the language would appear to mean that you could issue full faith and credit bonds.

Mr. Shocknessy - That's what it says, "...may extend aid and credit for the public purpose of housing." Those are faith and credit.

Mr. Bartunek - And what's the public purpose of housing. That's not just public housing. It could be anything.

Mr. Shocknessy - I think you guys are about to pick up something that's a little bit like a hot potato.

Mrs. Eriksson - The language "aid and credit" is the language of the section of the Constitution that prohibits the state from lending its aid and credit, which is not the general debt limit section - this is not full faith and credit.

Mr. Shocknessy - Yes, but this is a new section of the Constitution. It says Section 14, and that makes it new. And that means that it's language that is entitled to redefinition. It's not bound by any existing definition. You agree to that, don't you?

Mrs. Eriksson - It does not, of course, use the expression "faith and credit".

Mr. Shocknessy - Well, I don't know. I'd like to suggest that you drop this for the time being. If you want to, bring it up, after the Supreme Court of Ohio at least gets a chance to look at 870. But I don't think that this commission ought to do anything in derogation of the position of H.B. 870 which the General Assembly passed in good faith and I assume believed in.

Mr. Unger - I wish I shared your confidence in the Supreme Court of Ohio. It's a great court, but history indicates...

Mr. Shocknessy - I've lived with it 45 years.

Mr. Unger - It may not be as willing to move in the direction that H.B. 870 indicates. This test case has been postponed, as you know, for some time...

Mr. Shocknessy - How has this test case been postponed? They haven't had it. It hasn't been filed.

Mr. Unger - That's exactly what I said, sir. It's been postponed because there was some...

Mr. Shocknessy - Administratively postponed.

Mr. Unger - ...some considerable question as to whether the court would, in fact, validate the act, would find it constitutional.

Mr. Shocknessy - Well I was present for many of those discussions. I think I have some familiarity with the basis upon which the administrative determination was made not to seek constitutional interpretation prior to the submission to the electorate of the housing amendment which was recently defeated.

Mr. Unger - In any case, this would settle the matter by doing exactly what you said should be done. It would validate H.B. 870 which is now law but not in operation because of the uncertainty as to the constitutionality. This would indicate that it is constitutional if this were passed by the voters. And this would take care of the problem that has existed for many years and which has become critical now...

Mr. Shocknessy - You're assuming somebody's determination of an invalidity which I' m not at all sure has been determined. The only people who are on the surface concerned at this time with getting a constitutional determination are the members of the housing authority.

Mr. Carter - I don't think that's an accurate statement.

Mr. Shocknessy - What do you mean it's not an accurate statement? I said the only one that I know of who is concerned with getting it would be the housing authority and I'm willing to take the position right now that they're the only ones that have the official right. I believe the things that have passed the General Assembly are law until somebody says they're not.

Mr. Carter - Jim, I don't disagree with you but what I'm suggesting is that this is directed to local governments as well as state governments, and perhaps it might be well if we were to hear just briefly from John Gotherman of his concerns from the city level. This covers a lot more than just H.B. 870.

Mr. Bartunek - Mr. Chairman, every other time we get something to vote on, we get reams of legal documents and...

Mr. Carter - This is not up for vote today.

Mrs. Orfirer - I thought this was understood. Everything is heard twice, and all I wanted to do today is put this on the floor so you would have the wording in front of you to come back at our next meeting with a full explanation. Your point is very well taken, Mr. Bartunek. It was only to get this in front of the people. I would like to take our Chairman's suggestion and ask Mr. Gotherman if he would respond to this, if I may.

Mr. Shocknessy - Why? We haven't had any opportunity to consider it ourselves.

Mr. Aalyson - Mr. Chairman, I would like to have the opportunity to hear Linda's full statement as to why this is being submitted. I felt that she was not able to complete her statement as to why she brought it here today, and I'd like to hear from her.

Mr. Shocknessy - I want to hear that, too.

Mrs. Orfirer - I don t know that I am prepared today to go into all the details...

Mr. Aalyson - No, just what you initially started to say before you were interrupted.

Mrs. Orfirer - We felt that there is a great need for housing as a public purpose to be stated in the Constitution as a public purpose. Apparently, from what we have been told, it's been impossible for some federal programs to be initiated in the State of Ohio because of constitutional provisions in the state. We did take into consideration the fact that the housing amendment that was recently on the ballot lost. We felt that there were many other considerations as to why that went down that would not pertain to a provision which might be recommended by this Commission. We felt that its association with the other issues and with the tax issues did drag it down. That it lost to a much less extent that the other did. That it had the support, or the lack of opposition, of many of the groups that opposed the other issues: The AFL-CIO recommended, as I understand, the housing issue. The League of Women Voters took no stand on it, did not oppose it as they did the other issues. It seemed to have bipartisan support, apparently both the support of the Governor and I would think of the General Assembly which had passed the bill. So we felt that it had a good chance of being passed and put on the ballot in June and accepted by the public in June. At this point, if it is agreeable, I would like to have Mr. Gotherman speak to why he feels that it was important.

Mr. Fry - Mr. Chairman, I think that Mr. Bartunek's point is well taken;that it would be much more acceptable to the members of the commission to have the background and a lot of things haven't been said. For example, 870 is in some respects much more liberal than this. It makes provision for the moral faith of the state and reserves and things of that sort. But I think if this is written up and made available to members of the commission before the next meeting, for consideration at that time...

Mr. Carter - What you're saying is that you'd much rather listen to what John has to say after we've had a chance to look at the documentation.

Senator Gillmor - Mr. Chairman, a couple of things, since this is preliminary as I understand,it might be well to take a look at. First of all, I think it is going to make a great deal of difference whether these are full faith and credit bonds or whether they are going to be industrial revenue bonds. I'm thinking, for example, of one situation that would appear to be authorized under this, would be suppose you've got an agency that issues revenue bonds, and then you have a state

guarantee of those bonds, it would appear to me that under this provision, notwithstanding any other provision of this constitution, in essence, it's gone totally around the debt limitation and we could under this language be under a multi-billion dollar open end commitment if it were full faith and credit. So there are just some of the areas I'd like to call to your attention.

Mr. Carter - What he's saying is that there are other aspects of this that should be considered and I might say the finance and taxation committee was concerned with the very point that you are talking about in its deliberation and I concur 100% speaking as an individual. But I think the committee's recommendation coming back should also consider the debt question as to how much. We will await the committee's full report on this question.

Mrs. Orfirer - Fine.

Mr. Carter - The last item on the agenda is, of course, the date of the next meeting. I would not anticipate that we would have a December meeting, and I would think rather than try to schedule a meeting as far away as January, that we follow our procedure as the date approaches to send out a card with choices on it. We had a fine turnout. I'm particularly delighted we were able to have so many members of the legislature with us which is a most important part of our deliberations. And when we scheduled our meetings in conflict with the legislature, that was always a tremendous handicap. So we're delighted to have you with us and very much appreciate it. Is there any other business to come before the Commission?

The meeting was adjourned.

Ann M. Eriksson, Secretary

Richard H. Carter

Ohio Constitutional Revision Commission
January 27, 1976

Minutes

The Ohio Constitutional Revision Commission met on January 27 at 1:30 p.m. in Senate Hearing Room "D" in the State House. Commission members present were the chairman, Mr. Carter, Messrs. Bartunek, Carson, Cunningham, Fry, Guggenheim, Heminger, Huston, Montgomery, Russo, Skipton and Representative Roberto.

Mr. Carter called the meeting to order.

Mr. Bartunek - Mr. Shocknessy asked me to extend his apologies, but he had a conflict that came up and that's why he can't be here.

Mr. Carter - Thank you, Joe. You all received minutes of the November 18 meeting. I read them and found them to be reasonably okay. Is there any correction that anyone wants to make to them?

Mr. Bartunek - I move they be approved as distributed, Mr. Chairman.

Mr. Carter - Is there any objection? They are approved as distributed. The Judiciary article that was voted on at the last commission meeting, I'm very happy to report, has received sufficient votes. Some very narrowly. Would that be correct, Don?

Mr. Montgomery - That would be an overstatement.

Mr. Carter - Any time you can get 22 yes votes in this Commission with the people who don't vote, it's a pretty strong affirmation, and I want to congratulate the Judiciary Committee on bending far enough so that we could get support on all of those. I think we'll have a good report. Don, I understand that the committee has talked about having a minority or "less than 2/3 majority" report. The votes on the sections are as follows:

Article IV, section 4. Yeas: Senators Gillmor and Van Meter; Representatives Norris, Panehal and Roberto; Messrs. Aalyson, Bartunek, Carson, Carter, Clerc, Cunningham, Fry, Guggenheim, Heminger, Huston, Mansfield, Montgomery, Mrs. Orfirer, Messrs. Russo, Skipton and Wilson and Mrs. Sowle. Nays are Senators Applegate, McCormack, Mussey; Representative Maier; Mr. Unger. Totals 22 yeas, 5 nays, 1 pass. Mrs. Pope passed.

Article IV, section 5. Yeas: Senators Applegate, Gillmor, Mussey and Van Meter; Representatives Norris, Panehal, Pope, and Roberto: Messrs. Aalyson, Carson, Carter, Clerc, Fry, Guggenheim, Heminger, Huston, Mansfield, Montgomery, Mrs. Orfirer, Messrs. Russo, Skipton, Mrs. Sowle and Mr. Wilson. Nays: Senator McCormack, Representative Maier; Messrs. Bartunek, Cunningham, Unger. Total: 23 yeas, 5 nays.

Article IV, section 6. Yeas: Senators Applegate, Gillmor, McCormack, Mussey, Van Meter; Representatives Norris, Panehal, Roberto; Messrs. Aalyson, Bartunek, Carson, Carter, Clerc, Fry, Guggenheim, Heminger, Huston, Mansfield, Montgomery, Mrs. Orfirer, Mr. Skipton, Mrs. Sowle, and Messrs. Wilson and Russo. Nays: Representative Maier; Messrs. Cunningham and Unger. Pass: Mrs. Pope. Totals 24 yeas, 3 nays, 1 pass.

Article IV, section 7. Yeas: Senators Applegate, Gillmor, Mussey, Van Meter; Representatives Maier, Norris, Panehal, Roberto; Messrs. Aalyson, Carson, Carter, Clerc, Cunningham, Fry, Guggenheim, Heminger, Huston, Mansfield, Montgomery, Mrs. Orfirer, Messrs. Russo, Skipton, Mrs. Sowle, Messrs. Wilson and Unger. Nays: Senator McCormack; Rep. Pope; Mr. Bartunek. Totals 25 yeas, 3 nays.

Article IV, section 15. Yeas: Senators Applegate, Mussey and Van Meter; Representatives Maier, Norris, Panehal and Roberto; Messrs. Aalyson, Carson, Carter, Clerc, Cunningham, Fry, Guggenheim, Heminger, Huston, Mansfield, Montgomery, Mrs. Orfirer, Mr. Skipton, Mrs. Sowle, Messrs. Wilson and Unger. Nays: Senators Gillmor and McCormack; Representative Pope; Mr. Bartunek. Pass: Mr. Russo. Totals: 23 yeas, 4 nays, 1 pass.

Article IV, section 23. Yeas: Senators Applegate, Gillmor, Mussey and Van Meter; Representatives Maier, Norris, Panehal and Roberto; Messrs. Aalyson, Carson, Carter, Clerc, Cunningham, Fry, Guggenheim, Heminger, Huston, Mansfield, Montgomery, Mrs. Orfirer, Mr. Skipton, Mrs. Sowle, and Messrs. Wilson and Unger. Nays: Senator McCormack; Representative Pope and Mr. Bartunek. Pass: Mr. Russo. Totals: 24 yeas, 3 nays, 1 pass.

Mr. Bartunek - Mr. Chairman, could I get a copy of the final report approved by the Commission?

Mrs. Eriksson - The sections themselves are in front of you.

Mr. Bartunek - These are the only changes that were made?

Mrs. Eriksson - In Article IV, on the judiciary. Now, of course that's not the report itself, it offers no explanations, but it's simply the sections. This is the complete Article IV as now approved by the Commission.

Mr. Bartunek - I just see one little conflict here in section 1, Article IV. You limit the judicial power to the supreme court, court of appeals, court of common pleas, and other special subject-matter courts having statewide jurisdiction, and then in section 4, later on, you allow the probate court to continue as it exists. Would that be a conflict?

Mrs. Eriksson - That is a division of the common pleas court. That's the way that's presently constituted.

Mr. Bartunek - Yes, but I see you erased divisions from section 1.

Mrs. Eriksson - Only the creation of separate courts. Other divisions of common pleas court are permitted.

Mr. Bartunek - In your opinion, then, there is no conflict?

Mrs. Eriksson - Not in my opinion, Mr. Bartunek.

Mr. Carter - I don't know whether Don, you or Julius would want to comment on that.

Mr. Nemeth - I do not believe there is any conflict.

The final vote was also in on two of the what's left committee recommendations which are as follows:

Article II, section 37. Yeas: Senators Applegate, Gillmor, Mussey and Van Meter; Representatives Maier, Norris, Panehal, Pope and Roberto; Messrs. Aalyson, Bartunek, Carter, Clerc, Fry, Guggenheim, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Russo, Shocknessy and Skipton, Mrs. Sowle, Messrs. Wilson and Unger. Nays: Mr. Cunningham. Totals: 25 yeas, 1 nay.

Article XV, section 4. Yeas: Senators Gillmor, Mussey and Van Meter;

Representatives Maier, Norris, Pope, and Roberto; Messrs. Aalyson, Bartunek, Carter, Clerc, Cunningham, Fry, Guggenheim, Heminger, Huston, Montgomery, Mrs. Orfirer, Messrs. Shocknessy and Skipton, Mrs. Sowle, Messrs. Wilson and Unger. Nays: Senator Applegate; Representative Panehal; Mr. Russo. Totals: 23 yeas, 3 nays.

Mr. Carter - You have in front of you a summary of where our various proposals stand. I would like to make a comment that, as always, the best laid plans of mice and men....go awry. The Secretary of State has become quite concerned over the June election because of the primary and the bedsheet ballot problem that he's faced with, and has written the House and Senate leadership that he is most concerned about having a lot of constitutional amendments on the June ballot in context with the bedsheet ballot for the presidential primary. You may recall that at the November election, the constitutional amendment was passed for the elimination of the bedsheet ballot.

Mr. Roberto indicated that he had to leave. Mr. Carter asked him to comment on the flexible debt limit proposal.

Rep. Roberto - I'll just say that it is the chairman's intention to take a vote on the flexible debt limit tomorrow. I'm not entirely sure whether we have enough votes yet.

Mr. Carter - I'll read the last sentence from the Secretary of State's letter. "For the aforesaid reasons, unless the legislature can work out solutions to the bedsheet ballot, I urge that it hold to a minimum the number of constitutional amendments to be included on the primary ballot." Now, what has happened is that a constitutional amendment dealing with the simplification of the ballot was passed in November, but it required the legislature to pass enabling legislation, which has not been done, and as you know, it is a controversial area and so there is considerable doubt as to whether it is going to get through. That's my own judgment, to get it through in time to be effective. So it looks as though we may be faced with this mess again on the June ballot. And the Secretary is very concerned about having constitutional amendments. He goes through the problems: the machines, the problems of getting it on ballots and so forth and so on. I'm afraid that, as a practical matter, what's going to happen is that the legislative leadership is going to take this seriously and may slow down the activities that we hope to have on the June ballot. I don't know what to do about it.

Mr. Skipton - Mr. Chairman, if they get that constitutional amendment on dealing with real property taxes, we don't want to be on it.

Mr. Carter - So we'll just have to wait and see. Ann, would you comment on those items, please.

Mrs. Eriksson - You have in front of you a status of pending proposals. I'll just mention the things that have happened since the beginning of the year. S.J.R. 4 possibly was going to be reconsidered in the House this morning. I don't know whether that happened or not. However, that is tandem election, and that is probably very close to passage and that would go on the June ballot if that is agreed to by both Houses in its present form.

Mr. Carter - I might add that it is my information that chances are excellent that it will pass the legislature.

Mrs. Eriksson - The two taxation resolutions have both moved along and they are both now in the Senate Rules Committee which means that they only await assignment for a floor vote. H.J.R 42, the initiative and referendum proposal has passed the House. It has undoubtedly been assigned to a Senate committee and I have not yet looked to see which committee that is. We have had one hearing on S.J.R. 17 and we'll have another hearing tomorrow night on S.J.R. 17. That is not a matter that is of major importance. Two of the other elections resolutions have passed the Senate and have been reported by a House committee and are now awaiting assigment for a floor vote in the House. In the five county resolutions, we had already had two of those, 30 and 31, pass the House. H.J.R. 29, county powers, was narrowly defeated in the House on January 15, and a motion to reconsider that resolution is now pending in the House. The debt proposal, perhaps Mr. Carter will want to speak futher about later on, has had two hearings in the House Ways and Means Committee. The third hearing is scheduled for tomorrow morning and the chairman did announce his intention to have committee action on it tomorrow morning. So one way or the other that one will probably be acted on tomorrow morning.

Mr. Carter - I might comment further on the state debt question. Nolan and I were both planning to be here last Wednesday. Nolan got stuck in his driveway in the big snow storm, and I came down with a head cold, so neither one of us were here. But I have followed up on it since that time to see what happened. These are my personal observations at the moment. It was my feeling that there is strong support for the flexible debt limit proposal in the House. I know nothing of the Senate, but you may recall that Oliver was much in favor of this years ago and introduced in the Senate a resolution for that purpose and it never got off the ground. The problem that I think the people are giving a great deal of thought to is whether it should be on the June '76 ballot or the June '77 ballot. There is a lot of political, and I don't mean, partisan, consideration that indicate that June '77 might be the better ballot. I'm inclined to think it's time has come and it will receive the light of day. I've read a lot in our local papers about it. Unfortunately what I read doesn't bear much relevance to the facts but there is a lot of publicity being given to it. And I'm rather optimistic that we will see something happening. Do you have any comments on this, Charlie?

Mr. Fry - Anything having to do with state debt or municipal debt is not a popular political issue at this time.

Mr. Carter - Good or bad.

Mr. Fry - Most political figures would rather not discuss it or be identified on either side of it right now. I don't think you are going to get anyone who is going to go out there and die for it.

Mr. Carter - Particularly in an election year. Does anyone else have any information that they might have gleaned that would be of interest to the commission on the status of proposals? The next item on the agenda is new travel reimbursement rules.

Mrs. Eriksson - There are some new travel and reimbursement rules being promulgated by the Department of Administrative Services and some new regulations from the Auditor. The reimbursement for travel for state personnel is going up to 16¢ a mile. We have been paying 15¢ a mile, but beginning February 1, it would be appropriate for us to pay 16¢ a mile and to amend our own rules accordingly. The

second thing has to do with receipts. We have always requested that you submit receipts for lodging if you were staying overnight. The Auditor has now issued a rule requesting receipts for meals and I would ask you, if at all possible, to submit receipts for meals for which you're seeking reimbursement as well as for lodging. Rule F-1 of the Commission calls for 15¢ a mile and it would be appropriate to amend that to increase it to 16¢ a mile. This will begin February 1.

Mr. Carter - I would think it would be in order to have the same mileage as for the State generally, so, would someone be willing to make a motion to that effect? (Mr. Heminger made the motion and Mr. Russo seconded it.) Is there any discussion? If not, I'll have a show of hands.

The motion was passed.

Mr. Carter - Now we're down to the main part of the meeting, into our committee report. As you might recall, and for those of you who might not have been at the last meeting, this housing question came up. It was originally under the auspices of the local government committee and Linda felt that it was of a sufficiently specialized nature that a separate committee should be set up. And Charlie agreed to be chairman. Charlie, would you give us the report on the status of that?

Mr. Fry - The committee was set up. The members of the committee are Ed Heminger, Dick Guggenheim, Don Montgomery, Mrs. Orfirer and Mr. Unger. We wanted to have a report for this session. Despite the fact that it was just before Christmas, we called a meeting for December 12, and we should have known that something was wrong because everyone said that they would be there. And because Jim Shocknessy had some view on it, I called and asked him to come to the meeting. He said, "Charlie, do you know that last night in the Dispatch it was reported that the State controlling board had approved an appropriation for the Ohio Housing Development Board, so that they could go to the Supreme Court and get a decision on H.B. 870 which was passed by the 110th General Assembly?" So I called Bill Losoncy at the Ohio Housing Development Board and he confirmed that this was the case, they had asked for $40,000 but had only been given $20,000 but they had met with the Attorney General, who agreed to join in a quo warranto action directly to the Supreme Court, that they hope to have it before the court no later than March 1 and possibly by the middle of February. He confirmed that attorneys representing the Housing Board would prefer that we not take any further action because the Supreme Court might be hesitant about making a speedy ruling if they thought the matter might be placed before the voters in the near future. So recognizing this, we cancelled the meeting on December 12, and explained it to the members of the committee, and at the present time, we're going to wait to see what happens in that action. I might say several members of the committee are quite anxious that we do something, have a meeting and make a recommendation, but it's our intention right now to see what the Court does, and I think we will be able to get some idea after it is presented, how long the Court will take to make a ruling on it.

Mr. Carter - That makes sense, I think to know what the Court is going to do. Al Norris is not here. As you remember, there was a committee that was set up on two specific items that we felt that he was particularly qualified to head a committee. Ann, do you have any comments that you might make on that?

Mrs. Eriksson - That committee will study grand juries and civil trial juries, and it had an all-day meeting last Friday. A most interesting meeting, I think. A number of witnesses made presentations to the committee concerning grand juries. They dealt only with the topic of grand juries. We are now in the process of having that testimony typed, so that it can be reproduced and distributed. The committee didn't make any decisions or take any action, but did receive a good bit of interesting information.

Mr. Carter - They're in the investigative stage. Any questions or comments on that? If not, Don, do you want to talk about the Judiciary Committee?

Mr. Montgomery - We haven't met, of course, since our last meeting. I think you have pretty well summarized it, the report is in the process of being written. We should have a draft within a month. Depending on your time schedule, when you want the matter before the legislature, from that point on.

Mr. Carter - There would be no point in thinking about the June ballot. Is it not correct that there will be a "less than 2/3" report?

Mr. Montgomery - Yes, we're preparing a report on, at least, judicial selection.

Mr. Carter - And I assume you will be contacting members of the Commission who might want to join in on this? On that supplemental report.

Mr. Montgomery - Yes.

Dr. Cunningham asked for clarification of what the minority report will be.

Mr. Carter - The Commission report, of course, will identify and give the recommendations that were approved by 2/3 of the Commission. As you may recall, there were proposals before that received less than 2/3. Every Commission member may be identified, if he wants to be identified, with a position other than what was approved by the Commission he has the right to do so in a report. So, as I understand it, we will have in this case a supplemental report signed by the people that want to be identified with that.

Dr. Cunningham - That's my question. Will they have to take the initiative and file a minority report, or will that be automatic?

Mr. Carter - No, I understand that that initiative has already been taken, and a draft will be coming out that is part of it. It's a question, I think, of who may want to be identified, and perhaps some of you may want to see what it is like. And, of course, you can file your own individual reports. Did I answer your question?

Dr. Cunningham - Yes.

Mr. Carter - Craig Aalyson told us he would have to be a little bit later. The What's Left Committee met this morning and Bob Huston agreed to give us the report. There is one matter that requires Commission action.

Mr. Huston - At the November meeting, we talked about Article II, section 20, which deals with a change in the compensation of officers during their term. At that meeting we suggested that we leave section 20 the way it exists and add the clause "except that an incerase in salary applicable to an office shall apply to all persons holding the same office." It was brought to our attention at the November meeting that this really wouldn't apply to a county auditor who is sometimes elected

at the same time that the odd county commissioner is elected. So we went back and studied the situation. Also at the November meeting there was a question raised as to whether or not we should include the legislators in this amendment, to permit changing the compensation of legislators during term.. The committee discussed that and we felt that the section of the Constitution that specifically deals with legislators, Article II, section 31, prohibits the changes in salary of legislators, and we felt that it really was not advisable to change that section to incorporate the legislators into section 20, because of the conflict of interest, with legislators voting their own salaries. They shouldn't be able to affect the salary of an existing legislator during his term. In order to include the auditor in addition to the county commissioners in the possibility for an in-term increase, our recommendation is to leave section 20 the way it is but change one word. If you will look at section 20 at the top of the page in front of you, it says no change shall "affect" the salary of any offices during term. We suggest changing the word "affect" to "diminish", "but no change therein shall diminish the salary of any officer during his existing term". That does not preclude the possibility of an officer securing an increase during his term of office. This would apply to the county auditor as well as county commissioner, and to all officers to whom the section applies. The language is also substantially the same as Article IV, section 6, which concerns judges. I would like to move that the Commission accept the recommendation of the What's Left Committee and amend Article II, section 20 as recommended.

Mr. Carter - Do we have a second to the motion?

Dr. Cunningham - Second.

Mr. Carter - Do we have discussion? I assume you may recall that the main thrust of this was to cover the case of county commissioners who have staggered terms and the new commissioners ended up with more money than the older commissioners. We had some pretty good testimony on the inequity of that. And the legislature has the power to do that.

Mr. Russo - How can a man's salary be diminished?

Mr. Huston - All you have to do is pass legislation reducing it.

Mr. Montgomery - Has it ever been done?

Mr. Huston - I don't think it has, but it's not impossible. If you want to get someone out of office that the legislature didn't want in office, all they would have to do would be to reduce his salary to substantially zero, and he is going to leave the office. It's a means of getting a person out of office that they couldn't remove otherwise. So this prohibits that.

Mr. Russo - It has got to be a class of people, it can't be a person.

Mr. Huston - Supposing, there was an individual - as I say, I'm not familiar with all of the offices, but this would prevent the legislature from doing away with a class of offices.

Mr. Russo - Nothing else, though, not an individual?

Someone suggested the governor.

Mr. Huston - The governor is provided for in another section. It would include cabinet officers.

Mr. Montgomery - It's a theoretical possibility which has never happened in the history of the state. I wonder how sound it is to make a pronouncement on that subject.

Mr. Huston - That's not the only reason for the change in the words, of course.

Mr. Montgomery - I know, but you are getting at it in an oblique way. Why don't we just say what they can do?

Mr. Huston - We tried to do that and it made it more difficult. Once you attempt to put it in positive language it made it extremely difficult to cover everyone that you wanted to cover.

Mr. Russo - I'm confused as to who this covers. The term of office and the compensation of all officers, nothing else. We're not talking about department heads or executives in this particular section of the Constitution.

Mr. Skipton - I believe we are. If they are officers.

Mrs. Eriksson - And county officials, as well as other persons on a state level who are considered to be officers. We had some discussion about the Public Utilities Commission and the Industrial Commission. These persons are compensated and they are considered to be officers, although they are appointed, of course.

Mr. Fry - This covers county commissioners now. It doesn't relate to auditors?

Mr. Huston - No, this would cover all. It would permit increases during the term for all persons holding office except the General Assembly, the Governor, the Auditor, Treasurer, and others who are specifically covered by other sections of the Constitution. You have situations where the Public Utilities Commission, themselves, when they are appointed, they retain that salary during that entire time even if the salary is changed and new commissioners are appointed. The existing commissioners cannot have an increase in salary.

Mr. Fry - What this will do is build a lot of pressure on the legislature for salary changes in terms. Heretofore, when the commissioners have wanted to have their salaries increased, why it has been if I run again, or at least it's the ones pounding for it are at least one election removed from the time it's going to go up. It's been this way a long time. I'm not enthusiastic for it. The argument has always been in the past that they knew when they ran for the office what it was going to pay.

Mr. Huston - It's the inequitableness of the situation that causes us concern, and that is that the oldest member of a commission or a board, as a general rule, is the least paid and generally making the greatest contribution because of experience and tenure. And it just seems inequitable that these people should receive less than the others. It really wasn't of substantial impact prior to the inflationary times that exist today because salaries were a lot more static. But today it has quite an impact on the individual and also on his standard of living. And we felt that we should pay for the work that they're doing.

Mr. Fry - I don't feel strongly enough about it to fight it, Bob, but at the same time, as I say, when they ran for the office they knew what it paid. There is no question, Tony, every term in the legislature since you have been here and since I've been here we have these pressures.

Mr. Skipton - I don't have any great difficulty with the idea of making it possible to increase salaries during the course of say, a six-year term, but I see so many opportunities for mischief here. I have been involved in trying to persuade guys to take cabinet officers jobs, and I can see what's going to happen. They are going to have difficulty trying to get someone to take a mental health job or a public utilities job, where they come under attack all the time. So the Governor says "You take the job and if you take it I'll get the legislature to increase the salary." And the way you are going to end up is the Governor is going to come into the legislature and tell them "I've committed myself now, I'm on the line. You've got to raise this guy's salary". What you are going to have is a hodgepodge salary set-up. You're going to have one set of guys making $20,000 a year more than guys in equally comparable jobs. I don't know what the real solution is.

Mr. Bartunek - You did that one year, didn't you?

Mr. Russo - Let's suppose that in this Commission, we want to change this. Do we go to the legislative body and ask for a salary increase?

Mrs. Eriksson - I don't believe that this commission would be considered officers.

Mr. Russo - I think the word officers is pretty vague to me. That's what I'm trying to spell out.

Mrs. Eriksson - It has some constructions put upon it by court decisions, and this commission is essentially advisory and probably would not count as officers. This is the gist of our ethics commission decision.

Mr. Montgomery - Administrative boards?

Mrs. Eriksson - Yes, providing they have a part of the sovereignty of the state. Something like the Public Utilities Commission, where they are making decisions.

Mr. Montgomery - I sympathize with Bob. I do see the inequity of it in some cases and I wish we could take it out. But on the other side I can see a gigantic pressure group pounding at the legislature's door constantly for more money and I think of the alternatives I would have to opt for the other way.

Mr. Huston - Really, this would not increase that number by very many by virtue of the fact that this only eliminates the possibility of existing officers receiving an increase during term. Now, at the present time, the legislature will increase the salary of officers and then people that are elected subsequent to that increase, receive it.

Mr. Montgomery - Yes, but they are less likely to lobby for it if they are not sure...

Mr. Huston - The existing ones wouldn't get it. There is no question about that.

Mr. Montgomery - Then I don't think they would lobby for it.

Mr. Carter - Nolan, did you want to make a comment?

Mr. Carson - In the judicial article, judges in term can receive increases, is that right?

Mr. Carter - That's right.

Mr. Carson - This was changed in the Modern Courts Amendment?

Mr. Fry - Yes, and the legislators were surprised when they found out that that provision was in there. Now that may reflect on the legislators, but there was a great deal of surprise all around the Statehouse when they found that they had voted for the judges, who were immediately given the increase. That had not been the intention at all. That was one of several things about that proposal that was bad. But this was never brought up in any committee hearing that I know of.

Mr. Carson - Is that the only office where you can have in-term increases?

Mr. Fry - Right.

Mr. Carter - To the best of my knowledge but I would not pose as an expert on it.

Mrs. Eriksson - There were four places in the Constitution that prohibited increases, and the judicial one is the only one that has been changed so far.

Mr. Carter - Well, I can see we have some mingled feelings on this. This is an official matter before the Commission, so we ought to take a position on it. Ann would you call the role of those that are present?

The roll was called. Those voting in the affirmative were Mr. Carter, Dr. Cunningham, Mr. Huston, and Mr. Russo. Those voting no were: Mr. Bartunek, Mr. Carson, Mr. Fry, Mr. Guggenheim, Mr. Heminger, Mr. Montgomery, and Mr. Skipton.

Mr. Carter - As is our custom, we will keep the voting open until the next commission meeting, but it is clear that it is not going to pass. As of yet, we don't have enough no votes to say that definitely.

Mr. Carson - I haven't given this much thought, I'm not on the committee, but it is not inconceivable that some accommodation... This is a very broad provision, it covers hundreds of people. If the real concern is in specific areas like a commission job or a third county commissioner who you are concerned about, if this could be restricted in some way so it is not so broad, I think I would be interested in seeing another concept.

Mr. Carter - In other words, we could permit county commissioners to receive the increase, you would be sympathetic for it if it were not so broad in other areas?

Mr. Carson - Perhaps. I'm not sure of the breadth of it at the present.

Mr. Skipton - Mr. Chairman, I'm somewhat the same position. I feel that this is one of the things that the special groups that are most violently concerned with this might work out a better amendment. I can see other kinds of things that might work, but they are more complicated than we like to deal with here. If the General Assembly wanted to create an across the board cost of living adjustment, they can do it if they provide the funds for it, but we're not inclined to get into these kinds of machinations in order to take care of certain inequities. It seems to me that this might be something better left to some special interests to write the amendment.

Mr. Bartunek - Mr. Chairman, I would object to any amendment that takes care of just some and not all. I think if it applies to all then it should apply. I can

see justification for the judges because they have a six-year term. But in a four-year term or a two-year term, I don't think it's important to change the compensation. As Mr. Fry has indicated, they all know what they are going to get when they run for the job.

Mr. Huston - Some of the commissions have six year terms. Would you be inclined to lump them in with the judge-type situation?

Mr. Bartunek - No. I don't really think so.

Mr. Huston - Because there are six year terms for some commissioners, and with inflation the way it is, it really hurts them. And they play games where they will appoint one commissioner to take the term of another one who has resigned so that he can be reappointed earlier and things like that in order to get around this.

Mr. Carter - There are certainly pros and cons on this and I think it has been a good discussion. We are going to have another committee meeting before too long. Why doesn't the committee take another whack at it and see if we can answer some of the objections and still solve the problem that I think is valid.

We are now at the main item on the agenda which is the Bill of Rights report. Mr. Bartunek -

Mr. Bartunek - Mr. Chairman, we just spent 20 minutes on one section of the constitution. This report includes recommendations on 22 sections of the Constitution, so I will try to be as brief as I can. First of all I want to thank Mr. Clerc, Dr. Cunningham, Mr. Mansfield, Representative Norris, Representative Roberto, Mr. Shocknessy and Mr. Skipton for their long hours and diligent work on this committee. They were all very helpful, and we had a number of hearings. We had some internal discussion among the committee, and I appreciated their help very, very much.

Briefly, the Bill of Rights is the constitutional protection of the individual against arbitrary or tyrannical treatment by his government. The key provisions of the Fourteenth Amendment to the U. S. Constitution state that "no state shall deprive any person of life, liberty or property without due process, nor deny to any person the equal protection of the laws" have led, as you all know, I'm sure to the gradual application of many, if not all, provisions of the federal bill of rights as guaranteed of individual rights against state government encroachment. Most of these have been in the criminal field, but more and more in the civil rights field as well. In view of that fact, many of the federal provisions are applied to the states today. And most of the significant rights involve interpretation of the federal rather than the state constitutions. Therefore, the first question that our committee addressed itself to was whether or not the state bill of rights has any vitality whatsoever. And we believe loudly and clearly that it does have a vitality. Even though there are various protections found through the federal bill of rights, we still believe that it is necessary to have states bill of rights. And if the states cannot protect their citizens' fundamental liberties, or are careless about such protection, then obviously the basic fundamental vitality of state government is immeasurably weakened. We have no way of knowing what is going to happen in the future to the federal government, except I guess we can be sure that it is going to grow. We felt that these 20 some rights of the people of the state of Ohio should be preserved and protected for them. Incidentally, none of the new or rewritten state constitutions have omitted a bill of rights, so we felt that that was an important thing.

Another part of our philosophy was that we felt we didn't want to make any change just for the sake of change. Although there was some peculiar language that we will get into later on, where we weren't always sure what it meant, we felt that these have served the people of Ohio well and should continue to serve them well in the future. The committee determined that changes should not be made unless a demonstrated need existed for the change. Changes for the sake of modernizing language, omitting obsolete provisions, rearranging, and similar matters are not recommended. The only amendments proposed in the testimony that came under this category were that sex-specific words--for the most part, the use of the masculine gender, be changed to neutral words or the sections otherwise rewritten so that references to a particular gender could be eliminated. The committee rejected this proposal. The only changes of a purely corrective nature that are recommended are spelling corrections. I personally was against that, but the committee outvoted me unanimously. The research studies and the testimony noted provisions in the Bill of Rights that have not yet been fully explored in court decisions, or about which questions have been raised. The committee examined these and felt that most of them, if not all of them, can be handled legislatively, and that others--such as balancing the rights of the property owner and the government in eminent domain proceedings--do not lend themselves to a constitutional solution. We bore in mind always that we were dealing with a constitution rather than a state law.

Several new provisions were proposed by persons appearing before the committee and I believe at least one of them is here today, who may want to testify later on. These included an equal rights amendment, an amendment giving people the right to know and participate in governmental affairs --things of that nature. The committee felt that too little was known about the meaning of some of the terms used, and about the potential effect and meaning of the proposals, so these were rejected.

Now I would ask you to turn to Article I, section 1, page 7 of the material that has been handed to you. If it isn't going to take too much time, the way I would like to proceed, Mr. Chairman, is to read the section and then tell you our recommendations. And at each time, I think, if anybody wanted to be heard from the Commission, I'd be glad to entertain any of their questions.

Mr. Bartunek read Section 1 of Article I found on page 7 of the report. He stated that the committee recommended no changes.

He then read Section 2 found on page 13. The omission of the word "be" was noted. The committee recommended no changes.

He then read section 3 on page 16. The committee recommended no change in that section.

He read Section 4, page 19.

Mr. Bartunek - We did recommend an amendment, and that was to change the spelling of "defense" from "defence" to "defense". It was not intended to make any substantive change in the meaning but to correct the spelling. And that is our recommendation as to Section 4.

Mr. Fry - My question concerns the right to bear arms. How does that square with the laws that the legislature passes about permits for guns and things of that sort?

Mr. Bartunek - As I recall, the right can be limited and has been limited in some areas by city council, and the legislature has attempted to limit it. If you will

turn to the other side of the comments, the "right to bear arms" of the Ohio Constitution is different from the second amendment of the federal constitution and could have been construed to have a different effect on an individual's rights. The second amendment reads "A well-regulated militia being necessary to a free state . ." and thus the right to bear arms is intimately connected with the concept of a citizen-soldier in individual state's rights. Ohio's section appears to be an absolute affirmation of the right to bear arms without any governmental interference or limitation. The Supreme Court of Ohio, in its infinite wisdom, however, has held that to understand fully, Article I, Section 4, it must be read in conjunction with the second amendment. It's sort of reverse incorporation. Therefore it was seen that the primary purpose of permitting people to bear arms was to dispense with the need for a standing army and to enable the people to prepare for their own collective defense. The case is cited there. Furthermore, the existence of this right does not restrict the legislature's right and responsibility under police power to pass laws and establish regulations that may be necessary to protect the safety and welfare of the citizens of Ohio. Consequently, the protection of the general public by the regulation of the use and transportation of dangerous weapons, through the exercise of the legislative power, is a legitimate use of that authority; Akron v. White, 28 Ohio Op. 2d 41 (Munc. Ct. 1963).

Mr. Carson - Was defense spelled this way (defence) in 1851?

Mr. Bartunek - I believe it was, yes. I don't believe it was an error. I believe that was the use of the language at that time.

Mr. Carson - Mr. Bartunek, thinking of all of the thousands of dollars that it would take to put this on the ballot, I must say that that is a lot of money to spend to modernize a word which was correctly spelled at the time it was written.

Mr. Bartunek - If you care to make a motion, I'm sure the chairman would entertain it.

Mr. Carson - You don't want to do that now.

Mr. Carter - Why don't you go through your report first.

Mr. Bartunek - All right, but I hope we don't lost that. Very well we will continue on to Section 5 on page 24. "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." This was a question that bothered us considerably. There was absolutely no testimony before the committee at all on juries. So we recommended to the Commission and the Commission responded by appointing a special committee to study this and two other questions which came to our attention because we felt that when you are dealing with juries, and the right of trial by jury being inviolate, which many of us support, that it should not be passed on casually without at least some testimony from the judicial, the legal and the civil community. So it is recommended that Section 5 remain as it is but that it be considered by a special committee to study civil juries. And that committee has been appointed under the chairmanship of Representative Norris and indeed had its first meeting last week.

Mr. Fry - We've had some legislation that is contrary to what that Section 5 says.

Mr. Montgomery - Arbitration?

Mr. Fry - Yes.

Mr. Bartunek - No, I think that under arbitration I believe it can still go to a court and a jury, a judge and a jury.

Mr. Fry - I see, you say "the right of trial by jury" so you can demand a jury.

Mr. Montgomery - You're covered under workmen's compensation because it's in the Constitution. But no fault auto insurance, there's a real problem with that one.

Mr. Bartunek - I am not familiar with that, but I'm sure that attorneys like Craig Spangenburg are not unaware of this provision.

Mr. Bartunek then read Section 6 on page 26 and stated that the committee recommended no change in that section.

Mr. Montgomery - Excuse me. There can be involuntary servitude for the punishment of a crime?

Mr. Bartunek - There shall be no slavery nor involuntary servitude unless for the punishment of a crime. I guess "servitude" means incarceration in a prison.

Mr. Montgomery - I don't know that it does. Incarceration is one thing and involuntary servitude is another.

Mr. Bartunek - Well, that's why this Commission is good because all of us are reading language that we take for granted.

Mr. Montgomery - I wonder would we want our prisoners to be subjected to involuntary servitude for the punishment of a crime? I doubt that we would in this day and age. There are the chain gangs and the rock busters but we don't have that in Ohio.

It was noted that prisoners work on license plates.

Mr. Montgomery - Isn't that considered educational and therapy?

Mr. Carson - Maybe chain gangs were considered rehabilitative.

Mr. Bartunek - It was our understanding that it implies imprisonment. If you do have a serious question, about it maybe you'd want to refer it to another committee.

Mr. Montgomery - Imprisonment at hard labor is hardly a modern concept of penal administration.

Mr. Fry - I'm certain that if you would like to make a statement we could certainly have a group down here that would like to testify on that.

Mr. Bartunek read Section 7 on page 29. Again, we thought that this was a rather nice thing for the state to have in its bill of rights and recommended no changes.

Mr. Montgomery - Does this square with the U.S. constitution as it's interpreted, no school prayers?

Mr. Bartunek - I think this would permit school prayers, and I think school prayers ought to be permitted, although we can't do it under the federal constitution. I'd like to see prayers in schools. The federal government says we can't, but the federal constitution may be changed. Who knows? And if they do . . .

Mr. Carson - We've got to go to the Supreme Court.

Mr. Bartunek - Right, so from my particular point of view voting on this, I personally felt that it would permit prayers and I felt it should be retained. We will now turn to Section 8, on page 32. He read the section and stated that the committee recommended no change in that section.

He read Section 9 on page 33. "All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted." We recommend a change, again in spelling "offenses" and we recommend a change about bail. We recommended that persons may be denied bail prior to a trial if the offense charged is a felony committed while the person was released on bail. And continuing "Notwithstanding any other provisions of this constitution or supreme court rule adopted pursuant thereto, the general assembly may pass laws implementing this section."

This is one of the few substantive amendments that we recommend to this honorable Commission. It was suggested by Representative Norris, who pointed out the difference between the federal system of bail and the Ohio system. Under the Ohio Constitution as it exists now, we believe that a prisoner can be arrested for burglary, released on bail, go commit another burglary, be released on bail, go commit rape, be released on bail. Mr. Norris and the rest of us at the committee hearing that day felt that this is not proper. It's right to give bail the first time around, but when it is a second or third time, and the crimes are felonies, he should not be permitted to have bail. So those are the changes we recommend in that and also changes in spelling of the word "offenses".

Mr. Carter - How about the third sentence?

Mr. Bartunek - Well, we felt that this is not a self-executing provision. We felt that maybe the Supreme Court or somebody else might not like this and the Supreme Court might issue a rule that would say they could have bail from here to kingdom come. So we wanted to say through the people and their constitution that is not what we want. We want one time, and let the legislature decide how many times after, if any.

Mr. Carter - In other words, you want to make it absolutley clear it's a legislative prerogative.

Mr. Bartunek - Yes, sir.

Mr. Montgomery - What is a capital offense?

Mr. Bartunek - A capital offense is murder.

Mr. Montgomery - So if some guy gets out here and snipes and commits mayhem and does everything short of killing somebody, even though he is obviously dangerous to society, we're going to bail him.

Mr. Bartunek - They bailed Sam Sheppard. But even in capital offenses where the proof is evident or the presumption great, they do not have to let him out. If someone went on a rampage and killed a lot of people, under this provision he could be denied bail.

Mr. Montgomery - Oh yes, because it's a capital offense. But I'm saying that here is a person who has committed a dangerous offense to society. Maybe nobody was in the place when he bombed it, but it wasn't his fault.

Mr. Bartunek - Well, that can be taken care of through our elected judiciary process where the judge would set the bail so high that it would be impossible to raise it.

Mr. Montgomery - That's one solution.

Mr. Bartunek - I hate giving criminals all of these rights, but it's a peculiar balance where some judgment would have to be made and its placing that in the hands, heart and mind of a judge, and hopefully they will serve us well.

Mr. Huston - At what point can they be required to have a mental examination without bail? After they have been arrested, can they be referred for a mental examination without bail? At that point.

Mr. Bartunek - I don't think so. I'm not a criminal lawyer so I can't really truly answer how that works. But I think that if they have bail, under this provision bail has to be set.

Mr. Huston - Suppose you arrest someone that you know is mentally deranged?

Mr. Bartunek - Then you can put him right in a mental institution. It's very simple to put someone in a mental institution.

Mr. Huston - That's what I was thinking of in Don's example. A sniper out there shooting people. Apparently, he must be mentally deranged, or you would suspect so. You might be able to incarcerate him that way.

Mr. Bartunek - That's why we have judges who study the individual situations, but again, we want to protect the people of the state that they cannot be thrown in jail without great presumption and great proof and locked up in there because they got rude to a cop. Our big concern is the person who commits an offense while on bail. A lawyer will go up in front of the judge and tell him that the main witness hasn't arrived yet and he would let the guy out and the guy would go steal. None of my clients would do this, but it would be a fee for the lawyer.

Mr. Carson - This second paragraph only applies in a case where a person accused of a crime is released on bail and commits another crime while he's on bail. Is that correct?

Mr. Bartunek - Yes.

Mr. Carson - Pending trial?

Mr. Bartunek - That's correct. First of all, he has to be charged. Not just simply arrested but charged with a felony. And then that felony had to be committed while he was on bail.

Mr. Carson - One question and one observation. My question is, does this happen often?

Mr. Bartunek - Yes, very frequently.

Mr. Carson - Another crime while out on bail?

Mr. Bartunek - That's correct.

Mr. Carson - I didn't realize that. I guess my question was does it go far enough? If a person is convicted of a felony . . . .

Mr. Bartunek - You can't do that or you're tampering with his basic civil rights. If he's convicted of a felony and he serves his time, then he's supposed to be rehabilitated and you've got to give him a chance to get back in the mainstream of society. In fact they are even expunging records now.

Mr. Russo - What if he is out on bail on a misdemeanor?

Mr. Bartunek - Then he would be entitled to bail.

Mr. Russo - All this says is if he is charged with a crime while he's out on bail.

Mr. Bartunek -No, commits a felony.

Mr. Russo - If I get bail for a misdemeanor and then go out and commit a felony, am I bailable?

Mr. Fry - It says "they may be denied bail". How often do they get bail on a misdemeanor?

Mr. Russo - There's a lot of bail on a misdemeanor.

Mr. Montgomery - It could be a felony or a misdemeanor.

Mr. Bartunek - You're right. Any other questions, Mr. Chairman? All right we'll go on to page 40, Section 10. We did recommend a small change which I will tell you about when we get there. He read Section 10. There were two things we did on this section. First of all, you will note that in the second to last line of the amended portion of Section 10, we eliminated "and may be the subject of comment by counsel". We eliminated this because this is a federal rule as set forth in Griffin v. California, 380 U.S. 605 (1965). And we felt that since it is a law being followed in Ohio now, under the imposition of the federal will, that we would recommend that it be eliminated. So that was the only change that we recommended. However, in our discussions in this matter, there was absolutely no testimony as to the grand jury. And we felt that the grand jury is being criticized today, and that it was important enough to request further study on this. So it was requested and the commission chairman responded by appointing a special committee to study the grand jury. And indeed last Friday, a hearing was held all day with people testifying on the validity of the grand jury, whether it is needed and so on. We felt that this is so important that it needed special attention. It is possible that the other committee may recommend no change. If it would be agreeable to the chairman, I would like to have Section 10 adopted as amended here, and then whatever changes are proposed by the committee, if any, could then be considered.

Mr. Fry - Mr. Bartunek, I would be curious how this was handled in the Model Constitution. It is pretty detailed for a constitutional provision. Maybe there is no other way we can handle it. Is it just as long in the federal constitution as it is here?

Mr. Bartunek - I don't know the answer to that question. Again, the philosophy of our committee was to make no changes unless there was real demonstrated need.

Mr. Fry- Ann, is there any provision like this in the Model Constitution?

Mrs. Eriksson - I, frankly, do not know what the Model Constitution provides. This is really a combination of several provisions from the federal constitution and is perhaps a little more detailed.

Mr. Bartunek - We will go on to section 11 which is found on page 47. He read Section 11. We thought again, that was very nice language; however, the cooler heads on the committee pointed out that the libelous and acquitted were mispelled, so the only changes we are recommending are the purpose of correcting the spelling for libelous and acquitted.

Mr. Carter - Would anyone know if those spellings were correct when adopted ?

Mr. Bartunek - I'm sure they were part of the indigenous language of the day. We're down to section 12 which is found on page 53. (see report for text). This section opened up a lot of interesting discussion. It was pointed out that there is a trend toward regional prisons and that if there were a regional prison with Ohio, Illinois and Indiana participating, we couldn't transport the guy out of Ohio because of this constitutional provision. However, the committee felt that this is still in the future and if that ever did occur, then it would be a more propitious moment to change the Constitution, because it would have a concrete objective and a concrete proposal to go along with the change. Again "offense" was mispelled, so we are recommending that the word "offense" be changed to a different modern spelling. And then we had a long discussion about corruption of blood or forfeiture of estate. And quite frankly, none of us could really understand what that meant, and so therefore, in consonance with our philosophy, since it's not hurting anybody; there is no great designated need for change, and since it did seem to be important to some people who wrote the Constitution earlier and voted on the constitution earlier we decided that we ought to keep that in there. Because really if we take those negative rights away we don't know what's going to happen. So we prefer to keep it as it is.

Mr. Fry - Mr. Bartunek, I would comment that if you don't know what it is and the citizens don't know what it is. . . .I notice that in the comments here it was noted that one suggestion was that it was a loss of all civil rights. If we are going to amend this section, I don't think it would be wrong to make it a little more understandable by the citizens of our state.

Mr. Bartunek - No one complained to the committee that they couldn't understand it.

Mr. Fry - You just said that you didn't.

Mr. Bartunek - I said "complained to the committee." These obviously are from another time. "Corruption of blood" was believed by some people to mean a civil death. We didn't think that this created any harm. There was no public outcry to change it and we felt that Ohio did not want anybody to corrupt their blood or forfeit his estate.

Mr. Fry - I'm not going to form a committee, but I would like to see it say "loss of civil rights" or something of that sort.

Mr. Bartunek - Because, again, we didn't want to tinker with language that had been there for a long time, without considerably more research and study to know exactly what we are doing.

Mr. Fry - We've changed other parts of the constitution as we have gone through them - simply eliminated excess language or unclear language.

Mr. Skipton - If you read the comment, you get the idea that the corruption of blood meant not only to take away the civil rights of the individual guilty, but also of his issue. The constitution says that you may take away the rights of an individual, but you can't take away the right of his children. So this is sort of the reason why you don't want to monkey with the language.

Mr. Bartunek - That was our conclusion. We will proceed on now to section 13 (see p. 56). We recommended no change in that. I think it's self explanatory. We will proceed on now to section 14, search warrants (see p. 57). Even in modern days that looks pretty good. We recommend no change in that section. Turn to page 64, section 15. And again, we recommended no change in that.

Mr. Fry - What does "mesne" mean?

Mr. Carson - It's pronounced "mean" and I believe it means temporary.

Mr. Bartunek - Proceed now to section 16 (on page 66). This was a non-self executing provision of the constitution relating to suits against the state. We don't want to change it, because it's existed for a long time but it took the Ohio General Assembly til 1974 to create a court of claims whereby the state could be sued. We thought that was a good thing. Frankly, I think the committee shared my view that we liked some of the language used here. We're losing control of our language today with all the things we are doing in creating laws and so forth, and we thought this said it pretty well. We recommended no change in section 16. Now go on to section 17, page 74. We recommended no change in that. Go on to section 18, page 75. Again, no comment, no testimony, and we thought that was a pretty good provision. Section 19, on page 76. This is the section of law that provides for the eminent domain and the taking, and we found no need for change in that section. It would be very dangerous to change it because of the many rulings on this.

Mr. Carson - May I go back to section 18? Does this mean that we cannot have martial law in Ohio?

Mr. Bartunek - I think that the General Assembly has probably empowered the governor to suspend the law. I'm not sure, I haven't researched it. But I would guess that if the General Assembly has not directly authorized the governor to suspend the laws, then it would not be a proper thing.

Mr. Fry - I think the General Assembly has. Does the Turnpike Commission come under the eminent domain section?

Mr. Bartunek - The section says: "Where private property shall be taken for public use, a compensation therefor shall first be made in money, or secured by a deposit of money." They would have to put the money up first, before they could take.

Mr. Fry - I was referring to the fourth line, which says "or for the purpose of making a repair in roads which shall be open to the public, without charge."

Mr. Bartunek - I think if you separate the clauses, if you take it for the public, without charge, then you can "quick-take". The Turnpike Commission would come under "and in all other cases, where private property shall be taken for public use, the compensation shall first be made in money." He then read section 19a, damages for

wrongful death ~~(p. 87.)~~ Again, there was no testimony on this whatsoever. However, Mr. Norris felt, and the rest of the committee members shared his view, that this was an important question today, particularly in the problems of the malpractice siutation with physicians and the high verdicts sometimes being given and the problems in reducing them. So we recommended no change but asked that a special committee be appointed to study the question of reduction of verdict amounts in civil cases when it is felt by the court that they are in excess of the true amount that should be awarded. All of us did not really feel that there were too many excess verdicts, but there was enough thought on the committee that we felt that we ought to have some expert testimony and learn is this really a problem or not. Now we go on to section 20 on page 92. We thought that this was one of the most significant parts of Article I in that it gave to the people the rights that are not otherwise specially set forth in the constitution. So we recommended no change in that. And then our last section, you'll be pleased to hear about, because it is the last, is found on page 98. And I would like to take the opportunity at this time to thank the staff and Mrs. Eriksson for doing an excellent job on what we considered to be a complex and difficult matter. They provided us with a lot of material. A lot of effort went into it and it was well set forth. We do not apologize for the length of the report, because we feel that you and we and the people are entitled to know what the law is and how these things evolved.

Article XIII, section 5 was a section that was not in the bill of rights but dealt with eminent domain, and was given to our committee to consider in connection with the other eminent domain and jury questions. This is where public utility corporations acquire private property for expansion of their facilities. This is being used and it's been worked over in the courts for a long time. However, we did find that it requires a jury of twelve men. And we recognize that in Ohio, now we have juries of eight, six and so forth, and all juries are not composed of 12 men. Personally, I liked the jury with 12 persons. In our probate court, when they have the eminent domain hearing, they have to get 12 jurors. If they have an eminent domain hearing in some other jury trial in our other Cuyahoga County common pleas courts, they have six or eight, I've forgotten which it is. So our only change there was not to change the substance of this but to remove the words "of twelve men" from the language. Mr. Chairman, that completes our presentation of the report. I see that on the agenda, you have now set time aside for a public hearing. I believe there is one person here who would want to testify, and if this would be the appropriate time, I would ask you to accord her those privileges. Would you please come forward and state your name and organization?

Mrs. Workman - My name is Glenn Workman, and I have been with a number of different organizations. I'm here really representing myself as a parent, rather than specifically representing an organization. I have previously been with the Ohio Coalition for the Education of Handicapped Children. I am no longer with them. I am legislative governmental affairs advisor for the Ohio Association for Children with Learning Disabilities. My job is with the Ohio State Legal Services Association and I am on the research project for Ohio's elderly. This gives me a very broad background. I am also the mother of four children, all of whom are in high school. Three of the children have been diagnosed as having specific learning disabilities, which are educational, psychological kinds of problems. I had really addressed the wrong committee a year ago. So I do thank you for allowing me the time to address Article I of the Constitution.

The concern that we have with the constitution is that the Ohio Constitution does not specifically contain any language relative to the protection of rights of some of the people who do not fall into the category of normal, or average, or whatever words you want to use to describe that categorization. The groups of people

that I am specifically talking about are people that either by age or by physical or emotional handicaps are being excluded from basic rights in the State of Ohio. To illustrate, one is the right to access to an appropriate education. We have, within Ohio statutes, language that gives authority for setting up standards of education only to the Department of Education. So any of the people of school age that fall under the authority of say Mental Health and Retardation do not have any kind of educational programs written for them. This seems to have been a problem for a number of years. People are aware of it. I'm sure that you are aware of some of the legislation that has come out on the rights of the mentally ill and mentally retarded. The rights of the mentally retarded passed, I think, last fall, and the bill of rights for mentally ill patients is now in the House. So action is being taken. But if you look through the language of the legislation, you will find no definition, no requirement for educational standards, or no indication that a person has rights to an education, under those situations. The language is void of that kind of requirement. You were discussing earlier, pro and con, extending the right of a person who has committed a criminal offense. And within the constitution there are specific provisions protecting those rights. I'm appealing to you on that basis that the constitution contains no language to delineate the rights of pursuits.

Mr. Montgomery - Is there any place in the constitution where an individual's rights are only protected if he is healthy or if he is young?

Mrs. Workman - You have reviewed what the constitution says.

Mr. Montgomery - It means all people, doesn't it?

Mrs. Workman - Yes, it does.

Mr. Montgomery - Regardless of their physical, mental, or chronological status?

Mrs. Workman - Yes. The language does say that and you are absolutely right. The only defense I have to make on my behalf is that we have statistics to show that there are 200 blind school aged children in Ohio whose right to education is being denied and that is substantiated by the facts and figures from the Bureau of Rehabilitation and Services for the Blind. Those are hard-core figures. We have in black and white that that situation exists.

Mr. Montgomery - Are you suggesting that we should add language regardless of mental, physical, and chronological status?

Mrs. Workman - Yes. That is what I would like to recommend if the Commission would consider adding some phraseology that would say regardless of religion, sex, race, age, physical or emotional handicaps, which would, again, set forth an intent of good faith through our basic instrument of the State of Ohio.

Mr. Bartunek - Do you have any language that you want to propose to the committee?

Mrs. Workman - I have nothing formal prepared other than what...

Mr. Bartunek - You did present some language that was drafted by Mrs. Eriksson...

Mrs. Workman - Right, and that specific language at that time dealt only with the physically handicapped. I think that should be expanded, at your discretion, to cover, for instance, age, emotional or physical handicap and not specify one particular group.

Mr. Fry - Mr. Chairman, it seems to me, I may be wrong, but possibly the difference here is in the term "rights". What you're really asking is that people handicapped by reason of age or mental capacity be given the same privileges as those that aren't handicapped. Do we have provision in our constitution about education? Isn't that all by legislation, or is that covered by the constitution?

Mr. Bartunek - I think we have a provision...

Mrs. Workman - Not within the constitution's section on education. My previous testimony to the committee was to the committee that was dealing on the section of education. Mrs. Eriksson and I had discussed that previously. The article does not state who shall receive education, but merely outlines a provision for education. But there is no language that says that a particular group will receive that education.

Mr. Fry - That is handled by the legislature in order to carry out the provisions of the constitution.

Mrs. Workman - It is handled by the State Board of Eduation to set the standards, but there is still no statutory language to designate who shall.

Mr. Bartunek - Are there any other questions of Mrs. Workman? Thank you very much for coming here. We appreciate your testimony.

Mrs. Workman - Thank you for your time.

Mr. Bartunek - Mrs. Workman did appear before this committee. And as you may recall, this committee also dealt with education and she did appear before us then. At that time, the problem she addressed herself to revolved around a request for a mandate in the Ohio Constitution that everybody be educated to the point of their capability...

Mrs. Workman - Excuse me. Another person that testified was using the terminology "to full capacity or full potential". My testimony did not include that language. I merely addressed equal access to educational opportunities, hoping that you will see that there is a difference.

Mr. Bartunek - Right, thank you. In any event, some constitutions, I think Illinois' if I'm not incorrect, does have language that affected everybody no matter what their state in life, aged, but mostly youth and handicapped persons, had an opportunity to require that they be educated to the fullness of their capability. And obviously, the committee rejected that because that was such an unknown quantity and because of the limitation of funds available now for education. And then we did consider the questions that Mrs. Workman has raised that we put in some mandate in the constitution that people be educated regardless of their age, physical condition, or sex or handicap. Again, we rejected that because this is an unknown quantity. We felt that this was a legislative question and indeed there are laws now that provide for the education of the mentally retarded, of various kinds of handicapped persons. There are infirmities, we agree, but we felt that these things should be addressed by the legislature rather than a constitutional commission. For that reason we did not include any language about education to their capabilities or that they be educated regardless of their age, physical condition, sex or handicap, again, because it was an unknown quantity.

And so therefore, Mr. Chairman, I thank you all for your careful attention on this rather long and somewhat boring report, but it's an important report. Mr. Chairman, I now move that the report of the Bill of Rights and Education Committee as presented today with certain recommendations for no change be adopted as recommended by the committee.

Mr. Fry seconded the motion. It was unanimously adopted.

Mr. Carson - I have a question. What section, Ann, was it that Mrs. Workman was talking about?

Mrs. Eriksson - The language that was worked out was applicable, to section 1 or section 2 or perhaps a new section in Article VI. It was related to Article VI, on education.

Mr. Bartunek - I think Article VI was where it most probably belonged.

Mrs. Eriksson - It was not presented in the context of Article I, as it related specifically to education. And that education report has already been agreed to by the Commission.

Mr. Carter - Does that answer your question, Nolan? I share personally in the concern of Mrs. Workman. The question I don't think is whether we agree with her program or not but whether or not it's a proper matter for the constitution vis a vis the statutory process.

Mr. Bartunek - That was our concern, Mr. Chairman.

Mr. Carter - Mrs. Workman has been very diligent, she appeared before our committee this morning and I was delighted to listen to her. One of the big problems the Commission has is deciding what matters are of constitutional import and those that are most properly legislative matters. It's not that we disagree or don't think you have a valid cause, but it's a question of what should be in the constitution. Now, Joe, we're down to the question of the ones that you wanted to amend.

Mr. Bartunek - The first one is found on page 19, section 4, which had to do with a change in the spelling of the word "defense"

Mr. Bartunek moved the adoption and Mr. Heminger seconded. The roll was called. Those voting yes were Mr. Bartunek, Dr. Cunningham, Mr. Fry and Mr. Montgomery. Those voting no were Messrs. Carson, Carter, Guggenheim, Heminger, Huston and Russo.

Mr. Carter - We will keep the vote open.

Mr. Montgomery - What has our pattern been on others? Haven't we tried to go the correct way on other amendments?

Mr. Carter - I'm not sure I could generalize with 100% accuracy, but it has been my general observation that unless there was a substantive change that we didn't bother with the others. That's the way most of the committees have dealt with it, but I'm not sure I'm right on that.

Mr. Montgomery - I think we ought to be consistent. Either we make them all right or we leave them alone and not just this particular article.

Mr. Russo - Wouldn't this go all as one proposal if it did go before the voters?

Mr. Carter - I don't know.

Mrs. Eriksson - I would certainly draft one proposal with all spelling changes in it. Just as we have done with renumbering changes in some articles.

Mr. Carson - Mr. Chairman, on this point we are, I think ,all adults, but if we are going to ask 10,000,000 people in the State of Ohio, or however many voters we have, to read, look at and vote on a proposal to modernize the spelling of one word, at great expense to the State of Ohio, I think it's a travesty. Especially if the word was correct when it was written.

Mr. Carter - Nolan, I think your view will prevail.

Mr. Bartunek - Mr. Chairman, I agree with Nolan, but I feel compelled, as chairman of the committee to defend these things.

Mr. Fry - Let's carry it a step further. If the question is put before the voters, the text will be available to everyone but it will be, the question itself, a relatively simple matter of correcting spelling and mention it along with other things. Isn't that the case? We have to file the resolution in its entirety, but as far as whether or not we correct the spelling in one place or change the language or it's a substantive change, the cost is going to be the same, if it is all in one question.

Mr. Carter - It does suggest the possibility of having what the legislature has every once in a while, an amendment to correct various spellings and having them itemized at one time. What I object to is having a specific action on one little correction.

Mr. Fry - I agree with Nolan's point if this were the only thing to be considered, but if we have some other changes other than just spelling.

Mr. Bartunek - I think substantive changes ought to be in the same section because you've got the problem of printing the thing, you've got the problem of the bedsheet ballot, which has not been resolved yet. And I sort of like it in there. That's what they meant and that's the way they spelled it. We will turn now to the next amendment on page 33, section 9, and that is substantive amendment, denying bail if a man is out on bail and charged with a felony. I move its adoption, Mr. Chairman.

Mr. Fry seconded the motion.

Mr. Carter - Any further discussion?

The roll was called. Those voting in the affirmative were Messrs. Bartunek, Carson, Carter, Cunningham, Fry, Guggenheim, Heminger, Huston, Montgomery and Russo. The roll call was held open.

Mr. Bartunek - Mr. Chairman, the next section is on page 40. That is the grand jury section which is being considered by the other committee. We did recommend taking out "the subject of comment by counsel" which is prohibited by federal interpretation of the Constitution of the United States. That is a substantive amendment, but it is a difference without a distinction. I move its adoption.

Mr. Carter - With the understanding that there may be further amendment by the other committee.

Mr. Bartunek - Whatever their pleasure.

Mr. Montgomery seconded the motion.

Mr. Carter - Any discussion?

Mr. Russo - Why not drop that whole part, "but his failure to testify may be considered by the court and jury"?

Mr. Bartunek - Because we want the jury and the court to recognize that he didn't testify. The only thing that is unconstitutional is the comment.

The roll was called and the following voted yes: Messrs. Bartunek, Carson, Carter, Cunningham, Fry, Guggenheim, Heminger, Huston, Montgomery and Russo. The roll call was held open until the next meeting.

Mr. Bartunek - We now turn our attention to section 11, which is only a spelling change in "libellous" and "acquited", which was the current spelling of those words at that time. I move that the amendment be adopted.

Mr. Fry seconded the motion.

Mr. Carter - Any discussion?

The roll was called. Those voting in the affirmative were Messrs. Bartunek, Cunningham, Fry and Montgomery. Those voting no were Messrs. Carson, Carter, Guggenheim, Heminger, Huston and Russo. The roll call was held open.

Mr. Bartunek - I do think, Mr. Chairman, when you circulate the votes, you ought to explain why there were no votes on this, so that people just don't get in in the mail without the benefit of the discussion.

Mr. Carter - I think that would be a good idea, on the requests for votes, to have a very brief explanation of the reason that people voted no.

Mr. Bartunek - Mr. Chairman, I call your attention to page 53, section 12. Again it's a correction in spelling from "offence" with a "c" to "offense" with an "s".

Mr. Guggenheim - Mr. Chairman, if you are going to annotate the reasons, I'd like to say that I'm voting against these not because of the expense and the difficulty of the ballot. I am a bit of an antiquarian. These are words that have been in the constitution for years. It has been argued in court that they have got a memory and a patina to them. There is nothing wrong with them. I dislike changing them.

Mr. Bartunek - I agree with that.

Mr. Carter - Then why don't you vote no?

Mr. Bartunek - Because I am the chairman of my committee and when I am given orders, I carry them out.

Mr. Bartunek moved the adoption and Mr. Fry seconded. Those voting yes were: Messrs. Bartunek, Cunningham, Fry and Montgomery. Those voting not were Messrs. Carson, Carter, Guggenheim, Heminger, Huston, and Russo. The roll call was held open.

Mr. Bartunek - The next question, Mr. Chairman is the last one, on page 98, section 5 of Article XIII, the taking out of the words "jury of twelve men" just having a jury ascertain compensation. I so move.

Mr. Heminger - I '11 second the motion.

Mr. Carter - Any questions?

The roll was called. Those voting yes were Messrs. Bartunek, Carter, Carson, Cunningham, Fry, Guggenheim, Heminger, Huston, Montgomery, and Russo. The roll call was held open.

Mr. Carter - I'll take a few seconds just to simply say that I think this commission owes a great debt of gratitude to Joe and his committee for doing a great job on this whole subject matter. I had the opportunity of looking at this report some time ago. It was quite a thrill for me to read it. There is a lot of very interesting and good information and I commend every commission member to take the time to read it. Joe, thank you.

Mr. Bartunek - Thank you, Mr. Chairman.

The date of the next meeting was set for February 25. The meeting was adjourned.

Ann M. Eriksson, Secretary

Richard H. Carter, Chairman

Ohio Constitutional Revision Commission
October 5, 1976

Minutes

The Ohio Constitutional Revision Commission met on October 5, beginning at 1:30 p.m. in House Room 10 of the State House in Columbus. Chairman Carter opened the meeting by calling the roll. Those present were Senator Butts, Senator Gillmor, Representatives Maier, Norris, Stinziano and Thompson, Messrs. Aalyson, Carter, Clerc, Cunningham, Fry, Guggenheim, Montgomery, Russo, Skipton, and Wilson, and Vice-Chairman Linda Orfirer.

Mr. Carter welcomed new member Mike Stinziano and, later in the meeting, John Thompson, both Representatives. He announced that Representatives Scribner Fauver and David Hartley were also newly-appointed. He noted the loss of Jim Shocknessy, and read a letter acknowledging the flowers sent from the Commission: "Dear Sirs; To receive flowers always brought a special kind of joy to Mr. Shocknessy during his lifetime. It was most consoling to his relatives and friends to have the lovely arrangement that was sent by the Ohio Constitutional Revision Commission of immense white chrysanthemums and daisies. Mr. Shocknessy would have greatly admired it. Thank you for remembering us. Sincerely, Regina O'Grady for relatives and friends."

Mr. Carter: We will miss Jim and so will a lot of other people in the State of Ohio. So, we're down to 31 members instead of the full complement of 32, which makes our required number for recommendations 21 -- our 2/3 vote means 21. I doubt if there is time to fill the remaining vacancy caused by Jim's death, so I imagine we will proceed with 31 from here on out. I would like to talk a little bit, but I am going to wait until the end of the meeting, about what the plans are for the Commission, what the status is, and get your thoughts about whether we are proceeding in the right direction. We need to discuss, briefly, Issue #7 on the ballot because it is similar to one of our proposals. Ann, would you discuss Issue #7?

Mrs. Eriksson: Issue #7, which is placed on the ballot by initiative petition as part of a group of four proposals, is in essence the initiative and referendum recommendations of the Constitutional Revision Commission with one significant difference. Our proposal, which was one of our regularly issued reports, resulted in the introduction of H.J.R. 42 in the General Assembly last session. H.J.R. 42 after hearings in the House State Government Committee passed the House early in January by a vote of 90-1 and was referred to the Senate Elections Committee and did not move through the Senate this session.

The essential difference between our proposals and Issue #7 on the ballot has to do with the statutory initiative procedure. The essence is this. The present Constitution requires two separate petitions in order to get a statute on the ballot by initiative petition. You do not go directly to the ballot as you do with a constitutional amendment. You have to first petition the General Assembly by gathering 3% of the voters' signatures and then, if the General Assembly refuses or fails to act in a satisfactory manner, you must have another petition again signed by 3% in order to go to the ballot. The Revision Commission's proposal maintained the two petitions. We did reduce the number of signatures, not by what we considered to be a significant number but we did reduce the number of signatures that it would take. We did retain the two-petition requirement. The proposal on the ballot eliminates the second petition. What it does is permit a group of persons, and I think they are requiring 150,000 signatures for that initial petition, and it permits that 150,000 to petition the General Assembly. The proposal must go to the General Assembly first, but failing General Assembly action, the proposal can then go directly on the ballot simply by the committee, the small group of people that got the thing together, requesting the secretary of state to put it on the ballot. So that it eliminates the necessity to gather signatures on a second petition. That's the essence of the difference between the Commission's

proposal and the initiated proposal. Of course, any number of persons have in fact discovered that this is very similar to our proposal and have secured copies of our report and as a result of this, the Commission's name is being used, and our report is being quoted. The arguments on the ballot also refer to us, the arguments having been drafted by the promoters of the initiated proposals.

Mr. Carter: I might add, and Craig correct me if I'm wrong, the committee of which Katie Sowle was the chairman and you and I were members of, recommended to the Commission the elimination of the indirect initiative for statutes. The Commission did not give sufficient 2/3 votes, and so it went back to the committee and then the committee resubmitted to the full Commission the proposal that went into our report and that was approved. The reason I bring that out is that the proposal that is on the ballot is awfully close to what came out of the committee the first time, just for identification purposes.

Mr. Wilson: Did the Commission's proposal eliminate the 44 county requirement?

Mrs. Eriksson: Yes, it did.

Mr. Wilson: I wanted to vote against that.

Mr. Carter: As I recall it is probably unconstitutional in any event was the conclusion we came to.

Mrs. Eriksson: There was a considerable amount of discussion at both the committee and the Commission level on that particular point, and the Commission proposal did eliminate it. I might make one other comment and that is that the secretary of state worked very closely with the committee in working on this proposal. And the secretary of state recommended a direct statutory initiative rather than the indirect process.

Mr. Carter: So I think it is fair to say that this Issue #7 is extremely close to what came out of the Commission but not the same.

Mr. Skipton: There is a very key item here that differs from our recommendation that is being touted as our recommendation and it is influencing a great number of people. I have no desire to have the Commission take a stand one way or the other on the issue. But I do believe that it should be the subject of a news release or something to the effect that this is not exactly what the Commission recommended.

Mr. Carter: For purposes of clarification, I would think that would be in order. The staff could readily do that -- make a release pointing out there is this difference between what is on the ballot and the Commission's recommendation, without taking a stand pro or con -- simply pointing out the difference. Is that what you had in mind?

Mr. Skipton: Exactly.

Mr. Carter: Any further thoughts on that question? Anyone who would object to that procedure?

Mr. Aalyson: I have a question. Skip, as I understand it, you're saying that there are newspaper articles or other sources of releases being put out that indicate that this is our proposal?

Mr. Carter: Oh, yes.

Mr. Montgomery: That's a clear inference when you read the paper. They are using our name in an unfair way, in my opinion.

Representative Stinziano: How does the proponent argument refer to the Constitutional Revision Commission? I haven't read it.

Mrs. Eriksson: This is one of the published arguments for the proposed amendment: "Issue #7 will simplify the initiative and referendum based on the recommendations of the Ohio Constitutional Revision Commission. In its 1975 report, the prestigious bi-partisan commission viewing the entire constitutional language on the initiative and referendum concluded that the provisions were confusing and in need of revision". And I assume that is a quote from our report. Here is another reference, too. The Commission - referring to Issue #7 - brings Ohio into line with the other 22 states with initiative laws. It says the total number of signatures required by Issue #7 are high enough to keep frivolous measures off the ballot. The Commission found "these processes have been used by Ohioans with restraint in the past and there seems no reason they should not continue to be available in the future". And that also is a quote from our report. Our report has also been quoted in at least one article in the Dispatch.

Mr. Skipton: I was listening to a radio talk show where the panelist just flat out said this was a Commission recommendation. In fact, some people actually recorded it, so I know that it's accurate. They are using it, and as long as they are just quoting us, we can't complain too much about it. But it does bother me that a great many people are being influenced by the fact that this is one of our proposals on the ballot.

Mr. Montgomery: They sure do. If they pull it out of context, it's misleading, and obviously misleading. I don't have any question about that.

Mr. Carter: Ann and I were talking about this. It is unfortunate that it has come up in context with these other issues because it's not being considered on its merits at all, but that's the way it goes. I think we have established several things. Let me state my understanding and see if anyone disagrees. First, the Commission should not take a position one way or the other on Issue #7. Secondly, we should issue a press release through the office pointing out that the Commission takes no stand on Issue #7 and that it does have a significant difference between what the Commission recommended and what's on the ballot.

Mrs. Orfirer: I wonder if we, for purposes of clarification, might add a sentence to the effect that while several parts of the amendment do agree with our report, there are significant differences.

Mr. Carter: I think we want to state it fairly.

Mrs. Orfirer: Yes, state both sides, not just "no, this isn't ours, and we're not taking a position on it".

Mr. Carter: Yes, I think perhaps that's better than saying we're not taking a position on Issue #7 one way or another. It's just simply pointing out the differences between what's on the ballot and our proposal. Does that sound in accordance with...

Mr. Montgomery: They're inferring that we are taking a position and unless we specifically say we are not then we will be identified as for it.

Mr. Carter: Would you prefer to specifically state that the Commission is not taking a position on Issue #7?

Mr. Montgomery: Absolutely. That's been our position on every other constitutional amendment.

Mr. Carter: Anyone feel to the contrary? Then I feel we should incorporate that in the release. That seems to be the feeling of the group. It's too bad it's on the way it is because it's getting lost in other questions entirely. It's a darn good measure -- this whole business of changing the initiative and referendum, as evidenced by the House overwhelming approval. But getting mixed up in this other business is too bad.

The staff has put together a little booklet giving a summary on where everything stands. If anyone has any questions on the pending proposals, I think we will save them until after the meeting. There are only two committees that we have functioning now that are active; Al Norris' committee on the jury questions, and Craig Aalyson's committee on what's left. Al, do you want to bring us up to date on where your group stands on the jury questions?

Representative Norris: Mr. Chairman, we finished our public hearings on both the civil petit jury and the grand jury. We met last week and drew up some tentative recommendations in the area of grand jury reform. We will not really be making any suggestions in civil jury reform. But I think we will have some very meaningful suggestions to make in the area of grand juries. We're currently polishing up the drafts in those areas and I would hope to have a report by the end of the month.

Mr. Carter: So presumably this could be submitted to the next meeting of the Commission?

Representative Norris: If it's next month, right.

Mr. Carter: We need approval of the minutes of the January 27 meeting. They were all mailed to you. I looked them over and thought they were suitable. Does anyone object if they are approved? There being none, the minutes are approved.

Now, to the What's Left Committee reports. Craig, of course, has been the chairman of this Committee. I want to say on his behalf that I have been fortunate to be a member of this Committee. I have very much enjoyed the Committee discussions, I just missed one. We have a fine chairman who has done an outstanding job in these areas and I am proud of what the Committee has come up with and proud to have you present it, Craig.

Mr. Aalyson: Mr. Chairman, the What's Left Committee submits today two separate reports to the Commission for their consideration, with recommendations that they accept these reports. The first is entitled the Miscellaneous Report, which concerns itself with Articles II, VII, IX, XI, XV, and XVI of the Constitution. And the second report concerns itself with Article XI of the Constitution -- apportionment, and we move that the Commission does accept these reports. We will proceed to discussion.

Dr. Cunningham seconded the motion. The motion was adopted. Mr. Aalyson noted the page numbers in the report for each section.

Mr. Aalyson: Those of you who have been members of the Commission for some period of time will recall that this Committee earlier concerned itself with the terms of office of elected officials and the salaries which pertain to those officials and made an earlier recommendation which was not accepted by the Commission. The Committee went back to discuss this further, and the chief problem which appears to have been encountered in this section is the fact that in certain areas of the government, notably the county commissioners, because of the staggering of terms, one of the county commissioners is presently unable to receive the salary which other commissioners elected after he was elected are able to receive. The county commissioners were unanimous in presenting their views that this was an inequitable

result. Primarily because the person who would be receiving the lower salary is often the person who has had the most extended term as a county commissioner and the one with the most knowledge of the operation of the county commissioner's office and the one who would be taking the lead, at least initially following a new term, in the conduct of county business. There was some other discussion from the county auditors but they are not in the same boat since they don't have staggered terms. And there was also some input from some members of the legislature with respect to their inability to receive a change in income during term but that did not meet with a whole lot of sympathy from the Committee or the Commission, I believe, in its past discussions. In any case, what the Committee has done is to submit its first recommendation in this field which is to the effect that the General Assembly could not change the salary of an elected official during term unless the office were abolished. And then there was an additional provision to the effect that an increase in salary applicable to an office shall apply to all persons holding that same office. We feel this will probably only affect county commissioners. We move the adoption of this recommendation by the Commission.

Mr. Montgomery seconded the motion.

Representative Norris: Would this not apply to senators?

Mr. Aalyson: No, there is a separate constitutional provision which takes care of state senators.

Representative Norris: Refresh my recollection, if you would, I don't remember that prior proposal that well. Did the prior proposal say that the General Assembly could increase anybody's salary during term but our own? And if not, why don't we recommend that instead of fooling around with just this?

Mrs. Eriksson: This was the first proposal of the Committee and the second proposal of the Committee would have simply prohibited decreases but would not have prohibited increases at all. That proposal was defeated by the Commission.

Representative Norris: Would it have allowed increases in terms for legislators, too?

Mrs. Eriksson: No, because that is in a separate section in the Constitution.

Representative Norris: And that's the proposal that failed?

Mr. Aalyson: Correct.

Representative Norris: There is good rationale why we can't increase our own salaries during term, but I never understood why we couldn't increase the county recorder's pay. But if that was the proposal and that was rejected then that answers my question.

Mr. Fry: I had the recollection that we discussed this at length one meeting. Why was it taken back?

Mrs. Eriksson: Because the proposal was defeated and it was then moved that the Committee reconsider it, and the Committee reconsidered it and decided that it's first proposal was what it wanted to go with. It was discussed at length.

Mr. Fry: When this proposal was made, was it defeated too?

Mr. Carter: It did not come to a vote. What the Commission raised as an objection

to it related particularly to the senate question, which this does not cover. The senators raised questions about this and basically I think their situation was that if we're going to do this for county commissioners, we ought to look at the inequities that exist in the senate at the same time. So we took it back and looked at it in the Committee and came up with the approach that was just described, and then that was defeated clearly. So now we need to do something.

Mr. Montgomery: I think there was just a general broad sweeping opinion among people that there should be no increases in salary during term. That's as far as a lot of us looked, and I think further analysis has indicated that this is kind of silly. There shouldn't be such a broad sweep. We should start looking deeper. What he says is absolutely true. The freshman commissioner is the least qualified and you are paying him the most. It doesn't make any sense.

Mr. Carter: It's an obvious inequity. The motion was made and seconded to adopt the Committee's recommendation on section 20 of Article II again, that is adding that phrase that says that if there are raises made it applies to everyone holding the same office, principally the county commissioners.

Mr. Fry: Mr. Chairman, I had an opportunity to look at some of the comment on this. Who was responsible for the constitutional amendment that allowed in-term pay increases? Who put that on the ballot? It says "the failure of voters to ratify recently a constitutional amendment which would allow in-term pay increases for certain county officials". When was that on the ballot?

Mrs. Eriksson: About two years ago the legislature put it on.

Mr. Fry: And it was rejected?

Mrs. Eriksson: Yes. It was considerably more complicated than this proposal.

Mr. Fry: I'm going to vote against it. I feel the idea of a person at the time he proposes to run for office knowing what is provided for the office, I don't think they should run on an "if-come" basis either. I'm not going to try to persuade anyone, but I'm going to be consistent with the position I have taken for a long time.

Mr. Aalyson: We considered this in the Committee, and we took that particular attitude with reference to the auditor, for example. They knew what they were getting when they went in so they should be satisfied with it. I just want to let you know that we did consider that. We also considered that with regard to the county commissioners, but we did feel that there was probably an inequity here since as we described the later and less professional persons were receiving a higher salary than the persons who were doing most of the work.

Mr. Fry: I would guess this has been considered over a period of about 50 or 60 years. If it were to be adopted, it would be a change that had been considered many times in the past.

Mr. Skipton: Doesn't this apply to all the staggered term appointments as well?

Mrs. Eriksson: If it's a public official, yes.

Mr. Skipton: A lot of the debate before turned on who all was covered by it. Any staggered term office would be affected by this, but the change still would only occur when a new term started for somebody. I'm willing to go along with it just on the basis that it is not in-term for any office holder. There has to be some

basis for it, and it is the beginning of a new term for somebody when it occurs.

Mr. Fry: In this case, though, it will not be necessary. I mean the commissioner will not start a new term. He could get an increase without starting a new term.

Mr. Skipton: Anybody whose term has got a longer term to run would benefit from this, there is no question about that. All this does is say that all people serving in the same office are going to receive the same pay.

Mr. Fry: What about public utility commission members?

Mrs. Eriksson: Yes, it applies to them. Any official who occupies a public office. It would not apply to appointed persons who were not public office holders, but public utility commissioners would be considered a public official.

Mr. Fry: We say principally commissioners, but would this apply to all boards or commissions that are appointed?

Mrs. Eriksson: Most boards and commissions aren't salaried, and most of them are not considered to be office holders.

Mr. Fry: What about the Industrial Commission?

Mrs. Eriksson: I think it would apply to the Industrial Commission.

Mr. Fry: I had the impression from what was said that it was just county commissioners.

Mr. Carter: They were the ones who testified before the Committee. That's how their name came up.

Mr. Fry: I'd like to see a list of whose covered. It may be a lot more extensive than we think.

Mrs. Eriksson: It's difficult to come up with such a list because it depends upon the interpretation of what an office holder is. Those that you mentioned, of course, would be. The Industrial Commission and the PUCO.

Mr. Carter: There are two conflicting philosophies here. One is that when you run for a job and you know what the pay is you stay with it. The other is that if you are doing the same job you ought to get the same pay. You're going to have to take your pick.

Mrs. Orfirer: I don't think it's nearly so much a question of whose affected as a principle. Either you believe in the principle of equal pay for equal work or you don't.

Mr. Fry: I'm not certain that we want to be in a position of the voters saying we aren't in favor of this, and we say we don't care what the voters said about it, we think it's a good idea and we're going to give it to you again.

Mr. Carter called for the vote. Those voting yes were: Senator Butts; Representatives Norris, Stinziano and Thompson; Messrs. Aalyson, Carter, Clerc, Cunningham, Montgomery, Russo and Skipton; and Mrs. Orfirer. Three voted no: Representative Maier and Messrs. Fry and Wilson. Mr. Guggenheim passed.

Mr. Carter: We will as is our custom, of which you are all aware, hold the vote open until the next meeting to give those that aren't here and those who passed an opportunity to vote.

Mr. Wilson called for the totals: 12 yes, 3 nos, 1 pass.

Mr. Russo: I want to comment on one thing, here. We keep talking about the new term and the "least professional". That could be the incumbent who is running and the most professional. The new appointment need not necessarily be the least professional.

Mr. Carter: That's correct.

Mr. Russo: Because even on the board it could be a repeat, so when you keep repeating this, it sounds as if you are giving the least qualified person a pay raise, when actually it could possibly be the most qualified.

Mrs. Orfirer: "Experienced in that role" is perhaps a better way of saying it.

Mr. Aalyson: With respect to mechanics' liens the Committee has recommended no change. On workmen's compensation although the report indicates no change, there is a possibility that there may be some change in that section recommended by the committee which is considering the petit and grand jury. There may or may not be a change. The What's Left Committee had no recommendation for change in that area. The second area, being section 41 of Article II involving prison labor has been recommended for change. That appears on page 15 of the Committee's report. Of those persons who testified at the Committee's meetings, the general feeling was that there was some reason to amend this section to provide that there could be certain instances where prison labor could be had and it would be appropriate and beneficial to the prisoners themselves and not inimical to any ideas of state government. And that was where the prisoner was under some sort of program where he could be sent out of the prison to work, more or less in a rehabilitative capacity during the day and report back to the prison at night. The witnesses felt this could not properly be done under the present form of the Constitution. There was also testimony to the effect that in certain instances prison labor should be able to be used in competition with other labor, for example, government printing I believe was the instance which was cited. So the Committee did, following receipt of that testimony, make a recommendation for change which would have the effect of permitting the prisoners who are engaged in rehabilitative-type training to leave the prison during the course of their imprisonment during the daylight hours and engage in that type of training or work. And also we would leave it up to the General Assembly to prescribe the limitations with regard to prisoners involving competition with other forms of business activity. So we have modified the present section 41 of the Constitution quite substantially, by abbreviating it, primarily, but providing for the opportunity for the legislature to do the regulation in this area and leaving it up to them to determine where the regulation should fall.

Mr. Montgomery: Craig, the only question I have is should this be mandatory. It says "laws shall be passed". What if we just want to train these people? Why should they have to work necessarily? Is this something that we're going to mandate?

Mr. Aalyson: I don't know that we as a Committee were trying to mandate it. We're carrying over language from the prior section.

Mr. Montgomery: I'm wondering if "may" might be a better word than "shall".

Mr. Carter: I might agree with that.

Mr. Aalyson: Yes, I don't know that we even looked at that, but it sounds like a very reasonable proposal.

Mrs. Orfirer: I don't read it that way. It seems to me that the "shall" is related to the passing of the laws which provide, but in my mind, it doesn't say that they have to work. It just says that there have to be laws that decide that, make the provisions related to that. What do you think, Ann? How would that be interpreted?

Mrs. Eriksson: I think it would be interpreted as a mandate to the General Assembly to do something. As with all such mandates it's essentially an unenforceable mandate, so that if the General Assembly did not pass laws, nothing would happen.

Mrs. Orfirer: But can't it pass laws that do not provide that they must work?

Mrs. Eriksson: Yes, I think so. A law providing for the employment of prisoners could provide that prisoners could not be employed.

Mrs. Orfirer: Yes, that's what I wondered.

Mr. Montgomery: I differ with you in interpretation, because it says "Laws shall be passed providing for the employment...", not the non-employment.

Mrs. Orfirer: The occupation and employment.

Mr. Montgomery: I think a technical reading would require the legislature to pass laws making these guys do something.

Mr. Aalyson: The language to which you are referring is already in the Constitution.

Mr. Montgomery: I know that.

Mr. Russo: Why should we use a word in there that is going to be presented to the courts for a final decision when we could use "may" and eliminate the necessity of going to court to determine whether the legislature shall do that or not?

Senator Butts: I just wonder what you feel you have done with the curtailed language that you would not do if you had no section there at all.

Mr. Aalyson: In other words, does the legislature have inherent power to do what is now provided? Maybe nothing. Of course, there has always been a restraint on the Commission or any committee under the Commission where there is a constitutional provision which seems to actively support a type of activity on the part of the legislature, we just don't repeal it. We try to simplify it if we can. So maybe there is inherent power.

Mr. Carter: May I comment on that? You have a different situation if you are starting writing the Constitution from scratch than when you are amending an existing one. When you are starting from scratch, you don't need it at all. The plenary powers are adequate from that purpose. We always have a concern when we remove something from the Constitution, the fact that it has been in and has been removed, raises questions itself as to whether it is not to be interpreted in a different way. There is the practical political question that when you remove something that has been in the Constitution, the write-up always comes out that when you remove something you are permitting something else in its place, and it becomes a rather difficult thing to explain -- the ballot language and so forth. So in most cases, we found that in balancing all of these factors, sometimes we take them out but sometimes we feel it is best to leave a little bit in there for these various reasons.

Senator Butts: I understand. Have we had constitutional issues that have been

resolved that way? Where a decision has been made that it is an act to remove something from the Constitution that was in there and therefore you mean something else?

Mr. Carter: The question has been raised many times in our discussion. I don't know what the courts would say.

Mrs. Eriksson: I don't know that I could cite a precise instance of that happening. I think that in this case, the representative from the Department of Rehabilitation and Corrections who essentially came to the Committee and proposed this modification stated at one point that he did not think the Department would recommend a repeal of the section because they did not know what effect that might possibly have on existing laws and they were in favor rather of removing the restrictions in the section and leaving the general language there.

Mr. Skipton: What is the question? Are we debating whether we have anything in the Constitution?

Mr. Carter: Yes, I think the Senator is suggesting why not repeal the whole thing.

Mr. Skipton: I would be very leery about removing all reference to it because you are talking about forced labor. My feeling is if you don't have a provision in the Constitution providing for forced labor then you would eliminate any way of forcing anybody to do any work.

Senator Butts: That was the question I had for the Chairman, whether he felt that he was doing something.

Mr. Skipton: I don't care how you change this language, whether it is permissive or mandatory but I don't think -- you are going to be in dangerous ground if you eliminate all reference to it.

Mr. Aalyson: Don, I believe you raised the question of whether it should be "may" or "shall". Are we in a posture where we can accept a recommendation for an amendment?

Mrs. Eriksson: Perhaps we should have a motion to adopt the section first.

Mr. Aalyson: I move that the Committee recommendation with regard to the amendment of section 41 of Article II be adopted by the Commission.

Mrs. Orfirer seconded the motion.

Mr. Carter: Now then, Don, as I understand it, you would like to make an amendment?

Mr. Montgomery: I move that the language be made permissive with the insertion of the word "may" in place of the word "shall".

Representative Norris seconded the motion.

Mr. Carter: Any discussion on the amendment? If you are ready for the question, we can have a show of hands on this one. It is carried that the word be changed from "shall" to "may". Section 41 of Article II has been moved and seconded, and has been amended in a motion made in the past that the word "shall" shall be changed to "may". That is the question before the Commission at the moment. Is there any further discussion on that? If not we will call for a vote on that one.

There were 16 affirmative votes: Senator Butts; Representatives Maier, Norris, Stinziano, Thompson; Messrs. Aalyson, Carter, Clerc, Cunningham, Fry, Guggenheim,

Montgomery, Russo, Skipton, Wilson, and Mrs. Orfirer. None voted "no".

Mr. Carter: Again we will hold the vote open until the next meeting.

Mr. Aalyson: Mr. Chairman, it is with some misgiving that I approach this next item. We in the What's Left Committee thought that this one would take about 15 minutes and we ended up with about 15 hours. Present section 1 of Article VII of the Constitution provides that institutions for the benefit of the insane, blind, deaf and dumb shall always be fostered and supported by the state, and be subject to such regulations as may be prescribed by the General Assembly. We had visits from some very knowledgeable and very helpful people in this area who were very concerned about the present constitutional section. Particularly in so far as it does not provide for what those people referred to in their testimony as the least restrictive alternative for providing for the safekeeping of these individuals. And of course it was also felt that there was a certain stigma attached to some of the terms used in the present section of the Constitution. The principal import of the testimony with regard to least restrictive alternative was to the effect that persons of this character are unable to fend for or care for themselves, and should at least be in that environment which is most suitable for them in their capacity, and in an environment which would tend to provide the best form of rehabilitation to the extent that rehabilitation could serve this type of individual. There was also, of course, the feeling that we should continue to mandate or express in the Constitution the idea that the state would foster and support this kind of individual and so the Committee has made a recommendation which would tend to de-institutionalize the type of facility which would be provided for these persons although permitting the institutionalization if that were felt to be the most favorable type of treatment for this type of person.

We have attempted to provide that the legislature shall be given as much leeway as possible in providing for the care of these inflicted individuals. There was considerable misgiving expressed in the Committee discussions that we did not want to require the legislature to provide specific types of care for these individuals which would involve the construction of new facilities and things of that nature. We have come up with a recommendation which reads as follows: "Facilities for and services to persons who, by reason of disability or handicap, require care, treatment, or habilitation, shall be fostered and supported by the state". We took the word "habilitation" to include the term "rehabilitation". "Disabled or handicapped persons shall not be civilly confined unless, nor to a greater extend than, necessary to protect themselves or other persons from harm". This is the idea of the least restrictive alternative. "Such persons, if civilly confined, have a right to habilitation or treatment". We do have with us some persons, I believe, who want to testify or speak in behalf of this committee recommendation. In the interests of permitting them to return to their other occupations, if the Commission has no objections, I would like to call upon them at this time. I will call upon them primarily in order in which they spoke before us as a committee and would like to introduce you now to Mr. Robert Hopperton who is presently with the Faculty of the University of Dayton, recently with O.S.U.

Professor Hopperton: Mr. Chairman, Mr. Aalyson, members of the Commission, since Mr. Aalyson is concerned about the time I will make my comments very, very brief. I would like to say just two things: one is to express support for the recommendation of the What's Left Committee with regard to Article VII, section 1, and two, to commend the Committee for working with us for over a five month period in terms of giving very careful meticulous and thorough consideration to the subject area of Article VII, section 1. Again, we were supporting a broader scope of Article VII, section 1, but we do support enthusiastically the recommendation of the What's Left Committee.

Mr. Aalyson: Thank you, Bob.

Mr. Montgomery: He didn't say who he was representing.

Professor Hopperton: I'm sorry. The report you have before you mentioned an ad hoc committee and the ad hoc committee was organized largely by the Law Reform Project at Ohio State. It included representatives of a wide range of public and private organizations including the state departments of Mental Health and Mental Retardation, the State Disability Planning Council, the Youth Commission; private groups such as the Ohio Association for Retarded Citizens, the Ohio Developmental Disabilities, Inc., Easter Seal organization; and several Franklin County organizations including the Council for Retarded Citizens and the Children's Services Council. We had approximately 20 representatives and all of those representatives contributed in one way or another to the recommendation of the ad hoc committee, and in turn to the What's Left Committee. On behalf of the ad hoc group I would like to express that group's support for the What's Left Committee recommendation.

Mr. Carter: The Chair would like to add to what Mr. Hopperton has said. This group of concerned citizens about people came into the Committee to testify and Craig frankly asked them for their help in drafting something that would be appropriate. They spent a great deal of time on this. They came to the Committee with their recommendation which was not acceptable to the Committee, and through the process of give and take and discussions over a period of months this was reached as everyone felt an acceptable compromise between what the group had wanted and what the Committee was willing to go along with. I would like to say that I think it is one of the finest examples of citizen participation and democracy in government that I have seen and I think this group is to be congratulated for the great deal of time and work and consideration they gave the Committee. I'm proud of it.

Mr. Skipton: Mr. Chairman, is there anywhere in here that defines these terms "disability" or "handicap"?

Mr. Carter: Obviously not. This was discussed a great deal in the Committee.

Mr. Skipton: The present Constitution is very specific and this gets very vague.

Mr. Aalyson: This presented a problem to us, Skip, in the Committee. We did want to get away from the type of language which was characterized as stigmatizing. And we felt that disability and handicap were the most descriptive and yet the least stigmatizing language that we could select and we left it at that after much discussion. Bob Huston was concerned also with this, but we think that these are terms which have had a significant enough use in the law that if there is any question, the courts would be able to handle the matter adequately.

Mr. Skipton: Can you be educationally disabled?

Professor Hopperton: There are disabilities that are termed learning disabilities. I think the terms we had in mind in terms of using "disability" related to neurological deficienceis such as mental retardation, cerebral palsy, epilepsy, and the other forms of neurological problems.

Mr. Skipton: The reason I raise this is that we went through this in another committee. At that time it was education. Now we are talking about presumably something different, but it is exactly the same problem. I'm willing to hear out the rest of it.

Professor Hopperton: I might add that it is unlikely that someone with a learning disability would be civilly confined because of the educational disability. The

disability or handicaps would have to be handicaps that would require or permit the state to institutionalize or civilly confine a person. So I think that considerably drastically narrows the category of people.

Mr. Aalyson: Even with regard to your question, Skip, facilities for and services to persons who by reason of disability require care, etc., shall be fostered by the state. We were careful in drafting this to avoid any requirement that the state would have to start building institutions or facilities of any sort to take care of this. We thought also of using adjectives to describe, such as physical, mental, or emotional and we found that if we got into that we were almost going to have to list every adjective that we could think of, and we would be no further along than we were.

Mr. Skipton: I appreciate the problem that you have.

Senator Butts: I think probably the terms are definable but it seems to me that they are considerably broader than the present language, and what we are doing is extending the responsibility of the state. That may be a good or bad thing. I think the question of the handicapped is addressed in the Constitution with respect to homestead exemption, but there it is "permanent and total disability" which is far more restrictive and of course just applies to that particular provision with respect to homestead exemption. Now we are talking about having to care for everybody who is handicapped.

Mr. Aalyson: I think the intent is adequately expressed in the recommendation. It says "facilities for and services to persons, who, by reason" of these various things require care, treatment, or habilitation shall be "fostered and supported by the state". I don't think there is any requirement that the state do anything that the legislature would not provide they do. That was our intention.

Representative Stinziano: Mr. Chairman and members of the Committee, I'm sorry that I didn't have an opportunity to take part in the ad hoc committee and the Committee deliberations because I have a strong interest in this area. I would like to point out to Senator Butts that Columbus State Hospital is in my 30th House District and most of the people there are neither insane, blind, nor deaf and dumb. They are neurologically impaired, they are retarded and they aren't covered in the present Constitution. I think the state recognizes its responsibilities. Although I haven't had the advantage of having heard the testimony or taking part in the deliberations of the Committee, I would think that you can't get much more specific than the Committee recommendation now is.

Mr. Montgomery: That's one of the problems I have. I don't know how specific we dare to be in a field which fluctuates like this one has in the past and undoubtedly will in the future. I can see society's responsibility to confine those that are dangerous to themselves and to others. I think our tradition would support that. I have no problem with that one. My problem is with the right to treatment. Here it seems to me we could be indicating, financially, something which could be far beyond the willingness of the people of the state to pay for. We're saying that some people are entitled to treatment and there are some people who are untreatable...

Mr. Carter: If confined.

Mr. Montgomery: We all know there are hopeless cases. I doubt that that should be locked in concrete. I would like to give the legislature some flexibility here. We don't mention that the legislature can pass laws on this. I suppose it is assumed but no place is that mentioned as part of this Article. I think we ought to allow ourselves a little latitude here to cope with changing conditions, changing philosophies, changing medications and ideas. I just hate to lock it up.

Mr. Aalyson: This was a very major concern of the Committee. The language we drafted we had hoped would take into account that this type of situation is a fluctuating or evolving situation. There are different types of treatment that are coming out every day in this realm. I believe that the provision for treatment, and Bob I will ask you to help me on this, is a response to a Supreme Court case that has indicated that under the Federal Constitution there is a right to one civilly confined to have treatment.

Mr. Montgomery: And the next Supreme Court can say that there isn't.

Mr. Carter: There is a question of principle there.

Mr. Montgomery: We don't know from one day to the next what our institutions are going to decide is good or bad. And if I'm a hopeless case, and I'm 90 years old and in an institution, I don't want them to waste a dime. Under this you have to treat me and rehabilitate me to do something even though you know it is a waste of everybody's money. I think that's wrong.

Mr. Aalyson: I don't think any court would say that anyone who couldn't be habilitated or treated would be required to have it anyhow.

Mr. Montgomery: That's what it says.

Mr. Aalyson: I think we have to use reason or discretion about the thing even though it's constitutional.

Professor Hopperton: I think there are three basic objectives to the suggested version of Article VII, section 1. The first is a generalized commitment on the state's part to provide some sort of services and facilities to disabled and handicapped persons. But that is not indicated with specificity. I think it would be up to the General Assembly to decide the scope of those services and facilities. The intent of the second sentence is much narrower. It indicates that civil commitments would be limited to protect persons from harm, either the persons themselves or persons who might potentially be harmed by that person. And the third sentence applies only to those civilly confined under the harm or dangerous standard the right to treatment or habilitation. So it is a very narrow range of people who are guaranteed under this provision a right to treatment or habilitation. It is not the whole range of disabled or handicapped persons.

Mr. Montgomery: I understand that, I just think it should be left to the legislature to decide as time passes on and the state of the art progresses.

Mrs. Orfirer: I would like to say that I think you have done an excellent job in providing the kind of flexibility that Mr. Montgomery is talking about. I think we ought to pay particular attention to the word "or" in the bottom line. It does not say habilitiation, it says habilitation or treatment. Everything comes under the label of treatment, whether it's being given something to calm one who is confined or whatever. I think no one wants to feel that anyone in this society regardless of their handicap and the extremity of their handicap is left without treatment of some nature.

Mr. Montgomery: It means more than custodial care.

Mrs. Orfirer: Right, and I hope it does mean more than custodial care.

Mr. Montgomery: Society should not try to do more than custodial care for certain people.

Mr. Aalyson: If you read the last sentence in conjunction with the first one, I

believe maybe we have, and I don't recall whether we did this intentionally or not, satisfied your problem. Facilities for or services to persons who require such care, and then, such persons if civilly confined have a right to habilitation or treatment. Who require care or treatment. We were concerned with the same problem that you are, that you don't force the state to do something that would be in effect a useless act. But the first sentence provides the services for those persons who require, and if they are civilly confined you are going to give it to them. We were also concerned, of course, with the idea that if you take away a person's liberty, his physical liberty, you must do what you can to restore him to a condition where he could be released. You don't just let him sit there.

Mr. Guggenheim: Mr. Chairman, the problem of taking care of mental patients has been a perennial and almost continual problem in Ohio. Does this mean that if there isn't enough budgeted to furnish care for all these patients, and I think this has been true on many occasions, that they should be dismissed from the institution?

Mrs. Orfirer: There is an obligation to provide it, as I read it.

Mr. Aalyson: The obligation is to foster and support facilities and services. It was a major concern of mine during the discussion that we do not impose upon the state a burden for which it was not financially equipped. Perhaps we have not achieved that by our language but this was certainly intended. Some of the language in the original draft appeared primarily to me and Bob Huston to impose upon the state a financial burden whether or not it had the capability of assuming it. We tried to avoid that requirement in this recommendation and I hope that we have.

Mr. Carter: I don't think your point covers the question. Do you want to restate it, Dick?

Mr. Guggenheim: As has been perennially true, the state simply doesn't have the funds to provide treatment for everyone who is in mental institutions. If you have a person confined and you are not giving him the treatment, does this mean we have to dismiss him?

Mr. Aalyson: You only give treatment to those who require it.

Mr. Guggenheim: I'm talking about those who require it.

Mr. Aalyson: I think the answer is obvious that you give them the treatment to the extent that you are financially capable. I don't think the Constitution can impose upon the state an obligation it can't assume. Maybe I'm naive.

Mr. Carter: I think it is envisioning a law suit - you can't give me treatment, therefore you've got to let me out.

Mr. Guggenheim: I think that's correct. I think the state has been unable to give treatment to many people who are confined.

Mr. Aalyson: I don't think it would be a reasonable inference from this provision that the person confined should be released if he were not receiving treatment.

Mr. Guggenheim: But you are giving him a constitutional right to it. You would be depriving him of a constitutional right.

Mr. Aalyson: But the relief for the right is not to release him, necessarily, I don't believe.

Representative Maier: The feedback I get from what is being expressed which is my feeling too is what we are trying to do after we get by that first sentence, we're trying to legislate by constitution. There is nothing in that language that I don't really subscribe to, but I still don't believe it belongs in the Constitution. I think that's really the principle we are arguing about.

Professor Hopperton: The ad hoc committee clearly felt that this is precisely the sort of language that should be in the Constitution; that it ennunciated, at least for the civilly confined, a basic right, of a constitutional magnitude, and we would hope that it would be put in the constitution as a basic commitment of the state in terms of treatment and habilitation provided to those who have lost their freedom because of their dangerousness.

Mr. Montgomery: Isn't this discrimination? Now we're saying that these people have rights above and beyond the general population.

Professor Hopperton: It would be a right only when you or I had lost our liberty, so it would be a quid pro quo of sorts for the state taking away our freedom and liberty to do all those things we normally enjoy.

Mr. Montgomery: Are you saying these people don't have constitutional rights, they cannot be represented by counsel?

Professor Hopperton: Not of that sort. But when the state says you have to be institutionalized because you are potentially dangerous or you are dangerous, then the state has some obligation to help that person become undangerous or to help that person return to normal life to enjoy the freedom we all want to enjoy.

Mr. Fry: Where the state does not provide enough money for that treatment, then what's the remedy?

Professor Hopperton: I'm not sure this provision of the Constitution covers that directly. The U.S. Supreme Court says that if a state is not providing treatment to someone who is not dangerous, then that person must be released, the O'Connor v. Donaldson case. So there is some Supreme Court authority that release might be required if the state is not providing treatment or habilitation.

Mr. Skipton: You mean the Supreme Court has held that you cannot confine somebody to protect themselves or other persons from harm?

Mr. Aalyson: No, you must release the person who cannot be so defined. If my interpretation of the case is correct, Bob, it's been a long time since I read it, the Supreme Court case applies to those persons who are confined but are not dangerous to themselves or others.

Professor Hopperton: And who are not receiving treatment.

Mr. Fry: What about the case here where they are dangerous to themselves or others but they aren't receiving treatment? What's the remedy?

Professor Hopperton: I think this says that the state must provide treatment or habilitation.

Mr. Fry: What if the state didn't do it, then what?

Professor Hopperton: Then I guess it would be up to the courts to decide what the state must do. There would be a right there that was being violated that the individual could litigate.

Mr. Fry: If the legislature doesn't provide the money, then the courts would be in the position of mandating that the legislature raise taxes.

Mr. Skipton: This gets into the school tax cases, they're the same sort of thing -- that since we have compulsory education laws therefore since the state forces people to go to school, therefore they have the right to get a certain kind of education. And that's being interpreted now a days to mean equal numbers of dollars. When you put that word "right" in here, you have red flags flying all over the place.

Mrs. Orfirer: I think we're forgetting that what this says, is that if they are not dangerous to themselves or others then they can be released if you can't provide the treatment. What's the matter with that? They can be treated in out-patient facilities. They can be treated in mental health clinics all over the state. The point is you don't confine them if they are not dangerous to themselves and others and you can't financially do anything for them. That is a very sensible basic kind of right. So the answer it seems to me is, if the state does not have the money and if they are not dangerous to themselves or anyone, then you have an obligation to release them.

Mr. Fry: But what if they are dangerous? As long as I can remember, we haven't done what we should do, and I think under the terms we have here, and I'm sympathetic to what Mr. Hopperton wants to accomplish, I can see that if the legislature doesn't raise the money and treatment is not provided and people are still dangerous, then what's the answer?

Mrs. Orfirer: I think we could solve this. I'm not sure I want to. I think you could put in the first line the word used in the last line which is "care", have a right to "care, treatment or habilitation".

Mr. Montgomery: I would like to suggest what the remedy would be. The remedy would be a lawsuit against the state of Ohio for the reasonable value of rehabilitative services. And if you have this in the Constitution, every patient has that right and the state of Ohio will be adjudicated liable, and will pay for that amount of money as a first mortgage on revenue. This is part of what is widely known as the psychology of entitlement in this country. That desires become needs and needs become rights. We have it and we are going to live with it, but at least we can confine it to the legislative level. When we put it in the Constitution I think we are running a collision course with economic reality.

Mr. Aalyson: Would it help the members of the Commission if there were to be inserted in the last sentence of the proposal the word "available"? "Such persons if civilly confined have a right to available habilitation or treatment"? Which was one of the proposals before the Committee that was thought to perhaps not go as far as the ad hoc committee, at least, feels it should go.

Representative Maier: I think we could perhaps solve that whole thing better by just striking everything after the first sentence.

Mr. Carter: What's the problem with the second sentence?

Representative Maier: The problem with the second sentence is that that question has already been decided by the U.S. Supreme Court. I don't see why we should lock it into the Constitution at the risk of the Supreme Court coming up with some different interpretation of some substantive right. If that is currently a federal constitutional question, we ought to leave it to the federal courts. I see no place for it in the state constitution although I agree with the principles.

Mrs. Orfirer: Isn't it just the third sentence that you don't like.

Representative Maier: No, we were talking about the second sentence. I don't like either of them.

Mr. Wilson: I have trouble even with the first sentence. That word "disability" may be definable by somebody but it's subject to a number of questions in my mind. For example, just a moment ago we were talking about a learning disability.

Mr. Aalyson: Age is another one.

Mr. Wilson: Yes, so the state has to provide care treatment and habilitation for those who are suffering from learning disabilities. They could probably under that interpretation have the right to create whatever schools they wanted to. I think you have got a widemouth can of worms here in this article. It's okay to do a little cosmetic work in the language in the present Constitution. I don't like any of the three sentences. I can understand the approach of those who would like to put more into it, but I think it is a statutory thing and it doesn't necessarily belong in the Constitution.

Mr. Aalyson: If I may, Mr. Chairman, I would like to limit further discussion by Commission members to give the other witnesses a chance to speak. It may be that they will answer some of the questions of the Commission. Another person, who is also associated with the Ohio State University College of Law faculty is Dean Michael Kindred.

Dean Kindred: Mr. Chairman, members of the Commission, I'm coming in at a most unfortuitous moment. I do teach at the Ohio State University Law School, I am an associate dean of the Law School, I have a course in the area of mental disability and the law and I have for several years been the director of the project at the Law School, that concerns itself with the legal rights of a portion of the mentally disabled population. I'd like to begin by saying that I feel that this is extraordinarily artfully drafted language. I think that the What's Left Committee did a superb job of weighing the conflicts between mandating too much and providing for the guarantee of essential basic rights. I think that the first sentence is harmless. It doesn't say very much. It says approximately what the present Constitution says and that has been interpreted over and over again not to say very much. And that's fine. If you have been saying it, there is no reason to start not saying it at this point. That first sentence doesn't seem to me to be capable of interpretation to require a right to specific services, like a right to classrooms for the learning disabled or a right to an intensive treatment center. It simply says that services and facilities in general be fostered. So I take it that that is harmless enough.

With respect to the second and third sentences, I think there is no doubt that they are of constitutional dimension. That does not, of course, mean that they have to be in the Ohio Constituion. But they are both propositions that have been articulated by federal courts over the last ten years as constitutional principles. Courts have done that under the Federal Constitution which doesn't deal in any way with mental disability as the Ohio Constitution does in Article VII. But using the very general notions of due process, equal protection and the right to freedom from cruel and unusual punishment, the courts articulated these two principles as being principles of the constitutional law. It seems therefore that the only question really is as principles of federal constitutional law, one wants to incorporate them as well in the Ohio Constitution. They have already been articulated in Ohio statutes. That is the legislature is obvously capable of making statements which are statements of rights. That doesn't mean that they are not also appropriate statements to also be enshrined in the Ohio Constitution. If they are sufficiently fundamental they may be properly stated in the statutes and in the

Constitution as well. I think you find that very often. I don't think the fact that these doctrines have evolved as federal constitutional doctrines is a reason not to put them in the state constitution. In fact, I think it is only a policy question. Are these constitutional statements policies that the Commission and the state of Ohio want to subscribe to? If they are, then they certainly belong in the Ohio Constitution. We all know that a great many things get litigated in federal courts because the Federal Constitution either provides or has been used to provide a basis for asserting claims where there is not another basis for their being asserted. And that's the reason I think these notions developed first in the federal dominion. But the fact that there is a federal constitutional policy doesn't mean that we don't have to make the same decision at the state level. We have the state Constitution. We have an article in it that deals with mental disability. We have dealt with that for a long period of time, in the terminology of the "insane". And in thinking about what kinds of constitutional principles might go in here in addition to the nebulous first sentence, these seemed to the ad hoc committee and to the What's Left Committee as the appropriate basic statements to make.

In the last sentence, the right to treatment or habilitation, I would not want to see that read "care, treatment, or habilitation" or to have the word "available" placed in it. If you don't want to articulate a right to treatment or habilitation for the civilly confined, then take the sentence out. It's better not to have it in there at all than to have it in there in a sentence that seems to say something but doesn't really say something. It's a strong statement of a constitutional right. I think that it is an essential statement. I think if it is not in the Ohio Constitution that that will only mean that the question will be litigated in the federal courts instead of the state courts. There is a decision now that has been rendered in the northern district of Ohio with respect to Lima State Hospital, Davis V. Watkins. It has said, with respect to the most dangerous civilly confined people in the state, that those people at Lima State Hospital have a constitutional right to treatment or habilitation. Now, the court, by way of remedy, has not ordered all of those persons to be released. It has ordered that they be provided with treatment or habilitation. That was not a directive issued to the legislature to levy taxes. It was a directive to the Department of Mental Health and Mental Retardation to reassess their priorities and to see to it that with respect to this population they began to spend enough resources that they were provided treatment and habilitation or to re-evaluate them if they couldn't provide that and see if these persons couldn't be properly released. They have released a number of them. They have sent a number of them back to state courts and said "We don't think this person needs to be confined, he should be released". And many of them have been released. Some of them have been re-entered into the criminal process. The statement that one finds most commonly in the right to treatment cases is that a mental hospital without treatment is nothing more than a prison. And if a person is going to be placed in a prison, he should be convicted through the criminal process. I think that's the choice we have. There is nothing wrong with convicting people through the criminal process and putting them in prisons. Hopefully the prisons could do something for them if they are treatable. But that's a different question. If we view a commitment process that is less rigorous than the criminal commitment process, that is the civil commitment process, and we put them in places called hospitals, then I don't think that it is too much to say that the logical conclusion of that is that they must have treatment. And that is what the courts have said, that if you want to put them in prison, put them in prison. But if you are going to put them in hospitals, they have a constitutional right to treatment. I think that is a sufficiently sensible position and that the statement here is drafted to reflect that in very precise terms. I hope you will give very serious consideration to this provision. Thank you.

Mr. Aalyson and Mrs. Orfirer: Thank you.

Mr. Aalyson: We have another person in the room who may want to speak. Mr. Lobosco, did you wish to speak to the Commission? He was also very helpful to the members of the Committee in their consideration of this particular section.

Mr. Lobosco: I'm Gerard Lobosco. At the time the ad hoc committee was considering the provision here, I was staff attorney for the Franklin County Council for Retarded Citizens. I'm now an attorney with the Law Reform Project. I'll be very brief because I certainly couldn't express anything better than Mr. Kindred has. I would say that at the time I was considering it as an employee for the Franklin County Council for Retarded Citizens, we were very concerned with the fact that this constitutional provision contained some clearly obsolete language, at least implied an obsolete concept in the mental health field, which was that the only explicit reference was to institutions, which are places of confinement. The first sentence, as Mr. Kindred says, doesn't change things very much substantively. I think that it merely opens the door to modern treatment and modern technology, which does not focus its attention completely on institutions but instead gives the nod to some community oriented services and some non-confined services. I would like to also point out that the sentence refers only to persons who because of their condition require care, treatment, or habilitation. And in that sense does not require the state to provide care, treatment or habilitation for everyone who might be classified as disabled or handicapped.

Senator Butts: I think there are two different propositions going on here. One as a result of the cosmetic extension of the words used in the present Constitution, which seems to me to dramatically broaden who we are talking about, we're also saying that we're not just talking about within institutions but providing care, which may mean outside of institutions or without having to be confined to the institution, at least. That has a whole set of problems for me that even though I may agree with wanting to do that, I don't know whether or not we should put it in the Constitution to say that we must do that. The second is the statement of the second two sentences. If we took the language of the present Constitution, maybe there is a way that we can cosmetically say the same things and not have what is suggested to be the stigmatizing terms, but still limiting ourselves precisely to those people, and still talk about institutions. Then went on to say the second two sentences with the language changed to comply with institutions and these people precisely. Would that accomplish a big part of what you are trying to do?

Dean Kindred: The first question you raised is whether the first sentence requires the doing of something that isn't far beyond the minimum that has been done for many, many years, that is, where it says the state shall foster and support services. Does that create a specific claim by someone to something? It is my judgment that it doesn't do that, that the breadth of that language is acceptable simply because the sentence doesn't create a remedy. It expresses a goal, I don't think it expresses much more than a goal. If the Commission were to feel that the foster and support language could be interpreted to require specific services then I would certainly agree with you that you would want to narrow that down, because it is very, very broad. On the other hand, if it only expresses a goal then it seems to me that there is nothing wrong with having the categories that it is addressing be broad categories, because we do have that broad goal. With respect to the broad categories rather than with respect to very narrow kinds of terms. However, you are absolutely correct that the important language in the section are the second and third sentences. Those are the sentences that have teeth. The second sentence sets a minimum standard for the involuntary commitment of persons. That's very important. And the third sentence says that if you do involuntarily civilly commit persons, they have a right to treatment and habilitation. That is a second statement with teeth in it, and it is important. So in terms of having a strong constitutional provision, the first sentence I don't think is important. If you

want to revise it, tighten it, narrow it, take it out, then I don't think it would make much difference. So my answer to your question is yes, but I'm not sure that it is necessary to change that first sentence.

Mr. Fry: First, I want to say that these three gentlemen have made a very fine presentation. Let's address ourselves to the second sentence. It says persons shall not be civilly confined unless nor to a greater extent... and so on. Are there abuses in the state today that people are being confined that are not covered by the Bill of Rights?

Dean Kindred: Until very recently that has been a problem. The legislature has recently revised the commitment standards with respect to mental health and mental retardation, tightened them up substantially. The report indicates that the term "protection from harm" is obviously somewhat a broad term. The report of the Committee itself has indicated that the intention of the Committee itself is that that is to be given the meaning that has already been articulated in the statutes. So that the importance of that provision I think is essentially to prevent a backsliding, to prevent a reopening of the institutional process to persons who are not harmful to themselves or to others. I think that it certainly is the case that there is no doubt that the institutions have been overused greatly until very recently. There has been a dramatic move both in the administration and in the legislature to stop those abuses, and I think that has been handled very effectively.

Mr. Fry: Actually you are putting legislative language in the Constitution.

Dean Kindred: It is language that is consistent with the language that the legislature has used. I think the notion of requiring a dangerousness standard for civil commitment is a principle of constitutional dimension.

Mr. Fry: There is no other place in the Constitution, federal or state, that says that people will be protected?

Dean Kindred: People are protected through interpretations of the due process and equal protection clauses of the federal constitution and through the comparable clauses of the state constitution, in general terms.

Mr. Fry: I think that the terms "foster and support" do not mean totally support. Almost anything can be termed foster and support. Thank you.

Mr. Skipton: There isn't any question about that the first sentence being subject to definition, we have no idea how many dozens or more kinds of disabilities would fall under that than the insane, blind, deaf and dumb would be. I'm reminded of the United Community Funds which started out years ago with a dozen services funded by united community funds, and now you have dozens upon dozens of them because as long as there is a rationale of increasing the numbers of services that there would be those who will promote them. I'm very much in favor of pretty strict standards on who can be confined. I don't have too much difficulty with that second sentence. However, when read in conjunction with the third sentence, we would find the commitment process used more and more. Because the moment that it becomes an enforceable right to give to the people put in institutions more and more services of one kind or another, the easier it is going to be for someone to find a rationale to commit people to institutions. I would submit that if the last sentence stays in there, you will see a great increase in the number of people confined, rather than the opposite, because then we are guaranteeing them something better than they might have otherwise. I am reminded of the federal court judges who insisted in my own county that T.V. sets be provided for such people as one of the things they had a right to. So this thing goes a long, long way. Any time you

use that word "has a right to something" it sounds wonderful, it sounds constitutional, but you open up the possibility of great expansion of what that means and also many more attempts to use that right than if it wasn't so specifically expressed. So I'll go with the first two sentences, but I'll move to strike the last one.

Dean Kindred: It is important to recognize that the mental hospitals and mental retardation institutions in the state are increasingly being used for voluntary patients and not for civilly committed patients. There has been a dramatic move in that direction. One of those institutions last year, simply by the process of removing the population went from an 86% involuntary population to something like 15% involuntary population. They found that most of the people who were there were there because they needed to be there, they wanted to be there, and so on. So that they did not have to be civilly committed.Some of them didn't belong there at all. The use of the involuntary civil commitment process is becoming increasingly infrequent. Given the new standards that the legislature has imposed on the commitment process, one can expect it to become even less frequent. So that we are not talking about establishing the right to treatment in the Constitution altogether. We're not talking about providing it for all persons in institutions. We're talking about providing it only for persons forced to go to those institutions. In fact, the legislature has gone beyond that and provided that there is a right to treatment in the institutions for voluntary and involuntary patients.

Mr. Russo: I was going to comment on that. The fact of the matter is that if they are involuntarily committed, they can get better service than those that are voluntarily committed.

Dean Kindred: The constitutional problem is particularly acute when we involuntarily lock someone up, that's why I think the Committee decided to address that in the Constitution. In fact, the legislature has mandated a uniform standard of care for voluntary and involuntary patients. It has used "right to treatment" language in legislation that it has passed. The best way to get through is to have a good insurance policy or enough money to go to a private hospital, but minimum standards of treatment are constitutionally important if you are talking about involuntary confinement. In terms of the level of services to persons who are voluntary patients, that the state wants to provide, that is a question of legislative policy and not a constitutional question, as it is if we try to confine them.

Senator Butts: I want to try again on the first sentence problem that I have. Maybe you can help me understand what the words "require care, treatment, or habilitation" mean and do they mean to make whole?

Dean Kindred: The critical point is that that language is modifying the word "persons" rather than the word "services". That is,"facilities for and services to persons who require care, treatment or habilitation", etc., shall be fostered. So in other words, there are handicapped and disabled persons, who by reason of their handicap or disability require care, treatment or habilitation. In other words, they are handicapped and there is something that can be done for them. All this sentence says is that, with respect to that population, facilities for and services to such persons shall be fostered and supported by the state.

Senator Butts: That's what I think it means. It means that if you have a partially handicapped or a partially disabled person, no arm for instance, the state must make that person whole.

Dean Kindred: I don't think it says that, but I really believe that question is better referred to Mrs. Eriksson and other people who have done some general constitutional research. But I wouldn't read that general language to have that

specific an effect. That's what I understood the Committee to feel.

Mr. Aalyson: I had a great deal of difficulty with this particular problem when we were meeting as the What's Left Committee. It seemed to me that we should not saddle the state with the obligation to start building buildings to house people or to rehabilitiate people or to care for them. And I don't believe we have that in the language that we have chosen. We said that facilities and services shall be fostered and supported. It doesn't say built, provided, or anything like that. It is a statement of policy, we felt, that the state will view with favor the idea of caring for those who by reason of some handicap or disability require care.

Senator Butts: And if we don't then can a person go to court?

Mr. Aalyson: Not as I interpret the language. My problem, too, was are we requiring the state by this language to go out and build something which they don't have the funds to build? I'm satisfied that we don't. We're simply saying fostered and supported. It's an expression of the policy of the state -- an attitude towards this segment of the population.

Senator Butts: You mean it's different to say "shall support" as opposed to "shall do"?

Mr. Aalyson: I think it's different to say shall foster and support as opposed to "shall provide" or "build".

Dean Kindred: This is the existing constitutional language. The present provision says shall "foster and support". I believe that it is correct to say that that language has never been successfully used by anyone to get anything.

Mrs. Eriksson: The only court cases in Ohio that I know of attempting to interpret that language are cases brought by persons who were required by the state to pay part of the care and expenses in mental institutions, and who tried to use this language to say that this was an obligation upon the state to provide for the support of persons. And the court said, "No, if those persons are capable of paying for their own support in those institutions, the state is not obliged to pay that". I don't think that it would be possible for any of those types of handicapped persons to presently come in and say that the state must provide a certain level of institutional care or support as a result of that language.

Mr. Guggenheim: The word "support" bothered me at first but if it hasn't caused any trouble in 125 years, I think we are safe with it.

Mr. Skipton: That language refers to institutions that were in existence when that provision was first written, and it was a protective provision. To prevent anybody from destroying something that was already in place. We are not talking about that now. We're not talking about institutions. We're talking about services and facilities which can be institutions plus anything else that anybody would find some rationale to argue fits the definition of facility or services or fits the definition of disability. How many forms of disability were being treated or recognized as requiring treatment, let's say of mentally ill or mentally handicapped people, 10 years ago? The numbers and kinds of mental disabilities recognized and treated today show a great gain in the number and kinds of handicaps that we are talking about. There is a big difference between these two.

Mr. Aalyson: Do you feel that the first sentence of the recommendation requires the state to do anything?

Mr. Skipton: No. I am willing to accept it. It is broader language and may cover a lot of situations that may arise in the future but I also recognize that in the current climate of American public opinion that we would see almost immediately interpretations of what these words mean and additional kinds of handicaps that should be covered become provided for in a provision of the Constitution that you and I don't even dream about.

Mr. Aalyson: Are you saying that you think the legislature will provide programs in response to public opinion?

Mr. Skipton: Yes, and the constitution will become a prime argument that the legislature should recognize new forms of disabilities and should provide treatment of some kind, that you have a mandate from the people to provide. But I agree that the language itself does not mandate any particular programs.

Senator Gillmor: I am not very much convinced by the argument that the terms "foster and support" have been in the Constitution for a number of years and those particular words have not yet caused a problem. First of all, they were very much limited in what they applied to than under this provision. Both the change in the language of what they apply to and also a possiblity of a change in interpretation as to what they mean may open up a very substantial change beyond the change which appears to be the intent by this language. We no longer just refer to institutions, but facilities and services, something quite different, and I think the expansion of the types of disabilities -- this is really a very open-end thing.

Mr. Lobosco: There is an Ohio constitutional case interpreting the term institutions in this article to mean facilities and services so that the change of those words I think does not change what has been interpreted as the substance of that provision, at least with regards to the meaning of foster and support. As Mrs. Eriksson said, those words have been interpreted not to obligate the state to pay for services for persons who are able to pay.

Senator Gillmor: If that is what the term institutions means, why change it?

Mr. Lobosco: We recommend a change so that the constitutional language will reflect that that is what the state is talking about. So that people reading the constitutional language will know what it means and not have to rely on that case. In response to Mr. Skipton, the number of classifications of disabilities has increased in the last few years, that's certainly true, that is a reflection of the increasing knowledge and technology that is available. I was reading an article recently by Dr. Niesen to the effect that the population in the institutions for the mentally retarded is approximately the same as it was 10 years ago, so that in 10 years while the professionals in this field know much more about disabilities involved and are able to classify them and to differentiate among those various disabilities, the actual number who are so disabled or so handicapped that they require care and treatment in institutions has not increased significantly, at least as reflected by the figures of persons in institutions.

Mr. Skipton: In the 1950's I directed many of the studies that led to changes in institutions and led to discharging those people that didn't belong there in the first place, so if we can show great declines in the institutional population, it's usually because we got rid of people who didn't belong there in the first place.

Mr. Lobosco: Yes, Dr. Niesen's statement was that populations peaked during the 60's and have been reduced somewhat now.

Mr. Aalyson: Mr. Chairman, I move the adoption of the Committee recommendation for section 1 of Article VII.

Mrs. Orfirer: I second, and wish to propose an amendment. We seem to have a sentence here that is causing a great deal of difficulty on both sides. We have one point of view that says that the first sentence is essentially meaningless, a statement of policy. We have another very strongly felt opinion that this statement may open a Pandora's box. I believe there is both legitimate concern about what that might produce, and that it is not doing anything very positive, so I move that we amend this recommendation by deleting the first sentence. I feel strongly about the rights expressed in the second and third sentences. I hope we all feel that people who are confined against their will are entitled to proper treatment.

Mr. Wilson: My point is that this is a matter for the legislature and not the Constitution.

Mrs. Orfirer: I'll put my faith in the Constitution.

Mr. Russo: I will second the motion.

Representative Maier: Is a motion to amend the amendment in order?

Mr. Carter: Yes.

Representative Maier: I move to amend the amendment by including deleting the second and third sentences.

Mr. Carter: That really goes to the substance of the question itself, and I will rule that out of order. The motion is to delete the first sentence. Linda wants to preserve the second and third sentences and is willing to sacrifice the first.

Senator Gillmor: If the amendment is adopted, would the section simply read: "Section 1. Disabled or handicapped persons shall not be civilly confined unless..."

Mr. Carter: That is correct. The motion is to strike the first sentence from the Committee recommendation so that what is left is the second two sentences.

Mrs. Orfirer: That is correct. Then if someone wants to go back or refer the section to the Committee to rewrite the policy statement so that it is tight enough to solve your financial concerns that is fine with me. I don't want the controversy over the first sentence to interfere with what I consider constitutional rights in the second and third sentences.

Mr. Fry: It was my impression from the discussion that there was not that much controversy over the first sentence, and I was therefore surprised at the motion.

Mrs. Orfirer: There was concern on the part of Mr. Skipton that it would open up all new kinds of disabilities and there was controversy over the words "foster and support".

Mr. Carter: In the interests of trying to expedite the business of the Commission, rather than going through a lot of formal motions, the Chair would like to do something. We have three sentences, three concepts here. Some are in favor of all of them, some are in favor of only one or two of them. I think it would be helpful if we could have a show of hands on those three sentences separately on the concepts that are involved. This is not a vote, just an expression of opinion on what is going on.

Mrs. Orfirer agreed.

Mr. Carter: How many people are in favor of the concept stated in the first sentence? Please raise your hands. (There were 8.) And against? (There were 6.) So we are pretty evenly divided on that question. The second is the second sentence, this question of confinement. In favor of that concept? (11 for, 4 against.) How about the third sentence, which obviously depends on the second? In favor of that concept? (5 for, 7 or 8 against) So we have a real problem here.

Mr. Guggenheim: Mr. Chairman, if we knock out the first sentence and don't provide institutions or facilities, how do you confine someone?

Mr. Carter: You may have a problem, although it might be the inherent power of the legislature, but the point is that we have a position here of not getting an agreement on any one of these three sentences.

Mr. Russo: Have you had some expert testimony on the trend of deinstitutionalism?--

Mr. Carter: One of the things back of this change in the language was the eloquent testimony we got before the Committee of the necessity of changing the language to get away from institutions. The more modern treatments have recognized that institutions are the wrong place to put a lot of people. That is one of the compelling reasons for the proposed change. The big question we had in the Committee, which has been identified here, I think everyone agrees that these are good things, the question is whether they should be put in the Constitution. I was originally against putting them in the Constitution, but I changed my mind, and I am still in favor of putting them in the Constitution because I think they are important. I think they are like the Bill of Rights - that kind of stature. But I can recognize why other people feel very differently about it. It would seem to me that what we ought to do is have a vote on the Committee recommendation.

Mr. Aalyson: I see that there is almost an even division of opinion on the matter, and I, like you, was concerned with inserting these elements in the Constitution and changed my mind as a consequence of considerable discussion and deliberation over an extended period of time. I wonder if that opportunity for reflection might not benefit the Commission and therefore if I shouldn't withdraw my motion and submit this at a later time when the members of the Commission have had the opportunity to think about this at some length? There was a tendency on my part, in the Committee, to jump to a conclusion and then, when I backed off and looked at the matter and heard other people speak, I changed my mind. I think this is important enough that perhaps it deserves the same sort of process for the whole Commission.

Mr. Carter: As I said earlier, I am tremendously impressed with the people who worked with us on this, a very dedicated and very able group of people, and very thoughtful. I wonder if perhaps it might not be helpful to give them an opportunity, if they want to take advantage of it, because they have spent a lot of time on this, to write their own memorandum in support of this and we could send it to each Commission member before the next meeting and hold the matter over until the next meeting. We would be happy to put that in our Commission records, even though the final outcome goes against the proposal, so that it would not be lost. With the permission of the group, I would like to let Craig withdraw his motion and resubmit it at the next meeting for a vote.

Mr. Wilson: You have my permission, but I don't like it because I feel that the original concept of this Commission was to clean up, clarify, and reduce our Constitution to a statement of basic facts, and we should not change that philosophy on the basis of persuasion.

Mr. Carter: I think what we said was that we started out with one point of view and upon getting additional information and upon reflection we changed our minds, and I would think that would be the part of every thoughtful person engaged in the deliberative process.

Mr. Wilson: It is a complete reversal of what we have done in the past.

Mr. Carter: You mean the procedure?

Mr. Wilson: The procedure, and the fact that you are going to have certain nits as well as picks in the Constitution. I think we are here to minimize statutory law written in the Constitution.

Mr. Carter: That's a matter of philosophy, then as to the nature of this recommendation. Mr. Aalyson withdrew his motion and the matter will be held open.

Mr. Aalyson: With regard to sections 2 and 3 of Article VII, we've recommended repeal on the basis that they are obsolete and do not cover circumstances that presently exist as explained in the report. Certain bodies existed in our government that no longer exist, and this is a repeal to get rid of deadwood. I move the adoption of the Committee recommendation with regard to sections 2 and 3 of Article VII.

Mr. Carter: Second.

Mr. Aalyson: We had no testimony from anyone regarding these changes.

The roll was called. Those voting "yes" were Senator Butts, Senator Gillmor, Messrs. Aalyson, Carter, Clerc, Cunningham, Fry, Guggenheim, Montgomery, Mrs. Orfirer, and Messrs. Russo, Skipton, and Wilson. None voted "no". The Chairman announced that the roll call would be held open until the next meeting.

Mr. Aalyson: Those are the only changes recommended in this report. I therefore move the adoption of the Committee report, which will include adoption of the recommendation of no change in the remaining matters covered in that report.

Mr. Carter seconded the motion and all agreed to the motion.

Mr. Carter: That leaves the question of apportionment, very important and probably very controversial and one I hesitate to start on this late. Let us leave that for the next Commission meeting and discuss your thoughts for the next Commission meeting. We are trying to finish up the Commission activities, ending in June, so for all practical purposes our actions must be finished no later than February so that we have time to write our reports and wind things up. I would recommend a November meeting to take up apportionment and finish that matter we were just talking about, and to take up grand juries.

It was agreed to meet on Monday, November 8, the day before the legislature returns for session, and further agreed that the meeting would begin at 11 a.m. followed by lunch and an afternoon meeting in order to allow the greatest amount of time for discussion. The luncheon discussion will be devoted to the future of the Commission, and the matters of the final reports and records.

The meeting was adjourned.

Ann M. Eriksson, Secretary

Richard H. Carter

Ohio Constitutional Revision Commission
November 8, 1976

Minutes

The Ohio Constitutional Revision Commission met on November 8 at 11:00 a.m. in House Room 11 in the State House in Columbus. Those present were Senators Butts and McCormack; Representatives Fauver, Maier, Norris, Stinziano and Thompson; Messrs. Aalyson, Carter, Fry, Guggenheim, Montgomery, Russo and Wilson, Mrs. Orfirer and Mrs. Sowle. Ann Eriksson, Julius Nemeth, and Brenda Buchbinder attended from the staff.

Mr. Carter: In last week's election, as you know, the three Commission recommendations, Issues 1, 2, and 3, passed rather convincingly, basically 2 to 1 or better in favor. It was just about the reverse with respect to 4, 5, 6, and 7. The only one that has any relation to the Commission's activity is that Issue 7 was somewhat similar to a Commission recommendation, but I think it was tied in with 4, 5, and 6 and was not considered as a separate issue. It is probably unfortunate because in my opinion it is probably sunk for some time to come, when the voters have taken such a stand against one that was so close to the Commission recommendation. It occurs to me that most of the activity against Issue 7 talked about reducing the number of signatures, and of course that was not a key part of our recommendation. We were more concerned in the procedure of straightening out the complexities and confusion in the Constitution with respect to initiative and referendum. One thing that we might do as a commission or as a supplemental report is increase the number of signatures which, I think, was not really that important as far as we were concerned.

Mrs. Sowle: I gather that the main difference was with respect to the initiative on statutes.

Mr. Carter: The difference was that the Commission recommendation was that if an initiative petition for statutes was submitted to the legislature, and the legislature did not act, then it was necessary to obtain a supplemental petition to get it on the ballot. Issue 7 essentially took out the second step. And the initial petition would have the right to go directly on the ballot if the legislature did not act.

Mrs. Sowle: But that is a fairly good difference with that type of procedure.

Mr. Carter: Yes it is.

Mrs. Sowle: And it does seem to me that we have some fairly good arguments for the numbers that we used that might be accepted. Issue 7 was tied in with a package of issues, and I think the Commission endorsement might very well make a difference and I would certainly like to see an effort made. I think the difference between the Commission recommendation and Issue 7 on that one aspect might be sufficient for us to try it.

Mr. Russo: Mr. Chairman, it could be that the signatures weren't low enough to start out with and that's why it was defeated. I can give you the other side of the argument that the Commission's figures were higher than the ones on the ballot and there were two steps. I myself favored the one that was on the ballot at the time we were discussing that type of method. I think you get back to the question that it was tied to 4, 5, and 6 and I don't think it stood on its own merits. I don't see where adding an extra step would add any merit to it.

Mr. Carter: Do you think as a matter of policy for the Commission that we should stand by our existing recommendation? I think the only change that we might consider is a change in the numbers.

Mr. Wilson: The major flak I got on that one is that people didn't realize what the major change was, and one of them was the elimination of the 5% requirement from 44 counties, and people voted against it because of that. They didn't want to allow localized initiation of issues without having some statewide support.

Mr. Carter: Jack, you were on the committee but I'm not sure you were at the meeting where this was discussed but the committee made the recommendation which was finally adopted by the Commission on the basis. I think there was considerable flak from that standpoint. However, first of all it isn't the passage of the law, just the initiation. All it does is get it on the ballot so that the entire state is enabled to exercise the franchise. The second thought was that basically what you really want to show in initiative and referendum petitions is a significant number of voters having interest in the thing to justify the costs and complexities of putting it on the ballot. And it was our feeling in the committee as I recall that where the signatures came from wouldn't make any difference. And then there was the question of whether or not it was even constitutional under the one man one vote rule of the Federal Constitution. A serious question existed about that. So that was the committee's reasoning at the time.

Mr. Wilson: I know it was discussed rather thoroughly. But there is logic to requiring statewide support on an issue even to initiate it.

Mr. Carter: It certainly is an arguable position.

Mr. Aalyson: As I recall, we also considered the proposition which had been argued in this past election, talking of special interest groups initiating, that sometimes there is a valid point in having a special interest group able to initiate because otherwise they can't convince anyone that their interest merits attention.

Mr. Carter: Again drawing a distinction between the votes and initiating.

Mr. Aalyson: Yes, and we decided that if the entire state had to vote on what the special interest group is trying to do that would be enough of a safeguard.

Mr. Wilson: The other side is that the people who got the petition on the ballot this time met the 5% requirement, so it can't be that much of an obstacle.

Mr. Carter: It's arguable, there is no doubt about it. Well that's one of the things we want to give some thought to as a Commission before we are finished. You all received the minutes of the last meeting, October 5. Are there any corrections?

Mrs. Eriksson: One page 4 of the minutes of the October 5 meeting about 2/3 of the way down the page in a comment made by Mr. Aalyson there is a listing of Articles of the Constitution included in the miscellaneous report. Article II is listed twice, and the second time it should be Article III.

Mr. Carter: We will make that correction. Any other changes? If not the minutes will stand approved as submitted. The principle order of business for this morning is Section 1 of Article VII. You all received a copy of Mike Kindred's brief, arguments in favor of the committee's recommendation. (Mr. Carter introduced Dean Kindred's law school class in the audience.) At the last meeting, there was considerable spirited discussion on this topic. We decided that we would hold the matter open til this meeting of the Commission. I invited Mr. Kindred, who gave a very good discussion at the Commission meeting, to circularize the material that he presented together with anything else he wanted to the Commission. Craig, would you handle this part of the discussion?

Mr. Aalyson: I have read Mike's brief this morning, and it seems really only to put into writing or ease of reference the arguments that he proposed in support of

the amendment at the last meeting. The opportunity to review the written document as is often the case, I think, suggested to me some possible changes if changes need to be made in the proposal which we have made to the full Commission. Curiously enough, at least in my opinion, much of the discussion at the last meeting centered upon the initial sentence in this proposed amendment which to me seems to be nothing more than a statement of policy which didn't vary substantially from what is already in the Constitution and merely removed, it seemed to me, some language which might be characterized as being in the nature of stigma. After looking at Mike's proposal, I wondered if we need change the first sentence of the present section of the Constitution in view of the objections that were proposed last time that what we were proposing was going to unduly liberalize or extend the possibility of treatment to persons who might not need to be covered by the Constitution. It occurred to me that we might be able to keep the first phrase or first part of the present section in the Constitution.

Mr. Carter: In other words, as a fourth alternative.

Mr. Aalyson: Yes. I don't know that the use of the words "insane, blind, deaf and dumb" are necessarily in the nature of stigma, but we could keep those it seems to me and start there as a possible point of discussion in the present meeting. As I recall several persons who were present at the last meeting thought that the use of the word "handicapped" could very markedly increase the burden of the state with regard to providing facilities.

Mr. Wilson: I concur in that. I think we are opening up a very broad field of definition of disability or handicap. They can be so broadly defined that it might be entertaining action by the state in areas where in my mind they don't belong, for example, educational handicaps. If someone is not of a certain intelligence level, he might be deemed to be educationally handicapped and the state might be required under the terms of this recommendation to come in and assess taxes and build schools. While the words in the present section of the Constitution might be words which aren't the most wisely chosen because of the stigma attached, nevertheless they are definitive. Insane are insane, blind are blind, and the deaf are the deaf. They are not capable of as broad as interpretation as disability or handicap.

Mr. Aalyson: It was our idea in the committee that this was a statement of policy rather than a requirement on the part of the state. Another thought that has occurred to me, after reading Mike's brief, is that we might add to the first sentence what is presently contained in Section 1 of Article VII, and that is "as may be prescribed by the general assembly".

Mr. Wilson: To describe the handicap or disability?

Mr. Aalyson: It would read "facilities for or services to persons who by reason of disability or handicap require care, treatment, or habilitation, shall be fostered and supported by the state as prescribed by the general assembly". It seems to me that if you leave it in the hands of the general assembly you are not broadening the requirements for coverage, and at the same time you are setting forth a statement of state policy that we will look after our handicapped people.

Mr. Wilson: You are still leaving open to definition by someone else to say that this represents a handicap and pressure the legislature to do something. Of course they are always pressured anyway and that is beside the point, but you are still not defining disability or handicap.

Mr. Aalyson: I think the general assembly would have to define those terms.

Mr. Guggenheim: The proposed change adds services to persons shall be supported by

the state. Previously, it only says that institutions shall be supported. Does this create some sort of a personal right in people in whatever category is included, would they have a right against the state for support or for services of some sort -- a personal right which didn't previously exist?

Mr. Carter: As I recall, one of the principal thrusts of the ad hoc committee is that "institution" was one of the problems that they had. The direction in which treatment is going is very often outside of an institution and that was one of the things that they wanted broadened. As I recall, the two principal arguments against what we had was one, the use of the word "institutions" and the other was the use of these particular words which are not too current for constitutional language in any event. So that if you were to leave the word "institution" in, I think their preference would be to leave it out altogether because "institution" was one of the problems that we were trying to deal with. Correct me if I'm wrong.

Mr. Aalyson: No I don't think you're wrong.

Mr. Guggenheim: I'm thinking in terms of budget at this point.

Mr. Carter: Yes.

Mr. Aalyson: We had a lot of difficulty, as I think I stated at the last meeting, with the suggested language from the persons who were proposing it. I particularly was concerned that adoption of this language might require the state to build facilities which it doesn't currently have for the protection or support of the persons named in the provision. I don't think it says that, but we tended to be so close to the situation that we welcome the thoughts of other members of the Commission who seem to think that it does imply at least an obligation on the part of the state to go out and tax and build additional facilities or buildings to provide for care and treatment.

Mr. Guggenheim: I don't see buildings, I see services. "Buildings" don't bother me. It's personal services that might create a personal right.

Mrs. Sowle: The tendency today is to try and keep people out of institutions. So the addition of that term "and services" is only meant to reflect that tendency. I must confess a feeling of great stupidity. I missed the last meeting, and maybe someone can explain to me why this is being read as mandating anything. It is totally the intention of the committee to reflect a policy very much like the first sentence of the present section states a policy. We were changing the language to reflect current practices. I think the provision on education now in the Constitution says that the state shall provide education to children of the state. Right now when local districts are failing to support tax levies and schools are closing, there is nothing now in that statement in the Constitution that mandates the general assembly to go in there and finance the education for those kids who are not in school now. I feel very much the way Craig feels, that the sentiment of the committee would be just as easily expressed by adding something like "as provided by the general assembly." It was never the intention of the committee to add anything. If the language that we came up with is interpreted to mandate, I think we would want to change the language. We were only trying to reflect an updated policy similar to that reflected before. The words are subject to change as far as we are concerned.

Mr. Aalyson: May I say also that it has been my feeling throughout the committee discussion that the records of the committee would be available to any court which would have to interpret this provision. It was clearly stated any number of times in our discussion in the committee that using this language or making this choice, we did not intend to obligate the state to do anything. We merely intended to state

a policy of the state that it would look to the welfare in so far as possible for these handicapped persons who are listed. I don't think any court, if it ever chose to go back and look at our minutes, would ever conclude that there was a mandate there.

Mr. Montgomery: Can we break it down into the pieces that have been discussed so far? First of all, I agree that the term "institutions" is too limited and outmoded. It doesn't bother me to say facilities for. But the word "services" again is a pretty wide open phrase. I would much rather see the word "treatment" in place of "services" because I think it addresses itself to illness and sickness and things of this kind and it doesn't open up a "Pandora's box" of what are services which can be anything and everything. The thing that bothered me the most was the last sentence of your suggestion. "Such persons have a right...". That one, I think, could come back to haunt us. I would like to see that eliminated completely but I see nothing wrong with "institutions" being replaced by "facilities for and treatment to persons...shall be fostered and supported by the state." I do think we should keep the old language as far as insane, blind, deaf and dumb, are concerned, for the same reasons that were stated before.

Mr. Aalyson: Are you saying that with regard to disability and handicap you think those terms are too broad?

Mr. Montgomery: Yes.

Mr. Fry: In view of what you and Mrs. Sowle have just said about the committee's attitude on this, it would seem to me that Mr. Kindred's first alternative on page 3 where you take the word "shall" and convert that to "may" would certainly do the same thing that you're talking about and it eliminates the feeling that there is a right being established that disturbs some of the people on the Commission.

Mr. Aalyson: The only problem that I see with that portion of the thing is that presently there is a right for certain people. If we change the language simply by putting "may" in there and keep the remainder of it, we then imply that there is no longer a right even for those listed as the insane, blind, deaf and dumb.

Mr. Fry: You just said that it is much easier to put it in the Constitution when they can go back and check the minutes of your committee meeting.

Senator Butts: I'm trying to put us back on the track where it seems to me we were last session, because rather than thinking that we had one concept that we were dealing with, we have one concept per sentence. In recalling the question I had of the ad hoc committee of what they were after here, it was the second sentence that dealt with the person shall not be civilly confined unless nor to a greater extent than necessary to protect themselves, and that if the problem of the first sentence is the disabled or the handicapped as opposed to the present language, it would be my preference to go with the second sentence and alone, and drop the first and the third sentence. And change that sentence to read "such persons," as opposed to "disabled or handicapped" so they would be referring back to the ones that are already in the Constitution.

Mr. Fry: Can we deal with this a sentence at a time?

Mr. Aalyson: I move the adoption of the committee's recommendation by the Commission.

Mrs. Sowle seconded the motion.

Mr. Carter: I think the discussion might go a little better if we were to try and do it that way.

Mr. Fry: I move that we amend the recommendation of the committee to replace the word "shall" with "may" in the first sentence. I know it says "shall" now, but you're saying that even though it says "shall" now, you really don't mean shall.

Mr. Carter: Do you want to comment on Charlie's amendment, Katie?

Mrs. Sowle: I have one objection to using the word "may". Let me propose an alternative that I think might do the same thing. We didn't like the term "may" in committee, because it suggested that without this sentence, the general assembly couldn't do it. We had a lot of trouble in our discussions of various provisions, with sentences that said the general assembly may do something, because the general assembly has inherent powers to do things. So we have trouble with a sentence that purports to grant to the general assembly something that the general assembly already has the power to do. So we used "shall" in order to make the sentence have some meaning in the sense that it was intended to state a policy. But that's all. Do you think maybe it would do this if we kept in "shall" and dropped "and supported"? As Professor Kindred suggested. In other words "shall be fostered by the state" which maybe implies a little less. Or with Craig's term "as the General Assembly provides by law".

Mr. Fry: My reaction is that "shall" is what people who say they are going to get inherent rights for people rely on.

Mrs. Sowle: I agree with you.

Mr. Fry: I think it is good to have the sentence in here because I think it gets us into the other two points that you want to make in the section.

Mrs. Sowle: I have no great strong feeling about it. "May" certainly reflects the idea just as well. It's just the problem of telling the general assembly it can do something that it doesn't need this sentence to do, is my only reservation.

Mr. Montgomery: We are talking about "foster". This is just a wide open public policy statement as far as I am concerned, and I think it should be a strong statement. I think it should not be "may". I think the people of Ohio are speaking here to a real basic concern and I see nothing wrong with "shall". I'll turn that around and oppose putting in the right of someone to this or that and I don't see that they are necessarily inconsistent. I would like to see that first sentence read "Facilities and treatment of the insane, blind, and deaf and dumb, shall be fostered and supported by the state." Get out the "institutions" and you bring in "facilities and treatment" which opens it up and takes it out of the institution if necessary. And we keep the old definitions which I will grant might have been better stated but they have been there a long time and for what it is worth, that should count. I would oppose changing it, Charlie, to "may" because I think then it is too weak a statement to make.

Mr. Fry: My only reason is that if you get in there and you state it as you suggest right now that the state could be subject to a suit because it didn't have certain facilities.

Mr. Montgomery: All you are saying is shall foster, shall encourage, and I think it is an innocuous statement. I don't think it constitutes a right to do anything specific.

Mrs. Sowle: You're talking about taking out "and supported".

Mr. Montgomery: No, I would leave "supported". I think that the people have to do something and they are telling each other we have to do something in this field.

We just can't ignore it. It's a positive public statement. We just can't sit there, we must take action. That's what foster and support means to me. When you say "may", you're saying, you can do it if you want to, but if you don't, it's alright too. I think it's too weak a statement for the Constitution.

Mr. Carter: Don brings up the question of whether we should replace the words "insane, blind, deaf and dumb" by "disability and handicap". We'll open that up. How does the Commission feel about that question?

Senator McCormack: Mr. Chairman, it would seem that the word "insane" would be the only word of the old language which would refer to the responsibilities of what the state department of mental health and retardation would be. Under that department, the entire movement of all of our statutes seems to be away from any formal determination of insanity, and any formal court order. The words "voluntary", "self-admission", the special kinds of treatments of disorders which fall far short of insanity are probably taking up more of a volume of dollars and hours now than anything else. We seek to avoid the ultimate illness, insanity, through the courts or through the hospitals. My fear would be that merely to have "insane, blind, deaf and dumb" is that that would be so restrictive in the sense of not inclusive enough of the many functions of the state of Ohio now that it may not be saying what we wish relative to care and treatment. Especially if we get into community facilities where the vast majority of patients now are voluntary. It would seem as if we are almost encouraging the old restrictive system.

Mr. Carter: Thank you, Senator. I think this has been a good discussion, and I think Don has a good thought on the services that it might be too broad. I'm going to step in here and try to resolve this. How would we consider something like this: "Facilities and treatment for persons, et cetera, shall be fostered and supported by the state as may be prescribed by law"? Make these two changes. I think that's what the committee meant, treatment primarily, and by narrowing the word "services" to "treatment" and then making clear that it should be done by statute, wouldn't that solve the problem and still give us a pretty decent statement of what the intent of the people is in the Constitution?

Mr. Fry: We are going to keep "and supported" in there?

Mr. Carter: I would be willing to do that either way. But I see no problem with it once you add the phrase "as may be prescribed by law".

Mr. Wilson: Which is what it essentially says in the present section.

Mrs. Eriksson: Would you say that again?

Mr. Carter: What I have is: "Facilities and treatment for persons who by reason of disability or handicap require care, treatment or habilitation, shall be fostered and supported by the state as may be prescribed by law".

Mr. Wilson: You are using the language of the committee recommendation rather than the present constitution.

Mr. Aalyson: It seems that there are certain handicap situations which might deserve the support of the state other than these, as the Senator says. There are lesser forms of mental disability other than insanity.

Mr. Wilson: I'm not arguing that, I'm just saying that this is too broad.

Mr. Montgomery: It seems to me there are two choices. Either we open up this disability and handicap which is a wide-open field, they are terms which now have to be defined by case law and so forth, and they are going to be broader. I suggest

that the class can be broadened by court interpretation and is being broadened on a case by case basis. This language in the Constitution now has not prohibited treatment, has it? Haven't courts responded to new theories?

Mr. Fry: I think what they have done in the laws that they are passing goes beyond what the Constitution now says and it is probably a good thing that they do. I think we probably ought to leave the word "support" out. I think the word "fostered" should stay.

Mr. Carter: I think the word "fostered" would do it.

Mr. Fry: I'll withdraw my motion to amend and use the language that you suggested.

Mr. Carter: By dropping the words "and supported".

Mr. Aalyson: I think the word "supported" was kept from the old language.

Mr. Carter: I think it is surplus myself. Let's go ahead and discuss the next two sentences so we put the whole thing in context. The second sentence is one that is pretty much self-explanatory. How does the Commission feel about that? Craig, would you handle that?

Mr. Aalyson: Rather than move that the Commission accept the second sentence, I think that I would like to modify that before we submit it, and put "such persons" rather than "disabled or handicapped shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm." Such would then refer back to this first sentence.

Mr. Montgomery: That's what we haven't decided yet.

Mr. Carter: That's right. We are trying to put the whole thing in context. I don't think we need a formal motion because this is a discussion of it. Are there any comments on the second sentence?

Mr. Montgomery: I think the second sentence is fine.

Mr. Carter: The third sentence then, Craig?

Mr. Aalyson: "Such persons, if civilly confined, have a right to habilitation or treatment." That language seems to conform to the prior language we have discussed this morning.

Mr. Montgomery: I think that language should be deleted in its entirety, because it suggests a right and I think that it can be enforceable and I think that it can be reduced to monetary terms. I think we are unleashing something here that we have no right to.

Mr. Carter: And the modification "if confined" doesn't solve that problem for you?

Mr. Aalyson: Mr. Chairman, I have a little problem with this final sentence myself, and I think I expressed it in committee. It seems to me that this sentence ought to be modified in some fashion to provide for treatment if the treatment is going to be beneficial. I don't see the need for treating someone who is beyond treatment. We seemed unable to come up with any language in committee I think that would suggest this idea, but I still hold to it, that the treatment should have to be treatment that is going to work.

Mr. Carter: Would you like to have the word "beneficial"?

Mr. Aalyson: I don't know that that is going to do what I have in mind. I think I suggested in committee that such persons would have a right to habilitation or treatment if appropriate and I think I like that word better than beneficial. I don't know who is going to determine what is appropriate and may be the determination should be spelled out in this sentence. I think this is a little broad.

Mr. Carter: Mr. Kindred would like to make a comment. He has been very patient. For those of you who were not at the last meeting, Mr. Kindred and Mr. Hopperton and several others worked very closely with the committee that worked on this and were very constructive and helpful and we welcome their participation.

Dean Kindred: Thank you very much. I appreciate the opportunity to address this group. I'll make two very brief comments. The first is to emphasize the narrowness of the right that is articulated here. There is no question at all that this sentence articulates a right which would be an enforceable right.

Mr. Carter: This is the third sentence.

Dean Kindred: Yes. And I think that is completely appropriate. But I think it is critical to note the narrowness of the right that is created with respect to the class that we are talking about. That is, we're talking in this sentence only about persons who are involuntarily civilly confined. The process of involuntary civil commitment is obviously, as the Supreme Court has said, a massive curtailment of liberty. The Supreme Court has also said that when such massive curtailments of liberty take place, the must take place for a legitimate state purpose. We have a prison system where we lock up persons who commit crimes, and we want to confine, and we lock them up. Maybe we have rehabilitation programs, but we are very clear in our statement that in a criminal system we can lock people up because they are a danger to society as established by their past behavior and we can confine them there for a period of time set by the legislature. The civil confinement system is very different. It is based on a benevolent therapeutic notion. The reason that we confine people in hospitals, and call them hospitals instead of jails, is because we think that there are some people for whom jail is not appropriate because they need treatment. That's why we have a whole second incarceration system. And all that this amendment would say is that if you use that civil commitment process to put people in places called hospitals that those places must provide treatment. I think it is critical to see that it is that narrow. It is closely tied to the existence of a confinement system that has a non-treatment option but it has many procedural safeguards. The second comment that I would like to make is addressed to the comment that Mr. Aalyson just made. I can very well understand that concern. That is, how can one talk about treating the untreatable? Every one knows that there are forms of mental illness for which there is no known cure. How can we say in the Constitution that there is a right to treatment and habilitation? That is a problem that the courts have struggled with, as they have begun to recognize this principle. There are numerous court decisions at the federal and a number at state court levels which state that there is a right to treatment or habilitation if a person has been civilly confined. When I looked at those earlier cases, the literature was full of the question -- what about the untreatable, what does this mean? As the courts have looked at that problem, they have evolved a doctrine that gives the phrase, habilitation or treatment, a meaning and it means really what Mr. Aalyson was saying. I would prefer to have that language not be modified by language such as "if appropriate". But the courts have come to say that what we mean is that we have people in civil confinement that you must have a professional evaluation of their needs and a program that is responsive to their needs. That treatment for a person for whom there is a drug that will cure him is giving him that drug. Treatment for a person whose disability is of a very general

diagnosis and there is no drug to which that person will respond requires a much broader kind of professional evaluation. It may be in some cases, particularly with the aged, that all that treatment connotes is decent care in an environment that will support that person's life and not create, as some environments might, a rapid deterioration of the person's capability. The concept has been given a very broad meaning by the courts. I think that it is desirable to take that approach because if you add the language "if appropriate", and it would be certainly better to have that provision with that language than not to have that provision, but if you add that language it suggests that there are persons for whom treatment is not appropriate. In the broad sense of treatment, there is no person who is civilly confined for whom treatment is not appropriate. All persons ought to have professional diagnosis if they are going to be involuntarily locked up in a hospital, they ought to be entitled to professional diagnosis and professional programs. I believe that that is all the last sentence says and I think it is a very solid statement. As I thought in the last month about the reactions of the committee, I thought, are there ways that this could be stated less dramatically, and less offensively to some persons? And then I come back to the language and I find that that is the way that it is stated. I think that the subcommittee did an extremely careful job on the language that is here, and I would certainly hope that you would give their recommendation serious consideration.

Mr. Carter: There are a number of people that have comments. Let's start with Mr. Fauver.

Mr. Fauver: I have a question of the subcommittee. I'm curious that the first sentence, which is tentative, of course, talks about people who because of some disability or handicap require, and then the three key words, care, treatment, or habilitation. These seem to be the three key words that will define the concept that people are talking about. Then in the last sentence we say that if civilly confined, these people have a right to habilitation or treatment, and not care. I wondered what the thought of the subcommittee was in so carefully spelling out the three categories in the first sentence and then only two in the last.

Mr. Carter: You're suggesting that "care" may be appropriate for the last sentence?

Mr. Fauver: I don't know, but it certainly moves it somewhat forward, maybe we don't like where it takes up, but the subcommittee must have a theory for having eliminated that word in the last sentence.

Mr. Carter: Let's hold that one for a moment. Senator Butts?

Senator Butts: A question of Mr. Kindred. He said that the courts have interpreted this. The United States Supreme Court?

Dean Kindred: No, the U.S. Supreme Court has only dealt with one case that could have raised the issue. The federal district courts and courts of appeals have dealt with this. There have probably been ten or twelve federal district court opinions, including one in the state of Ohio holding that patients at Lima State Hospital have a right to treatment or habilitation. There have been several circuit court of appeals decisions as well.

Senator Butts: I guess I'm wondering why we put language that is somewhat different in the Constitution if that is indeed interpreted that these are rights that they do indeed have. Because I do like the description that you gave, that professional diagnosis be given to someone so incarcerated, and that whatever treatment that professional deems be given because that answers all these appropriate questions that we have. I'm not sure that that would be the way we would want to do it, to spell all that stuff out.

Dean Kindred: The problem with that both for courts in speaking to the issue, and even more so, for the Constitutional Revision Commission is that that language is so verbose and detailed and the courts have begun by articulating a right to treatment or a right to habilitation. The two terms, treatment is used in the mental health concept and habilitation in the mental retardation context. That articulation goes back over the last ten years or so, initiated by an editorial in the American Bar Association Journal in 1960. But then the courts struggled with the question that Mr. Aalyson raised as to what do we mean? They have said that there is a right to treatment. In perhaps the most interesting case in the area, the description that I gave you of the meaning of the phrase is found on the first page of the opinion and the court says "by this we mean", and recognizes that there are vast differences in people's needs and that there are some persons for whom treatment in the curative sense is not called for but professional treatment still is called for.

Senator Butts: If I might follow up, then it is your opinion that if we said this, that is the way it would be interpreted, with that footnoted-type language?

Dean Kindred: I would not want to guarantee that a court 20 years from now would look back and say, "Oh, yes, that was written at about the time of those court decisions and they must have been referring to that language in those federal court decisions." I think it would be desirable if there was a mechanism to do that, to have the Commission's records indicate that they are making reference to a broad concept of treatment.

Mrs. Orfirer: I understand with and agree with your objection to the words "if appropriate" because that brings in a choice of treatment or no treatment. Would you have any objection to the insertion of the word "appropriate" in front of "habilitation or treatment"?

Mr. Carter: And to add the word "care"?

Mrs. Orfirer: That I would like to know your reaction to, but I would like to suggest that we use the words "appropriate habilitation or treatment". It would seem to me this brings in exactly what you are talking about. That there would then be a medical, professional evaluation of what the appropriate habilitation or treatment in that particular case is.

Dean Kindred: I think that is an excellent idea. When one looks at the sentence one would have to ask why is that word in there. That word is in there to reflect the notion of flexibility and the need for a professional assessment to know what is appropriate treatment or habilitation.

Mrs. Orfirer: It implies immediately that something that is appropriate for one kind of patient is not appropriate for another kind of patient, and I think that is the concern that is being expressed here. There are degrees of habilitation, treatment, time, money, effort, that would be expended on different kinds of patients, depending on what is appropriate in that case.

Mr. Fauver: Would there be a difference in the right of a voluntarily committed patient versus an involuntarily committed patient?

Dean Kindred: Under this phraseology, very clearly. Now the legislature has said that in Lima State Hospital, we expect treatment for everyone who is in there. And that is fine as a legislative policy. But now we are talking about constitutional rights and it seems to me appropriate to distinguish those two situations. In terms of a constitutional right the reason we need to be concerned about providing treatment to an involuntary patient in a mental hospital is that we haven't given that person a choice in going in. I think one can well imagine a sensible statement of policy of providing public housing for people who need housing, some of whom may

be mentally ill, if they want to move in there, and not provide medical services in that kind of setting. But when we start locking somebody up because they are mentally ill or mentally retarded, that is a very different situation in terms of constitutional rights.

Mr. Russo: When someone admits himself for treatment or habilitation, aren't they then immediately entitled to the same things as anyone else who hits that door?

Mr. Fry: The Constitution isn't going to say that.

Dean Kindred: The Constitution doesn't say that and I don't know that it is a matter of constitutional principles.

Mr. Russo: But if they admit that there is something wrong with them, evidently.

Dean Kindred: But there may be a contract notion involved. There has been some interesting discussion that if a person admits someone into something that they call a hospital whether they haven't in a sense contracted a promise that there would be something inside other than a bed.

Mr. Carter: But it is clear that the word "confine" refers to involuntary in the Constitution.

Dean Kindred: That's right.

Mr. Montgomery: I have a very basic disagreement with putting anymore rights in the Constitution than are presently in there. There is a bill of rights in our Constitution now and we are really taking a lot on ourselves when we start to add new constitutional rights to our Constitution. I would do this with the greatest reluctance as a matter of Commission policy. Another section that we are going to deal with a little bit later is on workmen's compensation. If we are going to do this here, there is nothing to keep us from establishing a right of an injured workman to complete and thorough medical care for the rest of his life. You must reduce rights to economic and monetary amounts of money. This is for real, someone has to pick up the bill and pay for all this. I'm in the insurance business, and I can see no-fault insurance coming into this state following workmen's compensation. We're seeing cases now under unlimited medical in the state of Michigan where four year old children are going to cost somebody about four to five million dollars a piece when they run out into the street and are hit by a car and become paraplegics. All I'm saying is that society can't pay for all the nice things that we would like to, because we have to reduce it to money, and there isn't enough money to do it. And I would, with the greatest reluctance, get into that field at all. I think you should leave it in the legislative arena where it can move with the times and the ability of the people to pay for it.

Mr. Wilson: Is there any phraseology in our Constitution stating that the criminally confined have a right to rehabilitation?

Mrs. Eriksson: No, not that I know of.

Mr. Wilson: Then this doesn't belong in here either. I agree with Don.

Mrs. Soule: I would just like to make the point that if you are going to create a new right that this one should get in under the wire before some others in the sense that it is put in the alternative. The state does not have to confine the person. As Professor Kindred has very ably pointed out, this is not somebody who has committed a crime, that we have gone through the due process of law to say that he has done it and then committed them that way. If the state doesn't want to pay for the care,

habilitation, or treatment, if we should include "care" in there, the state doesn't have to civilly commit that person, so I just want to point out this is a right stated in the alternative.

Senator McCormack: Mr. Chairman, I think a couple of the comments were especially valuable. The conversation and the arguments made relative to the long range cost implications to adoption of this sentence, I think I could make the opposite argument. I hesitate to do so at length because I do think that that is more of a statutory and budgetary question. But I could say this: that if our concern is about costs and the long-range implications of adopting this language, for the moment I would argue that we determined that the long range costs, without question, is multiplied many times because of the cost of the system that we have had in the past and that is spending the 12 to 13 to 14,000 dollars per year to keep people institutionalized, whereas 80% of the people, two years ago, who had been institutionalized for 30 years could have been productive citizens, many times in a limited capacity, and could have been tax payers. It would have been much less expensive had they been treated. That's an argument obviously as we get into mental health law. I believe that we would find that adoption of this language would not be as dramatic in terms of costs in the long run. Secondly, I would think the comments made relative to what rights exist in the Constitution relative to penal institutions I think is a good question. We talk about confinement in this paragraph. Do we need to make a distinction between penal confinement and confinement for the mentally ill? If we do need to make such a distinction, there should be language within the paragraph that does make the distinction. If people are going to be civilly confined by a court order, we should have some degree of difference from merely the old system of confining people to keep them off the streets because they were insane. And that is that we have some difference in that institution which would be a treatment or habilitation. I do think that that distinction should be properly made in this type of institution versus Lucasville. I do not favor making a statement as to habilitation for Lucasville but I do think for the Columbus School for the Retarded we do have constitutional obligations which differ from the Marion Correctional Institute or Lucasville. I think it would be proper to make that clear. In fear that without the inclusion of that language that the opposite interpretation might be drawn that we do class them all in the same category. I think that this is good language.

Mr. Carter: As qualified by the word civilly?

Senator McCormack: Yes.

Mr. Carter: I do think that we could discuss the thing for all the time that we have available but we need now to have a motion to consider it by the Commission. Craig, are you ready to make a motion?

Mr. Aalyson moved and Mrs. Orfirer seconded as follows: "Facilities and treatment for persons who by reason of disability or handicap require care, treatment or habilitation shall be fostered by the state. Such persons shall not be civilly confined unless nor to a greater extent than necessary to protect themselves or other persons from harm. Such persons if civilly confined have a right to appropriate habilitation, treatment and care.

Senator Butts: I move to amend to delete the first sentence so that the section as it now is would take care of that part of it and you would go into the second sentence "such persons" then referring back to the current Constitution.

Mr. Carter: In other words you would replace the first sentence by the existing first sentence in the Constitution?

Senator Butts: Yes.

Mr. Montgomery: You would leave "institutions" in rather than "facilities and treatment"?

Senator Butts: Yes. Then it is "institutions for the benefit of the insane, blind, deaf and dumb, shall be fostered and supported by the state."

Mr. Carter called for a second for the motion, and there was none. The roll was called. Those voting "yes" were Senator Butts, Senator McCormack, Representatives Fauver and Stinziano; Messrs. Aalyson, Carter, Fry, Guggenheim and Mrs. Orfirer and Mrs. Sowle. Messrs. Montgomery and Wilson voted no, and Mr. Russo passed.

Mrs. Eriksson: 10 yes, 2 no and 1 pass.

Mr. Carter: Let's submit it to the rest of the Commission and then, if it fails, we still have the opportunity to come back and take a whack at it.

The meeting recessed for lunch, and reconvened at 1:30 p.m.

Mr. Carter: We had three roll call votes at the last meeting. One was the obsolete material which is Sections 2 and 3 of Article VII, which we felt were statutory material. That has received the necessary number of votes, it now stands 21-1 to simply repeal those. The second one is Article II, Section 41, relating to the employment and regulation of the occupation of prisoners in penal institutions. That one has received enough votes with no "no" votes, that's unanimous with 23 votes. The other one I would like to talk about for a moment because we have a decision to make, is Article II, Section 20, which was to add a clause to the existing section and the addition was except that an increase in salary applicable to an office shall apply to all persons holding the same office. That one basically prevents an increase during a term of office of appointed officials. It doesn't refer to legislators at all, and it was pointed out that this is the one the county commissioners had the problem with. Because new county commissioners, they were the ones that testified on it, often come in and get more than the old county commissioners. That one stands at the moment 19 in favor and 3 no votes. The three contrary votes are Charlie, Jack Wilson and Representative Maier who are all here today. Representative Fauver, who did not vote, is here this afternoon. Nolan Carson has not voted, he always votes, but he was away on vacation. The question is, and I don't want to push it, whether or not we want to give these people an opportunity to vote, those that haven't on this question. The previous position that we have taken as a Commission is that we do not extend the voting beyond one meeting unless it is by unanimous consent, which is the only time we waive it. We need two more votes to make this one pass.

There was some discussion about whether to postpone closing the vote. Mr. Carter declared the roll call closed.

Mr. Carter: Section 20, Article II has not received the necessary two-thirds vote. We will proceed into a most interesting question, the question of apportionment, Article XI. The What's Left Committee, Mr. Aalyson.

Mr. Aalyson: I'll refer you to the cover sheet of the apportionment article report, and you will note that there are only three recommendations for change. Section 1, and that will appear on page 7, Section 13 appears on page 17, and the temporary provisions or Section 14 appears on page 19 of this report. When the Committee came to discuss the problems of apportionment, we saw two primary areas for consideration. One in the way you draw the lines to effect the apportionment and the second, the way you choose people to draw the lines. And since the line-drawing problem was considered in 1967 and taken care of by constitutional amendment

at that time, we did not address ourselves to that problem. We confined our attention to the method of choosing those people who will, in effect, draw the lines. As you know, the present article of the Constitution provides that the governor, auditor, secretary of state, one person chosen by the speaker of the house and the leader in the senate of the same political party, and one person chosen by the legislative leaders in each of the houses of the major political parties of which the speaker is not a member would draw these. We thought there should be some change in that respect and we have made that change by setting up an apportionment commission which would be chosen by one, the speaker of the house, two, the leader in the senate of the political party of which the speaker is a member, three and four the legislative leader in each house of the major political party of which the speaker is not a member and five and six, something that is foreign to the Constitution in its present state -- we felt that elected members of the Congress should have a chance to participate in this selection, so we provided for the group of the U.S. Representatives of each of the two political parties in the state having the largest number of such representatives. That's six. Obviously that's going to lead to some problems, if you have six people on an apportionment committee. So the real problem I think we had in the Committee was deciding how to choose a seventh and perhaps deciding member. And we thought that this was an almost impossible task to be performed unless it would be by agreement among the members of the apportionment commission itself. And we saw some problems there if they were equally aligned politically. So we have come up with the solution of having the members elect their own chairman, and seventh member. And if they are unable to agree upon a person, then each member of the apportionment commission, each of the six members designated by the persons who would designate them, may submit a name to the secretary of state, and the secretary of state will reach into a hat and pull out a name and he will be the chairman of the commission. The persons submitted must be other than a member of the commission. Those are the major changes. We have, of course, provided for the apportionment commission to set up the districts for representatives to the U.S. Congress. I don't think there will be any other arguable changes, and I think we will now throw it open for discussion.

Mr. Carter: The first thing we ought to do is have a motion to accept the report, without taking any action. We generally do that and the reason is that that incorporates all of the "no changes" which are contained.

Mr. Aalyson: Perhaps I should mention Section 13 of the Article which is on page 17. That amendment has been made merely to conform to the fact that we are providing for an apportionment commission. It changes language, but it doesn't change anything substantive. Section 14 which is recommended for repeal is a section which was enacted to take care of a special situation and no longer has any operative function in the Constitution, so it is getting rid of dead wood. Mr. Chairman, I will move the acceptance of the Committee's recommendations to the full Commission of the report on Article XI for apportionment.

Mr. Fry seconded the motion. A show of hands was taken to accept the report.

Mr. Fry: Is there some other state that uses this manner of choosing by lot?

Mr. Aalyson: That is novel with the What's Left Committee, so far as I know.

Mr. Wilson: I would surely hate to see the Ohio Lottery get firmly entrenched in the Constitution.

Mr. Aalyson: We felt, number one, that it might be difficult with an apportionment committee that is aligned half and half by political parties to choose a mutually acceptable person. We felt that if we threw it open to lot, it might put some

pressure on them to make a selection. And the lot, of course, is strictly limited. Each one of the members of the commission that has been appointed could suggest a name of a person other than a member who he felt would be a good chairman and then it would be by lot. We had the opinion that the pressure of this sort of system would probably compel them to choose without resorting to lot. We couldn't think, frankly, of a better way of selecting the seventh member.

Mr. Carter: May I comment on that Craig? I'm sorry that the other members of the Committee aren't here. Katie was a member of the Committee, Bob Huston and Doug Applegate all participated in the discussion. Really when you boil this down, the apportionment commission depends on this so-called tie breaker. Assume that you have three members of each party. That selection becomes absolutely crucial to the operation of the commission. We went through all kinds of attempts to determine how do you select a Solomon. This was decided after trying everything else under the sun as being a good way of putting pressure on the six members to come up with a seventh that would be acceptable to both sides. In other words, presumably a person of high reputation, a person who would not be highly partisan in this matter. And the pressure that if you don't do that, you might get one of the bad people, not on your side, and we felt that this would be a really compelling reason for them to agree on a person who presumably would be bi-partisan and neutral in his approach. That was the Committee's rationale.

Mr. Fry: As you know, apportionment and redistricting is a pretty political matter. I'm trying to think of when we've done it in the legislature that it didn't go right down to party line votes. There may be exceptions, but usually it is because there is a disagreement within the party itself that we have had a cross-over on the vote. I think you'll end up doing it by lot.

Mr. Montgomery: I think so too.

Mr. Carter: There is going to be a lot of pressure on them to choose the chairman.

Mr. Montgomery: I don't care how much pressure is on them, I don't think they'll do it. I think it's a naive thought.

Mr. Carter: What is the alternative?

Mr. Montgomery: Just have them do it by lot.

Mr. Aalyson: That's what we suggested, but we had hoped that if they're rational people they might be able to say there is somebody in this state that we can all agree on.

Mr. Montgomery: Not unless he is half democrat and half republican.

Mr. Aalyson: There might be one.

Mr. Wilson: Why don't you let the seventh member be appointed by the third largest political party in the state? They'd know who he is.

Mr. Aalyson: That's a thought.

Mr. Fry: Mr. Chairman, maybe we ought to start on a positive basis. I like the fact that you are including the congressional redistricting. I think this is a big improvement.

Mr. Carter: That's one of the major changes.

Mr. Fry: It well may be that if we had an elected state officer, maybe the secretary of state, at least the people would know that this is a person who, it would certainly make that office very attractive from a political standpoint. I can't see them agreeing that here is this person who would be knowledgeable in this area, who would understand the political makeup of the state, and would still be acceptable to both parties. I would like to think that it could be done that way, but I think you are going to end up with it being by lot.

Mr. Aalyson: We didn't think that there was any other way to do it.

Mr. Carter: This is also a public hearing on this question and I would like to see if any of the two guests here would like to make any comment on this question.

Mr. Hetzler: Yes, I'm Dave Hetzler of Common Cause of Ohio. We are very interested in the apportionment process and participated in some of the discussions. In our draft model we also recommended an apportionment commission without any elected or appointed officials. Recognizing that you are not going to exclude partisanship from the process, but in an attempt to minimize partisanship, we also recommended that the seventh member by selected by the six. However, we did not have the option of the lottery in the event that they didn't come up with a chairman from the six. We didn't give that a thought one way or the other. However, we did feel strongly that there ought not be any elected officials on the commission. In our opinion, the make-up of the commission is only one part of the number of segments that ought to be considered in terms of the form of this area that would minimize the partisan abuse of the process. That is, the make-up of the commission is not the only thing that could be done to minimize it. It is, however, we think the major first step. In terms of the lottery itself, I don't think we have a comment one way or the other, except that it does seem like a good way to pressure the group into making the decision themselves rather than giving it up to chance.

Mr. Fauver: How are they appointed in your recommendation?

Mr. Hetzler: Similar to the one that has been suggested by the What's Left Committee, except that in our original model draft, we had not included the representative from congress which I do think is a good idea. It was our thinking that the governor really has nothing to do with the apportionment of congressional and legislative districting other than his own partisan political interest in the outcome of the redrawing of districts. But essentially ours was the same sort of formula. That is from the legislature and party representation based on the last election results, et cetera.

Mr. Wilson: Where it says the six members shall select by the affirmative vote of four members a seventh member who shall be chairman, I think that should read "by the affirmative vote of at least four members", because if five of them should agree, then in theory we can't do that.

That change was agreed to.

Mr. Aalyson: I have a rather minor modification, that the members should submit names to the secretary of state. It simply says "submit the name of one person" down where it says if they haven't submitted the name, each member on that date, etc. I think it should provide for the secretary of state to receive the names.

That change was agreed to.

Senator Butts: Mr. Hetzler, I'm sure that in the lottery, assuming the situation might arise, that one party is satisfied with the way it is and just assume that no chairman is ever chosen and no action is ever taken. Had your group considered that possibility and found a way to resolve it?

Mr. Hetzler: We had considered this possibility. It is obviously one of the major questions. We quite honestly found no other alternative. We searched in all of the states, and I know the What's Left Committee did the same. We found no acceptable alternative and I might add that we had not considered the lottery as an alternative. Although to my knowledge, the lottery system does not exist anywhere else.

Senator Butts: Did you have a date at which time they had to choose the chairman?

Mr. Hetzler: Yes, I think in our original draft there was a date by which something had to happen after which it was left up to the supreme court.

Mr. Carter: That was also one of our earlier proposals.

Mr. Fry: Isn't it Florida or one state where the members of the apportionment commission are retired justices of the supreme court?

Mrs. Eriksson: I think there is one state where they do use justices.

Mr. Fry: The idea being that they would be apolitical after they retired from the supreme court.

Mr. Montgomery: Haven't you read our judicial report? We rejected all of that merit selection. We've got a political animal in there.

Mr. Carter: With the merit selection, that would have made some sense, Charlie. Without that, it didn't appeal to us.

Senator Butts: I notice that Montana is the only state that has anyone other than the legislative representatives redistricting the U.S. House of Representatives. I'd be curious as to why we should be the second state. It seems to me that there is little enough responsiveness of delegation. I don't know that we would want to give up what little control we have.

Mr. Fry: I'll be glad to speak to that, Craig. I was chairman of the government operations, when it was called the state government committee. At the time we handled congressional redistricting. Trying to do that through the legislature, it is just a matter of trading and trading, and I think here from the standpoint of the congressmen themselves, if they have to look to one man in their party to present their viewpoint, it is going to be a whole lot better than having each of them calling all the people in their particular district. It becomes almost impossible sometimes. You have to have party caucuses first. I think that if we can make this go it would be a much preferable way of doing it.

Mr. Carter: I might make an editorial comment on that. This idea of bringing the congressional representatives in on apportionment commission was suggested by Doug Applegate, and this was well in advance before the Hays incident. So it is interesting that he is now going to be a congressman, but it wasn't even in the picture at the time.

Senator Butts: Just in response, I would say that the legislative process is a cumbersome one for doing lots of things, but I hate to hand it over to a couple of party members. I think the cumbersome democratic legislative process is one that I'm not sure I'd want to see relinquished.

Mr. Carter: I took the opportunity of discussing this with a number of people and that, from my limited survey, there are more voters that are upset by the present apportionment procedure than anything else we have been involved in. And I really think we could strike a blow for freedom if we came up with some improvements in this area. There is great disatisfaction with the way it is being done now.

Mr. Fry: In all fairness to the present Constitution, it was Judge Battisti's actions up in Cleveland that have kept them from following what the Ohio Constitution really prescribes as far as apportionment is concerned right now.

Mr. Carter: You mean as to the guidelines that are to be used?

Mr. Fry: Yes.

Mr. Carter: And we have left those unchanged. We think those are pretty good.

Mr. Fry: Well they were. And this was a matter of consensus between the two parties. But we have districts now that do not conform to the Ohio Constitution. Battisti as you know held anyone that pursued this matter in contempt of court. I think Alan Norris was a party to that at one time or another. So if people are upset, it is not because it is a problem with the Constitution, it's a problem that the Constitution isn't being followed.

Mr. Carter: Of course, that is a judgment area when you get right down to it. Hopefully we would avoid that kind of question with this kind of commission. It could still be challenged that their decision was not appropriate under the guidelines.

Mr. Aalyson: I take it that no one here is opposed to our rearrangement of the selection of the six members. We have eliminated the governor, auditor and secretary of state as persons who select and have provided for the six selections from other persons. No one is objecting strenuously to that?

Senator Butts: Except with respect to the congressional members. The idea of the balanced board, and the general format, I have no problem with.

Mr. Aalyson: And I'm not sure I understand what your objection is to having the members of the House of Representatives select members of the commission.

Senator Butts: Because there would be no purpose in that if congress were not to be so districted by this board. That is the more important part of the thrust of my feeling.

Mr. Carter: Perhaps one of the best ways of getting something like this done would be to make it effective in the year 2000, when all present partisan considerations would be removed from the picture.

Mr. Aalyson: Do others than Senator Butts have any problem with apportioning for the House of Representatives?

Mr. Fauver: I don't quarrel with that concept. Is there something in here that the congressional districts would in some way correspond with the districts for state senate? Is that part of this? We have at present overlapping districts.

Mr. Aalyson: No, there is no correspondence. We thought of that.

Mr. Carter: We gave it a lot of thought, particularly this participant in the committee. Common Cause was suggesting it and it made a lot of sense to me to have the congressional districts be a multiple of the state senatorial districts which in turn would be a multiple of the House of Representatives districts. We ran into some difficult problems in doing that. The numbers came out, as I recall, that we would have to enlarge the senate quite a little bit and the house would decrease in number. The second thing which was rather telling to me when I found out I dropped it, that every time there was a reapportionment nationally as to the number of congressional seats it would automatically change the number of legislative seats,

which would be completely beyond the control of the state. And then the third problem is, no matter how you do it within reason you end up with an even number of people in the house and senate. And when you have an even number you always have the spectre of what do you do when you have an even split in the house and senate. How do they organize? There are some answers to that but none of them really all that satisfactory. So for those three reasons we finally decided that that was not acceptable. And I was the one who was pushing it. It does make some sense. Both Skip Gillmor and Doug Applegate were participating in the Committee on this and they both felt that was not going to go, so it was dropped.

Mr. Guggenheim: I would like to ask a question to try to clarify this thing in my own mind. Under the proposed new method, before this chairman is chosen, you are assured of an even split politically.

Mr. Carter: Right.

Mr. Guggenheim: Whereas, under the present method, it depends on who is the governor, secretary of state and auditor. That could throw it one way or the other. So under the new method, you are assured of a committed completely split committee before the chairman is chosen and you end up giving one man the absolute power to district the state. At least the governor, auditor, and secretary of state are elected, but this man is not.

Mr. Carter: And of course there are arguments that that's good. It is the Committee's view that the uncertainty related to selecting a chairman by lot constitutes a powerful incentive for the six members to reach agreement on the selection of the seventh and that the person so chosen is most likely to be fair and impartial in this highly sensitive position.

Mr. Fry: If we go to a federal census every five years instead of every 10 years then will you change this accordingly?

Mrs. Eriksson: As this is presently written it says 10 years. There would have to be another constitutional amendment to change it.

Mr. Fry: I could see if you did it only 10 years, and you had a federal census that showed that some of those districts were not in accord with the one man one vote principles.

Mrs. Eriksson: There would be difficulty if the court held in fact that apportionment were unconstitutional because of the one man one vote rule. You wouldn't be in difficulty just automatically because this would carry for 10 years.

Mr. Montgomery: Should they respond to the latest census? Why shouldn't they have it every five years?

Mr. Aalyson: They could have it every census.

Mr. Carter: There is some reason for continuity for a reasonable length of time just to get acquainted with the districts.

Mrs. Eriksson: There is also the problem of the carry-over senators.

Mr. Russo: If you have it every five years, you are going to have it till the guy goes on his seventh year because he is serving another term.

Mr. Carter: We would be hopeful that once every 10 years is enough to do this kind of shenanigans.

Mr. Wilson: I'd like to raise another spectre here. You are talking from past and present experience that there are two major political parties. Not necessarily so in the future. You might have 5 or 10 parties which might conceivably have equal representation. It says "major". What is the meaning of the word "major" if you have equal representation? Suppose you have 40% democrats, 30% republicans and 30% conservatives?

Mr. Aalyson: I don't know that that precise question did come up in committee but the question did come up of what happens if you have more than two major parties and we were naive enough to assume that this is probably not going to happen.

Mr. Wilson: It may not. But other countries have more than two parties and we could conceivably have more than two.

Mr. Montgomery: Aren't there other references to two parties in the Constitution?

Mrs. Eriksson: In this section itself, this is the present language; this is what currently happens.

Mr. Montgomery: I mean not just this one. Aren't there other references all throughout?

Mrs. Eriksson: I don't believe that there are. I believe this is the only place where this is a significant reference.

Mr. Montgomery: The statutes, of course, are full of them.

Mr. Aalyson: Do we have odd numbers in the house and the senate?

Mrs. Eriksson: Yes.

Mr. Carter: You could have two tied for second place.

Mr. Wilson: Like 15, 15, and 69.

Mr. Carter: Since we started this discussion, Bob Graetz walked in. Earlier I had asked if there were any comments from the floor, and Bob, do you have anything you want to say?

Mr. Graetz: I'm quite content to listen. I'm pleased with what the Committee has come up with. If, at some point later on, I feel I can't restrain myself, I'll speak up.

Mr. Carter: You are representing the Ohio Council of Churches?

Mr. Graetz: Yes.

Mr. Wilson: The block I raise may be entirely theoretical. It may never happen.

Mr. Carter: It's a possibility.

Mrs. Eriksson: It would happen under the present Constitution, too.

Mrs. Orfirer: I know you all have gone through this and I hate to ask you to go through this again, but for my own satisfaction, I find it very difficult to place this kind of responsibility in a lottery. You have no idea what name somebody may put in the hopper. I doubt very much that the public would be happy with this pig in a poke kind of method. I'm not. I would have to really be very thoroughly convinced that every other reasonable approach had been studied. What kinds of methods of appointment to important decision making commissions in the state are used?

Mrs. Eriksson: Most appointments are made by the governor with the advice and consent of the senate, or just by the governor. The Elections Commission is the closest to this kind of outfit. And that is two people from each party essentially and those four persons choose the chairman. I don't believe that it is provided what would happen if the four fail to choose a chairman. Then there are boards and commissions that are chosen by the legislative leaders or by the legislature itself.

Mrs. Orfirer: Is there any provision for what is done in the Elections Commission if there is a tie?

Mrs. Eriksson: No.

It was noted that juries are chosen by lot.

Mrs. Orfirer: But there is at least a kind of review procedure, they can be excused on a peremptory basis.

Mr. Aalyson: One thing we maybe assumed, is that the people of the calibre that would likely be chosen to serve on the commission would be more than likely to choose someone equally capable to serve as the chairman.

Mrs. Orfirer: Craig, I have some reservations about some of the appointments that have been made by the legislature. They are under a great deal of political pressure when they make selections. They are going to, I imagine, appoint very politicized people.

Mr. Carter: Linda, the real thrust of this is not to have it by lot. It is to put pressure on the six to agree, because you are going to have, at any point in time, either the republicans or democrats in power. Let's assume the present situation, where the democrats dominate the state. Are those three democrats going to let this thing go by lot on the commission? My goodness, it could go to the republicans and the republicans might redistrict this thing. There is going to be tremendous pressure on those six people to agree to a mutually satisfactory candidate. That's the thrust of this. The lot is only a backup, because the problem is if you don't have something certain, you've got a stalemate and you don't have apportionment take place. That means the courts have to get into it, and all that sort of business and it becomes a real mess. So you have to have some way of those six agreeing on a seventh member. I thought this was a rather neat way of putting pressure on them to pick a mutually agreeable seventh.

Mrs. Orfirer: The board now consists of three elected officials, and four persons chosen by the legislative leaders, who are legislators.

Mr. Carter: So it's really the elected officials.

Mrs. Orfirer: Would it be so terrible to choose an elected official, whatever party that may be at that time to be the seventh member?

Mr. Carter: Then that simply perpetuates the present system. Remember this is an intensely political and partisan question.

Mr. Wilson: I would say this is the most political question we have discussed in this Commission's history.

Senator Butts: The reason you went to the lottery I'm sure is not because you were happy with it but because you felt it would force them to come to a decision. If they will do that you feel you've got your best of all worlds.

Mr. Carter: Exactly.

Senator Butts: Do you have a date by which time they are expected to have chosen a chairman? One party might feel that if nothing happens at all, we're in good shape, let's just leave it that way. That party would be subjected to great political pressure if it continued and continued to delay. Because the onus would fall on the majority or satisfied party. And I think that that political pressure would be very great indeed.

Mr. Carter: You just couldn't maintain the status quo. It would have to go to the courts then, you couldn't just leave it the way it is.

Senator Butts: Maybe at some other point farther down the line. It seems to me if there was an expected date and then maybe a date that would have to go to the courts. If there was another period of time of several months, that would be a very difficult time for the satisfied party, whichever one it is, to withstand just refusing to move in their own self interests.

Mr. Carter: It would be both of them -- 3 and 3.

Senator Butts: No, I think the presumption would be that the unsatisified party would have a candidate to offer than they felt was a neutral party, and the only reason the satisifed party would turn it down would be that they felt that no action at all was better than any action because they're satisfied. But then they would have to answer to why it was that they were refusing to accept that neutral candidate.

Mr. Aalyson: To whom would they be answering?

Senator Butts: The general electorate.

Mr. Montgomery: I want to point out that it shouldn't bother us that much to use the lot system. I'm against the lottery more than anybody in the room. But we use this chance selection in the area of juries. It is part of our government. This is a perfectly basic technique for resolving delicate issues like this. It doesn't bother me the least that we have to do it by chance.

Mr. Wilson: I think that both parties would find it to their advantage to continue to resist and let the person be chosen by lottery. Because you've got at least one chance in two of getting somebody on your side. The other way, if you are forced to accept the choice of the other side, whatever side you are on, you are acknowledging defeat right at the moment. You've got zero chances. So if you've got one chance in two, from a gambler's eyes that's better than zero chance, so you would go to the lottery every time.

Mr. Carter: Is that accurate, Jack? Let's suppose that the three and three did agree on a neutral. That's not a defeat.

Mr. Wilson: You are not going to find a neutral person.

Mr. Carter: Admittedly, it is not easy.

Senator Butts: To take my description of it, the unsatisfied party, it seems to me under the lottery system would never agree. I think that's what you are saying, because chances are they couldn't improve markedly their situation where there is a one in two chance that they could take over the ball game.

Mr. Carter: Is having a neutral person, assuming a Solomon can be found, so bad for the unsatisfied party? It's not the opposition. It's the neutral party.

Mr. Hetzler: I don't share the skepticism that has been expressed of finding a neutral person. I think because many of you are so closely tied in this partisan

arena, it is inconceivable that a neutral person would be available. I think there are in fact individuals who are now in the political arena and could deal with the problems of apportionment, but are not highly identified with one party or the other. I don't think that that is as far out a possibility as it might seem. The second point is that I don't think the dissatisfied party would take the flip of the coin response. I think there is a chance that the dissatisfied party, better than the flip of the coin chance, to be able to negotiate within the context of this partisan commission, to negotiate a better situation than certainly under the current process. That is the party on the outs are not going to negotiate for anything. I don't share your skepticism. There are people, I think, in various commissions that function now in state government, that are quite capable of handling sensitive issues. In the Ohio legislature, for example, there are people who handle sensitive areas within state government that function very well without a great deal of partisanship.

Mr. Fauver: I wonder if consideration was given to the creation of a panel of potential chairmen from a slightly different source. One of the things that bothers me about the lottery, it is almost by definition the people that are eligible for that spot are being nominated by some highly politicized people. I don't see anything built into the system that creates incentives to nominate as chairman the so-called nonpartisan people. They are being nominated by highly politicized people who have been appointed by political officeholders. Was any consideration given to creating a panel of potential chairmen from another source, or in some way to move in that direction?

Mr. Aalyson: I think not. I don't know whether the idea ever occured to us but the same problems seem to be there. How do you select this panel?

Mrs. Eriksson: I think the only other course that was considered by the Committee was the courts being a source of the chairman or panel of persons for the chairman and that was ruled out.

Mr. Aalyson: And they are political figures, whether they are named so on the ballot or not. We always came back to the problem that it was going to be very difficult to select anybody who was not political so put the pressure on these guys to select somebody that both sides would have a little faith in to do what was right.

Mrs. Orfirer: It seems to me that what we are doing is insuring this kind of politicization and this clash. What would be so terrible, I'm thinking out loud and it may be very naive, if we left it at a six man commission, let them fight out each of the decisions among themselves. A certain amount of trade-off would take place, it seems to me, which is what we expect in our two-party system. There would have to be a certain amount of agreement, even-handedness, which would grow out of this.

Mr. Carter: That argument presupposes that they would have to come to an agreement and they don't.

Mrs. Orfirer: They don't have to redistrict?

Mr. Carter: No. What happens is if you have 3 and 3, and they don't agree, they come up with no recommendation. So now it would be thrown into the courts presumably to make the recommendation. And we are not very comfortable with that. You see, you have to have some mechanism that forces a decision by this group.

Mrs. Orfirer: Can we write into the Constitution something that would set a final deadline and a necessity to reach a decision?

Mr. Carter: You can't mandate that.

Mr. Aalyson: What do you do if they don't?

Mr. Fry: Apparently the Committee was satisfied with the constitutional language describing the guidelines. If you have a bi-partisan group to redistrict, what will happen probably, three of the members will draw the districts -- they will say this is the way it is going to be. But they are still subject to the constitutional requirements. It may be that a quick referral of any differences to the supreme court would be worthwhile. I don't know, but they still have to follow that language. It is a political process now. If we made one officer, I mentioned the secretary of state because he is the chief elections officer, the chairman I don't think we would be in such bad shape. It could be the governor, secretary of state, auditor, or anyone. But I think you are going to have a political figure at that point.

Mr. Montgomery: That's where you are now, isn't it?

Mr. Fry: Let me respond to that. The difference right now is that the three people who are on there have a lot of other things they are going at the same time. And if you had this commission, where they submitted it in public and answered questions and so on, where they laid out what they proposed to do, I think you are going to have a lot greater interest in the matter of apportionment and redistricting than you have at the present time.

Mr. Aalyson: My problem with what you are suggesting is what if the designated official is a member of the party not them in power and maybe he is the only member, and then he controls the apportionment.

Mr. Fry: I don't think there is any easy answer.

Mr. Aalyson: No, but as long as there is a designated political official and you have a party designation attached to him, you create problems.

Mr. Graetz: There are two other things that I think might put additional pressure on the six to name a reasonably neutral person. One, that if they can find such a person who would at least be not totally in the other camp, it gives both parties an opportunity to protect the incumbency of their people. That's probably at least in some ways as important as what happens in the total balance. So that's a negative in some respects, because we are not trying to protect incumbency. But by the same token that would seem to me to give them an added incentive to agree on someone. Otherwise they may lose out in the lot and lose some of their incumbents. The second thing is what Charlie was just talking about. The more open process where you have public hearings and provide the possibility for people to be watching over their shoulders as they are putting the maps together. I think those two would give much more incentive to the six to add another person who would be as close to the middle as possible. I agree that there are no such people who are totally non-politicized, and that if we found such a person that person would probably not be an appropriate one to serve in a sensitive position like this. But there must be people whose minds are so open that they would not be totally locked up in the grasp of one party or the other.

Senator Butts: I have been thinking about what he said and your reply to me where you felt that the neutral person would be not a loss to the unsatisfied party. I think that moves under the presumption that the unsatisfied party is unsatisfied by the fact that it has been gerrymandered against, that it hasn't had its fair reflection of its voter strength. It may well be that the minority unsatisfied party has relatively fair apportionment and that is a true reflection of voter strength. However, if they were in a position to gerrymander, if they had that fourth vote, they could redraw so that it would be better for them and an unfair reflection. That then being the case, it would be maybe not a loss but no gain whatsoever to have a

neutral party and it would be far worth the risk to go the one in two shot where you can run the whole ball game. And I think in consequence the unsatisfied party unless they felt that they had been grossly gerrymandered against, just a fair shot would improve their case. But unless that were true they would always go the lottery route.

Mr. Aalyson: Then what problems do we have with having the lottery except the method by which the people whose names are in the hat are chosen? Why not do it by lottery? We get a seventh member.

Mrs. Orfirer: Suppose a different way of selecting the members to go in the hat?

Mr. Aalyson: That seems to be the only other alternative, selecting a different way of selecting those.

Mr. Carter: That's a possibility.

It was noted that election was a method of selection available.

Mr. Carter: You've got a problem of the timing involved in here too.

Mr. Russo: Anything we adopt here that sounds good is alright with me because we are never going to get past the legislative group that is in power. And this is a life or death concept with the parties when it comes to picking congressional districts and house and senate districts. Fairness goes out of the window. I know when Charlie was chairman of the committee, there was all kinds of wheeling and dealing going on for everything. For congressional districts, for house districts, and for the abolition of house districts of which I fell victim to . Nevertheless, this talk of fairness is going to go out the window. So anything that sounds plausible should be adopted by the Commission. But it is not going to mean anything depending upon the makeup of the legislature, as far as I am concerned.

Mr. Carter: You mean as far as putting it on the ballot?

Mr. Russo: Right.

Mr. Carter: We dealt with this question before and have generally come to the conclusion that we should be sensitive to what is practical in the real world. But on the other hand, I think it is the basic job of the Commission to present something that we feel is in the public interest, and if we feel that this is in the public interest then we are told to make that judgment, and know that it would never get through the legislature, there are other ways still to get the matter before the people. So that I would not despair of ever having it see the light of day. So it seems to me we ought to propose what we think is best.

Mr. Russo: It seems to me there is no fair way of picking the seventh member. In a hat or whatever. If my party says drop John Doe's name in the hat, that's the name that is going to go in.

Mr. Carter: We recognize that.

Mr. Russo: So all of the conversation at the high level really gets down to the practical level which says "Men, we've got to seize control here". So if we do take the lottery, it doesn't make any difference to me. If the guy runs for office it doesn't make a difference to me. If he ran as chairman of the apportionment committee, fine, put that in. Because any of the methods are just as fair as any of the others. The question is, how do we determine how much fairness can we get out of the chairman? Nobody knows that. Nobody can determine that by putting anything in the Constitution about it.

Mr. Wilson: Tony just made a point. Let the chairman be selected at the fall election, then the party in power will have control of the thing and that will be it.

Mr. Aalyson: Not necessarily. If he is running as a democrat or republican, he may pull some votes from one side or the other.

Mrs. Orfirer: He can run on a nonpartisan ballot.

Mr. Aalyson: You can say the three members of the party that get the most votes in an election can select the chairman.

Mrs. Orfirer: Maybe that's as good as any other way.

Mr. Wilson: At least you would be assuring yourself that you wouldn't have the minority party controlling the redistricting.

Mr. Carter: Is that necessarily bad?

Mrs. Orfirer: I think that's fine. I'm willing to go along with that. They are going to be open to the public view. Let the majority party select it.

Mr. Carter: That's what we have now.

Mr. Graetz: I hate to offer a word of disagreement but that is exactly the situation we are in now. The party that happens to control certain offices. The parties have taken their turns at gerrymandering the state. And we're trying, this is a long shot hope, but anything is better than what we have now. I think that would leave us precisely where we are now. It just enlarges the committee but it doesn't really change anything.

Mr. Montgomery: Is the life of this commission 10 years?

Mr. Aalyson: When they go in and do their work, I guess they dissolve. They would meet once every 10 years after the census.

Mr. Hoover: This idea of trying to get a different handle on nominees for potential chairman. I wonder if there is anything to saying that they have to be an independent officer, that they can't have held public office, or can't hold public office for five years after serving on the apportionment commission. Some things that would eliminate the obvious forces.

Mr. Carter: That would be very difficult. How are you going to eliminate the party chairman, for example? You start to draw a laundry list and you end up with a very difficult situation. It's a good idea but I don't think it is practical.

Mr. Montgomery: There are some people who would be both good and neutral. I can think of some judges that I don't even know their parties for example.

Mr. Guggenheim: There are some good people but how do you get them to be chairman of this commission?

Mr. Aalyson: That's what the six members try and decide. They go out and ask them to do it.

Mr. Guggenheim: I just don't believe they would do that. The republicans would put names in they were sure of and the democrats would put in the name they would be sure of and they would either choose it by lot or end up getting a very prejudiced person at the head of it. Personally I would rather have an elected official rather

than someone who has been chosen like that who has no base really.

Mr. Carter: Then you might as well leave the present system alone.

Mr. Guggenheim: I'm inclined to.

Mr. Carter: As you can see this was a difficult problem facing the Committee. Even to people such as Doug Applegate and Senator Paul Gillmor, even after thinking of all the alternatives, and then you come up to this and maybe it isn't such a bad idea. At least you can keep an open mind on this question.

Mr. Wilson: It would be better to find some way to assure that we would find a neutral chairman. Because obviously if it goes to lot it is going to be a strongly partisan chairman.

Mr. Carter: No doubt about it.

Mr. Aalyson: We think that's true.

Mr. Wilson: As I said earlier, that is all the more reason why it shouldn't go to lot.

Mr. Carter: The whole thrust of this is to avoid going to the lot selection.

Mr. Wilson: I think you are assuring the lot selection.

Mr. Carter: Well, that is the question.

Mr. Wilson: Why should you give into their selection when you know you won't want that, when you have got one chance in two with a blind draw?

Mr. Aalyson: The third alternative is you might find someone all can agree upon.

Mr. Carter: For example, Jim Shocknessy who is no longer with us, might be that kind of person. He was strongly identified by both parties as a man obviously of independent judgment.

Mr. Montgomery: Bob Leach would be another. Judge Weyandt. There are any number I would have complete confidence in.

Mr. Russo: Should we consider the other extreme which would be to have the fewest number of members possible on the commission, thereby being about to pinpoint where the problems stem from? Because if there are seven people, the situation becomes much more difficult for the public or the spotlight to be on the people that aren't doing the proper job. But if you have a three man commission with a working staff that gives you most of the technical stuff, and then just putting it together.

Mr. Carter: Still you would have the same question of picking the odd number. We talked about numbers in the group. I don't think that's the guts of the question. The guts of the question is the tie breaker.

Mr. Wilson: Going even further, you just need one who is going to be the paragon of virtue.

Mr. Carter: The reason for having more is to have a funnel for information coming in from various viewpoints so that it can be taken into account in the deliberation of the commission. We want to get to the jury question this afternoon. I suspect that this is something that the Commission members might want to reflect on. Linda said that she would, for example. Rather than bringing the matter up for the voting process today, would it be acceptable to make this on the agenda for the next?

It was agreed to.

Mr. Carter: I suspect that the more you reflect on it the more you may like it.

Mr. Aalyson: Spoken by one who was completely opposed to it at the beginning.

Mr. Hetzler: May I make one final comment? We gave a lot of consideration to this whole area both at the state and the national level. We are about to launch a special project here in Ohio to concentrate on apportionment, and this is a model for our national organization. I would like to point out a number of other factors that have been considered besides the administrative issues. One is that the utmost consideration is what should be done for the public in terms of fair representation through the political process. And although it is certainly very partisan, in terms of my party or your party, the political considerations ought to be based on what is fair and not on what is going to pass the legislature or whatever. That would be the best possible way. I would like to finally comment, that in our opinion, the current situation is simply not acceptable. That it is disenfranchising individuals. It tends to lend itself toward a disrespect for the political process which we cannot afford. That is, people tend to have less respect for the partisan views involved than for the parties involved. And this may be reflected in the number of registered independent voters that we are beginning to see. I think the two major considerations are, one; that we keep in mind what is the best possible thing for the constituents; and secondly, you tend to put aside the more expedient questions as to what will pass the legislature or whatever, and concentrate on what is best for the process.

Mr. Carter: Mr. Hetzler, would you like to submit a memorandum to the Commission?

Mr. Hetzler: Yes, sir.

Mr. Carter: If you would do that well in advance of our next meeting. That would give you about 10 days or two weeks. We will see that it is sent to all the Commission members. We're all through with apportionment for today. Al, that brings us to the question that your committee has been dealing with and we would be delighted to hear from you at that point.

Mr. Norris: Thank you Mr. Chairman and members of the Commission. Our charge was to inquire into the sections of the Constitution dealing with grand juries and civil petit juries. Our charge was a spin-off from the Bill of Rights Committee as that committee came to those two subjects. It determined that there should be a special in-depth inquiry into those two areas and it would just be too time-consuming for the Bill of Rights Committee. Some of us on that committee felt that whether or not there was change recommended by the Commission in the grand and civil petit juries, nevertheless this Commission would not really fulfil its obligation if it didn't inquire into both because there has been a lot of public clamor on both sides and a lot of literature on the subject of both of those areas.

We held all day hearings, one on each subject, and then a little additional testimony on the grand juries. We felt that the testimony produced on grand juries was really outstanding. And we are pleased at least that that will be preserved. On the other hand, the testimony on the petit juries was really not quite so outstanding, although we did have some good testimony. In effect, what the Committee is recommending to the full Commission are some basic changes in the grand jury proceedings in this state. And some very minor changes in the civil or petit jury. We are essentially recommending that trial by jury in civil cases be preserved in essentially the same form as it is today.

I suppose you could break down comments on the grand jury system as we know it today into, basically, four areas. There is a great field, both in the literature

in this state and across the country, on the inadequacies of the grand jury system as a protector of the defendant's rights. These people complained bitterly that these proceedings infringe on the defendant's right because they are secret proceedings, because neither the defendants nor witnesses are entitled to have counsel of their choice in the arenas with them. That there is no opportunity for cross examination of witnesses in grand jury proceedings, and there is no effort made to present exculpatory evidence, and therefore everything is stacked against the rights of the defendant. And therefore these people ask that the grand jury be reformed. Make it open to allow counsel inside the room to allow the right of cross-examination, et cetera. There are also others who complain that the grand jury as a protector of the defendant's rights is a fiction. That the grand jury is no more than a tool of the prosecutor. He uses it for indictments whether or not he is entitled to one and that he uses it to get himself off the hook where there is great clamor for prosecution in a case where there ought not be. And he doesn't want to take the political heat. Those are I guess two of the points. A third one, and one that I think we found very valid and is really the main thrust of our recommendation is that today in Ohio, a grand jury proceeding results in an awful lot of waste of time and duplication. To see that, we need to look at the way the procedure works. In Ohio, if somebody is charged with a felony, other than by grand jury indictment a criminal affidavit or information is filed against them, what happens is that first the accused is entitled to a preliminary hearing. A preliminary hearing in our metropolitan counties will be held in a municipal court. Since it's a felony, it will ultimately be tried in the common pleas court, so we start out in a different court and there is already some duplication. It will normally then be handled for the prosecution side by a municipal prosecutor, even though that municipal prosecutor has no ultimate responsibility for the prosecution of the case. The purpose of the preliminary hearing is to establish probable cause which is also the purpose of the grand jury hearing. Is there probable cause to go forward with the prosecution? At that preliminary hearing the defendant may cross-examine prosecution witnesses. He may be represented by counsel. What customarily happens at a preliminary hearing is that the prosecutor puts on just enough testimony and just enough evidence to establish probable cause. And of course that is a lot less than proof beyond a reasonable doubt of guilt. So he just barely gives the defendant a glimpse of his case.

Mr. Fry: Can the judge take any action after a preliminary hearing? Can he dismiss it?

Mr. Norris: Let's assume that the judge finds probable cause. At that point, the defendant still has his right to a grand jury and the case will go before a grand jury unless he waives that right to a grand jury. Very frequently that is done. But nonetheless, he has to waive it or it goes to the grand jury. Obviously if it goes to the grand jury you have got your duplication. You've got two show-cause hearings. Another problem at that level, going back to the preliminary hearing, is that very frequently the preliminary hearing will be used as a plea-bargaining confrontation, and I think very validly so. This is the first time that the prosecution and the defendant are together. Quite often, there will be reductions in the charges in exchange for guilty pleas, reducing from felony to misdemeanor. The problem with that in our urban counties is, you have got a fellow agreeing to plea bargaining who is not responsible for prosecuting the case. Very often, the county prosecutor will find that he has lost his felony case because a municipal prosecutor has bargained it away at the preliminary hearing level in exchange for a plea to a misdemeanor charge and this happens quite frequently. Let's go back to the situation where the judge after the preliminary hearing finds no probable cause. That may be because there is no case or because the prosecutor didn't get enough there. He took a chance and didn't give the defense enough of a peek at his case and so the judge finds that there is no probable cause. And you would think that would be the end of it but it is not. Even though the judge does not find probable cause at that stage, the prosecutor can go around it and get a second crack at the defendant

through the grand jury by indictment. Again, another example of duplication.

Mr. Montgomery: Doesn't the lower court judge either have to bind him over or dismiss it?

Mr. Norris: Yes, if he finds probable cause, what he does then is bind the defendant over to the grand jury unless the defendant waives the grand jury.

Mr. Montgomery: Right, in which case he stands trial. But the third alternative is he dismisses it.

Mr. Norris: But the prosecutor can then get an indictment directly to the grand jury.

Mr. Montgomery: Direct? I don't know if that ever happens.

Mr. Norris: Oh, yes, it happens lots of times. I used to be a city prosecutor, and in our breakdown in our little city, where I would handle them, if you lose one you don't lose anything. You just put on the minimum possible evidence because what if you lose? The only reason the defendant is there is to go fishing, and you don't want him to know what you have got. If you have got something you don't want him to know about, then you really take a chance because the chance is minimal. If I lose then I just call the prosecutor and tell him to go directly to the grand jury.

Mr. Wilson: The prosecutor can't lose.

Mr. Norris: Right. Sometimes, felony cases are instituted directly by grand jury indictment. If that is done, then you don't have the preliminary hearing. Another area of testimony would be those who think the present system is just great, and there is no reason for any change, and there are some who think that's the case. The system seems to work better in rural counties because you don't have this division of jurisdiction. I think many of the problems of duplication would be handled in and of themselves if we went to a unified court system because even in the urban counties then, you would only have the common pleas court and at least you wouldn't have the division of responsibility between the municipal and the county prosecutors. And that would help some. But it still wouldn't eliminate the duplication between the two kinds of hearings. As a result, we recommend that the grand jury be changed in four principal respects, and you can find this on page 5 of your memo. First, we would make an information the primary method of initiating felony prosecutions, which would permit either the accused or the state to demand a grand jury. We would require that charges be instituted by information, by the filing of a criminal affidavit, unless either party demands a grand jury. Today, in the majority of cases, it is instituted by information, but then you still have that duality. So we're going to say information unless there is a demand, and if there is no demand, then there is only a preliminary hearing. That's how we get rid of the duplication. If either party demands a grand jury then there is only a grand jury.

Mr. Carter: Would I be correct in assuming that they essentially have their choice, but not both?

Mr. Norris: That's correct. If neither opts for a grand jury then the prosecution is instituted by information and there is a preliminary hearing only. No grand jury.

Mr. Montgomery: The difference would be a public or private forum.

Mr. Norris: Yes, and we open up the grand jury to some extent.

Mr. Fauver: If you do have the preliminary hearing that takes on more substance because the judge could throw it out.

Mr. Norris: Yes, then if the judge finds no probable cause that's the probable cause hearing just the same as a grand jury and a no bill. What they are saying is no probable cause and they throw it out. That's the end of the case.

Mr. Fauver: But the system is set up so you are going to have one or the other but not both.

Mr. Norris: Correct. Moving on to the second point, every person accused of a felony would have the right to a hearing to determine probable cause, and that would be either what we call a preliminary hearing today or a grand jury. So there would be a constitutional right to a probable cause hearing.

Mr. Fauver: Then why have the two?

Mr. Norris: There are reasons why you want the two. In some instances, the secrecy or the near-secrecy that we would preserve are desirable. Let's assume someone who is accused wrongfully of a sex-act, or some kind of scandalous charge. He may feel that he doesn't want a public hearing. That there will be no probable cause and he can establish that at some kind of probable cause hearing but he will be darned if he wants that to be a public hearing. So he would opt for a grand jury. There are instances where the prosecutor doesn't want to institute by information. For example, in organized crime and drug rings, he will want secret indictments. So he would in those instances opt for a grand jury. Those are some examples.

Mr. Fry: And in those cases grand jury would not necessarily have to be open.

Mr. Norris: No, and I'll mention some of the changes we do make, really to help make the grand jury a genuine probable cause hearing. Third, we would impose the duty on the prosecutor to tell either the court where there is a preliminary hearing, or the grand jury about evidence that he knows of which tends to negate the guilt of the accused. He has a burden to present exculpatory evidence only if he knows about it. He doesn't have to prepare the defendant's case. If he omits that, it would not affect the validity of the prosecution unless the omission was deliberate. We had testimony from both prosecution and defense that there ought to be exculpatory evidence mentioned to the grand jury if we are going to have a real probable cause hearing, if he knows about it. The prosecutors said, "we don't mind that but don't make us prepare his case. We're in the prosecution frame of mind and if you say we have to present all exculpatory evidence, we are going to goof, because we're not thinking of all of the defense theories that he would normally think of." So the burden is only to present things that he obviously knows are of an exculpatory nature. This is done in California and in some other states. We had really no objection from the prosecutors on that regard, many of them, in fact, favored it. They just didn't want to have to lose a case because they would omit something that they had not anticipated.

Mr. Fry: You mentioned where the municipal prosecutor handles the case that will be tried possibly by the county prosecutor. Do you do anything about that?

Mr. Norris: We can't do anything about that. That would however be handled if the unified court system we recommended passes. And finally, we would open up the grand jury to this extent. Any witness before a grand jury could have his counsel present in the grand jury room. Today they have to run outside to consult. The counsel could be there at his side in the grand jury room, but his counsel would be limited purely to advising his client as to whether or not he should testify, on rights of self-incrimination and also of privilege. He would not be permitted to object on grounds of inadmissibility of evidence or rules of evidence, nor would he be permitted to cross-examine the witnesses or even be in the room when his client wasn't in there. That procedure is also followed in a number of states and while there was some hesitation on the part of some prosecutors to having defense

counsel in, it was mainly I think a reaction to having counsel turn the grand jury into a circus. Their objection then seemed to subside when representation is limited only to advice on matters of self-incrimination and privilege.

Mr. Montgomery: Alan, you talk about witnesses. What about the prospective defendant?

Mr. Norris: He is a witness. This would be available not only to the defendant but to anybody who appears. They would have a right to counsel.

Mr. Montgomery: Even though we are going to try to surprise somebody.

Mr. Norris: We don't have to call him. Only if he is going to be in there.

Mr. Montgomery: Most times, the defendants aren't present.

Mr. Norris: Right.

Mr. Montgomery: So he has no protection. There is no judge in a grand jury.

Mr. Norris: His protection in the grand jury is only if he appears as a witness, if he is called.

Mr. Montgomery: There is no requirement to advise a prospective defendant if he is under investigation and is likely to be indicted. So there is really no probable cause hearing as far as the defendant is concerned if the state requests a grand jury.

Mr. Fauver: That's right. The state could request a grand jury and that would be it, wouldn't it?

Mr. Norris: And I don't see how you avoid that.

Mr. Carter: At least it gets around the self-incrimination problem.

Mr. Aalyson: Yes, if he is called he can have his lawyer there.

Mr. Norris: It just seemed rather silly to us to go through the charade you have today of having to run outside every time a question is asked, and ask his lawyer whether or not he should answer it. Again, we were trying to strike a balance. We felt that if you only have one or the other, the grand jury should be more meaningful than it is today. And I think these two things, the exculpatory evidence and the presence of counsel will assist in that. But we didn't feel we should eliminate it when the prosecutor had a valid need for it. It still gives the defendant more than he has got today.

Mr. Montgomery: Was the Bar Association in on this?

Mr. Norris: We've had testimony from the Bar Association. I think some of the most meaningful testimony we had was from the American Bar Association. We also had the state bar. In reaction to our latest draft, the one just before this one, the Prosecuting Attorneys Association filed a brief on that and we made numerous changes in response to their suggestions which we felt most were valid. We felt we answered, if not every point, the ones that we felt were valid.

In so far as the petit jury system, we made several recommendations. Article 1, Section 10, you'll notice on page 2 the deleted language and this is really substituted for what I just talked about in Article I, Section 10A, so disregard that for the moment. On page 3, about six lines down, you will notice the deletion of "and may be the subject of comment by counsel". You will recall that under the federal case law, it has been held that we may not, in Ohio, comment on the failure

of a defendant to take the stand and so that has been a moot question for some years now. In other words, the United States Supreme Court has held that the Ohio Constitution is unconstitutional in that regard. The next change, if you will look at Article I, Section 5, found on page 12, that change is no change. We do not recommend any change. We spent considerable time talking about remittitur and additur, and I suppose the only one who remained adamant was myself, and I was outvoted on that one. I had the feeling, as some others have had, that an appellate court ought to be able to reverse the amount of a jury verdict, given a high burden of proof. For example, if it is against the manifest weight of the evidence. If they can do it on facts, why not on amount. But there seemed to be little sympathy for that and so we recommended no change. Finally, in Article II, Section 35, on page 15, there was a feeling in the Committee that in the workmen's compensation section of the Constitution, where there has been permitted an appeal to the courts from the administrative determinations, that kind of claim ought to be subject to jury determination just as any other claim in court. Those Mr. Chairman, are the recommendations of the Committee. Mr. Chairman, I move that the report of the Committee be accepted by the full Commission.

Mr. Montgomery seconded the motion. A show of hands was taken. The Committee report was accepted.

Mr. Carter: Thank you very much. Discussion?

Mr. Guggenheim: You said something about making the grand jury proceedings a little more public?

Mr. Norris: Public in the sense that the witness can have his counsel present. I don't mean open to the public.

Mr. Guggenheim: But if it is before the municipal court, that is open to the public.

Mr. Norris: That's correct.

Mr. Montgomery: I question whether the right to trial by jury gives a person a right to have a jury establish the amount of damages without some kind of court review. I think all of the criminal stuff looks good. But you know and I know, we are seeing some verdicts come, particularly from California, for punitive damages which are absolutely wild. They go beyond the prayer of what the petition asked for in the first place. There are 12 people deciding they are going to give some guy something and they are going to stick somebody up. We have no review of that for reasonableness.

Mr. Norris: I agree with that. What we get down to is capsulized as a matter of constitutional law is that we have a very limited additur, which means raising the jury verdict, and remittitur which means reducing the jury veridct. But it can be only by consent of the parties. The courts have held that the provision in the Constitution giving you the right to a jury trial means just what it says. The jury determines the amount of damages. If the amount is exorbitant, the trial judge has a couple of alternatives. He can get the parties to agree to remit on the threat of sending it back for a new trial, which he can do on the basis that it is exorbitant. He can have it tried over again, if they refuse. But he cannot, no matter if it is against the manifest weight of the evidence, the appellate court cannot increase or reduce the amount of the verdict. It seems to me that you have got to have a remedy for error. And if you have error, that is what an appeal is for. Whether it is in the amount of the veridct, or the kind of evidence you have or a mistake of law, it is an error. And errors are supposed to be corrected. We need that plugged into the system. I think what the Committee was saying is that the right to trial by jury is so fundamental that the present remedies are adequate. Those remedies being either voluntary remittitur or additur or remanding for a new

trial. I guess I would have to say the Committee feels that there is a remedy. The argument is whether it is as adequate as it is in other areas. I would argue that it isn't, but I was the only one.

Mr. Aalyson: As a member of the Committee who was opposed to Alan in this, I guess the general consensus of the other members of the Committee was, and I'm not saying this in a facetious manner, it's easy enough to sit back and say that the verdict was excessive and it should be lowered. But who is to make that decision? Is a single judge any better entitled to make a decision of this character than the six or eight or twelve members of the jury? Especially since the judge can watch over them and say "I'm going to give a new trial unless you agree to this." Again, the question is, is any single individual any better equipped to make this decision than a group of individuals to whom this function has been assigned?

Mr. Carter: Wouldn't that same argument apply to other matters before the court, the other aspects of the case?

Mr. Aalyson: It depends on what you mean by "other aspects". Curiously enough, of course, the ratio of additurs to remittiturs is infinitesimal. You get very few courts who say to a jury you did not give enough, and attempt to add. It's a rather common occurrence for a court to say you have given too much, I'm going to give a new trial unless you reduce.

Mr. Montgomery: My only point is, from my daily work, we're seeing the beginning of a real tort crisis in the United States. Not just in Ohio, it's everyplace. The municipalities, factories, doctors, we can hardly furnish a market at any price -- actuarially. And I know that that's not our job here, to address ourselves to tort reform. All I care is whatever we do here is not going to be repugnant or clash with some ultimate modifications that are inevitable. And I don't know what they are going to be.

Mr. Wilson: We do allow judges certain discretionary areas in criminal sentencing. Why wouldn't it be corollary to allow them to review monetary awards?

Mr. Aalyson: I think they do quite often review them, grant remittitur.

Mr. Wilson:: But they don't have the right themselves to say this shall be it. They have to either get the parties to agree or they have to go to another trial. They can't adjust it on their own.

Mr. Aalyson: That's correct. But the judge doesn't have the right to decide whether the person is guilty or not guilty.

Mr. Wilson: No, but he decides the sentence.

Mr. Aalyson: I don't have any answer for the rationale between the two. I see your point, but my answer to that would be I see no reason to permit a judge to toy with the sentence, if you give it to the jury to set the sentence, then the judge shouldn't interfere. But the jury doesn't set the sentence. It's just a different philosophy.

Mr. Montgomery: The suggestion along these lines is to let the jury determine negligence or no negligence and have a separate board of experts in the field, whatever the field may be, assess the damages -- the people who are educated in the economic sense as to what the verdict ought to be.

Mr. Norris: Our suggestion is just no change.

Mr. Wilson: At the risk of sounding unAmerican, so many of our juries are not

economically responsible. They just figure if you've got somebody with billions and millions, then just give it to them. I don't think that they weigh that seriously in deliberations as they do the life or death of the criminal.

Mr. Aalyson: I am in a rather peculiar position to try to answer that since I represent plaintiffs, although I do very little personal injury work. You never hear the guy who has lost his leg say "That's enough". There has always got to be a philosophical problem in this kind of situation.

Mr. Norris: I might say that in the testimony that we had, we had some testimony that juries are so bad that you just ought to throw them all out. And then we had other testimony to the effect that juries are the greatest thing since sliced bread.

Mr. Aalyson: And we got into the numbers: how many people should you have on a jury? Should it be 12 or six or some other number. Rather surprising to me was the testimony from the lady from New York that indicated that you should never go less than 12 - they had done research.

Mr. Norris: Studies for years have indicated that you should reduce the size of juries. We had testimony that you should increase the size of juries. When you are dealing with juries, it's very subjective. That's one reason why I have really restricted our consideration in some of those areas to remittitur and additur because my only arugment there is that you ought to have the same remedies available that you do on determination on facts in the appellate court. Having the same remedy, you don't argue whether the jury is wrong, right, good, or bad or too small or large. But give a remedy if it is wrong. But again, I think the majority of the Committee felt that the present remedies were adequate.

Mr. Maier: It still isn't clear to me how my defendant in a criminal case gets an honest-to-goodness probable cause hearing before the grand jury.

Mr. Norris: If you want a public probable cause hearing then our recommendation won't do anything. And if the prosecutor does not do anything, which he isn't going to do, statistically in most of the cases, then you will have your preliminary hearing which will be very similar to the one you have today with one added feature and that is the prosecutor will have to present exculpatory evidence he is aware of. That's one small change. If, on the other hand, the prosecutor opts for a grand jury, he is going to get it, just like he can today. You then get two new added features that tend to make it more genuinely probable cause. One is the requirement for the prosecutor to give the grand jury exculpatory evidence, and second that if your client is called as a witness, you can represent him inside the grand jury room.

Mr. Maier: It seems to be like giving a drowning man a drink of water.

Mr. Norris: I would only say, Dick, it's better than what you have got today.

Mr. Maier: I don't really think it is. I think it's the same thing.

Mr. Norris: Alright. It's a matter of degree. If they go directly to the grand jury today, you don't get a preliminary hearing. There is no burden to present exculpatory evidence and you don't get to represent your client inside.

Mr. Montgomery: In the preliminary hearing, is there an appeal for a court review of the judge's determination of probable cause?

Mr. Norris: Now?

Mr. Aalyson: The appeal is the trial.

Mr. Montgomery: And of course there is none in the grand jury hearing.

Mr. Guggenheim: How does the defendant know if the prosecutor has presented exculpatory evidence to the grand jury? How can he bring up the question as to whether it has been presented?

Mr. Norris: He is obviously going to have a right to get the grand jury transcripts.

Mr. Montgomery: That's a secret.

Mr. Aalyson: If he learns of the exculpatory evidence, and can establish that the prosecutor also knew of it.

Mr. Guggenheim: If he wasn't called or wasn't there, he wouldn't know what was said.

Mr. Aalyson: If he learns from another witness that that witness told the prosecutor, but he may not.

Mr. Guggenheim: If we require the prosecutor to give it, then you are giving some right to the defendant, how can you enforce that right?

Mr. Norris: I think we have just given them the right to enforce, is the answer.

Mr. Montgomery: There is no review that the prosecutor ever presented a probable cause case.

Mr. Aalyson: No, not a probable cause case.

Mr. Montgomery: Just a duty that he must.

Mr. Norris: Let me see what language we came up with on exculpatory evidence.

Mr. Maier: If you have the prosecutor or whoever is representing the state and you have them in municipal court and you have them in a preliminary hearing, whatever evidence they are going to put on is going to be publicly recorded and is going to be subject to cross-examination and the defendant is going to have the right to make a statement not under oath if he wants to. That is a probable cause hearing. But you just don't satisfy me that you are going to get that through the grand jury.

Mr. Norris: And I can't satisfy you that you will. If we have to protect the secrecy of the grand jury and the evidence or testimony from the prosecutors, isn't that absolutely essential in some regards, then you obviously can't have the same kind of hearing. One other way to do it Dick, is to start the other way, and this is the way we started at one time, and that is you always have a grand jury unless one party opts for the preliminary hearing. You can see why we reversed it, because statistically now and even more if this were adopted you would go to 95% or 98% by information.

Mr. Montgomery: Alan, you have just addressed yourself to existing or prospective criminal cases that a prosecutor has in mind. Have you thought about a prosecutor running wild going on a big moral campaign throughout town and using the form of the grand jury deciding that he wants to look into his neighbor's activities, and the grand jury's going beyond that scope of the act?

Mr. Norris: I don't think we have created any more risk of that with this proposal than there is presently. The protection there is the ballot box.

Mr. Guggenheim: Does the preliminary hearing take the form of a regular trial?

That is, is the defendant there with his lawyer and is there cross-examination, can he testify and so forth?

Mr. Norris: It's a one-sided hearing in the sense that all that is trying to be established is that there is probable cause and so the defense doesn't put on the testimony. But they can cross-examine.

Mr. Maier: You wouldn't put on testimony if you could. It has been so effective at getting at the heart of the state's case that if the prosecutor is trying to hide something, the first thing the police prosecutor or the city solicitor is going to do is call the prosecutor and say "This guy has asked for a preliminary hearing. Quick, let's get a secret indictment!". That will happen in every sensitive case in which you have asked for a preliminary hearing.

Mr. Norris: We concluded that we wanted to avoid the duplication as much as we could and that was our primary goal, and I think most people would agree with that. But then you still have a small number of cases where you can't get rid of the grand jury.

Mr. Fauver: Why not have the grand jury proceeding the same as the probable cause hearing at the public level except that it is private? What were the reasons for not having the defense sit in with all of the witnesses having an opportunity to cross-examine, just as though it was a preliminary hearing in public, except that it is in private?

Mr. Norris: The secrecy aspect of it.

Mr. Fauver: The press is not there. The press is available at the probable cause hearing and not at the grand jury hearing.

Mr. Norris: You can argue that you can swear a body to secrecy, but I guess that would not be very convincing either to a prosecutor who needs secret indictments for a drug ring or that kind of thing or to a defendant who doesn't want anybody to find out that he was charged with something. I guess that wouldn't be very convincing. So we moved away from secrecy a tiny bit, but I admit hardly at all. That seemed to be about the only valid reason that we had to keep the grand jury. Everybody seemed to agree that you had to have a secret probable cause hearing in these limited areas.

Mr. Fauver: Was any consideration given to limiting the kinds of cases where the prosecutor could move in that direction? In other words, where he makes a special finding that there are other reasons for a secret proceeding.

Mr. Norris: We first started out by saying that all murder cases should go to the grand jury. We had, I think, treason, which is in the present Constitution, and decided that that doesn't make any sense. Why is that any different?

Mr. Carter: You get into the laundry list problem.

Mr. Norris: Yes. We did not consider seriously some kind of a determination or finding which would be made by a prosecutor. I don't know that that would mean much.

Mr. Montgomery: You are just talking about the one side of it, but I have been a country prosecutor. The power to indict is an awesome power. The power to bring a criminal charge against another person is so awesome at times that you want some company. It's just too much at times, if you are wrong you can ruin somebody or their family. And there are times when you want to go in there in secret and you want to bare your soul and if the community agrees with you and so forth then you feel more comfortable with it. It's not all one-sided.

Mr. Norris: No, I agree with you. You talk about sharing the burden, and the secret proceedings.

Mr. Fauver: But the secrecy is the press, the public, it's not the defendant. That's the difference.

Mr. Montgomery: There are times when you will inform a defendant that he is being investigated and I have had defense counsel ask their client to appear and talk to the grand jury and try to keep them from finding probable cause.

Mr. Aalyson: The organized crime type of thing where your big fear is that the potential accused will escape, take off if he hears anything. They have no compunction about leaving the scene.

Mr. Carter: I can see this is a matter where non-lawyer members of the Commission would not have much to say. We have not had an opportunity for a public hearing on this, so I would suggest that we schedule this for a vote at the next Commission meeting, and give the public an opportunity to be heard at that meeting in case they wish to do so.

Mr. Norris: Mr. Chairman, this is a very important and complex area, and the experience is going to vary almost from county to county, and large and medium cities. If staff could make an effort to mail a copy of this draft to organizations that we know would be interested. I'm thinking of the trial lawyers associations, the police, the sheriffs, the prosecutors, any defense organizations, the bar associations. The more people we can get shooting at it, I think the more comfortable we would all feel.

Mr. Carter: That's a good thought. We will get that out promptly then and that will be another reason to delay any further consideration until the public hearing when these people will have an opportunity to be heard.

December 7, at 11:00 was agreed on as the date of the next meeting, which will be in House Room 11 of the State House in Columbus.

The meeting was adjourned.

Ann M. Eriksson, Secretary

Richard H. Carter, Chairman

Ohio Constitutional Revision Commission
December 7, 1976

Summary

The Ohio Constitutional Revision Commission met on December 7 at 11:00 in House Room 5 in the State House in Columbus. Members in attendance were Richard Carter, Chairman; Senators Butts and Gillmor;Representatives Fauver, Maier, Norris, Stinziano and Thompson and Messrs. Carson, Huston, Montgomery, Skipton and Wilson. Ann Eriksson, Brenda Buchbinder and Julius Nemeth were present from the staff.

The meeting was called to order by the chairman and the minutes of the November 8 meeting were approved as mailed.

Mr. Carter: You have in front of you a letter from the Ohio Council of Churches about what's going on in other states with respect to apportionment. I thank the council for making this available to us. I'm sure it will be helpful to us. We have one pending roll call on the matter of Article VII, Section 1 which we have discussed at the last two commission meetings, and the committee spent a lot of time on it. The results of the roll call thus far are 17 in favor and 8 against the recommendation. I don't know if anyone here would like to vote that did not vote on that. Skip?

Senator Gillmor: I thought I was recorded as voting negative.

Mr. Carter: Do you wish to be recorded one way or the other?

Senator Gillmor: I don't know that it would make much difference. From my hazy recollection, I think I do. But, it won't make much difference because we aren't going to get the 22 anyway.

Mr. Carter: As you know we need a 2/3 majority, and with 31 members of the commission, that means 21 votes. We have 17 in favor and 8 against. If no one has any objections, the chair will declare this motion did not carry by the necessary 2/3 and that will be that. I do understand that a minority report will be filed. There are enough people on the commission in favor of this, who feel strongly enough about this that a minority report will be written. I invite anyone that wants to participate in that minority report to make themselves known so that you could be included in it. Unfortunately, the chairman of that committee, Craig Aalyson, could not be here this morning, and made it known at the last meeting that he could not attend today. I'm sure he will be a participant and I think some of the other members of the committee and other members of the commission will wish to do so.

The voting on Article VII, Section 1 was as follows: "YES" Senators Butts, McCormack, Mussey; Representatives Fauver, Norris, Stinziano and Thompson; Messrs. Aalyson, Carter, Clerc, Cunningham, Fry, Guggenheim, Mansfield, Mrs. Orfirer, Mr. Unger and Mrs. Sowle. Those voting "NO" were Representative Maier; Messrs. Bartunek, Carson, Heminger, Huston, Montgomery, Skipton, and Wilson. Mr. Russo passed, for a total of 17 yesses, 8 nos, and 1 pass.

There are two other things that are left for the commission before we finish our task, the matter of apportionment and districting, and Alan Norris' committee on juries. He will be in this afternoon as I understand it. We will discuss the apportionment and districting question this morning and the jury questions in the afternoon. To my knowledge, this will then complete the work of the commission. We have invited any member to present any other matters that he wants to take up before the commission, and none have been forthcoming. Is there any objection to saying that when these two matters are finished, the formal meetings of the commission will be finished? Of course, the other matter remaining is to prepare the records of the commission and to make sure that people that are interested in

constitutional change in years to come will have the benefit of the research and deliberation of the commission and all the things that were involved in our work.

With respect to the apportionment, we do have a number of people here. John McElroy is here from the governor's office and said he would like to make a statement or to participate in the discussion, and I think there may be others as well. This would be our public hearing on this question, in accordance with the commission's practice. I think it would be appropriate first of all, if we were to hear from our guest. Is there anyone else who would like to be heard? Well, John, if you would be good enough to give us the benefits of your thoughts, we would appreciate it.

Mr. McElroy: Thank you, Mr. Chairman, for giving me the opportunity to speak to the Commission. I would like to say that I am not here for the governor. I am here in a personal capacity and also as legal counsel to the Republican State Central Committee. I have past connection with apportionment as executive assistant to Governor Rhodes during his first two terms and two months of this term. I have also been counsel for people who have tried to be involved in litigation with the present apportionment. I have the dubious distinction of being held in contempt of court for a time with respect to this matter. My present interest is as a citizen of Ohio to see that we preserve the best kind of democratic institutions we can. I think the present article in the Constitution regarding apportionment is a good article, as it stands. The only problem is that people cheat and I think the thrust of the efforts of this commission is to find out what mechanism and what structure of government will minimize cheating. I'm pleased to see that in the recommendation of the commission that you want the present standards to remain. The apportionment that is now in effect in Ohio violates the standards. That is because they were deduced by cheating under the protection of the federal courts. I see no great merit in going to a new type of commission. I think the problem with apportionment is to identify the people who are responsible for it. Under the constitution as we have it now, it is the governor, the auditor of state, the secretary of state and other people chosen by the legislature. But the people actually performing the apportionment are the anonymous staff members. That's where the dirty work goes on. So I think some amendment to provide for appointment of staff, recommendation of staff, binding of the staff people who participate by an oath of office to do an apportionment according to law. The apportionment has been made by people who owe no particular allegiance to the government of Ohio. So I think a mechanism is needed to prevent this. Then, I would like to see a provision that instead of simply ordering an apportionment into effect, that the apportionment plan first of all be proposed and exposed to public view and hearing and criticism of the democratic and republican parties and anyone else who wants to offer criticism. As you go through making an apportionment, there are a lot of cases where you can make choices as to which way you will go. But if you follow the provisions in the Constitution, the number of choices is not going to be very large. You may find in some cases where a hard choice has to be made. But I think this sort of thing ought to be exposed to public view, the press ought to have an opportunity to comment, so when the apportionment is finally ordered, the public knows what is going into effect. I think the way it is now, it is written off in the public mind as so much politics. But it is a little bit worse than that. They have cheated but been protected, and we need a mechanism to prevent that. It is important to try to find that mechanism. I think it should be exposed to a public hearing. Your proposal to place congressional districting under the same procedure I think is sound, but the General Assembly probably won't buy that. Maybe you could take some action by initiative petition. Thank you very much.

Mr. Carter: Thank you Mr. McElroy. We invite you to stay and participate further in the discussion. I would think that the Commission might wish to address some questions.

Mr. Montgomery: Do you have any concrete proposals, any specific language or recommendations that you would like to suggest?

Mr. McElroy: If the commission is going to have time, I would like to submit some language to staff.

Senator Gillmor: John, I don't quite follow you on this identification of the staff that is involved to bring this out into the open, and I just wonder how you are going to accomplish that.

Mr. McElroy: It's a matter of selecting the right people. Now, if you are going to have a commission, as you were proposing, of people who are not public office holders, you want to be sure who you have on the staff. I don't know if you contemplated the place where you are going to recruit that staff. But if you recruit from the political party headquarters or from the governor's office or from the secretary of state's office, you are going to wind up with exactly people who are in no way constitutionally responsible for apportionment. It is a pretty technical job. The staff needs to be professional.

Mr. Carter: Do you believe that the question of the staff and the question of public hearings, what your thrust is is to get this in the public arena so the process can be seen and observed. Do you feel that these are matters that should be in the Constitution?

Mr. McElroy: I think we should, because I think that if we have people in the parties with good will that the present language would be sufficient.

Mr. Carter: In other words, you feel that some comment about the way the staff operates and a requirement for a public hearing should be in the Constitution?

Mr. McElroy: That's right. I think that's implicit in your question, if you don't require it in the constitution, you are going to make it statutory.

Mr. Carter: Yes.

Mr. McElroy: We have not succeeded in recent years in accomplishing these things by statute.

Mr. Carter: Let me ask you this question. Under the sunshine law, which I am not familiar with in great detail, wouldn't that already be a requirement under Ohio law?

Mr. McElroy: Except that there is no opportunity for a hearing on it. I think the mechanics of making an apportionment in the past has been that the republicans and the democrats usually wind up producing one or more apportionment plans. Last time the secretary of state had his staff produce a plan. The thing is that there are just so many packages and the committee is going to choose the best package from the standpoint of the majority and just buy the whole package.

Mr. Carter: Why do you feel that the present arrangement of the five on the apportionment board, which, as I recall, consists of the governor, the secretary of state, the auditor of state, and persons selected by the leader of the house and the senate; why do you feel that that is better than what is proposed by the Commission?

Mr. McElroy: I don't feel very strongly about this. It seems that the power you set up initially is part of the checks and balances between the executive and legislative branch to set up some apportionment.

Mr. Carter: In other words, your feeling isn't very strong on this question, but you don't feel that there is an important need for change?

Mr. McElroy: No, I don't have the confidence that you seem to have that getting it

one step removed from politicians is the way to work on this map. I'm sure it works both ways. We need people who are more responsive to carrying out their constitutional duty. Because I have lived too long not to know that you can choose or appoint any kind of person you want, but you are not necessarily assured that you are going to get the person to be objective.

Mr. Carter: If it could be obtained, would that be a pretty good thing? Would you be in favor of the election of an apportionment commission?

Mr. McElroy: No I think the key things are staff and public exposure.

Mr. Carter: So the make-up of the board doesn't bother you as much as these two other items?

Mr. McElroy: No, I don't think elected officials are going to do it any more than appointed members of the commission are going to. It's still going to be done by staff.

Mr. Carter: I'm a little puzzled as to how you could incorporate your thoughts with respect to staff in the Constitution.

Mr. McElroy: I don't know whether we could write anything like that until we start writing.

Mr. Carter: I like the idea, frankly, of a public hearing being a requirement, if that is not already required under law.

Mr. McElroy: Maybe we could do it half way, and by constitutional requirement direct that the legislature require that.

Mr. Carter: Our recommendation has a statement that all meetings should be open to the public, but I guess it wouldn't be mandatory that they have any meetings.

Mr. McElroy: As far as I am concerned, the meeting is not a meaningful thing.

Mr. Carter: It's a very interesting point. Do any other members have comments?

Mr. McElroy: I'm sorry I didn't address the commission earlier.

Mr. Montgomery: I would like to invite Mr. McElroy to submit some material. He has had more experience than any man that I know of.

Mr. Carter: Would you be willing to submit something to the Commission?

Mr. McElroy: I'd be glad to put my thoughts down in a more organized fashion and give it to staff.

Mr. Carter: Yes, I think that would be very helpful. It's probably going to be the last matter before the Commission, so I think we would have time to do this if it were done fairly promptly. We are going to have another meeting, probably in February. So that this could be done. The committee will perhaps feel a need to act on this matter. And of course, our committee meetings are not only open to the public, but any member of the Commission that had an interest in this matter would be invited to attend. So I think maybe if we call a committee meeting in January to consider what Mr. McElroy has, and perhaps any others. I know you, Mr. Fauver, have an interest in this question.

Senator Butts: Could I ask a question of Mr. McElroy? Were you asked what you perceive would happen with respect to the seventh member if this were instituted?

Do you think that such a person would be selected by the six?

Mr. McElroy: Rather than letting it go to lot, I think probably they would choose somebody. But I still have the same reservations about getting the job done that way.

Senator Butts: So you are in support of the concept of basically as it is here?

Mr. McElroy: I don't have as much criticism of it. I don't think it accomplishes as much as you think it does.

Mr. Carter: Senator, as I understood Mr. McElroy's comment, his principal thrust was not what we have in here, but really it is the point of the importance of staff, and he also made a very strong recommendation that public hearings be required as a part of the deliberative process. Is that correct?

Mr. McElroy: That's correct. I think public exposure of the plan could very well bring out that certain districts could, instead of being cut this way, could be cut that way and still conform to the standards in the Constitution. There are choices, but you ought to do it as honorably as you can.

Mr. Carter: I think we would all agree to that. Any other questions of Mr. McElroy? We again invite you to stay with us during the discussion. Does anyone else wish to be heard on this question? Okay, we will then proceed with a discussion of the matter in the Commission itself. Mr. Fauver, you were going to give us some thoughts.

Mr. Fauver: Yes, and I enter this field with trepidation. It would seem to me that the approach that is involved here in the committee recommendation,if the six people are unable to agree on the seventh person, it seems to me that you are guaranteeing that there will be a partisan approach, in the way in which apportionment is carried out. We all have our own thoughts as to the likelihood of that taking place. At least it is a possibility based on this presentation. It seemed to me that we at least ought to try to go a little further to see if we can't set up a procedure that would minimize that particular possibility and maximize the chance of a non-partisan solution. The kind of thing I came up with was that the six members of the commission could not be political office holders, either in a public sense or political parties, could not have held those positions for three years prior to service and could not hold it for three years after. And if those six people are unable to agree, then the chief justice would appoint someone who would also fit that role as far as public involvement. It would seem to me that that is worth considering at least as an effort to establish a non-partisan approach. I think it is not unlike what has been done in New Jersey. So that is the essence of the proposal that I had in mind. I had some specific language which may or may not be appropriate to offer at this time.

Mr. Carter: You are suggesting that the six members, presumably three from each party, be selected by another method, other than was outlined in the commission recommendation?

Mr. Fauver: I didn't have any strong objection to having them appointed in that fashion, but they had to at least not have political ties.

Mr. Carter: And then what you are suggesting is that if they cannot agree that it go to the chief of the supreme court. This was discussed in the committee.

Mr. Huston: We considered referring it to the chief justice, but you find that judges do have some political affiliations and that you are going to bring politics back into the picture again and this is the reason that we went to the selection by lot. We felt that we could get a compromise from the six members rather than to

take a chance of getting someone selected or nominated by one of the commission members and possibly having someone on the commission that would be biased, opposite what these people really want. So we provided for selection by lot, feeling that it would push people into making an objective selection. We were trying to get away as much as we could from the partisan involvements.

Mr. Carter: The problems that we foresaw is that if you have three republicans and three democrats, and the chief justice is either republican or democrat, it makes no difference, let's assume he is a democrat, that there would be no incentive then for the three democrats to agree with the three republicans on the seventh man. Because failing to agree, the chief justice appoints someone and he is a partisan of their party so it would destroy the incentive of selecting a bipartisan objective tie-breaker.

Mr. Fauver: The point that I was making was that the chief justice would clearly be in the spotlight on the situation, and maybe there would be some compulsion for him to exercise a non-partisan choice. Somehow, I get more comfort out of that than I do with the possibility that the six highly politicized people are going to agree.

Mr. Carter: We hoped that the uncertainty of the seventh man if they didn't agree would be helpful in getting them to agree on someone who would not be too objectionable.

Mr. Wilson: That's one I will disagree with, as I said at the last meeting. I feel that one chance in two, by lot, of getting your man, is better than zero chances in zero of appointing him as a concensus. You can't get away from having politics involved. There was a consensus on the committee that this choice would force the people to make a selection and I think it would work exactly the opposite way.

Mr. Maier: I think it is fairly obvious that we are hung on the horns of a great big dilemma. What is a partisan political matter, and has been historically, what we would like for some very legitimate reasons to take out of the political arena. I'm thinking that may not be possible. I was thinking of what Mr. McElroy said and I interpreted it as not worrying so much about whether you really get a non-partisan plan but exposing it to public light. Maybe that is really what our purpose ought to be.

Mr. Carter: I think we have Mr. Fauver's suggestion that the six members would not have held public or political office or appointment for three years. Do you have any reaction to that?

Mr. Maier: I think that removes it, perhaps, in degree only from a partisan, political matter. It gets it away from direct participants but I don't think it takes it out of the political arena.

Mr. Carter: You are dealing with political realities.

Mr. Montgomery: I just can't, on reflection, accept the premise that the whole thing rests on, and that is, that politics is bad and the people who participate in it cheat, and so forth. I know there is some cheating, there is cheating in everything. It seems to me as a constitutional commission, that we shouldn't ever do anything that is going to tear down the integrity of the political process. And the more I see this and the more I think about it, I don't think we should change it unless we can come up with something that is much better than we have, and I don't think we have something that is much, much better, because there is no way that we are ever going to take the politics out of it, and I don't know that we should. As Mr. McElroy suggests, if we could get the press and the public working on this thing, it will keep them honest.

Mr. Carter: You are saying that you agree with Mr. McElroy, then?

Mr. Montgomery: I think we ought to leave it alone, and if we can, inject some sunshine on it. That's a better idea. The whole idea of taking it out of politics is naive in my opinion and I just don't think we can do it.

Mr. Wilson: I have one more idea to throw out here and this is if we are trying to create fairness or equality, then let's put it in the Constitution that whatever party is in charge at one reapportionment period shall be in the minority at the next period!

Mr. Skipton: If you want to get it out of state politics, why not say it has to be done by somebody that is not even a resident of Ohio?

Mr. Wilson: Or a non-registered voter?

Mr. Skipton: Or not even eligible to vote? Politics is politics, and doesn't have to be republican, democrat, or anything like that. It can be personal politics. I can't imagine anyone approaching this problem no matter how they are selected, that isn't coming with biased points of view and pre-determined ideas about what it should be like. Any thought that by some method of selecting people you are going to avoid those things, sure, you may rule out those people that are most directly affected by the decisions, but I'm not sure how you could do that. Because what groups want to serve on this, anyway? The representatives of groups that are either lobby groups or they are representatives of special vested interests of one sort or another. I don't know how you are going to find anybody that wouldn't be political in some way. I think it is a vain pursuit.

Mr. Carter: In other words, if you wanted political neuters, you would end up with nobody.

Mr. Skipton: That's right.

Mr. Fauver: Is there anything in the present statutes that would allow a referendum on the apportionment plan?

Mrs. Eriksson: No. You can only have a referendum on a law.

Mr. Fauver: My experience with apportionment, once at the state level and once at the city level, is that at the time that it happens, the parties are disposed to forget about appealing to the public in some broad sense. They pick hard-nosed positions in order to accomplish the maximum advantage for themselves. If they take some flak, they take it. Because in the long run, it doesn't hurt them badly. And it is better to have the votes that you can pick up by doing this. I have seen it happen a couple of times. What we are really saying is that the public outrage objecting to something like this is not enough, and therefore the parties can afford to take that position. If you take that view, then your ideal position is a public that is sensitive to the thing, and the public aspect of hearings on this thing would help. I'm not sure it takes us too far. There may be some who are upset by it and perhaps they should be able to appeal. It sounds like agony but at least there would be a way in which you could have public reaction to the plan.

Mr. Carter: I wonder how this would work. I am in fact intrigued by this thought. If you have, in effect, a referendum provided for in the Constitution, the referendum would be on a particular plan, I would assume. There would be no opportunity to do other than accept or reject that particular plan. It occurs to me that we have a time problem among other things on all of this.

Mr. Wilson: It would put you right back in politics, because if there was a statewide referendum the voters who are registered democrats would vote for the democratic plan, and against the republican plan and vice versa. You are not removing politics,

you are just inviting all the partisan voters over all the state rather than just a few. I'm not just referring to politicians, but referring to registered voters of either party to oppose or support a certain plan.

Mr. Fauver: At that point basically what you are saying is there aren't enough people concerned about the validity of the plan as opposed to the political implications, at which point maybe we should just let the party members make the decision.

Mr. Carter: Nolan, do you want to give us the benefit of your thoughts?

Mr. Carson: It's a tough subject. I was impressed by John's observation. In my experience there is nothing that keeps people more honest than requiring an opportunity for public comment. I think most people who serve on these things are concerned about their reputations and how their decisions would be viewed by the public. I think that if there was something built in to require publication, as John is suggesting, of various plans, far in advance of the time that they are acted upon, so that there could be hearings and public comment, I would think that that would go a long way toward assuring that there would be some more objectiveness put into it. I think it should be political. I think it is a political subject. I don't think the Supreme Court ought to be involved at all. I think this is one area where the chief justice should not make an appointment. I agree with John also that I am inclined to think that there will be a chairman selected. I think the stakes are so big, I don't believe people would take the risk of one in two. I think if you had a chairman selected that was agreed to, I trust that we are talking about the two political parties here, not necessarily the individual members, I think this would go a long way toward adding some objectivity. I am serving on a commission where the chairman is selected in this fashion, the Ohio Elections Commission, and it happened to work there, and there is an immense amount of pressure put on the person that is selected to be objective.

Mr. Carter: So the committee's thoughts make a little sense to you as far as the structure of the commission is concerned?

Mr. Carson: Right.

Mr. Carter: It seems to me we can agree on a couple of things. I have not heard any disagreement that the congressional election should be handled on the same basis as the election to the legislature by the same body, whoever that would be. Is there disagreement to that, Senator?

Senator Butts: Yes. I said at the last meeting that I felt that there should be a distinction between the legislative apportionment and the congressional apportionment. There is a feeling on the part of a lot of legislators, I think, that the Congress acts so entirely alone, and that the one access point that the legislature has is drawing their districts, and I don't think we want to abandon that. So there is one point where they have to acknowledge that state legislatures exist. I think that is something that a lot of people want to preserve, so that the legislature itself would be recognized as an entity in relation to the congressional decision making process. Right now they can make decisions free of the legislature. Redistricting is the only time they have to answer to the people because they have to come back and be elected by the voters of the state, but they don't have to answer to the legislature.

Mr. Carter: You are speaking as a legislator at that point. Do you think that that is in the interests of the people in the state of Ohio?

Senator Butts: Yes. I don't know if the Council of Churches information contradicts it, but the report made by the committee indicated that only one other state combined these functions. And I think that probably means that it is left to the legislature

in every other case. And we are setting a precedent. I don't think we should have congressmen be totally independent. Obviously, we have a tie to them because of all the federal funds we have to appeal to them for. So they have access to us in a number of ways because of their powers in terms of providing fiscal resources. But in return, our having access or leverage over them, as I said, is virtually non-existent. I like the idea of coming up with a not necessarily non-partisan, but an objective and responsive seventh person for the commission. I just don't know where we get that yet. I wish we could. I agree with Mr. McElroy's point that there is no way you are going to have a nonpartisan person. He has been partisanized and politicized by virtue of that appointment, no matter where he came from. How are you going to come up with the seventh person? I think that the minority party would always opt for a one in two chance of getting their choice to be the seventh person.

Mr. Carter: Well, I guess perhaps we don't have agreement on what I thought we did then. Is there any further discussion on the question of including the congressional?

Mr. Montgomery: I like the idea of a little check and balance, and the idea of states rights and protection of the public rather than a neat scheme which would be what is nice but would it really do the job for the people? I think there is something to that.

Mr. Wilson: One way we could time them together is a mechanical thing - if the districts are probably drawn for the state legislature you have already solved the one man one vote bit and you at least know where people are, a head count. And you can use that for a fair mechanical basis for congressional redistricting. You wouldn't solve exactly the numbers problem but at least you have got areas of population.

Senator Butts: Mechanically that has to be done necessarily for redistricting anyhow. In a unit much smaller than a state representative unit, in fact, even smaller than a precinct, or at least as small as a precinct. So that mechanically has to be done and I think is available on tapes now and there are procedures for keeping it updated. But it would seem to me that we could use even smaller units than a state representative unit or a state senate district in order to make it conform to the different number, the 23 congressional districts.

Mr. Carter: A number of authorities believe that gerrymandering in the broad sense is not limited to the numbers. There are ways of doing it and still be within the numbers routine. Some of the authorities felt that the numbers game was counter-productive in some respects. But that's something I don't think we can handle. That is a matter of judgment and you can't do that in the Constitution. I think you all agree that the criteria in the Constitution, the basic criteria are about as good as you can come up with. Don, you affirmed that, and I have not heard anyone indicate any thoughts of changing those criteria.

We have three issues: congressional districting; the make-up of the commission or board or whatever you want to call it; and now we have a third element injected by Mr. McElroy which I think is accepting a great deal of acceptance, making sure we have all of the sunshine possible in the situation. Is there any disagreement on the third point? Senator?

Senator Butts: I like that idea, too. I have a question, whether that should be done by legislation as opposed to putting it in the Constitution?

Mr. Carter: Yes, I'm sure that is a question. Ann, would you want to comment on the present requirements with regard to the sunshine question?

Mrs. Eriksson: The present Constitution has no provision with respect to public

hearings or public testimony of any type. The present statutues, of course, do require that public bodies have public meetings, and as a matter of practice, I believe that the meeting of the last apportioning board was public, but as Mr. McElroy points out, this does not necessarily mean public input nor that the plan ultimately adopted was exposed to the public in advance so that there would be meaningful public comment on a particular plan. Just having a meeting open to the public is not an assurance of that.

Mr. Carter: I assume that the thrust of the commission is that the idea of sunshine is a good idea. The question then is to what extent it could be incorporated in the Constitution. I think the committee would be glad to take a whack at that question and come back with a recommendation to the Commission on that. Our Common Cause man would like to speak.

Mr. Hetzler: In terms of the sunshine question, our group has recommended public hearings on a regional basis. Mr. McElroy, I think, points out an interesting idea in terms of staff. I attended the last apportionment board hearing that was held, which was under the new sunshine law and was about as far away from a public meeting and open process as I have ever attended. Everything was done ahead of time and packaged and so on. Although it was open to the public it was not really a public meeting, in the sense that the information that was processed itself. So I would suggest assigning a law or constitutional language that deals with hearings, that there also be language in terms of the staff and minutes and any sub-committee hearings and that sort of thing. For example, if there is a staff that prepared the plan or report, that the workings of the staff be open to the public, at a minimum. I like the idea, even further, that Mr. McElroy suggested, that somehow we have an independent staff, to come up with plans, as opposed to the secretary of state's staff, or the governor's staff, or the private firm hired by the political parties. My point is that if you are going to have open public hearings, it seems to me you ought to go the additional step. Again, even a hearing on a regional basis is not going to guarantee public input, as long as all of the information leading up to the hearing is done behind closed doors.

Mr. Carter: How about the legislative service commission? Would they have a role to play? It seems to me a little difficult to mandate to a board certainly in the Constitution as to how they would select their staff or how the staff would be selected for them. Is that practical?

Mr. Fauver: It seems to me, if there is a feeling around this table and I tend to share it that you can't keep politics out of this thing, there probably is no effective way that we can prevent the democrat or republican parties from preparing their own plans and making them somehow available to the commission.

Mr. Carter: As I said at the outset, this whole thing needs a Solomon somewhere, and it is difficult to find. Senator?

Senator Butts: I think that the idea of the public hearings, and your idea that they be outside of Columbus, perhaps, going into various areas...

Mr. Carter: That was Common Cause's proposal.

Mr. McElroy: I don't have faith in a hearing in which the citizens generally are invited throughout the state to appear and submit suggestions. I think this is ultimately going to be decided by professionals, the people who work on a particular plan. I think the thrust is to expose apportionment plans for comment. Then you are going to have the public looking at it and seeing what is going on. As long as you can get some sort of adversary proceeding. I think the adversary proceeding itself tends to get to something that is objective. It gives everybody a chance to study it and see what it does. In practicality, if you have someone looking over the

shoulder of the staff man who is trying to draw the districts, it's like doing a crossword puzzle. If you have a whole lot of sub-divisions of government...

Mr. Montgomery: John, your suggestion on staff was really to have a separate staff, not a non-political staff.

Mr. McElroy: I don't think that you could get away from politics nor that you should get away from politics. It's not a sin to be a politician. It is a sin to be dishonorable. I think what you need is competent people whose loyalty is to the concept of an honorable and fair apportionment as mandated by the constitution and whose loyalty is not to one party or another.

Mr. Montgomery: And if you have the secretary of state, who is obviously of one party, you are just leading into more politics than you really need.

Senator Butts: I assume that hearings would be conducted by professionals. My feeling is that if it were held around various areas, that the concentration would be on the particular problems of that particular area which may not be just strictly democrats against republicans because there are democrats and democrats and democrats who have various ideas about how to draw districts just as republicans have different ideas. The problems of the people may be just geographic. Republicans and democrats might like it this way because it serves their ends, but we don't want our township to be connected with that area, we want to be connected with this area. That kind of thing would tend to come out.

Mr. Carter: Mr. Noragon would like to be heard. You are identified with the Legislative Service Commission?

Mr. Noragon: I am with the Legislative Service Commission but I am of such recent vintage that I do not think that I can speak very well for the commission. I can speak, perhaps, as a student of the subject. As far as the staff issue is concerned, and as far as the Legislative Service Commission being the staff that would engage in any kind of map drawing, I'm not sure how Mr. Johnston would react, but I think he would perhaps be somewhat leary of this suggestion, because as we all know, once you draw a single line on a map, there are political ramifications of such a line, whether I do it blindfolded or with conscious intent.

Mr. Carter: So it destroys the effectiveness of the commission by becoming involved.

Mr. Noragon: The problem is you have to specify guidelines and you have to have criteria. You have to know exactly what it is you are trying to build into an apportionment plan. If your criteria are clearly expressed, identifiable, defined, measurable and so forth, then an objective commission, perhaps, could follow those guidelines without any concern as to what the political consequences would be. I suggest that the criteria are not that well established in the Constitution or anywhere else.

Mr. Carter: Even with the criteria, there is a great deal of subjectivity that is still left.

Mr. Noragon: A great deal. I think it could be reduced to some point but it hasn't been thus far. Beyond that, speaking again not as a partisan person, I'm not sure either of the political parties' leadership would desire that. I think there is too much chance element involved in this. Because it could amount to a complete revamping of districts, nothing like what they appear to be now. It would further all kinds of political insecurities, and I don't think anybody desires that, either republican or democrat. I think it is a great task and a very difficult task for any staff without bearing the brunt of severe criticism from one side or both sides. I think anytime you get involved in this you are subjecting yourself to criticism

from both political parties. So you are probably right. It would tend to destroy the effectiveness and objectivity of the Legislative Service Commission.

Mr. Wilson: I would hesitate to see us put in the Constitution any reference to regulation in connection with the sunshine law. I think the sunshine law is a sham. If the parties want to get something accomplished in private, it can still be done. Getting back to what Mr. McElroy has stated, I think we have to try to find honorable people in all positions. I would much rather trust an honest man in the dark than I would a crook in the sunlight.

Mr. Carter: What I would like to do for the benefit of the committee is to come back with the input of this meeting, to have an opinion poll of the members who are here, if you will, on the basic questions that I see are involved. One is the question of the sunshine purposes aspect of it, for identification purposes. Do you think this is a good idea or not to have in the Constitution? Presumably this would mean a requirement for public hearings and an opportunity for the public to participate, and, as Mr. McElroy has said, have a kind of an adversary proceeding relationship.

Mr. Wilson: I'm not opposed to public hearings, but I don't think they would do as much good as we might hope for.

Mr. Carter: Yes. Is there anyone who would disagree with the committee giving some more thought as to how that could be done? Do you all agree?

Senator Butts: Not necessarily in the Constitution.

Mr. Carter: Yes, I understand that. We will give that some further thought. The second question is to whether or not it is advisable to include the congressional districting by the same vehicle that the legislative districting has been done?

Mr. Carson: Let me ask a question on this subject. My recollection of the report is that the legislatures are mandated by statute to district for U.S. Representatives. Is that not correct?

Mrs. Eriksson: It just says that it shall be done "by law".

Mr. Carson: And is it your opinion, Ann, that the plan approved by this commission would comply with the federal statutes?

Mrs. Eriksson: I don't know. It has not been tested because no state has done it other than by the general assembly, other than by the legislative body doing it. So it is a question to which there is no positive answer at the moment.

Mr. Carter: If one interprets the law, the constitutional law as well as the statutory law, I would think this would be okay. I shouldn't speak, I'm not a lawyer, but that is my interpretation. But if when you refer to the law you mean statutes, then there is a question.

Mr. Carson: Another question I had was the present sections of the Constitution which define the procedure for the apportionment don't include anything about districting for congressional purposes. All we are saying here is that you are going to have a commission established with the power to draw the federal districts, but they are going to have to look to federal law for guidelines for this.

Mrs. Eriksson: The committee proposal recommends that the same standards be used in the creation of congressional districts as are used in the creation of house and senate districts, which have to do mainly with preservation of political sub-division boundary lines to the extent possible with some maximum amount of deviations.

Mr. Carson: Have they been written?

Mrs. Eriksson: They are in the Constitution and what this proposal does is say that the same standards would be applied to drawing congressional districts.

Mr. Fauver: Is there anything in the proposal that would require that the congressional districts and legislative districts be coordinated?

Mrs. Eriksson: No.

Mr. Fauver: Could they be or is that a separate decision?

Mrs. Eriksson: It would be difficult because the numbers would not come out right.

Mr. Fauver: Even after this amendment is proposed, there would still be a fix at 99 and 33 which may or may not coincide with the number of congressional seats that are existent right now?

Mrs. Eriksson: That's correct.

Mr. Carter: The committee did go through quite lengthy discussion on making the legislative districts multiples of the congressional districts and finally decided that that was not the best procedure. That was the committee view of the thing. I remember it very well because I was heavily in favor of that and got shot down.

Mr. Fauver: Shot down or dissuaded?

Mr. Carter: Dissuaded. There are some problems involved there. The biggest one is that when you change the number of congressional districts due to the federal census, then that has a backwash on the number of legislative districts. There is a considerable amount of logic that that should not be. And there are some other reasons too. The question before us is whether the congressional districts should be done by the same procedure as the legislative districts.

Mr. Skipton: You say the same procedure?

Mr. Carter: The same entity, if you will.

Mr. Skipton: You have a problem using the same board, the problem is more than it's capable of doing. The process of doing both of these, it usually takes months and months for each. Now you are talking about combining it. I just don't see how one board can do it sufficiently within a reasonable period of time.

Mr. Wilson: If you managed to get the group to agree on an objective seventh person for the chairman, that would be the ideal group to do whatever you wanted to do in the state as far as drawing political boundaries.

Mr. Carter: That was the committee's view.

Mr. Wilson: Other than that, I see no great reason why it has to be the same group, particularly if, as John says, they can't perform their function in that amount of time.

Mr. Carter: Let's go over what we agreed to. First the sunshine, we are going to take a whack at that, I think that's the intent of the Commission. The second question is to the combination of the single entity of the congressional and legislative districts. (Vote: 5 for, 3 against) The third question is the question of whether we should restructure the board (a straw vote showed 6 in favor, three opposed). Thank you very much. The committee will take a whack at this recommendation and come back to the Commission.

The Commission recessed for lunch until 1:30 p.m.

Mr. Carter: We have some people here interested in the report of the Committee to Study the Grand Jury and Civil Petit Jury. Mary Jo Cusack would like to be heard on the workmen's compensation section.

Ms. Cusack: I'm representing the Ohio State Bar Association. At the present time I am serving as the chairman of the Workmen's Compensation section of the Ohio State Bar Association. We have been trying for some time to have the legislature amend the workmen's compensation law, which will soon be the worker's compensation law, to allow appeals on occupational disease cases. Appeals from the Industrial Commission's decisions are permitted in an injury case, but not in an occupational disease case. That is by statute and not by the Constitution. The Ohio State Bar Association has never taken a position on a constitutional amendment which would permit an appeal of occupational disease cases, but when we heard that you had this before you, we felt that I should come over here and bring the thinking of the Ohio State Bar Association as far as those appeals are concerned. There have been a great number of problems and I am not going to go through them at length. I'm sure you have heard them. One of the arguments against permitting such appeals is that there is supposed to be a certain expertise required for occupational disease cases which only the Industrial Commission would have and that no court or jury would have. I don't think I have to tell you that that is ridiculous. Any case that involves injury or occupational disease would require medical evidence that would have to be brought in before the commission or before the board. Certainly the people on the Industrial Commission are no better informed on occupational disease cases than on injury cases. The present chairman of the Industrial Commission has testified before the house committee that he would really prefer that those cases go to court.

As it stands right now, this is the situation we face. Let me take the man who is working for a long period of time and there are a number of fumes there. But on one particular day there are an exceptional number of fumes and he has some kind of attack, which leaves him with asthma, t.b., something like that. The question arises whether or not this is an injury in the course of employment because of this sudden concentration of fumes that occurred on that one day or whether it becomes an occupational disease because he has been subjected to this gas over a period of time. Most attorneys would prefer to file it as an injury case because right now he can go to court if he loses on an injury case. He can not go to court on an occupational disease case except on a mandamus action alleging that the Industrial Commission has abused its discretion. Let me place this example in Richland County, Ohio. My appeal from the Industrial Commission on an injury case must go into the common pleas court in Richland County. On the contrary, any mandamus action filed against the Industrial Commission for abuse of discretion in the event it is an occupational injury must be filed in Franklin County. So I could end up with a common pleas court or court of appeals decision in Richland County saying we do not believe this is an injury, but we believe that it is an occupational disease and should have been filed as an occupational disease, and bring that same case into the court of appeals in Franklin County as an occupational disease case brought on mandamus that the Industrial Commission has abused its discretion, and have them take the reverse approach and say they are not going to allow this as an abuse of discretion because we feel it is an injury case and should have been appealed. If the Supreme Court has refused to review my injury case, it could very well come down with two different decisions from the Supreme Court particularly if the make-up of the Supreme Court has changed by the time you get the second case into court. So as you can see, a person who has obviously suffered some disability as a result of his employment is perhaps left out without any benefits because it really is on the borderline between an injury and an occupational disease. Basically, we are getting different results in different counties and no opportunity to have just one decision the way the law is right now. I think both of these matters require the expertise of the court and

should be permitted to be appealed to the court, and if that can be accomplished as a constitutional amendment we will support it. I would be happy to answer any questions.

Mr. Montgomery: What is the law in Indiana and Michigan for example? Do they allow appeals to superior courts?

Ms. Cusack: I honestly don't know.

Mr. Montgomery: Did the constitutional amendment when it was first established provide specifically for appeals?

Ms. Cusack: The Constitution says nothing about appeals. The injury case is appealed to the common pleas court, and then it would probably be appealed to the Supreme Court. But for occupational disease cases they can not be appealed to the common pleas court. That is statutory.

Mr. Montgomery: That gives one case an awful lot of attention doesn't it? You give him a referee,you have about six steps in the determination, and it would seem to me to be an awful lot of review.

Ms. Cusack: The workmen's compensation law is going to be changing after January 17 as I am sure you are aware. The problem is that now the Industrial Commission handles occupational disease cases differently than they handle injury cases. Another thing is if you file it as an injury case, the thing that most attorneys will do to protect their client is to file both an injury and an occupational disease case. And we have gotten all kinds of problems because they will say, make up your mind, which one is it? Well, when we make up our mind and we are wrong, then our client is out. If we make up our mind and the court doesn't agree with us or the Industrial Commission doesn't agree with us, but we don't get them into court at the same time, we may have contrary decisions. Because the only way to get an appeal on occupational disease is to claim that there is an abuse of discretion by the Industrial Commission, which is very difficult to prove. The Supreme Court has not be sympathetic about cases charging abuse of discretion. Frankly, they are not too interested in workmen's compensation. One appeal that came down from the Supreme Court indicated that they prefered not to hear any mandamus actions.

Mr. Montgomery: That's not right. They should either both be appealed or not.

Ms. Cusack: We feel that they should both be appealed.

Mr. Huston: Isn't it true that the present constitutional provision with regard to workmen's compensation is really implementation authority. Does not it say "laws may be passed"? It provides that the legislature can create a workmen's compensation board and provides that the employee's comon law right are abolished and their rights under the Constitution are, you might say, taken care of by workmen's compensation, as actually enacted by the legislature. It says "laws may be passed establishing a state fund to be created by compulsory contribution by employers and administered by the state." It goes on to say that laws may be passed establishing a board which may be empowered to classify, etc. This is not a limitation provision. Do you think we should put into the Constitution the limitation of the constitutional provision itself? The way it is set up now, the legislature has the entire responsibility for establishing a workmen's compensation commission or an industrial commission and also for establishing the rates for employers to pay, etc. This particular amendment puts into the Constitution a right, does it not? Which I believe the Constitution permits the legislature to do today. Actually this provision of the Constitution to my recollection was established when the courts held workmen's compensation laws invalid. As being unconstitutional as depriving workers of their rights. And they had to establish an implementation provision in the Constitution.

The Constitution actually gives the legislature the right to implement a workmen's compensation plan, and to me that does not go into whether or not they have the right of appeal on various areas. That seems to be the legislature's function.

Mr. Norris: Mr. Chairman, I don't think establishing a right in here really does violence, that the rest of the constitutional provision goes on and gets probably just as detailed as this talking about procedure and powers and things like that. There is already a lot of detail in the provision. One of our committee members, who practices extensively in the field, felt that there ought to be a right to a jury trial in an appeal. It had been tried through the legislature before and did not pass. He had the strong feeling that it ought to be included in the Constitution and the members of the committee were unanimous, as I recall, in supporting that. It is a basic kind of a right and I guess if you think there ought to be a jury trial you might as well put it in the Constitution. If you don't think there ought to be one, then obviously you should leave it out. It doesn't offend me to see it in the Constitution. I think it is a question of whether you think there ought to be a jury trial, and if you do, I think the place for it is in the Constitution.

Mr. Huston: Why hasn't the legislature provided for it?

Mr. Norris: Mr. Chairman, my guess would be that this is a case of effective lobbying over the years. It tends to be an issue that would gather special interest support on both sides.

Ms. Cusack: About the lobbying, when the worker's compensation law passed the last time, it was supposed to be a revision of the workmen's compensation system. It was in there as a major change. The number of lobbyists interested was overwhelming and (I found this rather appalling) the issue was not whether it was right or wrong, it was "Hey, this is our bread and butter argument and this is what we use to hold against labor so that we can keep the payments low, so that we can negotiate the payments." I found the argument rather hard to swallow, frankly. I think that there are things that ought to be in there because you feel they are right and not because they are a good lobbying point, or a negotiating point.

Mr. Skipton asked about the language concerning appealing a final administrative decision.

Ms. Cusack: The way the appeal is set up now the only finding that any jury would make is that the plaintiff is or is not entitled to participate in the workmen's compensation fund. The jury may not come back and make a finding about the amount of damages. They can only make one finding and that is that he is or is not entitled to participate in the fund.

Mr. Skipton: In other words this provision you interpret as meaning that the jury could not set the amount of damages?

Ms. Cusack: No, not unless the statute is changed. The amount of damages per week a person is entitled to get if they have temporary total disability or temporary partial disability or permanent partial disability, is set by statute. There is no feasible way that this could be construed given the present statutes to in any way change the requirement that the function of the jury is to determine simply whether or not the plaintiff is entitled to recover, not the amount.

Mr. Skipton: I would support a motion to delete section 35 in its entirety and leave it up to the General Assembly. But I am not inclined to add anymore to what is in the constitution dealing with the subject.

Ms. Cusack: If you delete section 35 in its entirety then we would be back to the regular damage concept. What you have right now really is no-fault workmen's compensation. A person is entitled to recover whether it is the fault of the person or the employer, and the damages are limited regardless of whose fault it is. There were a couple of cases that came out recently that held that there was no right to go against the employer, even if the employer had been grossly negligent prior to the accident. If you delete section 35 in its entirety, then you are opening it up to law suits against the employers with no limitation on damages.

Mr. Montgomery: What exactly is the appeal used in the occupational disease case?

Ms. Cusack: We can't use an appeal in an occupational disease case.

Mr. Montgomery: The mandamus. What is the extent of its use?

Ms. Cusack: I cannot honestly answer that. I would say probably not in most cases. Actually the appeals depend on the make-up of the Industrial Commission at the time of the decision.

Mr. Carter: Any further questions of Ms. Cusack? Thank you very much.

Senator Butts: May I ask a question of the committee chairman? In the testimony that you heard in front of the committee was labor involved in that at all.

Mr. Norris: In the last provision, you are talking about?

Senator Butts: Yes.

Mr. Norris: No, as a matter of fact we had no testimony at all on this provision, and it was placed in the committee report simply as a result of committee discussion.

Senator Butts: Were they notified?

Mr. Norris: This is one of those areas where I think we know where people are lined up ahead of time. Our committee didn't feel that it needed to continue our meetings to get testimony on this issue. Everybody on the committee is a lawyer, for example, and felt they understood what that particular issue was. But it did come up at the last meeting, and was inserted as a result of committee discussion. There was no testimony.

Mr. Carter: I think we should proceed with question 1 first, which is the grand jury question.

Mr. Norris: Mr. Chairman, the gist of the report, of course, the main part of the report concerns Article I, Section 10A and is the proposal for revamping the grand jury. This is undoubtedly the most controversial part of the report and the major part too. I am interested that of all the groups that we knew would be interested in this proposal, none of them have shown up, which indicates to me that we were able to accommodate their objections, apparently as a result of the redrafts. We had very extensive testimony. We had some objections to this provision, and those were embodied in a very extensive and well reasoned brief from the prosecutors' association. We attempted to meet their objections, and I'm just assuming that we must have if they haven't shown up. I have talked to a couple of key people in the organization who reviewed this provision as it is before you, and they indicate that it took care of most of the problems, they thought, so apparently that is the case. What we were attempting to do mainly in the grand jury proceeding was to meet the objections that generally you hear about the grand jury procedure itself, the grand jury as an institution, and also the way the grand jury operates in relation to preliminary hearings, and duplication of effort that we find. I suppose the

literature in the area breaks down into several areas. There are complaints on one side that the grand jury infringes on a defendant's right because of the secrecy. That it ought to be a public hearing, that there ought to be a right to cross-examination, that there ought to be a right to counsel, and that there ought to be a requirement that exculpatory evidence be admitted as well as accusatory evidence. There are also complaints in that area that the prosecutor controls the grand jury, and it's his instrumentality and he can make it do whatever he wants it to. On the other side there are arguments that the grand jury is necessary for the protection of defendants' rights. That it affords some insulation, some barrier between the accusing authorities and the citizen's rights, and therefore that the grand jury serves a valuable function.

We have complaints that there is a lot of duplication. For example, if a felony charge is brought by information by the filing of a criminal affidavit, there is a right under statute to a preliminary hearing, which is essentially a probable cause hearing with very little burden of proof on the part of the prosecutor. In a county like mine, an urban county, that is before the municipal court, arraignment court. The case is handled by a city prosecutor, even though the charge may have been filed with the advice of the county prosecutor. There are some problems with that division of authority. Often a county prosecutor will find that suddenly he has lost his case because the city prosecutor has bargained it away. He reduced the felony to a misdemeanor charge. County police often find that that has happened to them, especially county sheriffs.

If there is a finding of probable cause shown, that still doesn't eliminate the grand jury. The defendant has an absolute right to the grand jury. He will go to the grand jury unless he waives that right. So you can have two hearings in that situation. If the judge finds that there was no probable cause to charge this person, that doesn't mean he is free. It just means simply that the prosecutor can go to the grand jury and get the indictment. There are problems with that system when you step back and look at it objectively. Now, there are some advantages to it, from the defense standpoint. Most defense lawyers use that as a fishing expedition. It's their first opportunity to get some glimpse at the prosecutor's case. Many of us would argue that that is not really necessary at the present time under the discovery rules that are available to the defense counsel under the adoption of the new rules of criminal procedure. My experience as a former city prosecutor is that it is a cat and mouse game. As prosecutor, I am going to show as little as I can and the game is to see just how little I can produce and still have probable cause. Defense counsel on the other hand views that as an opportunity for plea bargaining. I found in my own circumstances, where we pretty much retained control of our own cases that were filed in my own little municipality, I found that the only really valuable function that a preliminary hearing served. It was the first confrontation between the two sides of counsel and we worked a lot of cases out. I kind of liked it for that reason. But I don't know that that is a valid reason for retaining that kind of procedure, just to allow a first confrontation for plea bargaining.

With those things in mind the committee decided that we would like to, and I would say this is a primary thrust of the provision, we would like to limit the procedure to one probable cause hearing. Either a grand jury or a preliminary hearing. And, of course, you could go one way or the other. You could say the only hearing will be a grand jury and then provide what a grand jury is and provide the procedure. Or you could abolish the grand jury and say that every defendant who comes to trial has a right to a preliminary hearing. Call it whatever you want to and basically spell out the defendant's rights. We decided that what we would do would be to preserve the grand jury because as a public body it does have some other functions which we felt were valuable investigatory functions, and it ought to be preserved. And maybe as a matter of tradition, it ought to be preserved also. So what we essentially

have here is a provision that says that you will charge in felony cases by information. Which means a right to a preliminary hearing, and that is the only probable cause hearing, unless either the prosecution or the defendant requests a grand jury. In that case then, you don't have a preliminary hearing. You go to the grand jury and that is the only probable cause hearing, and you go by indictment. If we were really going to be in any way intellectually honest in saying we were going to have only one hearing, we had to revise the grand jury proceedings some. And there are some revisions of grand jury proceedings. For example, counsel for a witness would, under this procedure, be allowed in the grand jury room. His function however, would be very much limited. He would not be permitted to cross-examine, or to examine his own witness on direct. His function would be solely limited to advising his client on whether or not he ought to answer questions on the basis either of self-incrimination or privilege. Also, we require that a prosecutor, if he knows of exculpatory evidence, has got to tell the grand jury about it. If you will read the language there, it is very carefully couched language (on page 4). It would be an unbearable burden, obviously, to require the prosecutor to prepare the defendant's case and anticipate what his theory of the case would be and anticipate all kinds of exculpatory evidence. So he doesn't have to do that. He doesn't have the burden. It says "the inadvertant omission by the state to inform the court or the jury of evidence which reasonably tends to negate guilt in accordance with the requirements of this section does not impair the validity of the criminal process or give rise to liability." So if he knows about it he has got to tell the grand jury, but he isn't required to dig it up or to anticipate all that is exculpatory because he hasn't thought about that particular theory. If any of you have ever participated in either a criminal prosecution or defense, you know you do attack things from different viewpoints, and that is the reason for the adversary procedure. I don't think of everything the defense lawyer would, as a prosecutor, and vice versa. There are various ways to approach the case, and you can't expect the prosecutor to put his mind in the other framework, so that is the reason for that kind of language. There are a few other changes in there, but nothing that is particularly striking.

We kicked around some other ideas and felt really that this was the gist of the problem. I might say to you that the present system works. It's just a question of whether or not you think the duplication and confusion we have is burdensome and needless and ought to be abolished. Most people I talked to on both sides felt that there really is room for reform, that there ought to be only one hearing.

Another criticism that could be made here, and I know Dick Maier was making it, you talk about a probable cause hearing, but you don't really have one. Even though you have opened up the grand jury somewhat, it is not really a probable cause hearing. That's up for grabs. You have to decide whether that is enough of a trade-off. The reason that you ought to preserve the grand jury and allowing either party to demand it is there may be some reason for secrecy. For example, you can think of a situation of a prospective defendant, let's say somebody involved in politics, and there is a charge that would embarass him politically and ruin his career. Sex offenses are under that obvious kind of charge. If there is nothing to it and the grand jury or any kind of probable cause hearing would quash the charges, he would like to have that secret. The same thing applies to a prosecutor. There are some times when he is going to want secret procedings, and the obvious one there would be the organized crime kind of thing. They are most often used now in drug rings, you need secret indictments if you are going to run out and grab major pushers. You obviously can't publicize that ahead of time or they are just not going to be around. So that is the reason to allow either one of them to opt for the grand jury. I am hopeful that most of the bugs have been worked out in these amendments. I was hoping that some of these people would come in and shoot at us, but they haven't done it. I will entertain any questions.

Mr. Montgomery: Alan, I have a question on your comment on page 13, on the modification of jury verdicts. The committee thought that it was highly doubtful that

the review of monetary awards would be constitutional under the federal constitution. About 15 or 20 states have no fault laws on automobile insurance which take away that right to a jury trial in civil cases. I don't think that there is any federal question at all. I'm going to propose an amendment to section 5 when we get to it.

Mr. Norris: Mr. Chairman, I move adoption of the committee report's recommendations on Article I, Section 10 and 10A.

Mr. Maier seconded the motion.

Mr. Norris: That takes in all the grand jury.

Senator Butts: In the inadvertant omission language, that still becomes a point of appeal?

Mr. Norris: Yes, that's my opinion on it.

Senator Butts: Is there a problem with creating more things, more appeals to be filed not on the basis of the merits of the case but on the conduct of the case, that you can get it thrown out or start it all over again?

Mr. Norris: There always is. Any time you create a new right or procedure, you are going to create a right to appeal from it. How do you avoid that? Let's say for example that we agree that the prosecutor ought to present exculpatory evidence. It seems to me that that is not too difficult to agree on. Most prosecutors agree that they ought to do that and most of them do. That's a simple proposition, but how do you implement that? If you just say they have to do that, you've created a right, haven't you? Which is going to blow almost every case out of the water because he just isn't going to present everything he knows about it. He might overlook something. So the only way I know to avoid that is just not to put in the right, not to put in the requirement.

Senator Butts: If you take the whole thing, not only inadvertant, but the fact that he must present it.

Mr. Norris: Yes, I think that's the issue. If you do require him to present the exculpatory evidence, then I think you do have to have that clause on omission. My own view is that in all fairness, even under the present procedure, I think the prosecutor ought to be presenting exculpatory evidence. That's my own view under the present system. If we go to an either/or situation where you have only got one chance, there is only one hearing, then I think it becomes incumbent upon us to make the grand jury procedings more fair than they are today. So I would say that is something that has got to stay.

Senator Butts: I guess my feeling is that hopefully there is some pressure on the prosecutor not to ask for indictments against people he thinks are innocent, but beyond that that he doesn't have the responsibility of preparing the defense case the way the adversary relationship is set up, it is unreasonable to expect him to. I want to take great care in creating an opportunity where everyone agrees he is guilty but he still may go free because there is a question of whether the prosecutor should have done a little more along the way on the question of presenting evidence. We spend so much time letting people free or trying to find a way to get him a little bit of jail, even though everyone agrees he ought to go away forever, including the defense. That worries me.

Mr. Norris: I think this is a situation where there tends to be some agreement in both the defense and the prosecution camps. The first witness who suggested this to us, as I recall, was the prosecutor from Montgomery County, who is, by, I think,

everybody's common agreement, one of the finest in the state. I think that was the first time the suggestion was raised, and it was heard at other times during the public testimony.

Senator Butts: Are you talking about the inadvertant?

Mr. Norris: I'm talking about the exculpatory. When we raised the exculpatory in one of our preliminary drafts, the prosecutors went bananas, not over the idea but about the very thing that you are talking about -- that they were not going to be able to make any conviction stick. So this inadvertant omission language really was a response to what we thought were very valid objections that they raised to our original proposal. And I must assume that they feel they can live with it, or else we would have heard from them. Dick McQuade the prosecuting attorney for Fulton county wrote the brief for the Association.

Mr. Montgomery: What did they say about it?

Mr. Nemeth: I should add that that brief was directed toward the first draft which didn't have this in it.

Mr. Norris: "Should the prosecuting attorney be compelled to present evidence that tends to exculpate the defendant? This requirement to present exculpatory evidence placed upon the prosecuting attorney the burden of making subjective judgments as to what is beneficial for the accused." (This is the first draft where we didn't have the inadvertant omission language.) "This decision must be made without knowledge of the defense's theory of the case, nor do the proposals provide any effective means of enforcing this provision. In fact, this requirement is not enforceable unless the process is to be saddled with dilatory evidentiary appeals. We would recommend that this requirement be deleted. It is only prudent that the prosecuting attorney make available evidence to the grand jury since there is little value in indicting if it has no possibility in bringing a conviction at trial. His willingness to disclose evidence to the grand jury results from the fact that the proceedings are secret. Clearly this requirement loses sight of the limited function of the grand jury. The grand jury does not determine the guilt of the accused nor does it determine the nature or the severity of the punishment. It's sole consideration is whether a crime was committed and the probable cause that the defendant committed the crime. The advocates of the requirement are confusing the looser probable cause standard to accuse an individual of a crime with the more stringent beyond a reasonable doubt standard required to find an individual guilty of a crime. It is precisely because there may be probable cause to indict and yet reasonable doubt as to guilt that a trial is conducted following an indictment. It is therefore inappropriate that grand jurors, as this requirement applies, should invade the domain of the petit jury. Rather at trial, the defendant has the opportunity to present any evidence which is favorable to his cause." In response to this, we drafted the "inadvertant" language and that seemed to really change their view.

Mr. Montgomery: We don't know that it is if they are not here to say.

Mr. Norris: No, but at the meeting they indicated they felt that that would take care of the problem on this point.

Mr. Montgomery: I think the brief is extremely well written.

Mr. Norris: It's a good brief.

Senator Butts: If you take the word "inadvertant" out and put in "any omission", would the sentence mean anything?

Mr. Norris: I think so.

Mr. Carson: Alan, I have a question. Did you give any consideration to the possibility of making more fundamental reforms in the grand jury system to make it more fair as an alternative?

Mr. Norris: We had testimony, of course, from those who just felt that grand juries were barbaric and it ought to be a mini-trial. The committee just didn't agree with that. They felt that as is said in the brief and has been said elsewhere too, people do tend to confuse the probable cause with the beyond the reasonable doubt burden. And we are only talking about probable cause. You don't need a second trial at this level. We did feel that the two areas of abuse were on the exculpatory evidence and the presence of counsel and for that reason we opened those up. But when you start talking about the other functions, what you really do is open it up into a mini-trial. There are those who say why have it at all? At that point I would tend to agree with you. If you tend to make it a duplicating trial then I would say, who needs it?

Mr. Skipton: Suppose it is a purposeful omission to present evidence? What happens? Under this language? I think if you infer that there is no liability that is inadvertant, then you are saying that there is liability that was advertant.

Mr. Norris: I mean the right is either there or it isn't. I don't think this creates a new kind of liability. It just simply says there isn't any liability that is inadvertant. I don't guess I thought through the civil liability for a purposeful omission, but obviously if you are going to have that exculpatory language in there, you might as well extend it to personal liability as well. What happens in your view, Julius, if the prosecutor intentionally omits exculpatory evidence?

Mr. Nemeth: I think what would happen in our proposal would be that the indictment would be quashed, and the prosecutor would expose himself to the same standards as any other public officer for willful disregard of his duty.

Mr. Norris: I think that probably is the answer. He would expose himself under the criminal statutes and obviously a violation of that could have civil consequences.

Mr. Carter: Any further discussion?

Mr. Montgomery: I just wanted to indicate that Senator Butts and I will vote for excluding the exculpatory language if that would expedite the proceedings.

Mr. Norris: You would have to move to amend.

Mr. Carter: That would be appropriate. Do we have a motion to amend?

Mr. Montgomery: I move to amend to remove those two sentences, "at either such hearing", it starts there.

Mr. Carter: The last two sentences of the first paragraph. Is there a second to that motion?

Mr. Norris seconded the motion as a courtesy to Senator Butts.

Mr. Carter: Discussion on the motion to amend?

Mr. Norris: Mr. Chairman, on the statement of opposition simply I think that our position on the committee, my position, has already been expressed.

Mr. Carson: I had a question. I am concerned I think about what John talked about regarding the last sentence. I would not support the amendment except that I am concerned with the case if there is an inadvertant omission, the verdict would not

be effective nor would there be liability. But I can also see a case where there was an omission which was not inadvertant but which would not change the result. The question is should that change the verdict? I'm not sure we have really covered both sides of this coin and I'm troubled by that.

Mr. Fauver: I feel somewhat along the same lines. I think in a couple of other areas of criminal law, and I am thinking specifically of unreasonable search and seizure types of situations, I seem to recall the United States Supreme Court holding that in cases where this is taking place that that need not necessarily upset a guilty finding, if it is based on evidence that was uncovered illegally, but it may impose personal liability on the part of the individual law enforcement officer for infringing on rights. I think I am quoting that correctly but you may know more about that. I'm wondering if that was considered at all.

Mr. Norris: The only assistance I can give would be to say that without that second sentence, you have an absolute burden on the state to present exculpatory evidence. It seems to me that if he willfully does it, the penalty is in the criminal statute, on public officials. And I think it's a pretty high test. If it's willful, then obviously it is going to fit. He could be civilly liable as well as criminally. Let's assume that it is inadvertant. I would think that probably there wouldn't be any civil liability because you couldn't show that he knowingly, purposefully...I'm just thinking out loud here. So if that second clause of the second sentence says anything at all, it is because it protects the prosecutor. I don't think it creates a right. There would be a right to sue him for civil recovery without that second sentence. But I don't think that second sentence creates a right, it may not protect him enough.

Mr. Maier: I was thinking of an example where you have a secret indictment situation which is not entirely unusual and the defendant in not only not there but the defendant doesn't even know that he is being investigated. Let's say he has talked to the police about perhaps having committed a bank robbery in Columbus and has made a statement to the police. "At that particular time I was in Indianapolis, Indiana" and the prosecutor has this police report in his hands when he goes to the grand jury. This being a secret thing, why should not the prosecutor have the burden, even when there is probable cause, because first the issue in probable cause is presenting it and if he doesn't present it, of course he can't claim it is inadvertant if he knows about it. I would think he would be opening himself up for further liability?

Mr. Norris: I think he does. If he has read the thing, under that situation, he sure can't claim that he inadvertantly omitted it. Any dumbell knows that that is relevant to the hearing.

Mr. Montgomery: I want to say something in defense of the amendment, and that is that as far as I am concerned, if you leave exculpatory language in there, we're handing an automatic appeal to every defendant who is indicted and convicted. You render him another basis of appeal on a technicality which has nothing to do with his guilt or innocence. I assume this is going to continue the same thing we have seen so much of in the last 15 or 20 years in the criminal process. The prosecutors in the case are just wasting their time. If they don't come through with this kind of evidence, they are not going to get a conviction. They might get an indictment but they are not going to get a conviction. That would be a waste of their time not to volunteer their stuff. But to put it in as a matter of right, this is just going to continue to keep people out on bond and to commit more crimes and to keep this whole thing open. It will terminate the criminal process.

Mr. Huston: In contravention of what you say, Don, if the prosecutor gets an indictment, doesn't that give him some bargaining room to get the guy to plead guilty to a lesser offense, which the man may not be guilty of, but due to the exposure of

the indictment, he would plead guilty to a lesser offense? He may not even be guilty of it.

Mr. Montgomery: How many innocent people would do that?

Mr. Norris: Mr. Chairman, let me just insert a hypothetical reason in terms of abuse. There are a lot of complaints that the primary abuse is the use of grand juries politically. You don't have to have a conviction to destroy somebody politically. An indictment is fine enough and thus obviously the requirement that the prosecutor tell the grand jury that there is exculpatory evidence is a protection, because in that political situation that is all that you need. That would just be one example. I'm sure in the literature there are a lot of other examples.

Mr. Carter: Speaking as a nonlawyer, I believe most people think of an indictment as a conviction. They really do. So there is some validity to that point. The motion has been presented to delete the last two sentences.

Senator Butts: Very briefly, I think I would agree with all of the evidence suggesting that the grand jury process is abused. Often you can change the process around and if a person wants to abuse it advertantly or inadvertantly, they still can and still will. I think in an effort to try and do something that is occasionally misused, it creates this other hole for these people to keep on coming through. I think what people are asking for most of all is to devise ways to, with justice, bring to terms these people who are terrorizing our society.

Mr. Carter: I might say that this is a question as to whether this is justice or not -- the grand jury procedures.

Mr. Fauver: One final question. Was consideration given to the possibility of treating this subject by legislation rather than in the Constitution? I assume it is possible to do it.

Mr. Norris: Yes, but if you are going to tinker with the grand jury, it has to be done constitutionally.

Mr. Fauver: Yes, but I mean the subject of the amendment on the table.

Mr. Norris: We may have mentioned it, but decided if we were going to limit someone to just one hearing, we felt we ought to package the thing and say what are the basic rights. It may be that you felt that wasn't a basic enough right to be in the Constitution, but we felt it was as a package.

Mr. Carson: The same thought occured to me at the same moment. It wouldn't be unheard of to have a provision which would guarantee a right saying "Laws shall be passed providing or requiring that evidence that may reasonably tend to negate the guilt..." and so on. In other words, telling the legislature to pass a law to implement this right which would include, presumably, presenting exculpatory provisions. I support the concept, yet I am troubled about the detail.

Mr. Carter: The subject would be, as I understand it, that before the last sentence then, say "Laws may be passed."

Mr. Carson: "Shall be passed".

Mr. Carter: So that the question could be given more careful consideration by the legislature as far as the quid pro quos involved. Is that your thought?

Mr. Carson: Yes.

Mr. Fauver: In support of that, I'd just like to say that one of the things that

I am uneasy about is inadvertant omission. Maybe it would take on some connotations that we really don't have in mind. If that should happen, our alternative would be to amend the Constitution. The legislature would at least be able to respond a little more fairly to results like that.

Mr. Norris: I don't know that it would accomplish that much, frankly. It might save a couple of sentences. If you are going to say that there is the right, if the right is so important to mention it in the constitution, and that is what you are saying obviously, if you are going to mandate the legislature to protect the right. The legislature is going to have to implement it anyhow. You've got problems of access to transcripts, all this kind of thing, where there is going to have to be legislation on it anyhow. If you are going to say that it is valuable enough to protect, I don't see any problem with being this specific.

Mr. Montgomery: I think the constitution is the place it should be handled rather than by legislation. It's a fundamental right.

Mr. Norris: If you don't think it's that valuable a provision, don't put it in at all.

Mr. Carter: We are now ready for a vote on the amendment unless there is further discussion. A show of hands was taken, 4 were in favor, 7 against. Alright, the amendment is defeated. We are ready for the question on the committee recommendation.

The roll was called on Article I, Sections 10 and 10A. Those voting in the affirmative were Senator Gillmor, Representatives Fauver, Norris, Maier and Thompson; Messrs Carter and Huston. Senator Butts voted no, Mr. Montgomery voted no, and Messrs. Skipton and Carson passed.

Mrs. Eriksson: It's 7 yes, two pass and two no.

Mr. Carter: Do the pass people want to record their votes subsequently, out of curiosity?

Mr. Carson: All I can say is I favor the concept but I don't think the language is adequate, so I hate to vote yes for something I don't really like, so I thought the best thing to do would be to pass.

Mr. Norris: Mr. Chairman, I move that the roll call be left open until the next meeting.

Mr. Carter: Yes, that is our procedure.

Mr. Norris: Mr. Chairman, I move that the recommendation of the committee as it applies to Article I, Section 5 be adopted.

Mr. Montgomery: If it is on the table, I would like to amend to add, after the word "juries","and to provide for judicial review of monetary awards for damages".

Mr. Carter: Is there a second for the motion? Senator Butts seconds it for purposes of discussion. Do you want to make a statement, Don?

Mr. Montgomery: Only that I think it should be constitutional to review a jury award as it is constitutional to review the award of a court sitting alone, and I think there is a definite need for it in our judicial system today. And it leaves it up to the legislature to provide the most effective way of doing it. It doesn't say what the procedure should be but it lets the legislature have the ball to do something, whatever they choose.

Mr. Fauver: I think I understand the intent. I'm not sure that I disagree with

that at all, but I have a question about the language. For instance, an attempt to put a celing on pain and suffering damages might not fit in the language that he is suggesting. Because he is talking about judicial review as opposed to saying you cannot recover more that "X" dollars. So I have to question whether his language is accomplishing that end. Maybe I am misinterpreting what he is trying to accomplish.

Mr. Norris: Mr. Chairman, I assume that the amendment is directed toward the question of additur and remittitur, and that was one of the subjects that we were charged with specifically. Also the language of the amendment that what you intend to do is just authorize the legislature to do that by law, which they cannot do at the present time.

Mr. Montgomery: To do something in the way of review.

Mr. Norris: It has bothered me for some time that there is no real right of additur or remittitur upon appeal. Additur of course means increasing the amount of a jury verdict or a verdict by a court and remittitur means reducing it. It is interesting that under the rules, if there is a trial before a court without a jury, the appellate court may add or remit without ordering a new trial. It may enter a final order on appeal. But if there is a trial to a jury, the appellate court may not add or remit without consent of the parties, which means really that they can't do it. You hear about remittitur and additur, but that is a consentual process where a jury is involved, either as a motion for a new trial after the verdict has come in or upon appeal. In other words the trial judge can say that the verdict is excessive, and either I am going to order a new trial or you come to an agreement on the amount. I think it ought to be reduced by "X" number of dollars; if you can agree to an amount then we will substitute that and we won't have a new trial. That's the kind of leverage he has. The trial judge cannot remit or add in response to a motion for a new trial. If it goes to the appellate level, essentially they do the same thing. All the court has is leverage, because if the court believes the verdict is excessive or is not high enough, the only remedy is to reverse and remand for a new trial. The reason for that is that you have an absolute right to a trial by jury and the courts have held that that means the verdict is inviolate. That's it, they are going to decide it. That has always offended me because it seems to me that in order for a system to work properly, a system of justice has to have ways to remedy error. That's what an appeal is -- it's how you remedy an error. You can remedy a final judgment on appeal in a civil case where there is a jury, for example, on an error of law. You can do it if it is against the manifest weight of the evidence. Why can't you do it if there has been an error in the verdict? I had thought, very simply, that we would just amend the constitution to say that, maybe you can find a better way, that if the appellate court finds that the amount of the verdict is against the manifest weight of the evidence they can either reduce it or increase it for that reason. It just seems to me to be in line with everything else. If you want to do it constitutionally, it would take an amendment. I discovered that out of seven votes in our committee, it was kind of six to one. There was really no sympathy. And I think it was a combination of feelings. Some felt that the jury verdict ought to be inviolate. Others felt that the present system does work adequately, that consentual remittitur and additur is sufficient. I think that is probably a fair summary of the way the vote broke down and I was the only one who still felt otherwise. I have talked with defense lawyers' organizations' representatives and with plaintiffs. You would think that the plaintiff's lawyers would be against anything like this. But I'm told that they don't care and defense lawyers feel the same. So there doesn't appear to be any strong division in the bar anymore. Apparently there is a feeling that jury verdicts are more in line than they were historically. When I say historically, I mean maybe 5 years ago, when some thought that they were terribly excessive. I don't know what the source of that is, but I know I was really shocked when I discussed that with the trial lawyers' association, they couldn't care less. Maybe everybody thinks it works better than I do.

Mr. Montgomery: It is an abuse of the system to have to threaten a new trial, the expense and delay and all that, to get to a review, which is really what you are after. You are doing one thing to, indirectly, do something that you really want to do. That's just playing games. That's one of the reasons why people lose confidence in the system, because there is so much of that horsing around, so to speak.

Mr. Norris: I had some language to accomplish that, that we will try to find. And I think also it might be a good idea to add some burden language in it too. I would just hate to see trial courts reverse it willy nilly, but maybe we don't have to say manifest weight of the evidence.

Mr. Fauver: I apparently misinterpreted the thrust of the amendment. I think I was going back to our conversation at lunch where there was some discussion about the question as to whether we could limit the amount of recovery for pain and suffering and damages. Which is a subject I gather your amendment does not address itself to.

Mr. Montgomery: No, that's another subject. What I had in mind was both inadequate and excessive verdicts.

Mr. Carson: I would have to align myself with those on your committee who feel that the trial by jury concept is somehow inviolate. There is a remedy if a jury really goes haywire. The appellate acourt can order a new trial. But why would you have a trial by jury if you can appeal to the court of appeals? Those three judges can look at the evidence and say that the twelve jurors were wrong -- it should have been $50,000 instead of $40,000. What is the purpose of having a jury trial if you are just transferring the decision to three members of the bench?

Mr. Montgomery: I would think the legislation would safeguard against simple differences of opinions from the judges. I think it is only excesses that the legislation would address itself to.

Mr. Norris: You're talking about the appellate court substituting its judgment for the jury verdict. If you insert, "against the manifest weight of the evidence" test, there has to be an abuse, not just a willy-nilly substitution.

Mr. Carson: So it would be just eliminating a new trial?

Mr. Norris: Yes.

Mr. Maier: I'm lost. If you don't mean that you are substituting the judgment of the three men for the opinion of a certain number of jurors, whatever it might mean, what is it you are really doing?

Mr. Norris: I'm talking about a "burden" test where the court of appeals cannot remit or add unless the verdict of the jury is against the manifest weight of the evidence; they're going to have to show some abuse by the jury. They can't just say "we would have done this". That's what I mean by substitution of their judgment. They have to find that there just is no support in the record, or hardly any support in the record, for that kind of a verdict.

Mr. Maier: What you are really saying is that now we get to the appellate court and they say there is no grounds for it at all, so we are really not talking about manifest weight of the evidence. We are talking about abuse of discretion, and now we are making an appeal to the supreme court, and now we have another group of people substituting their discretion. What is the point of having another jury? Most of us who have experience in this type of work know that there is all sorts of wrangling before it ever gets to the jury. The trial court generally gets you in and sits

both sides down and tries to hammer you over the head with some sort of settlement. The reason it goes to a jury is because for some reason one side or the other wouldn't be hammered. In our system of justice, the ultimate way of determining that particular issue is by a jury verdict. That's the name of the game.

Mr. Norris: Certainly, what you are expressing is what the vast majority of the committee felt. My opinion is that that remedy is there if it is a trial by the court. The court of appeals cannot overturn the judgment of a trial judge sitting as trier of the facts simply because they disagree with something. They have to show that the verdict of the trial court is against the manifest weight of the evidence. If it works there, why won't it work for the jury? Again, Dick, what you are saying, there was a very strong feeling that you are right. There is something about the jury that is different and ought to be preserved.

Mr. Montgomery: My figures might not be exactly right, but in California not too long ago I think the prayer was for $50,000 plus a million dollars punitive damages. The verdict was about $250,000 monetary damages and $5,000,000 punitive damages. This was against the manifest weight of the evidence and it is going to stick. Juries are increasingly doing wild things and that is the only thing that I am interested in. If there were some way we could control the jury going wild. Not in 90% of the cases, because in 90% it happens just as you say and it works.

Mr. Norris: The appellate court hasn't ordered a new trial?

Mr. Montgomery: We're seeing more and more of this. If there were a way to avoid it and be consistent with the court's trial of the case, why shouldn't we?

Mr. Fauver: I have to ask, if the appellate court does not see fit to order a new trial what basis is there for thinking that they would come up with a smaller remittitur?

Mr. Montgomery: Where there is no error and it is pain and suffering.

Mr. Fauver: I don't know the rules in California but certainly under our rules, if it is against the manifest weight of the evidence you order a new trial.

Mr. Norris: My argument is that in those cases today, where the appellate court would order a new trial, but I'm proposing that they could remit or add then and avoid a new procedure. It wouldn't open it up any more though. They couldn't just substitute their judgment.

Mr. Fauver: In answer to your question, we agree that we have a way of making a new finding in an instance where a jury has run wild and done something ridiculous. But the remedy in that instance is to have the trial held over again by a different jury, and the amendment is going to say we are going to substitute for that new jury the opinion of three judges. That's the question. Who makes that decision. How about the other problem, limiting the amount of damages?

Mr. Norris: I don't know how you would put that in the constitution. I guess you could say that the legislature can prescribe maximum recoveries in various areas.

Mrs. Eriksson: There is already a provision in the constitution, Section 19A of Article I, that says that the amount of damages recoverable in wrongful death cases may not be limited by law. That section would have to be either repealed or amended if you were to try to write in some provision like that. It was added in 1912 and it has not had much interpretation because the legislature has never attempted to limit damages until very recently. And this only applies to wrongful death cases.

Mr. Norris: They obviously felt the legislature could limit damages.

Mr. Carter: We have on the table before us the question as to whether the amendment to Section 5 is to be adopted. The language we have is to add the words "and provide for judicial review of monetary awards for damages".

Mrs. Eriksson: Could I suggest that if you want to discuss the question of limitation of damages, go on to that and wait until Julius comes back with the language that was previously drafted, because I don't think this language is going to do that.

Mr. Carter: We will table this matter for the time being. We will go on to discuss this matter of the legislature placing a maximum on the amount of damages.

Mr. Norris: The committee did not consider that. The only area that we got into in terms of excessive jury verdicts was in the area of remedy. I felt that there ought to be a remedy.

Mr. Carter: Let me read the language with which we are concerned. "The amount of damages recoverable by civil action in the courts for death caused by wrongful acts, neglect, or default of another, shall not be limited by law." It refers specifically to death and nothing else.

Mr. Montgomery: We should repeal that.

Mr. Norris: You could add a new first sentence and put an "except" before that language.

Mr. Fauver: We are really talking a lot about negative implications today. I hadn't been fully aware of that.

Mrs. Eriksson: I don't know whether the argument has been made or not, that this section implies the right to limit damages in all other cases.

Mr. Fauver: I'm thinking of the limitations in the medical malpractice act.

Mr. Norris: That has been knocked out several times. We have our common pleas decision. As I understand, his opinion simply cited the opinion of another common pleas judge who said it was unconstitutional.

Senator Butts: I like the "laws may be passed" approach.

Mr. Carter: In other words, you want to see it expressly permitted in the constitution, that it can be done by the legislature.

Senator Butts: Yes.

Mr. Carter: If there is sufficient interest, I think the committee would be delighted to submit this to us at our next and final meeting. As to the concept of giving the legislature the authority to place a maximum limit on damages.

Mr. Carson: Can we do that now except in wrongful death cases?

Mrs. Eriksson: We don't know. It might take a little research to see if there are any court decisions.

Mr. Norris: The only decisions that we know of are the ones on medical malpractice. We know of at least two common pleas court decisions holding that unconstitutional.

Mrs. Eriksson: But we don't know on what basis.

Senator Butts: If I can inject some legislative insight, in the discussion there were two portions of the medical malpractice bill - one was the $200,000 in general damages, which was basically pain and suffering. There was also the half million dollars which was on everything except wrongful death and we had to except that out because of the provision in the Constitution. I think the reason it didn't pass the senate was the same argument there was that this surely was unconstitutional. In other words, they tried to make some difference. Maybe this other one is, maybe it isn't -- this $200,000 but surely this $500,000 is unconstitutional. That isn't an answer, but it gives you some idea of the views of the Judiciary Committee chairman.

Mr. Norris: I think Section 19A could be replaced very easily -- you just turn it around and say you <u>can</u> instead of you <u>can't</u>. Laws may be passed to limit the amount of liability.

Mr. Montgomery: Wrongful death would not be singled out for special treatment.

Mr. Norris: As to the other question, we had some preliminary language that was rejected by the committee that could be worked around.

Mr. Montgomery: The two ideas are not inconsistent with each other.

Mr. Carter: I think the proper procedure would be for the committee to come up with recommendations in these two areas for consideration at the next commission meeting.

Mr. Norris: If I might make a suggestion, why don't you just appoint me as a draftsman rather than going back to the committee and holding a committee meeting?

Mr. Carson: Are we talking about personal injury cases only?

Mr. Norris: I think it will be drafted to cover any jury case. Then you can shoot at it if you want to limit it.

Mr. Carter: I think it should go out to the commission before the next commission meeting so that we can act on it at that time.

Mr. Norris: Mr. Chairman, I move that the committee recommendations relative to Section 35 of Article II be adopted.

Mr. Montgomery seconded the motion.

Mr. Huston: Presently this section just authorizes the general assembly to establish a workmen's compensation system. This the legislature has done. It has defined the rights of workers, the rights of the employers, it has defined what a compensable injury is, and has changed it over the years; it has also defined what an occupational disease is, and has changed that over the years; it establishes the amount of the award, also establishes the amount of the employer's contribution; it establishes a means of review of the award, and it appears to me that if you put a provision in the constitution such as proposed here, that certainly hamstrings the legislature when they want to change certain parts of the compensation system. It seems to me that it is a matter to be left to the legislature in connection with the whole system of workmen's compensation.

Mr. Montgomery: Is there anything in the constitution that would prohibit the legislature from allowing private insurance carriers to compete in this field? If there is, I think we should have some language that says that the legislature could do that. Does this language require a state monopoly?

Mr. Norris: We tried to do that in the legislature, and I think we were assuming that the legislature could do that.

Mr. Montgomery: Could we have some language to the effect that nothing herein shall be construed to prohibit the legislature from allowing private coverage for workmen's compensation?

Mr. Carter: Don, I was on the committee that originally considered this, and I think the testimony we had was that it was impractical in this day and age for a private insurance carrier to do this, what with the reserves that are necessary and so forth.

Mr. Montgomery: Ohio is the only industrial state that does not permit private insurance coverage for workmen's compensation. It may be impractical, but all the others do it.

Mr. Huston: You may have an impediment in the present constitution -- it talks about creating a state fund.

Mr. Norris: It talks about "payments therefrom". "Such compensation" is in lieu of all rights.

Mr. Montgomery: It sounds as though this is an exclusive method.

Mrs. Eriksson: I don't think you could deny the worker the right to sue or deny the employer his common law defenses unless you follow the constitutional provisions.

Mr. Montgomery: I don't want to provide for it in the constitution, just give the legislature the right to do so if it wants to.

There was general agreement that such a provision should be drafted by the staff for commission consideration.

The roll was called on the committee recommendation to permit an appeal to court in all worker compensation cases, with the stipulation that it would not preclude further consideration of the section.

Those voting yes were: Representative Norris and Mr. Carson. Those voting no were: Senators Butts and Gillmor; Representative Thompson; Messrs. Carter, Huston, Montgomery, and Skipton. The roll call was held open until the next meeting.

Mr. Carter: The next meeting, which will be about the second week in February, will be the last formal meeting of the Commission. We will send out postcards to get your preference for a date for that meeting.

The meeting was adjourned.

Ann M. Eriksson, Secretary

Richard H. Carter, Chairman

Minutes

The Ohio Constitutional Revision Commission met on February 22 at 10:00 a.m. in House Room 7 of the State House in Columbus. Present were Chairman Richard Carter, Vice-Chairman Linda Orfirer, Senators Butts, Gillmor, Mussey and Roberto; Representatives Hartley, Norris, Oxley, Stinziano, and Thompson; Messrs. Carson, Fry, Huston, Mansfield, Unger and Mrs. Sowle.

Mr. Carter welcomed new members, Representatives Mike Oxley and David Hartley and Senator Roberto. The minutes of the last meeting were approved as mailed.

Adoption of a resolution authorizing the Chairman to approve travel vouchers of commission members, the director and staff was moved by Mr. Fry, seconded by Mr. Mansfield and adopted.

The chair declared that the proposal to amend section 35 of Article II to permit appeals to common pleas court and jury trials in all workmen's compensation cases had failed. The vote was as follows: those voting yes were Senator Mussey, Representatives Fauver, Hartley, Norris and Stinziano; Messrs. Aalyson, Bartunek, Carson, Wilson, Mrs. Sowle and Mrs. Orfirer. Those voting no were Senators Gillmor and McCormack; Representative Thompson; Messrs. Carter, Cunningham, Guggenheim, Heminger, Huston, Montgomery, Skipton and Unger.

The chair then announced that the vote on the grand jury proposal (sections 10 and 10A of Article II) was much closer, 17 yes and 4 no votes, and the vote would not be closed until the end of the meeting. Mr. Fry and Representative Oxley voted yes.

Mr. Carter: The first item on the agenda is apportionment. The committee is presenting two alternatives to the Commission. The first one constitutes the original committee recommendation modified to take into account the comments of the Commission at the last meeting. And the second one is the proposal that has been submitted to the Commission by Mr. John McElroy. I would characterize the distinction between the two as the committee recommendation makes an attempt to get the matter out of partisan politics, or at least to make it bi-partisan in approach. Mr. McElroy's takes the approach that this is a partisan matter and there is no way of getting around it so that the best approach is to bring the matter out in the open and to have it subject to scrutiny with certain safeguards so that the public will have an opportunity to look at the proposals, with the intent that by giving it public scrutiny that the partisan process will be restrained and responsible.

Mrs. Sowle: In response to Mr. McElroy's proposal, the committee added an extension of the time table to require publication of a tentative proposal in advance, so that the public response can be made before adoption rather than after.

Mr. Carter: The congressional districting in both proposals has been left up to the discretion of the legislature rather than being mandated in the Constitution.

Mrs. Sowle: The committee proposal specifies the commission appoint its staff. That's an addition to the last proposal. The time table is expanded to allow for publication of a tentative proposal before adoption rather than after and to allow for feedback from the public with regard to a plan. The committee proposal retains the idea of a bi-partisan commission, with the fifth person chosen by the four appointed. If they can not agree, it still employs a lottery.

Mr. Fry expressed the opinion that if the choice of the fifth person goes to the lottery the four must submit names they have already suggested because those are probably the best people, and least partisan.

Mr. Carter noted that part of the pressure to get them to agree is that the person chosen by lot is more likely to be highly partisan.

Mr. Carter: I'm not sure we can restrict the names in the lottery. The process would be that the four would get together and the usual discussion: who can we select that would have the support of the public and both parties. And that discussion hopefully would result in a choice. They don't actually submit names in that procedure, that would just be a deliberative process. So there is no name that they have submitted at that point and they may not all suggest a name. In case that process fails, they then would go into the process of submitting names.

Mr. Fry: Once we get the board, I think we would be well advised to let them handle both congressional redistricting and apportionment because that's a tough thing to do in the legislature, and I don't know anyone who has ever participated in it who felt so very good about the results.

Mr. Carter: That was the original recommendation of the committee. Senator Butts at the last meeting had a rather eloquent statement to the effect that this was one of the few ways that the legislature and the people of the State of Ohio keep control over their congressional delegation, and he felt that it was very important that the legislature retain that power. The committee's feeling was that that was such a hurdle, and this is a compromise in the hope that it would muster the necessary support to get the main thing across which was the idea of a bipartisan commission.

Mr. Fry: No matter what we recommend, when this gets to the legislature it's likely to be changed in a lot of respects anyhow.

Mr. Carter: Don't you think we ought to take a stand as a commission?

Mr. Fry: Certainly. I think we should make a recommendation because we will have had more time to consider it than a lot of the legislative committees will at the time they receive it.

Mr. Mansfield: I'm persuaded that we ought to deal with both state and federal.

An informal vote showed support for this concept.

Senator Gillmor: Mr. Chairman, I agree with the committee's approach which is to leave it optional for the legislature on congressional districting.

Representative Hartley: I think there are more people in the state than you realize who know that the election of the governor, secretary of state, and whoever controls reapportionment. Are we going to go against the will of the people with the lottery?

Mr. Carter: The justification is that it puts a great deal of pressure to have a bipartisan commission rather than a partisan one.

There was discussion about requiring that the names submitted to the secretary of state for the lottery must have been discussed by the four in attempting to choose the fifth.

Mr. Carson: I think if it is possible for a chairman to be selected by agreement, it is probably going to be done by people other than these four people themselves. I think probably a whole list of names will be discussed to see whether there could be common agreement. I really don't anticipate that this decision is going to be made at this first meeting. I'm sure there is going to be a lot of help from the party chairman and that sort of thing.

Mr. Mansfield: There is nothing wrong with that.

Mr. Carson: If it is possible to select a chairman by agreement it's going to be done before this meeting is held.

Mr. Fry: Could we do this? Following the discussion, the nominees be named, made public. They are going to get reaction from the press. If they don't agree on them then you go to the lottery. And if I'm sitting here as a member of the majority and say we either take so and so and we'll take a 50-50 chance of losing him.

Mr. Carter: You're suggesting that each of the members make a nominee for chairman which would be made public.

Mrs. Orfirer: But as many as they wanted could be brought up, right? Not just one from each one.

Mrs. Sowle: Would it be consistent with your proposal to say each one at the very first meeting can propose a name or maybe two, and then they would have to stay with that pool of names? I think that is an appealing idea, but doesn't it doesn't give them the flexibility to say, yes, we didn't think of John Doe and that's a perfect proposal.

Mrs. Eriksson: If you are going to have a meeting and discuss names, that is going to be an open meeting so anyone interested in knowing what names they are discussing would be able to be present at that meeting.

Mr. Carter: You could limit each member to submit one name for the lottery purpose. Any number of names can be suggested, but the person they finally select has to be limited to those nominated. The four members shall nominate persons to serve as chairman, and then, failing agreement, they go to the lottery and each can nominate a person that was among the nominees.

Mrs. Orfirer: Each person in the initial round, in the attempt to agree on a fifth person, is not limited to nominating one person.

It was agreed that an amendment would be drafted to this effect over lunchtime for afternoon consideration.

Representative Hartley: I think the difference in the commission proposal as opposed to John McElroy's proposal -- I think the partisanship is still going to be there and John McElroy's proposal accepts the fact that partisanship is going to be there, except that it makes it public.

Mr. Carter: That is, in essence, correct. I would say on behalf of the committee that it is going to support either proposal. It has a preference for the one that we have been talking about but in case that would not carry the day, it would be prepared to support the public airing of the partisan process.

An informal vote was taken showing about equal support for the committee proposal and Mr. McElroy's proposal.

Mr. Carter: Mr. McElroy's is basically the status quo, but with public airing of the whole process.

Mrs. Sowle: And the appointment of staff.

Mr. Carson: I have one or two questions on the committee proposal. There is a prohibition against any elected or appointed officer serving. What was the need for that? That's not in the present Constitution, of course.

Mrs. Eriksson: I think the committee was concerned with trying to get one step away from the present situation, which in fact does consist of certain named elected public officials and persons appointed by other public officials. And there is no prohibition against the public official serving. It is intended to move it more into the citizen arena.

Mr. Carter: I don't think that was a very strong feeling. It is a question of whether you are going to have a citizens' commission, or whether you want to include public officials in there.

Mr. Carson: It seems to me that if it is possible to find a chairman who is acceptable, it could well be a public official, a mayor of some community or maybe an elected official. Why is it necessary to prevent that from happening?

Senator Gillmor moved to delete it and Mrs. Orfirer seconded the motion. A majority agreed to the amendment. Three were opposed.

Mr. Carson: I want to make sure the language permits the chairman of this commission to vote.

Mrs. Eriksson: I think it is clear that the chairman is a member of the commission and that it takes at least a majority of the members of the commission to adopt a plan.

Mr. Carson: Let me point out line 5 on page 2, where it says "the chairman shall give the members two weeks prior notice...".

Mr. Carter: Nolan, could I refer you to the fifth line of the second paragraph; "a fifth member who shall be chairman...".

Mrs. Eriksson: You could say "give the <u>other</u> members notice of the meeting".

Mr. Carson so moved and Mr. Fry seconded the motion. All voted in the affirmative.

Mr. Carter: Are we going to have the congressional districting mandated by the Constitution, or make it discretionary to the legislature?

Mr. Fry: You could just put a period after Congress in the first sentence of that last paragraph and then strike the rest of the language.

Mr. Carter: We would go back to the original committee recommendation for a seven man commission including two persons appointed by members of Congress and the congressional districting would be done by the same commission that does the legislative districting.

Mr. Fry: But the ones that you would add would simply be for the purpose of congressional redistricting?

Mr. Carter: No, we had congressmen appointees participating in the legislative apportionment too.

Mrs. Eriksson: Now they could be congressmen.

Mr. Unger: The whole commission under that revision could be made up of the state legislature if they so decided.

Mr. Carter: That's correct.

Senator Gillmor: If this is permissive so that you can set it up anyway you want to by law, suppose the law says that the designees shall be designated by a majority of the congressional delegation from Ohio. Even though they may have to be from opposite parties, you could have one person of that party and then a friendly person of the opposite party.

Mr. Fry: I'm not certain that the legislators are going to like the idea of congressmen sitting and having a part of their apportionment. I would guess that the congressmen could have just as much input on the commission as they can in the legislature and

wouldn't be losing anything even without actual representation. I would support in legislative apportionment the group that we are appointing doing congressional redistricting as well as apportionment.

Mr. Carson: I totally overlooked the point that Paul Gillmor made. Did the committee consider that?

Mr. Carter: That point didn't come before the committee and I do think it's a good point.

Mr. Huston: You attempt to get bipartisan representation. You are never sure you are going to. I'm inclined to agree that having the congressional members sit on the apportionment board for the state legislature is probably a poor choice.

Mr. Mansfield: I prefer not to have the congressmen represented.

Mrs. Eriksson: The original proposal of the committee would have mandated congressional districting, and the two congressional appointees were chosen by the group of representatives to the United States House of Representatives of each of the two political parties. In other words, the democrats would pick one and the republicans would pick one. When I rewrote this, I didn't go into so much detail because this was optional with the general assembly anyway.

Mr. Carter: We could go back to the language we had before "shall be appointed by the two delegations".

Mr. Fry: I'd still like to raise the question of whether we want congressmen on the commission.

Mr. Carson moved, Mr. Unger seconded to eliminate the last sentence. A voice vote was taken, none were opposed. The last sentence was deleted.

Mrs. Sowle: And we are leaving in "if so provided by law".

Mr. Mansfield: As I understand, we deleted that sentence that disqualifies holders of public office. What is the possibility that with that sentence out and with no specific authorization that members of the general assembly and other public officers can serve, what is the possibility of running against that other section which precludes a member of the general assembly from holding any other public office?

There was discussion on this point.

Mr. Carter: Perhaps we ought to take a look at that before our afternoon session. Your point is Bruce, that even if we deleted that it may not have any effect, if we want to have elected and appointed officials eligible so we would have to state it affirmatively.

Mrs. Orfirer: When I voted for that deletion it was with the understanding that members of the general assembly would not be eligible. I would certainly change my vote if you were going to reword this to say that this was not a public office or that they were eligible. I think that when we talked about public officers or people who were elected or appointed we were thinking much more in terms of local government officials or judges or that kind of person, and not legislators.

Mr. Unger: Mr. Chairman, I think it is worth pointing out that all of the discussion that has happened since that vote makes it quite clear that almost everyone who has spoken assumes although it hasn't been said that the result would be a commission made up almost entirely, if not entirely, of legislators, and that's why I voted against deleting that section. I don't think it should be a legislative commission.

I think our major purpose in rewritting this section in the beginning was to make a citizens' commission. And as you stated when the discusssion started today, the option of having either a partisan or a seemingly nonpartisan or bipartisan method of doing this, and I favor the bipartisan to the extent in realism that it's possible.

Mr. Carter: Perhaps to cover both thoughts could we change that sentence to "elected or appointed officers other than members of the general assembly may serve as a member of the commission."?

Senator Gillmor: Personally I don't see any reason to exclude legislators, but I don't feel that strongly about it if that's what the majority wants.

Mr. Carson so moved and Mr. Unger seconded. The motion was agreed to.

Mr. Carter: We have Professor John Laubach here from Otterbein College. I understand you have some students here with you to observe what goes on here.

Professor Laubach: That's true, we have here our class in state and local government.

Mr. Carter: We welcome you to the confusion that exists in this commission. I also understand we have the Franklin County Prosecutor here who would like to make a statement on the grand jury when we get to that, Mr. George Smith.

Do we want to state that the apportionment commission shall be responsible for dividing the state into districts for the election of representatives to the U.S. Congress? And then the question is the last phrase "if so provided by law". We could delete the last phrase and then they would have the responsibility.

Mr. Mansfield: I move that we delete the words following "congress".

Mr. Fry seconded the motion.

Senator Gillmor: I think that it should be an option of the legislature. I'm not so sure I disagree with the point that it doesn't hurt for the legislature to have a little bit of string on some of the congressmen.

Mr. Fry: I will express the opinion that I expressed earlier. I think that any legislator who has participated in congressional redistricting will state that it's a very unsatisfactory way to do it. Your congressmen are going to be at every legislator, writing to him, trying to get what is particularly good for his district, instead of having a balanced approach. It gets to be a horsetrading deal. No one is satisfied. I think we should recommend deleting the language after "congress" in the balance of that sentence in the second line in the last paragraph.

Mr. Unger: If the apportionment for members of congress isn't done in this fashion can anyone speculate on how it would be done?

Mr. Fry: It would be done by the legislature just as it is done now.

Mr. Carson: Would this satisfy the federal statute?

Mrs. Eriksson: We don't know because so far no other state has done congressional districting other than by the usual legislative process. A similar provision was written into the new Montana Constitution. As far as I know, that has not been questioned, but it has not been used because there has been no census since that constitution was adopted.

Senator Mussey: I wonder if consideration had been given to the possibility under this language of one county furnishing the entire commission.

Mr. Carter: You mean as to whether it could happen?

Senator Mussey: Certainly. There are 23 or 24 members in Cuyahoga county and 12 in Hamilton county.

Mr. Carter: The four members of the commission are appointed by the four legislative leaders in the house and the senate. If they all agree on having them all from the same county, it could happen. It hadn't been discussed at all to my knowledge.

Senator Mussey: These are the kinds of things that can happen.

Senator Butts: You talk about the letters we get from congressmen, those might be the only letters we get. I don't want to reiterate what I said at the last meeting which was that I think it is appropriate to have some balance in the relationship between the two bodies.

A show of hands was taken (9 voted yes, 3 voted no). The motion was adopted.

Senator Gillmor: In this selection by lot by the secretary of state, there is a lot at stake. Is it possible for the secretary of state to get those four names submitted to him and the next day say he threw them all in a hat and drew out this one who just happens to be of the same political party he is?

Mr. Carter: How about adding "in public"?

Mr. Huston: In the presence of the commission.

Senator Gillmor moved adding, after "secretary of state", "in the presence of the commission".

Mrs. Sowle: I think there is something requiring that all commission activities be public.

Mr. Carter: This is to make sure that the lot is an action that is public.

Mr. Mansfield: Drop the phrase "in the presence of the commission" -- "public" is sufficient.

Mrs. Orfirer: It would be public if you have it in the presence of the commission.

Mrs. Sowle: It says all meetings of the apportionment commission shall be open to the public.

Mr. Unger: This may not be a meeting.

Mr. Carter: Perhaps we could cover both by saying "shall be chosen by the lot by the secretary of state at the meeting of the commission".

Senator Gillmor: I will amend the motion to read that way.

Mr. Fry seconded. The motion was adopted.

Mr. Carter: Now the next item on the agenda I think we can cover before lunch -- legislator eligibility to certain offices. You have a memorandum on this question from the What's Left Committee. It was pointed out that this has created some situations that were felt to be adverse to the public interest in the current scene. And that what was put in the Constitution related to a long time ago when the legislature was all powerful. The checks and balances that have come into the picture since that time

have really negated the possibility of abuses in this area, and it is actually working against the public interest today. The committee I think unanimously recommends this change to the Commission.

Senator Gillmor moved the adoption of the committee recommendation and Mrs. Sowle seconded.

Mr. Carson: Did the present language in Section 4 of Article II come from this commission?

Mr. Carter: The Commission made a few cosmetic changes but this goes back, as I recall, to 1802.

Mrs. Eriksson: It was amended in 1973 as a result of our recommendation.

Mr. Carson: And we are asking to go back to the voters again and change our own recommendation?

Mrs. Eriksson: It was a combination of two existing sections and was part of the rewrite of Article II, the legislative article. The language itself has been in the Constitution since 1851. What we did was combine two existing sections into one section.

Senator Gillmor: As I recall there was a change made in that constitutional provision, but the Commission intention was that it was a nonsubstantive change. It was just to clean up the language. We are not reversing a recommendation that we made.

Mr. Carter: This question did not receive consideration by the Commission on its merits.

Mr. Carson: I guess I have some hesitation to go back to all the voters of Ohio with the same section again when we should have perhaps considered it back then. Does this really create much of a problem in the state of Ohio? It only talks about appointed officials, it doesn't bar a member of the legislature from running for election to another office. It only prevents him from accepting an appointment if the compensation was increased during his present term or the office was created during his present term.

Senator Gillmor: I don't know whether it is all that critical, although I think it is probably more critical than a lot of other changes that we made, like on the duelist provision and some other things. The original concept of this constitutional provision was a good one. It was aimed at preventing the legislature from setting up a lot of lucrative offices by statute with the understanding that they could be appointed to them. I just don't think today that that, as a practical matter, is any problem. With the press coverage that you have, it is just not going to happen. It seemed to me that the compensation provision causes problems particularly because at the time that this went in in the early 1800's we didn't have the kind of inflationary pressures that we do now. As a practical matter, every session of the general assembly raises the salary of everybody, basically just to keep up with the cost of living. It is not really an increase in compensation. This provision excludes a certain category of people, legislators, from being considered for any of these appointed positions. On the federal level, for example, Carter went to Congress to appoint one congressman as Ambassador to the United Nations. He selected another congressman for Secretary of Agriculture. For example, we had an appointee as Director of Insurance seven or eight years ago who was a member of the legislature, and resigned from the senate, and then found out he was ineligible to be appointed because the pay had been increased. He didn't vote for that pay increase thinking he was going to be appointed Insurance Commissioner. The abuse this was to guard against really isn't a danger now. It has the practical effect to simply automatically exclude a group of people whom I see no reason for excluding.

The roll was called, as follows: Yes: Senators Butts, Gillmor, Mussey, Roberto; Messrs. Carter, Huston, Mansfield; Mrs. Sowle and Mrs. Orfirer. No: Messrs. Carson and Unger.

Mr. Carter: We will keep the roll call open. Would you be good enough then to make your statement Mr. Smith?

Mr. Smith: Mr. Chairman, I note that there is some confusion as to what the position of the Ohio Prosecuting Attorneys is on this grand jury proposal. We feel that the proposal would sabotage an established system of checks and balances within the criminal justice system. Though some duplication between the preliminary hearing and grand jury no doubt occurs, and the proponents talk about eliminating that duplication, the grand jury offers a more thorough forum for inspection of criminal evidence than a preliminary hearing. The courts of Ohio have recognized candor unique to the grand jury proceedings and the supreme court of Ohio has said "the grand jury room is a secret chamber where, independent of fear, favor and effect on and unmoved by malice, hatred, or ill will, charges against persons may be investigated and indictments presented if the facts warrant them." A second hearing, in other words, under the present system where you have a preliminary hearing and a second hearing, the person charged with a crime has a right to a second hearing before a grand jury. It provides another look at the case and often, I might add, a much more thorough look, in fact, almost always a more thorough look. We feel also that the grand jury, particularly a grand jury that is in session constantly and is used to concerning criminal cases, is a superior investigative tool, particularly on the more complicated cases. If you have a complicated embezzlement thing, a complicated public corruption type thing where you must take testimony and fit the pieces together and this is very helpful from this standpoint. Also a prosecuting attorney, a police officer, or what have you is powerless to subpoena witnesses, put witnesses under oath, and obtain records by subpoena by any other method than through the grand jury. And this is again a valuable investigative tool. In cases of immediacy where evidence should be formally probed, the prosecutor will have access to a standing grand jury. A special grand jury, as the amendment would contemplate, just to hear such matters, will unduly encumber the process. As to the secrecy of the grand jury, behind closed doors the prospective defendant will sometimes consent to addressthe grand jury, sometimes to clarify or crystalize the entire case. Many witnesses will not testify except under the cloak of secrecy of a grand jury. We have had personal experience of this in our own office, where people would refuse to speak to the investigating agency, namely the State Patrol, but when they were subpoenaed to the grand jury they came in and made a clean statement as to their part in the subject of the investigation. We feel of course that the witnesses will be much more candid before a grand jury which is helpful to the investigation. Though the expense and allocation of resources for grand juries continues to cost the criminal justice system hard to come by dollars, it is currently worth it. Counties that have grand juries must literally usher the grand juries through a lengthy training period so that they will properly perform their important task. Grand juries which are specially called for special offenses only, such apparent important matters might receive less than adequate treatment or the grand jurors for each separate investigation would have to be retrained costing valuable time and money. Now, where a deceitful prosecutor could indeed manipulate a grand jury, laws provide the best safeguards available to prevent this abuse. First of all, the jurors are selected like any other jurors on an impartial basis. In this county, by computer from the rolls of electors. The jurors take an oath demanding that they perform impartially to the best of their skill and understanding. Now while the prosecutor can direct the investigation and must direct the investigation brought to the attention of the grand jury, he is not permitted to be present during the expression of views or the taking of oath. The prosecutor must leave the room. If a prosecutor abuses his office in conducting investigations before the grand jury, he must answer to the voters as well as the courts. And I believe this is a strong deterrent. As a matter of fact, a violation of the secrecy of the grand jury places the prosecutor in a position where he would have to face criminal sanctions. Now there is a part in this amendment that proposes that the prosecutor disclose evidence that "tends to negate the guilt of the accused". Proponents of this amendment might argue that this proposed provision would further safeguard the criminally accused from wrongful prosecution, and it sounds very good on its face. The Ohio Prosecuting

Attorneys Association feels that adequate safeguards already exist. The code of professional responsibility, as adopted by the Supreme Court of Ohio, Rule 16 of the Ohio Criminal Rules of Procedure, requires that all exculpatory evidence in possession of the prosecution be turned over to the defense during discovery. And just last week in the U.S. Supreme Court they similarly required the prosecution to release exculpatory information to the defendant. There is no standard of disclosure under the proposed amendment as set forth. To summarize, the Prosecuting Attorneys Association recommends: (a) grand juries should remain intact as an essential cog in the criminal justice system of Ohio; (b) the advice of counsel - regarding that there are already adequate safeguards. It is not an adversary proceeding. All potential defendants must be advised of their rights -- that is the current case law. Counsel is already allowed outside of the grand jury room, so that an individual must be advised that he may leave and discuss any question with his counsel. And again, we are only deciding probable cause before a grand jury, not guilt or innocence. Should this person be charged, they have the right to a fair and impartial trial by a jury of their peers following that. And I have just mentioned the part regarding the negation of the guilt of the accused as are adequate safeguards and responsibilities on the lawyers who serve as prosecuting attorneys in this state at this point. Most important, this proposal removes the charging of crimes from the watchful eyes of the grand juries who are regular jurors and electors of the state. Thank you for this opportunity, Mr. Chairman.

The Commission recessed until 1:30 p.m.

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Mr. Carter: Let's go back now to the matter of apportionment. A proposed amendment is before you to do what we were talking about before lunch.

It was moved by Mr. Mansfield, seconded by Mr. Fry that the amendment be adopted. It was adopted.

Mr. Carter: We will have to cover the procedures in a letter. The first motion, if adopted, would be the commission recommendation. If it is not, then we will vote on the second one, the McElroy proposal.

Mrs. Orfirer: We should have two different mail votes.

Mr. Unger: The second depending on the outcome of the first.

Mr. Carter: So we will have one vote, and then we will authorize the chair to carry on a second vote, then in case the first one does not pass.

Mr. Carson moved that procedure be followed, and Mr. Huston seconded. All voted aye.

Mr. Carter: Are there any other further items to be brought before the Commission before we take a vote on the committee recommendation?

Mr. Huston: Let me ask you this question of procedure. Suppose you have three people submit the name of one person that was previously nominated. They didn't nominate the person. That way that gives them three chances out of one of having his name selected and that could be done by the language here.

Mrs. Orfirer: Nothing wrong with that.

Mr. Huston: It would seem to me that what you were trying to do was to prevent that by requiring the people to name one of those persons that they nominated rather than

to select one of the three or all of them select three, that gives them a greater chance. They necessarily wouldn't agree on them because that way they would have three chances out of four out of getting a person.

Mrs. Orfirer: If the majority of the commission votes for one person, that person will be chairman.

Mr. Huston: But you are increasing the odds and making it very desirable not to agree.

Mr. Mansfield: You can solve that by adding in the third line after "nominated", "by him".

Mr. Fry: If the three of them agree as to the qualifications of one person, that is a good thing. In the lottery, there would be three chances to one that his name would be pulled.

Mr. Mansfield: Except that you might get the fourth one and in that case you've got a guy against the majority of the commission.

Mr. Fry: This is the reason why if three of them agree on one they would be better off to say let's do this publicly rather than run the risk.

Mr. Carter: That's right. Still both parties are taking their chances on a 50-50 basis.

Mr. Huston: Not 50-50. Two could submit one name and the other two could submit two names.

Mr. Carter: But they would still be the representative of their party. So it's still the same odds for the party.

Mr. Huston: If each submits a name it would be one out of four, but this way it would be one out of three.

Mr. Carson: One person's name would be in the hat twice. If two people want one man he would have two slips in.

Mr. Huston: If two people want one man, should they be permitted to put two slips in?

Mr. Carson: That would change the odds. I think each member should have a chance of submitting a name.

Mr. Carter: Now we will vote on the committee proposal as amended.

The roll was called. The voting was as follows: Yes: Senator Mussey; Messrs. Carson, Carter, Fry, Huston, Mansfield, Unger; Mrs. Orfirer. No: Representatives Hartley and Oxley and Norris.

Mr. Carter: I can see that we have the public members for it and the legislative members against it. The second part of this matter, in case this does not pass, we then will consider the McElroy proposal. Do you all have a copy of that?

Mr. Norris: Refresh my recollection if you would, Mr. Chairman. What is the essential difference between John's proposal and the present Constitution?

Mr. Carter: Mr. McElroy said the thrust of his proposal is that this is a partisan matter -- let's recognize it and admit that. Then his argument was for two things which incorporated in his proposal. One is that there be a staff for the commission,

most likely appointed on a partisan basis. And secondly that it be done all the way through with adequate opportunity for the public to observe what is going on and to critique and have an opportunity to participate in the process -- comment on it anyway. Those are basically the two things.

Mr. Norris: It also puts the congressional districting...

Mr. Carter: That becomes optional with the legislature.

Mr. Unger: The composition of the commission would be the same as it is now.

Mr. Carson: At the bottom of page 1, the sentence which begins "the staff with the assistance and under the supervision of staff director, shall formulate an apportionment plan conforming to the requirements of Article XI in the constitution". To me that seems to be the wrong direction. I would think the members of the commission ought to be involved in determining how the plan should be put together rather than the employees of the commission. Secondly, on page 3 of the provision it reads "such meetings may recess from time to time as deemed desirable by the governor" to permit the completed development of an apportionment plan. I really don't know whether that is wise to give one member the power to call recesses and determine how long is needed.

Mr. Fry: If the governor is all by himself in the statehouse in one party, he could indefinitely delay the completion of an apportionment plan.

Mr. Carson: Right.

Mrs. Orfirer: You could change it to a majority of the members of the commission.

Mr. Carson: Is this a part of the present Constitution or is this new?

Mrs. Eriksson: This particular provision is new. But the fact that the governor, auditor and secretary of state are members of the commission, that is a present constitutional provision. The present Constitution does require the governor to call the meeting as does this last paragraph on page 3, that the governor shall cause the apportionment to be published, that is present constitutional language.

Mr. Fry: I think the advantage of this over the present system is that you are going to bring it out in the open. By having the staff operate in this manner it is going to be better than having it in the back office of one of the state office holders, where they are marking up maps. There is an advantage to exposing the work of the staff to the public and also giving the public a chance to react. I would like to recommend that if we do go this direction that we handle congressional redistricting too, however.

Mr. Norris: I think there is a certain logic in having that done, but to me the basic threshhold question behind the advantage of having a separate apportioning board is just simply to make certain that a group not be able to apportion itself. Now, there just isn't anybody else to do it. We had to set up an independent board and that's what has been done in our Constitution in the past. If there was someone else to do it that'd be okay. I don't see any problem with the legislature being the forum to take care of congressional districting, because again there is that one step removed and Congress isn't drawing its own districts. The legislature, for all its imperfections in this kind of thing, is after all the ultimate political forum and this is the ultimate of political acts. We are out in the open more than anybody else. If we district Congress it is a much more public act than if the apportionment board would do it. I don't care how much we talk about here of opening it up more than is the present case. Anything would help. The thing I want to guard against is a legislative body drawing its own districts.

Mr. Fry: Then you will recall that it gets down to a matter of horse trading and it is not done by an impartial group. And I think the reasons for having the apportionment board for the legislature apply just as strongly to Congress. You are subjected to a lot of pressure from your congressmen on these things.

Mr. Norris: We did it twice since I have been here and then we had the abortive attempt last year. Under the McElroy approach, you don't have any bipartisan board. It is still a political decision. I don't care whether that plan is submitted to the legislature or to an apportionment board, the political party headquarters is going to have that plan drawn. Truly, what is the better forum to perform that ultimate political act? Okay, so all the horse trading goes on here but it is out in the open, it takes a long period of time and a lot of people get to shoot at it.

Mr. Fry: Unless they open up the caucuses, it won't be any more out in the open than it has been in the past.

Mr. Carter: Could I have a motion that would authorize us to submit this as an alternative in case the first one is defeated?

Mr. Carson: I would like to amend it first, at least the wording of it. In the fourth paragraph on page 1 I'd like to move that it be amended to read as follows: "The staff, under the supervision of the apportioning persons"....

Mr. Fry seconded the motion.

Mr. Huston: Does that necessitate a revision on the top of page 2 where we say "shall be reported by the staff director"?

Mr. Norris: Does the staff director have a vote at the staff level? You have two democrat staff members and two republican staff members and then the staff director -- you can't break a tie. If staff means five people, it's okay. If the staff means four people with the staff director standing on the outside, then you don't have anything.

Mr. Carter: I think the staff would include all of them because in the previous sentence it says the staff director and staff assistants.

Mr. Norris: I think the amended language is better than the other language because you can at least argue that it means five people.

Mr. Mansfield: I'm not sure whether I am qualified to vote on either one of these plans. Does the legislature in effect participate now or how is that done?

Mr. Norris: Speaking as a battle scarred veteran who was the plaintiff in the last lawsuit, the way it works now is when the census figures are available, each political party draws its own in-house plans secretly. The last time it was done so secretly by the party that controlled the apportionment, maybe not all but certainly most of the members of its own party in the legislature didn't know what it was going to do. Obviously, some of the members were privy to that. Of course none of the members of the other party knew about it The meeting was called, they parade out the plan and the majority members of the apportioning board quickly adopt it and the meeting is adjourned. And that's it. And then everybody tries to find out what happened, after it's already done.

Mr. Carter: This is still with respect to legislative members, not congressional.

Mr. Norris: Right, just members of the legislature. The only legislative input is that there happens to be one republican and one democrat legislator on the apportionment board. But they really don't have any input. The board doesn't really have any

input. As to congressional districts, a congressional districting bill has to pass through the legislature like any other bill. So sure, the original map is drawn by headquarters of the majority party just as secretly as the other. Although congressmen tend to have a way of cutting their own deals behind the scene with the party chairman. But once that map is made public, obviously it takes a while to pass it. There isn't just a summary vote like on the apportionment. It's got to go through the committee hearings. Every senator wants to get as much of his district inside a congressional district as he can. This is the whole ball game and there is no way you are ever going to have a bipartisan board that is really nonpartisan. That's impossible. So I think the best thing that you can ask for is a process that is one step removed. Just because you've got an apportionment board doesn't mean that they are going to draw a better map than any other group, it's just that it's one step removed and that's good, removed with some very specific guidelines against gerrymandering and that kind of thing, multiple bites out of counties.

Mr. Carson: I wonder if I may suggest changing the word "supervision" to "direction". It sounds a little less every day kind of activity. "The staff under the direction of such apportioning persons, shall...."

Senator Roberto: Whether the staff draws up the plan or the apportioning persons draw up the plan, what I see under this or any other proposal is a plan drawn up by the party and submitted to the staff people or submitted to the apportioning persons, and they will have little choice but to accept and assume their own, whatever plan is drawn up by the party. Unless someone can persuade me differently, I see this as a futile effort. I don't think this language is going to change anything in the way of practice and it may in fact interject a good bit more confusion than we have now.

Mr. Carter: Mr. McElroy's point on this was that the way it is done now, the political parties do the staff work, and he felt it was a substantial improvement if the apportioning persons had their own staff to make sure there was adequate attention paid to the details of working this thing out. Now it's going to be a political staff -- make no doubt about that. But at least there would be people that would spend the time and would be empowered to spend the time to develop it.

Mr. Norris: One of the biggest problems in the last apportionment was who was going to pay the bill. What I read between the lines is really simple. The two republican staff people, instead of sitting over at 50 West Broad Street drawing a map, are going to move over here, and the public has got to pay them. That's what we are talking about. So yes, it's still a headquarters plan. But the staff people aren't going to be over there, they are going to be over here, so I think it's a mixed bag. It is more open in the sense that this is really staff charged with working for the commission. As a practical matter it is going to be paid for by the taxpayers. I suppose that's a fair trade-off.

Mr. Fry: Then you've got the other great advantage that there is going to be some chance for input by the public after the plan is published and before it's adopted. Which is a big advantage, I think.

Senator Roberto: Mr. Chairman, I would agree that that would be a big advantage if there weren't so much at stake. I don't know how much public testimony it would take to change those boundary lines. It may be more facade than it is real.

Representative Hartley: I disagree a little bit because for one thing, I think there is going to be a tendency to not gerrymander quite as much when it is before the scrutiny of the press. Those people are really going to get raked over the coals for their actions. Where at this point they are not until it is handed in and done and then everybody screams.

Senator Mussey: If the apportioning persons are not elected officers, I doubt whether any amount of public criticism is going to affect their decision.

Mr. Carter: They are elected officers in this plan, the governor, secretary of state, auditor of state and two members of the legislature.

Senator Mussey: Okay, if they are public officers they would still have to weigh public criticism against political considerations for a period of ten years. Now which way would you bounce if you were in that position as an apportionment person? I don't think there is too much doubt.

Representative Hartley: I think you would go for political, but I don't think they would make it blatantly political.

Mr. Carter: I think Mr. McElroy's point was that it would put some restraints on the process and not really change it.

Senator Butts: If the majority party is picking the director of the staff and two staff people and then picks two that are not members of their party, they can choose people who would be sympathetic to their position even though they have a different party label. I wonder if you wouldn't enjoy more balance with respect to their ability to kind of look over the shoulders if they were selected by the members of the minority party.

Mr. Norris: Yes, that's a good point. The minority members of the board ought to be able to appoint their two staff.

Senator Butts: We've got so much clerical detail -- they ought to be paid the same amount. Is it conceivable that the majority people can be paid $20,000 a year and the others paid at a rate of $5,000?

Mr. Carter: I imagine the newspapers would have something to say about that. I'm suggesting this: after the first sentence "and shall likewise appoint two staff assistants who are members of the same political party as the staff director", add "The two apportioning persons who are members of the major political party of which the staff director is not a member shall appoint two staff assistants".

It was so moved, seconded and adopted.

Mr. Carson: I note, Mr. Chairman, that there is nothing in this proposal that requires all of the meetings to be open to the public that I could find in there, and I would like to move that we add that sentence. At the end of paragraph one, and reading from the committee's proposal, on page 2 the next to the last paragraph the first sentence there, "all meetings of the apportioning persons shall be open to the public."

Mr. Fry seconded the motion and it was adopted.

Mr. Huston: Does that mean that only action can be taken at meetings of the commission? It really doesn't spell it out in either proposal, except that Mr. McElroy's does mention that it should be done at a meeting, but the other one doesn't -- it just mentions that all meetings shall be open.

Mr. Carter: The thrust of this is to make sure that all meetings of the apportioning persons at which deliberation or action is taking place shall be public meetings.

Mr. Huston: That's what I would think. I just wanted to make it clear for the record what we anticipate will happen -- the sense of this. In our proposal we say the concurrence of at least a majority of the members of the commission. I just wanted to

clarify the record that it was anticipated that all action be taken at public meetings.

Mr. Carter: If you are going to do that, it seems to me that when the governor gives one week advance notice that should include public notice. It says here "the governor shall give one week advance notice to each of the apportioning persons".

Mr. Carson: I don't think that is much of a problem. Seven people from opposite parties will get notice.

Mr. Carter: If we put in public notice and public meetings, will that take care of it?

Mr. Carson: Sure. On page 3, the sentence relating to recessing by the governor, I'd like to change that to read "such meetings may recess from time to time as deemed desirable by a majority of such apportioning persons", etc.

Mr. Carter: Is there any objection to that?

There was none.

Mr. Carson: Three lines down on page 3 you use the words "upon motion by one of the number duly seconded". I think you could probably strike that out -- that phrase. Just begin the sentence "The apportioning persons".

All agreed.

Senator Butts: While we are talking out lines, on page 4, those four lines.

Mr. Carter: Is it not true that even if we did not have this in there, the legislature would still have this authority?

Mr. Norris: My opinion is yes.

Mr. Huston: And I think they ought to have it.

Mr. Carter: Then the argument is it's superfluous.

Mr. Huston: Not necessarily. It could be if the legislature did not appoint the apportioning persons as the group that does the congressional districting, it could imply that they couldn't authorize anyone else to do it.

Mr. Fry: I'd like to have the legislature face up to this thing. I'd like them to say, "we are going to strike it and we are going to do it the same way we have been doing it".

Senator Butts: I'd prefer to strike it out now.

Mrs. Orfirer: What are the consequences of removing it? Then they could provide it anyway they want. If we leave it in, then it only can be this way, if they do not do it by themselves.

Senator Butts moved to delete the language, and Mr. Mansfield seconded the motion. A show of hands was taken. Six were in favor, five opposed. The motion was agreed to.

Mr. Carson: I'm very confused. We took a vote on the committee proposal and that requires the apportionment commission to deal with redistricting. Some members of the Commission may vote against that because of this provision. We have just voted with respect to this one to take it out and I think we are running at cross purposes

here. I happen to like the committee proposal for apportionment much better than John McElroy's. But I'm afraid somebody is going to get hung up on the committee proposal because it deals with congressional districting. It requires it to be done by this commission. This one will not.

Mr. Mansfield: I don't find anything inconsistent in that. In other words, I think the committee's proposal is considerably different than Mr. McElroy's. If the committee proposal is adopted by the Commission and recommended to the legislature, I would think the first thing they would do is knock that out.

Mrs. Orfirer: Then maybe we ought to knock it out now as we have in the second proposal, so at least it would be considered by the legislature.

Mr. Fry: If the congressional thing were taken out A1, would that change your position on the committee proposal?

Mr. Norris: No, I still would be against it.

Mr. Carson: May I change my vote on the last motion -- I'd like to vote no.

Mr. Carter: The motion has been made that we strike the last sentence on page 4. And it is seconded and I think I will call for another vote, if I may. Does everyone understand the question at this point?

A show of hands was taken (6 voted yes, 6 voted no).

Mr. Carter: The motion fails, the language stays in. We will submit the first question that we have already taken a vote on as the committee proposal to the membership. In the event that it does not pass, the staff and the chairman will submit this question to the Commission members before having another meeting. Now the next thing we are going to move to is civil juries, the question of civil trial juries and damages. I might make the announcement that the grand jury question has carried by a vote of 22 in favor, 5 against, which means that it does carry the Commission and will be submitted as a Commission recommendation.

The voting on Article I, Sections 10 and 10A was as follows: Yesses: Senators Gillmor, McCormack, Mussey, Roberto; Representatives Fauver, Hartley, Maier, Oxley, Norris, Stinziano and Thompson; Messrs. Aalyson, Carson, Carter, Fry, Guggenheim, Heminger, Huston; Mrs. Sowle, Mrs. Orfirer; Messrs. Unger and Wilson. Nos: Senator Butts; Messrs. Bartunek, Cunningham, Mansfield, Montgomery: Pass: Mr. Skipton.

Mr. Norris: Mr. Chairman, I think that really our committee's function was complete, and I think the only thing we are doing here today is considering some proposals from Don Montgomery.

Mr. Carter: He raised the questions that were discussed at the last meeting.

Mr. Norris: I'm referring to this memorandum of January 31, entitled "Civil Juries and Damages". The first thing he wanted to raise was empowering the legislature to impose a cap on the amount of civil damages. That pretty much speaks for itself. In the medical malpractice legislation one of the questions that is often raised is whether or not it is unconstitutional in that it did permit a cap on general damages, and a number of lower courts have held that it was unconstitutional in that regard. What Don proposed is, if it is unconstitutional, let's change that and say that the legislature can put a cap on general damages. If that then were in the Constitution then obviously the language of medical malpractice limiting recovery would be constitutional.

Mr. Mansfield: Wouldn't you run into federal constitutional problems then?

Mr. Norris: Of course we could, but there is nothing we can do about that. Depending on the form, I think it also could have some outcome on the constitutionality of no fault automobile insurance. Another change that he suggested was granting a court of appeals the remedy, in essence, of remittitur and additur, to alter a jury verdict by either raising the amount of an inadequate jury verdict or lowering the amount of an excessive jury verdict. And that would be conditioned upon a test similar to a reversal on the weight of the evidence. The verdict would have to be against the manifest weight of the evidence, as I understand it. That originally was a crusade of mine in the committee, and my rationale was that a court of appeals under the new appellate rules can essentially enter final orders on about anything but this. If an appellate court feels that a jury verdict is excessive or inadequate, the only remedy presently available to the court of appeals is to order a new trial. It cannot enter a final order. I stood alone on the committee and I guess they softened my ardor somewhat, convincing me that perhaps that is an adequate remedy. What happens as a matter of practical procedure now is the trial judge can remit or add only he is limited in that regard in the same way as the court of appeals. If he thinks it's an excessive verdict, he can't enter a verdict notwithstanding what the jury does. He has to order a new trial. So what he does is, he says "Now look fellows, this is too high, now either you agree on an amount or I am going to order a new trial". The court of appeals can do the same thing. So remittutur and additur are only voluntary. They can only be done by agreement of the parties. Otherwise, the only remedy is either for the trial judge to order a new trial, or the court of appeals. A judgment n.o.v. cannot be entered to either lower or increase a jury verdict.

Mr. Mansfield: It's either the whole thing or none?

Mr. Norris: Right. He has to just simply order a new trial. He cannot enter a new verdict.

Mr. Huston: Can he enter a verdict in favor of the other party?

Mr. Norris: He might do that but he can't change the dollar amount.

Mr. Mansfield: He grants his judgment for the other party notwithstanding the verdict. It may not be directly responsive to the question, but it provides a remedy to put the parties together and come to a conclusion.

Mr. Norris: The third suggestion is to authorize the general assembly to limit or abolish punitive damages. You have suggested language there. My own feeling would be that I'm not ready to support a measure to allow the legislature to put a cap on damages. That's just my personal opinion. I guess I still am ready to support a measure that would allow remittitur and additur although my ardor is somewhat dampened, and I don't see any reason to fuss around with punitive damages.

Senator Roberto: The research suggested that it is an equal protection argument. It sounds like a Fourteenth Amendment argument. Changing the Ohio Constitution won't change that. I wonder if that wouldn't be spinning our wheels. And with regard to the second, as I understand it, Mr. Chairman, the reluctance with giving this authority to the court of appeals, the court of appeals doesn't hear all of the testimony, they don't watch the witnesses, they haven't gone through the trial. And having gone through the trial, the jury is sitting there observing the process and participating in this process, and then to turn around and give this power to the court of appeals offends people.

Senator Butts: I think I will limit myself to the first point which I think is the most critical of the propositions and that is the matter of being able to put a cap on damages. While the discussion that the staff has prepared in the memorandum is in

reference to the litigation that has already begun with respect to the malpractice case, I think it is fair to say that in this session or certainly in the next session, the legislature is going to be asked with the same kind of fervor and excitement that the doctors came to us last session, by the manufacturers with respect to product liability. This probably is going to be an even more widespread kind of problem that we are going to have to deal with. The insurance people who are in the business of providing this kind of protection are throwing up their hands and saying there is no profit in it, it is impossible to predict what the future is going to be. A future which sees jury verdicts of much increased magnitude and a future which may be almost any time. A product that is created today is sold to one party and the warranty runs out and it is sold to another party, it's altered and some worker is using a machine or a tool or some customer who is using it has an accident, and goes in the court and sues to get damages. There is just no predictability. As a result they say, "I don't want any part of it". So then the manufacturer says, "I can't be in business, I'm not protected. I'm vulnerable. You are going to have to provide me on the part of the state with that kind of insurance." The money has to come from somewhere. We have no more ability, in fact far less ability, to look into the future and make underwriting judgments than insurance companies do. So what we do is create a fund which will expand as necessary as the suits and demands upon it are made. That, in effect, no matter what system we provide for recouping those funds, will be a form of taxation. As I was involved in the medical malpractice situation, I felt great sympathy for those kinds of cases, the people affected, the deaths, the vegetable cases, the people who had all kinds of problems happen to them. And I felt that while the judgments were very high, I could understand how they were just. The fact is, however, there isn't enough money to pay for all of those accidents, and it's brought into the public sector, what we have to do is go to our taxing capacity in one form or another. It seems to me it's appropriate for us to say, okay, with our limited amount of taxing capacity, what are we going to spend that money on. I think everyone here will have to admit that we have not allocated sufficient funds to those things that are clearly within the domain of the public sector because we don't have enough money. And to be able to hand out huge, multi-million dollar judgments for accidents, whether they are medical malpractice, product liability, lawyer malpractice, and whatever else is down the line, I just think there isn't enough money to go around. I feel very, very strongly that if we are going to have to get into this field, we had better put a cap on knowing how far we're going to have to go. Otherwise, there just isn't enough money.

Mr. Fry: I agree with this. And we don't know what it is going to affect. And at the present time it is no problem for contractors but I can see a time that a building that you are associated with in the construction. And even if the federal constitution says something to the contrary it might be well for us to at least make a step in this direction.

Mr. Carter: I don't think it follows necessarily that the federal constitution is against this principle.

Mr. Mansfield: You mean against putting a limit on damages?

Mr. Carter: Yes. I admit it is uncertain. I personally would be in favor of removing a constitutional impediment to the legislature dealing with this question as future events determine appropriate.

Senator Butts: We have at least one manufacturer here that I know of. Is product liability on the horizon or is it already here?

Mr. Unger: It's already here. It's a real problem and it is growing very fast.

Mr. Mansfield: It's inclining toward absolute liability.

Senator Butts: The major portion of the report of the small business committee was the cry of those small businessmen saying that product liability is literally going to shut them down.

Mr. Norris: Mr. Chairman, if I might just talk about public policy just briefly. I understand the pressures we have in medical malpractice and I know it is coming in product liability but I think there is a distinction. The whole exposure problem is the result of courts through interpretation shifting from a negligence doctrine to one of strict liability. That makes the manufacturer the insurer of his product. Until ten years ago, that never created a problem. The plaintiff has res ipse loquitur on his side but he still had to prove negligence in some way. If you use strict liability as the test there is no end to the liability. But the legislature can change that. We don't need a constitutional amendment to change the basis of recovery. We could just get back to a negligence theory and that gets you back to where you were. Obviously then the number of plaintiffs recovering is going to be limited. As a matter of public policy, there are some things that ought to stay out of the legislature's purvue. There ought to be some basic rights that are constitutional in nature and that's the reason we have the Constitution as a document. And then if we grant to the legislature the authority to put a cap on damages, the legislature will turn it into a battleground between warring special interest groups. And we saw the doctors organize and panic the legislature, and we're going to see the manufacturers do it and then it is going to be the lawyers. I mean there are some things that are pretty basic and a person's right to be compensated for his damages is that basic. So until I see a situation where we can't really respond by other methods, I don't want to take away what is really a basic right, the right of somebody to be compensated when he is aggrieved by another person.

Senator Butts: I wish there was a way that we could make a distinction between that which was an accident, that which is unforseeable, and that which is really negligence and malice. We're seeing where people are doing the best they possibly can, and it doesn't work out as well as it might.

Mr. Norris: In medical malpractice, in order for the patient to recover, he has to show that the surgeon was negligent. Even under that rule, obviously, because you have such a small group of people in the risk pool, a small number of surgeons, they can't handle it. In the area of products liability that negligence rule is gone, and they are down to making the manufacturer strictly liable where he becomes an insurer. You can imagine what would happen in medical malpractice and say in every case, every time somebody is injured he can recover from the doctor whether or not the doctor is liable. There is just no way. So the problems are different. In medical malpractice they can't respond because the pool is so small even under the negligence rule. But what has caused the problem in the manufacturing area is they have gone to strict liability. That's not a constitutional problem at all. We can legislate the responsibility.

Senator Mussey: What happened in malpractice was that the cost of the insurance was driving the doctors out of buying the insurance. Those who witnessed before our small business committee said they had been carrying insurance for years and all of a sudden the insurance company calls them up and says "I won't carry you", in certain fields of manufacturing. I think there is a need for a cap.

Mr. Carter: It does seem to me that this question is an important one, but I really am reluctant to take action on behalf of the Commission without it going through a matter of this fundamental importance as you have identified this. I'm really reluctant for the Commission to take a quickie action on a matter of this sort without having the opportunity to go back through the committee, the hearings, and to develop the rationale in an orderly fashion. My conclusion is, even though I support the

position of having some restrictions on this, it is probably not practical for us in our remaining days to tackle this. There is nothing that prevents the legislature from doing this as a part of their general attack on this problem if they choose to do so.

Mr. Fry: Mr. Chairman, I would suggest this. I think the Commission in its remaining days has time to look at this. If it is in our power to bring this to the attention of the legislature by means of a recommendation, I think we would be remiss in not doing so, because really a lot of the things we have dealt with are as important in today's world as this matter.

Mr. Carter: My concern is with the ability of the Commission to deal effectively with it at this point. Let me ask a question. How many of you would support this kind of amendment at this point? How many would not? You see, there are four against. It's just not going to be practical. That doesn't mean you are against the concept, but you are not ready to act on it today. We don't have time to deal with it. That's the real world I'm afraid we're in.

Mr. Mansfield: I think it really requires a period of time for the general populous to simmer down. This is a fairly recent development. When people begin to realize that what they have done (I say "they" in the loose sense) by getting these verdicts, they discourage the really good doctors, who normally take the high risk cases, they discourage them from doing anything. And this gets to be a very complicated field. And there are good arguments pro and con, and this is one of the phases that one may take. Really, it's got to be. To put in another way, the legislature sometimes acts before the people react in order to try to have things done. Most of the time the legislature is acting to reflect what the people have already in effect come to conclusions about. But to try to stop an ongoing movement which is very basic, I don't believe the legislature can do it.

Mr. Norris: If we had a longer life, it would certainly be a proper subject.

Mr. Carter: For a year's study.

Mr. Norris: I agree. You've got to have public testimony. At this stage, maybe the proper thing to do would be for one of the legislative members of the Commission to introduce an L.S.C. study resolution.

Mr. Carter: That would be alright.

Mr. Norris: So we could conduct one of our detailed inquiries between session with full staff support on the entire question.

Mr. Carter: Maybe that should be our commission recommendation then.

Mr. Norris: You could do that even informally by letter from the chairman.

Mr. Carter: We're going to have a final report. We could say that this is a complex problem which we think requires further legislation.

Mr. Carson: The product liability question is one which cannot be dealt with by each state taking a different stance. We sell across state lines and what we do in Ohio won't protect you in Illinois or California. There are big efforts going on in Washington to find a congressional solution.

Mr. Carter: We have one more matter to act upon and that is this question of whether or not we want to amend the workmen's compensation section in order to permit the

general assembly to permit private insurance coverage of workmen's compensation liability as well as coverage by the state fund.

After discussion, Mr. Fry moved and Mr. Mansfield seconded the motion that the draft submitted to the Commission be adopted. The roll call vote was begun on Article II, Section 35. Those voting yes were Senators Mussey and Roberto; and Messrs. Carson, Carter, Fry, Huston, Mansfield and Unger. None voted no. The vote was held open at the discretion of the chair.

Next came discussion of time and place for final meeting. It was agreed that it would be the latter part of May. The date will be selected later.

The meeting was adjourned.

Legislative-Executive Committee

Originally two committees, a combined committee under the chairmanship of Mr. John Skipton was formed early in the Commission proceedings. First meeting of both committees, April 15, 1971. Last meeting March 26, 1973.

Minutes begin on page 816

Research begins on page 984

Ohio Constitutional Revision Commission
Report of the Committee to Study the Executive
April 22, 1971

The committee held its first meeting on April 15. Present were Mr. Pokorny, chairman, Dr. Cunningham and Mr. Ostrum

The committee agreed to begin the study with a review of the present constitutional provisions relating to the executive branch of government, and to consider the number of executive officials presently specified in the Constitution, their functions, and whether they should be elected officials. A review will be made of the number and type of executive officials elected in other states, and suggested by the Model State Constitution. It was agreed that questions relating to education will be reserved for a later time, but that the committee will consider the Articles of the Constitution relating to the Militia and Public Institutions as part of the study of the Executive.

The next meeting of the committee will be Thursday, May 20, at 3 p.m. at the Commission office.

Ohio Constitutional Revision Commission
Report of Legislative Committee
April 22, 1971

The Legislative Committee held its first study meeting on April 15, 1971, in the Commission offices. Present were: John A. Skipton, Chr., Richard E. Guggenheim and Frank W. King, and Director Eriksson.

The Committee considered the recommendations of the Standing Committee on subject matter and concluded that the constitutional provisions relating to the structure, organization and procedures of the General Assembly would be studied first. Sections 1 to 31 of Article II, with the exception of 1a through 1g and sections 21 and 30, therefore, are to first get our attention.

Excluded from consideration for the present will be the provisions relating to the initiative and referendum and those matters in Article II which deal with public officers generally.

Also deferred for the time being is consideration of Article XI dealing with legislative apportionment. This article was completely rewritten and adopted by the voters in 1967.

A recommendation by Director Eriksson that Mrs. Joseph Hunter be assigned to assist the Committee was approved. Mrs. Hunter is a Cleveland attorney who conducted related studies a few years ago for the Ohio Legislative Service Commission.

Members present at the meeting discussed generally a few specific areas of study such as: (1) unicameral vs. bicameral legislature, (2) annual meetings of the General Assembly, (3) allowances for legislators, (4) the requirement for readings of bills, (5) signing of bills during sessions, (6) confirmation of gubernatorial appointments, and (7) length of legislative terms.

The next meeting of the Committee will be held in the Commission offices at 9:00 a.m. on May 20, 1971. Legislators and their leaders will be invited and solicited for their views on revision of the legislative provisions of the constitution.

Ohio Constitutional Revision Commission
Committee to Study the Executive
May 21, 1971

Summary of Meeting May 20, 1971

The committee met in the Commission offices at 3 p.m. Thursday, May 20, 1971. Present were Chairman Pokorny and Dr. Cunningham.

Dr. Cunningham, who had submitted to members of the committee suggestions for revisions in Article III of the Constitution, raising some questions to be determined by the Committee, discussed some of the problems. He pointed out that, if the constitutional amendment lowering the voting age in Ohio is adopted, the age for holding public office will also automatically be lowered to age 18, and the committee might wish to consider recommending establishing a minimum age higher than 18 for elected executive officials which the committee has under consideration. He also noted that the recently adopted constitutional amendment revising the Judiciary Article of the Constitution prohibits election or appointment to a judicial position after attainment of age 70, and that placing an upper limit for holding executive offices might also be discussed by the committee. He submitted, for committee discussion, the suggestion that the age for election to the office of Governor (and Lt. Governor, if elected) be 30. The Chairman pointed out that, since the present age limit is 21 by virtue of the "elector" requirement, this would be in, in effect, increasing the required age to be Governor. A question was raised as to the ages at which persons had been elected Governor in Ohio, and whether there had even been anyone under 30 elected Governor. This question will be researched. The Chairman pointed out that several persons, including former Governor O'Neill, were elected to the legislature when they were 21 or 22, but he did not know of anyone under 30 elected to the office of Governor.

Dr. Cunningham also discussed briefly the proposal to replace the elected Auditor of State with a Legislative Auditor, as contained in H.J.R. 32, presently pending before the General Assembly. It was pointed out that the Legislative Committee is also considering the question of whether provision for a Legislative

Auditor should be placed in the Constitution. Dr. Cunningham pointed out that the question also involves the function of the Auditor of State, who presently performs both preaudit and postaudit duties, and that it is difficult to see how the auditor can perform both functions.

Dr. Cunningham expressed the opinion that the militia function is not an administrative function, such as a police function which might be performed, for example, by the Attorney General, but a military function, although, because there is reference to it in Article III, it falls within this committee's jurisdiction.

Dr. Cunningham pointed out that one area of discussion should be whether any executive officials other than the Governor and Lt. Governor should be elected, and that his proposal suggests that the Lt. Governor be appointed and then an election held if there is occasion for him to succeed to the office of Governor, since he would then be succeeding from an administrative position to the Chief Executive position which should be responsible to the people. He pointed out that the question should also be raised about whether the Lt. Governor should continue to be the presiding officer of the Senate, which has historical precedent but which may no longer be a valid function for him to perform, and violates the principle of separation of powers. He also noted that some states have abolished the office of Lt. Governor and provide otherwise for the succession to the Governor's office in the event of vacancy. The first important decision to be made in this area, however, is whether the Secretary of State, the Auditor of State, the Treasurer of State, and the Attorney General should continue to be elected officers. It was noted that H.J.R. 18, presently before the General Assembly, provides for joint election of the Governor and Lt. Governor so that they would be of the same party.

The Chairman stated that he would like to have the opinions of all members of the committee on these issues.

It was tentatively agreed to have the next committee meeting on a Monday evening, June 7 or June 17, at 7:30 p.m. but that committee members would be called to see whether they will be able to come on either date or whether another time is better.

Ohio Constitutional Revision Commission
Committee to Study the Legislature
May 24, 1971

Summary of Meeting May 20, 1971

The Committee to Study the Legislature met on May 20, 1971 in the Commission offices. Present were Chairman Skipton, Messrs. Taft, Montgomery, and Schroeder.

The Honorable Charles F. Kurfess, Speaker of the House of Representatives, met with the committee to discuss problems with respect to legislative operations found in Article II of the Constitution.

Initial discussion centered around the initiative and referendum provisions. Mr. Kurfess pointed out that the 90 day referendum period constitutes the basis for establishing the effective date of measures and that only emergency, tax, and appropriation measures can become effective immediately. He stated that the courts have, so far, not looked behind the emergency clauses as adopted by the General Assembly to determine actual emergencies in the constitutional sense, but that some measures adopted as emergencies might fail to meet a rigid emergency test if one were to be adopted by the courts.

Election of Members--An effort to preserve the four-year senatorial term over a reapportionment period, which will occur every 10 years, has not yet been tested because there has been no reapportionment under the new constitutional provisions and since the recent census. Reapportionment should take place this Fall, and if there are challenges to these provisions, they may have to be looked at then.

Residence--One year in the district preceding election for both senators and representatives may constitute a hardship, especially during a reapportionment period. If a member's residence and a large portion of his district are separated, it is argued that he should be able to move into the area where most of his constituents are located, but the one-year residency requirement gives him only about 30 days in which to move and establish a new residence. Congress has no residency requirement. The one year residence requirement might be eliminated and left to statutory law, or reduced so that the member would have more time to make that decision, or he might be required to be a resident of the district when elected, or when he files to become a candidate. There is no present requirement that the residence be maintained during the member's term.

Organization--The organizational rules in the Constitution should be looked at, but do not create particular problems. Mr. Kurfess suggests that the committee examine the evaluation of the state legislatures done by the Citizens Conference, since it contains suggestions for some things which the Ohio General Assembly does not do. Some of these suggestions are not necessarily constitutional. Mr. Kurfess feels that, in connection with keeping the Journal, one element of legislative procedure missing in Ohio is keeping any kind of record which enables courts to determine legislative intent when that is necessary for interpretation of statutes. Tape recording of legislative hearings is a possibility, not necessarily to be transcribed but to be kept so that they could be used later by anyone interested in the testimony. A committee report which would set forth legislative history of the bill, such as the problem, why this approach is taken, what is to be accomplished by the bill, and similar matters is another suggestion. At times, an administrative approach or a judicial interpretation of a statute is quite unlike the intent of the legislature in enacting it.

Filling Vacancies--This is a new provision and raises two questions: should it be in the Constitution at all, and is this the proper way to do it? Mr. Kurfess suggests that he would prefer a vacancy to be filled in some fashion that would involve the people being represented rather than by the members of the house where the vacancy occurs of the same party as the person whose vacancy is being filled, although he does not favor going back to the system where the vacancy could only be filled by election because most vacancies never got filled and the district was unrepresented. In some areas, such as county elected officials, the central party committee now fills the vacancy.

Privileges of Members--No particular problems.

Public Proceedings--Deliberations of committees on substantive matters of public policy should be open. In fact-finding areas, there is good argument that some testimony should be received in closed sessions, because some officials indicate reluctance to be completely frank in open hearings. The campus unrest hearings are an example, where some testimony would not have been given freely in open hearings. Large staffs for congressional committees help them to obtain this type of information, or to ascertain whether the reasons why the testimony could not be given in public are valid ones. Generally, Mr. Kurfess feels that no other state legislature is as open as Ohio's. He also feels that state legislatures do not have the same need for closed hearings as does Congress, which considers matters of national security in committee hearings, although some matters considered by Congress in closed hearings, such as the welfare program, could as well be considered in public hearings. Chairman Skipton also commented that Ohio General Assembly proceedings a... more open than those of most other states.

Adjournment--No real problem although, in order to comply with the provision, both houses hold skeleton sessions which means one member and the presiding officer. Skeleton sessions are also held during a long recess so that bills may be introduced. The Journal reflects that there was a session, but the courts have, in at least one instance, looked behind the Journal when members claimed mileage for a week in which there were no real sessions, and they did not actually come to Columbus. Another section involved in this same problem is section 17 requiring bills to be signed by the presiding officer when the house or senate is in session and capable of doing business. As a matter of practice, bills are signed in skeleton session--toward the end of the session, there may be as many as 60 a day, and the members have gone home. Will the court some day look behind the Journal and say that there was no session and hold a law unconstitutional for this reason?

Senator Taft commented that, although these provisions may not create current problems, they are always being worked "around" and therefore should probably be changed for that reason. In addition, every time adjournment is desired for more than two days, a concurrent resolution has to be adopted to comply with the constitutional provision, and this also seems unnecessary. Present legislative operations are such that it may be very desirable to have one house in session for a period of time to consider a major issue while the other house may wish to recess for that time. Since the legislature is now in annual sessions, it might be advisable to permit separate operations of the two houses without these constitutional restrictions.

Mr. Kurfess pointed out that the adjournment restriction might have value if one house wanted to recess simply for the purpose of avoiding taking action on a matter. Also, if one house recessed, the other house might have difficulty keeping the members present and working. However, each house ought to be able to operate its own schedule to get its work done, but perhaps a provision requiring the consent of the other house for a long recess should be retained.

Mr. Montgomery pointed out that procedures which are used to get around the literal language of the rules or the constitution affect the credibility of the legislature in the eyes of the public. Although the Ohio General Assembly has no time limit for adjournment and therefore does not usually have to indulge in "stopping the clock" to finish within a certain time, even this has happened in Ohio when a concurrent resolution for adjournment on a particular day has previously been adopted.

Bills to be Read Three Times--Never done, unless someone wants to slow the procedure down, in which case the rule can be enforced. The real purpose of the rule is accomplished by requiring that the bill be available to all members in writing before being acted on. This should be sufficient. In some states, bills can still be passed before a copy is available to everyone. It might be better to change to a requirement of availability of a bill in printed form rather than the three reading requirement.

Signing bills publicly--Senator Taft questioned why this section is necessary at all. The act of the officer in signing is a clerical act, not otherwise essential to the passage of the bill. Moreover, the Speaker pointed out, the act of signing, the procedures of the clerk's office in engrossing the bill, and the actions of the printer, could all be used to delay the effective date of a bill where the effective date is important. The section does not say when the bill should be signed. Some of these procedures could be spelled out in the statutes rather than in the Constitution.

Term of Office and Salary--Salary should not be specified in the Constitution. It is difficult enough to make changes in the salary by the General Assembly, and states which have salary specified in the Constitution find it extremely difficult to secure increases. Some states are now establishing salary commissions so that salaries of elected state officials are established by the commission subject to legislative veto. Such a provision (for a commission) could be considered for the Constitution.

When sessions to commence--Annual sessions are now required by statute, which Mr. Kurfess feels does not contradict the constitutional provision but simply adds to it. Perhaps the constitution should be brought in line with this practice, however. As a matter of fact, the General Assembly has met every year for some years past, although it has been necessary to call special sessions for this purpose until the recent statutory provision for annual sessions was enacted. Prefers not to restrict the subject matter in either year, as some states do--restricting one year to a budget session. The practice, in Ohio has been to kill the bills at the end of the first session that had been considered and were not to be held over, although many of these were reintroduced anyway in the second session. Many states have restrictions on the introduction of new bills. In Ohio, only bills agreed to by a majority of the members may be introduced, but the House took the position that agreement to a Reference Committee report referring a bill to a standing committee for consideration constituted agreement by a majority that the measure could be considered.

Uniform Operation (section 26)--This section prevents the consideration of local, special legislation in Ohio and the legislature does not get hung up on many local measures as do the legislatures of other states. There are probably times

when the uniformity requirements get in the way of what the legislature wants to do, but on balance it is better to have it than not to have it. Other states have consent calendars, on which bills are listed and are passed by one roll call at the end of a particular period of time if no one has objected. This type of procedure is deemed unnecessary in Ohio, because there is no legislation city by city or county by county in Ohio. The legislator should have a broader outlook than the local government official and should not have to make the local governmental decisions.

No extra Compansation (section 29)--Means that the sundry claims bill requires a 2/3 vote. Since there is no procedure for handling claims against the state by a claims court, which Mr. Kurfess feels we ought to have, all claims approved by the Sundry Claims Board must be submitted to the legislature in the form of a bill and heard all over again in committees of both houses and acted on by the General Assembly. It is not a good use of legislative time, and should it be a legislative decision whether certain claims are justified or not? Negligence actions against state employees on state business, salary claims of state officials, claims of prisoners for damages for injuries suffered, all are included and are basically claims which should be handled by the judicial branch, not the legislature.

Payments would still be subject to appropriation although it could be written in the Constitution that, once a claim is allowed, the legislature must appropriate the funds, which would eliminate any opportunity for a retrial in the legislature.

New Counties (section 30)--This is really a local government problem. Legislature has not faced it in recent years.

Compensation of Members (section 31)--Problems exist in the language prohibiting the payment of any other allowance or perquisites, either in the payment of postage or otherwise. We pay postage, and get around this provision by mailing letters for members instead of reimbursing them or giving him money for postage. We have mileage provided for years, and it's been approved by the court, but even that is questionable. It's the only thing paid other than the salary. Secretarial service is supplied, as part of the expenses of the General Assembly, not as a personal service for the member, but a taxpayers' suit could raise questions about a number of these items. Mr. Kurfess feels the legislature ought to be in the position of being able to pay some expenses to members, such as a per diem allowance when the member is in Columbus for legislative sessions, covering room and board, travel.

The following sections--dealing with workmen's compensation, mechanics' and materialmen's liens, etc. probably do not need to be in the Constitution, although there may be historical reasons for their inclusion which should be investigated.

Other constitutional areas which should be looked at by the Commission, according to Mr. Kurfess, are the debt limit, which requires a constitutional amendment every time bonds are needed for capital improvements. A reasonable debt limit for capital construction only should be established, not for operational funding. There is no similar limitation on local government borrowing powers. Seven hundred fifty thousand dollars was twice the state annual budget when it was adopted, in 1851, but is no longer realistic.

Another area Mr. Kurfess would like to see considered which is presently before the legislature in bill form but which the Internal Auditors Association urges as a constitutional amendment has to do with the state's auditing function. Many states are now placing the auditing function in someone responsible to the legislature. The new Michigan constitution, for example, so provides. This has

partisan political implications, as long as there is an elected state auditor, but our legislature is very weak in its fiscal function. Although this is not the fault of the constitution, the legislature would be strengthened by specifically including in the Constitution such an office or function as a legislative function. If the provision is merely statutory, it becomes more partisan, because it is more easily changed.

Professor Schroder, who had to leave early, indicated that he had a number of questions regarding the operation and basic philosophy of the legislature he would submit to the Speaker in a letter. He states he would like to seek ways to strengthen the legislative body, to increase the legislative strength vis-a-vis the other two branches of government. He feels that fragmentation of society can only be solved by the legislative branch, which makes the policy decisions. The legislative branch is where the people can participate and become involved.

Mr. Kurfess responded that he felt the state legislature was the epitome of representative government, and he hoped that the legislature in Ohio would never become such a full-time operation that the members failed to keep in touch with their constituents in order to be able to reflect their wishes.

Unicameralism--Mr. Kurfess indicated that he felt a proposal for a unicameral legislature would never pass in the General Assembly. The change would be very dramatic, and he feels that, to make it work, it might have to be tied in to a proposal that no one who served in the bicameral legislature could serve in the unicameral legislature. Even though both houses are now elected on the basis of population, differences between the two houses can be detected. Senators have more people to represent, a broader constituency. Senator Taft pointed out that the size of the body itself creates a different attitude in the members. Mr. Kurfess suggested that it might be possible to have a legislature consisting of members who have different terms and represent different numbers of people, like a Senate and a House sitting together. Senator Taft pointed out that, in a district such as his, which contains some areas which are more Democratic in politics and others more Republican, some of his constitutents have a Democrat representing them in the House and a Republican in the Senate, and perhaps they are better represented this way. It is also possible that public opinion may react to the actions of one house in such a fashion that policies will be changed in the second house.

Senator Taft pointed out that another reason for keeping two houses is the personal relationship in one house which may prevent members from raising objections to another member's bill, while the same bill may be subject to more careful scrutiny in the second house.

Chairman Skipton stated that he felt that the two houses should not be combined solely because of any arguments of greater efficiency, because there is greater public protection in having two houses to vote on important policy matters. For the same reason, the governor has been given the opportunity to veto legislation.

Mr. Kurfess stated that whether the Governor should have a part in the legislative process, and whether overriding a veto should take more than a majority should be reviewed, as well as what gubernatorial appointments should be confirmed. The item veto is another matter that might be looked at--should the Governor be able to reduce items?

Extending the terms of Representatives to four years--Mr. Kurfess feels this probably should not be done although there are times when members of the House are looking too closely at the next election and perhaps not concentrating on the policy matters before them. The shorter the term, however, the greater the public participation in the legislative process. Perhaps changes could be made in the election laws so that House members did not have to file for re-election so soon after taking office - only 13 months.

A question was posed about whether the legislature would be more effective if program budgeting were adopted, and Mr. Kurfess stated that it probably would be, although the lack of such a budget is the fault of the legislature itself and could be instituted without constitutional change. Insufficient legislative staff in this area is one of the problems. The legislature could begin the process by having a full accounting, on a program basis, of the expenditures made for prior program enacted. The Chairman pointed out that, if the executive and legislative branches wish to change the method of budgeting and accounting, they can do so. Duplication presently exists in the Auditor's functions and those of the Department of Finance.

After the Speaker left, there was further discussion about budget procedures and the question was raised as to whether it would be desirable to go to an annual budget, and whether this should be provided for in the Constitution. It was pointed out by the Chairman and by Senator Taft that the problem is having enough time to prepare and present the budget on an annual basis--that it presently takes six months to get it ready for biennial presentation. It was also noted that some planning probably should be done on an even longer time schedule than two years--perhaps a three to five year schedule, with review by the legislature on an annual or biennial basis. Chairman Skipton noted that it would even be possible to make the budget process more flexible by considering different departments on different time schedules--from January 1 to January 1 for some departments, and other schedules for other departments. The appropriation period would not have to be changed to do that. Program expenditures may be unevenly spread out over any given period of time.

There was further discussion about the provision for a legislative auditor, and the need to provide for this office in the Constitution. It was pointed out that not only when the legislature and the administration are of different political parties, but even when they are the same, there may be reluctance on the part of the Department of Finance to permit the legislative auditor to examine its figures and question its methods, and having the office in the Constitution would eliminate any question as to the power of the legislative auditor to have access to all state agencies' records.

It was noted that the committee studying the Executive also has under consideration whether the Auditor should continue to be an elected state official, and whether the post-audit function should be placed in a legislative official as opposed to an administrative official. A resolution (HJR 32) is presently pending which would create the legislative auditor and abolish the Auditor as an elected official. A bill is also pending which would transfer the Bureau of Inspection, which audits both state and local government agencies in Ohio, to a legislative auditor. Chairman Skipton pointed out that the main purpose of having a legislative auditor is to provide oversight for state programs and questioned the advisability of having the legislative auditor audit school districts and local governments.

Senator Taft had distributed some comments on various portions of the Legislative Article to members of the Committee. The first item was the bicameral vs. unicameral legislature, and he concluded that, although theoretically the unicameral idea is attractive, especially after the reapportionment decisions held that population is the basis for representation in both houses, he would prefer to stay with the present bicameral system. The Chairman noted that the May, 1971, issue of the National Civic Review contains an article advocating the unicameral legislature by Jesse Unruh.

Senator Taft also noted that, although the initiative and referendum provisions are not presently included in the committee's assignment, it is necessary to consider them to the extent that Section 1 of Article II excludes from the legislative power the power of initiative and referendum , and the only necessity for emergency bills is the referendum provision which requires a 90-day waiting period before a bill can become effective. Senator Taft suggests eliminating the specific details, and requiring the General Assembly to provide by law for initiative and referendum. Mr. Montgomery pointed out that there might be opposition even to this, since these provisions give the people the right to participate and the people might feel frustrated in their efforts to secure action where they felt the legislature did not act in their interests. The Chairman questioned whether these provisions should be considered unless there is a desire to make some changes, but Senator Taft stated that part of the job is revision, and this includes eliminating unnecessary language from the Constitution. This, he feels, should help to sell the revision job since it will make it easier for the layman to read the Constitution. However, if provisions are to be eliminated, such as the workmen's compensation section, there must be adequate research to establish that substantive rights are not affected by the action, and the staff could start now building the necessary research on these issues.

Senator Taft's section-by-section comments will be distributed to members, and he urged that the committee start working toward a draft to be presented to the Commission for consideration very soon, with research directed toward documenting the possible changes. There is no present feeling among the committee members present that a unicameral legislature will be part of the committee recommendations, and no research need be devoted to this at this time.

There was further discussion about the terms of representatives being lengthened to four years, for which there is not much positive sentiment, and extending senatorial terms to six years. It was again pointed out that the position of the holdover senators is in doubt until after reapportionment and the possibility of a challenge to this position, and the Chairman noted that one solution might be reapportionment every 12, instead of every 10, years.

With respect to a question about the qualifications to be a member of the legislature, it was noted that if the voting age is lowered to 18, the age to serve in the legislature will automatically be lowered to 18 unless also a separate provision is made. The committee members present expressed the opinion that, if 18 is the age to vote, that should also be the age for full responsibility, including serving in the legislature. A research memo will be prepared on the question of qualifications generally--residence, conviction of a crime. Research will also be done on the question of incompatibility--other offices which cannot be held while the member is a member of the legislature--in order to show the committee how this constitutional provision has been interpreted, so that the committee can decide whether it wants to retain it. A memo will also be prepared on the various extraordinary majorities necessary for certain legislative actions, and what those provisions are in other states,

to determine whether they should be retained or modified in any way. A case could be made, for example, for not requiring more than an ordinary majority for overriding a gubernatorial veto.

Mr. Montgomery expressed the opinion that the committee should be cautious about removing any provisions which constitute a means for the public to express their opinions or participate in the legislative process.

There was further discussion about the provision for filling vacancies, with Mr. Montgomery expressing the opinion that he would prefer a method for the person to be chosen by a group representative of the people to be represented, such as the party central committee, rather than the members in the house or senate of that party. Alternates to the present provision will be suggested by the staff.

The investigative powers of the General Assembly and its committees will be the subject of a research memo, to determine whether any language changes are needed to assure that the powers are adequate. There may be doubt about the powers of committees after a sine die adjournment, according to some old cases. A memo will also be prepared on the meaning and implications of making a General Assembly a continuous body, as suggested by the Model State Constitution. A memo will also be prepared on how the legislature can call itself into session after adjournment in other states, whether by the leaders or whether a particular number or a majority of the members must petition. The Chairman pointed out that this is related to whether the Governor should have the power to call a special session and, if so, whether the subjects to be considered should be limited, as they presently are, to those he specifies in the c ll.

With respect to the Governor's veto power, in addition to the questions already raised, it was noted that, in some states, there has been raised the question of whether there is sufficient time for the Governor to consider bills. Whether this is a problem for governors in Ohio is not known.

Alternatives might be suggested by the staff on the "three reading" question--perhaps "three considerations" or similar language. With respect to the allowances for legislators, alternate proposals might be made--such as repealing the limitation, and leaving the question up to the legislature.

The Chairman expressed the hope that the committee will begin to formulate recommendations at its next meeting. Opinions and suggestions of other legislative leaders and heads of legislative agencies will be sought, as well as interested citizens and groups who have recommendations to make respecting the legislature.

The meeting was adjourned, after scheduling the next meeting of the committee for June 17, 1971, at 9 a.m. at the Commission office.

Ohio Constitutional Revision Commission
Committee to Study the Legislature

Summary of Meeting

June 17, 1971

Present at the meeting on June 17 were Chairman Skipton, Senator Taft and Mr. Montgomery.

Mrs. Hunter, research consultant for the committee, reviewed several memoranda. The first dealt with legislative compensation. Mrs. Hunter pointed out that, although legislative salaries are not fixed in the Ohio Constitution, there was interest expressed in a recent trend in various states to establish a salary commission, either for legislative salaries or salaries of elected state officers generally.

Some states have adopted a constitutional provision for a commission, either appointed by the Governor or by the Governor and legislative leaders to make salary recommendations to the legislature which would become law unless rejected or reduced by the legislature. Arizona, Maryland, West Virginia, Michigan, and Hawaii have recently provided for such commissions by constitutional amendment and Idaho by statute. Similar amendments were recently defeated in Nebraska and New Hampshire, and North Dakota.

Skipton: It would be helpful to know how these commissions have worked in those states where they have been established a few years. There may be a public reaction against commissions of this sort, where the legislative body does not take the responsibility for establishing the salaries.

Hunter: It may not be a good idea to put such a provision in the Constitution, especially where, as in Ohio, legislative salaries are not presently fixed by the Constitution. It can be done by law.

Montgomery: It used to be that people served in the legislature because it was an honor, and the salary was not intended to compensate them, but now it is a full-time job and we need to rethink our ideas about compensation.

Comment: In colonial legislatures, it wasn't necessary to compensate members of the legislature because they were generally wealthy people.

Skipton: We must consider whether we want to make our state legislature a full-time, career professional job. Does it serve the interests of the people of the state to make the legislature a career job? Should we encourage people to make a career of the legislature with no other profession or career?

Montgomery: Since it takes so much of their time, we should compensate them for that time.

Skipton: The compensation pattern may decide whether we have a citizen legislature or a career legislature. It's a question of representation.

Comment: The largest single occupation in the legislature is attorneys, who can leave their practice and go back to it.

Skipton: Professions such as insurance agents, farmers, and attorneys who have control over their own time always have the greatest numbers in the legislature.

Businessmen probably could do it, but many won't. The question is whether a wage earner can do it? Compensation is bound to have an effect on the makeup of the legislature and we should ask ourselves: will increased compensation get us more wage earners? shopkeepers? or just more professionals? These compensation commissions are not just wage compensation boards, but will actually decide the types of people who will serve in the legislature.
(Discussion about campaign costs and whether campaign costs should be considered part of the salary and added to compensation in some fashion.)

Skipton: Establishing something like a compensation commission usually means that you want certain results. What results do you want? I believe they are more significant on the noneconomic side than the economic side. Where you fix the compensation determines what people you attract--it might take much more to get a dentist to leave his practice and come here to serve in the General Assembly than a farmer or insurance man or attorney. A compensation commission has to determine the type of people it wants to attract--it isn't merely a matter of evaluating the job done and fixing compensation according to the time spent or the amount of legislation produced.

Taft: Would the present constitution give the legislature the authority to establish such a commission? There are some bills introduced to do this.

Hunter: Yes, I think it could be done by law.

Taft: We should not get into the question of what salaries ought to be; the committee to study the legislature will probably get into that. We certainly don't want to write the salaries into the Constitution.

Skipton: There is such a difference between congressional salaries and Ohio legislative salaries that I don't think there was a great public reaction the last time the Ohio legislature increased its own salaries.

Hunter: There is great variation among these constitutional compensation commission provisions with respect to how much detail is in the Constitution--some are very simple and some are very detailed. If the commission plan is adopted, it would be better to leave the details to statutory law.

Skipton: Better to leave it to law since the legislature apparently now has the authority to establish such a commission if it wants to.

Taft: Would there be a problem of delegation of authority if the commission were appointed by the Governor? With authority to make recommendations to the legislature or to have its recommendations go into effect unless vetoed by the legislature?

Hunter: Yes, there might be a problem with delegation.

Montgomery: If the legislature sets up a commission such as this, isn't it just passing the buck to someone else--for something it should do itself?

Taft: Let us have several alternatives drawn for the present compensation provision--one, simple one, eliminating the language about perquisites and whatever else would simplify it, and then some alternatives, perhaps providing for a commission.

Skipton: If the recommendations of a commission are to become operative if the legislature fails to act, then it should probably go into the Constitution; if the

General Assembly will still be required to act before any recommendations are adopted, then it does not have to go into the Constitution because the General Assembly could create such a commission anyway.

The next matter discussed was the power of the General Assembly to convene itself in special session. The Ohio General Assembly has no power to call itself into special session; only the Governor can convene a special session and he specifies the subjects to be considered. Some states have amended their constitutions to permit the legislature to call itself into special session and others have eliminated the restrictions on the subjects special sessions can consider. A memo was presented indicating which states have done these in recent years.

The main questions are: should the power to call a special session be exclusive for the Governor, exclusive for the General Assembly, or a joint power, what should the scope of a session be, and who should make the call if the General Assembly has the power--what number of members, the leadership, the presiding officers, etc.? The new Illinois Constitution appears to be the broadest in power--leaders of the two houses.

Taft: The problem is not as serious as it used to be, since we now recess at the end of the first year's session instead of adjourning sine die. We are now in continuous session from the beginning of January in the first year to the end of the second year's session, in June or July. There is now only a period of about six months when we are not in session and subject to continuous call--it used to be a year and a half. It seems to me that the Governor ought to have the power, and the legislature ought also to have the power. Especially when the Governor and the legislature are of different parties, both should have the power to call the Assembly into session to deal with what seems to each to be important. Today, I think people expect to have the legislature available at all times. Another way of dealing with the problem would be to have the legislature be in continuous session, or be a continuous body, in session continuously throughout the term.

Skipton: One thing to consider is, how long should a piece of legislation be alive? And to whom would you give the power to call the session, in addition to the Governor? If you give the power to the presiding officers, will the same political pressures work on them as on the Governor? Should you require a petition by a certain number of members?

Taft: Should it be required to be a bipartisan decision, such as requiring a petition by two-thirds or three-fifths of the members might require, or should the majority party be able to call the session? If the Governor can make the decision on his own without consulting anyone, why shouldn't the majority in the legislature have the same power? Or the leadership?

Hunter: The Illinois Constitution says that special sessions may be convened by joint proclamation by the presiding officers of both houses as provided by law. The Governor may also call a special session.

Skipton: Since the Lt. Governor is the presiding officer in the Senate, we would have to specify the President Pro Tem if we wanted him to be the person to make the decision. Would you limit the power to call to the majority party?

Taft: If one house were one party and the other house the other party in the majority, they would have to get together to decide.

Montgomery: It used to be a club the Governor could use on members of the legislature.

Taft: And a basic feeling of distrust in the legislature. Hopefully, public attitudes have changed.

Skipton: If you provide for continuous sessions, you still have to adjourn to a time certain or provide for some means for the leaders to convene a session.

Taft: We needn't provide that mechanism in the Constitution. The legislature could draw its own procedure, as the Illinois provision permits. Another problem is what should be done with the bills at the end of the session--this should probably not be provided for in the Constitution, but could be dealt with in a statute.

Skipton: Do you want to give the membership any leverage to force the leadership to act?

Hunter: Several other states simply give the legislature the authority to convene itself into special session as provided by law, with no details in the Constitution.

Taft: The Citizens' Conference evaluation of state legislatures rated Ohio low on this point--not independent enough from the Governor because it could not call itself in special session.

Skipton: Prepare an amendment along the lines Taft has suggested for the General Assembly convening itself into special session.

Next discussed was Research Study No. 5, a report on the age and residency qualifications for the legislature in the 50 states, and whether the legislative article requires that a legislator possess the qualifications of an elector.

In Ohio, a legislator must possess the qualifications of an elector (reside in the state 6 months and be 21 years old) and have resided in his district 1 year prior to the election. There is variation among the states--a year is a common district residence requirement, and 2 or 3 years a common state residency requirement. Some states--such as Missouri and New York-- require district residence of 1 year provided the district has been so long established. Residence requirements are generally the same for senate and house members. In the newer constitutions, Hawaii requires 3 years' state residence but simply requires the person to be a resident of the district, registered in accordance with law--no time period. Connecticut, among the newer ones, does not specify a period of time for residence in a district, but authorizes the legislature to set qualifications.

Montgomery: It would be frustrating for a person who wanted to become involved politically to move into a state and find you had to live there five years before you could do anything.

Taft: I think that if you can vote you ought to be able to run for office--if you have the qualifications of an elector.

Skipton: Agrees

An elector is 21 and 6 months residence in the state. You do not have to be registered to vote.

Taft: Sometimes a person runs for office and it turns out he never voted.

Skipton: Registration laws are designed to prevent fraud, not to determine eligibility to vote. Is there any reason not to stick with the current definition of elector--for example, should we reduce the residency requirement to 40 days?

Montgomery: Is there any reason why the requirements for seeking office should be different from those for voting?

Taft: Making more stringent requirements for seeking office is a protective device for the person who is already in office--to prevent someone from moving into your district and running for your position. Purely a defensive mechanism--perhaps not good from the people's point of view. At the present time, you must live in the district one year preceding the election, but you only have to be a resident of the state 6 months. A voter can move from place to place in Ohio and can vote.

Comment: By law, you must live in the new district 40 days prior to the election if it is a place requiring registration. Or you can go back to the old district to vote.

Skipton: I suggest that we provide that a candidate for legislature must be a resident of the district when he files for office--this would cut the time down from one year prior to the election to February, when you have to file to run in the primary. If the primary is changed to a later time, that would cut down on the time, too. You could require him to take some step to become a resident of the district before he files.

Taft: Agree - he should have to do something to become a resident. But the time should be shortened, because the issue of whether he knows the district is a legitimate issue for the campaign anyway and can always be raised by his opponent.

Skipton: He should have to be one of his own constituents, in order to represent a district. This is not unreasonable. But the time period could be shortened.

Taft: Residence, as determined by court decisions, is pretty tenuous anyway--a hotel room with an affidavit that he intends to move there may be sufficient.

Skipton: In a year of reapportionment, the establishment of districts may still be in court in February, when the time will come to file.

Montgomery: Which is a good reason to liberalize the rules.

Taft: Even if not challenged, if the one-year requirement is kept, a candidate has only a few weeks to move if his district is changed in reapportionment.

Skipton: As a general principle, should a person be a resident of the district--should he represent the people who elected him? At a particular time or throughout his term?

Montgomery: Perhaps he should have to stay there throughout the term--if he is to represent the people in the district.

Skipton: This comes up in another connection--single member districts. In the past, we've had multiple member districts, but today we have only single members districts in Ohio. If we determine he must represent the people in the district, the next question is, when must he become a resident?

Montgomery: I think your idea is good, when he files for office.

Skipton: Is there any disagreement that he must have the qualifications of an elector?

Montgomery: The major argument on that would be the 18-year voting. Should we go that far? To vote he still should not be able to hold office unless he has all the responsibilities, civil and criminal, of an adult. So it might depend on what happens to the 18-year-old vote.

Skipton: I think that being an elector is the most responsible job he has--I will be a strong advocate of wiping out every restriction on 18 to 21 year olds if they are given the right to vote.

Montgomery: I will, too, but perhaps not everyone will agree.

Skipton: A provision could be put in the Constitution prohibiting the legislature from making other age requirements for particular purposes. Our question here, though, is whether anyone possessed of the qualifications of an elector shall be eligible for the legislature?

General agreement that n separate age requirements should be imposed for eligibility for the legislature.

Discussion about the provisions making persons guilty of certain criminal activities ineligible. No decision on the merits of these provisions.

Discussion about Research Study No. 3, dealing with the specific majorities required in the Ohio Constitution for various purposes of the legislature. Considerable variation noted. Also noted is the fact that a majority of those "elected" to the General Assembly which is required for some actions might be looked at in view of the fact that vacancies are filled by appointment.

In Ohio, 2/3 are required for an emergency, and for dispensing with public hearings, 3/5 to override a veto, 3/4 for dispensing with 3 readings. In other states, 2/3 seems to be the most common percentage, but there is not necessarily a trend to standardize them.

Montgomery: In ordinary matters, a majority should make the decision; for extraordinary matters, perhaps we should narrow the choice of how large an extraordinary vote is required to one or two percentages. It may be confusing to have 3/5, 3/4, 2/3 for different matters.

Skipton: A majority of those elected are required to pass a bill and do other things. Do we want to reduce this to a majority of those present and voting?

No opinion for reducing the majority of those elected to a majority of those present and voting nor for eliminating any vacancies from the total. Perhaps clarify the language so that it is clear that the total elected includes those appointed to fill vacancies.

Skipton: Perhaps it would be easier to clarify the language regarding the filling of vacancies to make clear they are construed as "elected thereto" rather than try to change all the other sections--just make them all uniform.

Should we change any of the extraordinary votes?

Montgomery: It would be simpler if all the ordinary things just required a majority and the extraordinary things were all the same. Is there any logic behind the difference between 2/3, 3/4, or 3/5? Perhaps we could just have two levels--a majority and 2/3 or 3/5.

Skipton: I would not change the 2/3 for emergencies or the secrecy rule. I don't know any reason for the 3/4 requirement on dispensing with the rule requiring 3 readings. The question of whether we should even leave that in is debatable. Perhaps we should just write a uniform provision. I would stick with 2/3 for conviction for impeachment. Leave extra compensation at 2/3. Perhaps section 15 of Article IV should be stricken--or recommend this to whatever committee studies the judiciary. Section 22 of Article IV is also probably obsolete and could be removed, or recommend removal to the committee on the judiciary. Pasaage overrveto and proposing constitutional amendments require 3/5.

Comment: Some recommend that the General Assembly be permitted to pass over a Governor's veto by a simple majority.

Skipton: If the power to veto is to mean anything, it should require more than a simple majority to override. The only other way you can give the Governor any real power is to insert him in the legislative process before the final enactment by the legislature is completed. The big question is whether he should have the power or not. Veto power is usually exercised with great restraint because it is done in the glare of the public eye. I would not be inclined to recommend elimination of the veto power. I think the veto is not just an executive prerogative, but, because of the way it has to be exercised with a message, it is a power that becomes available to the public. Most vetoes are not exercised for personal reasons or even for the effect on the operations of the executive branch of government but because of some provision affecting the general public. The most important exercise is in the budget field.

Montgomery: For convenience, perhaps the ratio should be 2/3 rather than 3/5.

Comment: This would make it more difficult to override the veto.

Skipton: The more difficult you make it, the more the executive will be encouraged to use it.

Comment: Illinois just went from 2/3 to 3/5.

Skipton: The trend will probably be to lower rather than raise the requirement. I would leave it the way it is, so it still has some meaning but doesn't make the Governor more powerful in relation to the legislature. If you make it too difficult to override a veto, you might encourage irresponsible action by the General Assembly because the members would take the attitude that the Governor will veto anyway so it doesn't matter what they do. And the veto can be used not only on basic issues but on any bill, so it shouldn't be made too difficult to override it. On the question of submission of constitutional amendments to the voters, if that is made too easy, if the requirement is lowered to a simple majority, you again encourage irresponsibility

on the part of the General Assembly, as well as cluttering up the constitution with legislation. A lot of pressure groups will try to get their ideas written into the Constitution.

Montgomery: Is there any trend?

Hunter: Again, Illinois lowered its requirement from 2/3 to 3/5.

Skipton: I'd leave it where it is - 3/5.

Discussion on Research Study No. 6 on eligibility--compatibility. Indicates need for clarification because of the number of times it has had to be interpreted.

Montgomery: Perhaps we should try to liberalize the rules, and just eliminate conflicts where they occur.

Comment: Is there any logic to excluding persons who hold other public offices from the General Assembly? Does this create more conflict than a person holding another type of job?

Montgomery: I'd like to see how other states have tackled this one. It's too hard to get good people to serve, and I think we should liberalize these rules so that we try only to eliminate abuse of the position or very basic conflicts.

Skipton: We received several communications. One from Tom White, legislative clerk in the Ohio House.

Comment: Mr. White has raised one point that has not previously been considered at all by the committee--whether there should be a method of determining when a member is disabled and no longer able to serve.

Montgomery: I don't see a need to put it here unless you put it in the qualifications.

Skipton: If a man gets the electorate to vote for him, should you be able to force him to resign? Who will make that decision?

Comment: The question comes up in connection with the Governor also because the Constitution does not define "disability."

Skipton: Also in determining disability of the President of the United States. These people are elected, and it should really be something extraordinary to justify removing them. It would be almost impossible to determine when this could be done and how it would be applied. Such power to remove would probably only be used for the wrong reasons.

Skipton: Mr. White also raises a question on emergency laws, if an emergency clause is inserted in a conference committee, does it go back to the original house for a separate roll call? Is he saying that the procedures are different in the senate and in the house? Apparently he feels that the constitutional language on emergency clause votes is not clear. I will ask Tom how he would draft this language if he feels it is unclear. We also have a proposal from the Internal Auditors Institute, proposing a legislative auditor responsible to the General Assembly not intended to abolish the duties of the state auditor. Follows general accounting office of the

Congress. There are both a constitutional amendment and a bill presently before the General Assembly.

Montgomery: Does this require a constitutional amendment?

Skipton: Their proposal says that the new auditor general shall conduct post-audits of transactions and activities of the state and all branches and performance post-audits thereof. Performance post-audits, which is not related to whether moneys were spent legally, but whether the expenditure accomplished the purpose, probably ought to be controlled by the legislature, and you could leave the audit of expenditures to the state auditor, as he does now. Performance post-audits would tell the General Assembly whether programs they approved produced the results they wanted. Did we accomplish the purpose?

Montgomery: It seems to me they are probably talking about a nut-and-bolts financial audit.

Skipton: If they are, I don't see any reason to keep the state auditor. Even now, the Finance Department performs a pre-audit and the Auditor also performs a pre-audit, and then comes along and makes a post-audit. I think we should look this over before we make a decision, and then perhaps we can decide whether we want to have them come in to discuss their proposal. Are there other matters?

Taft: I think we should consider, in connection with the three-reading rule, a provision that the bill must be available in writing three days before final action, to prevent what happened in the House on the appropriation act this year, which was available only a few hours before the session and no one had an opportunity to read it.

Next meeting of the committee to be fixed when additional memos and alternate drafts are ready. An agenda to be sent to committee members, and perhaps have legislative leaders advised of proposals and invited to discuss them with the committee.

Ohio Constitutional Revision Commission
Committee to Study the Executive Branch

Summary of Meeting
June 21, 1971

Present at the committee meeting on June 21 were Dr. Cunningham, Mr. Ostrum and Senator Dennis.

Dr. Cunningham discussed various aspects of the executive branch suggestions he had submitted to the committee for consideration. He mentioned the diffusion of executive power if the people elect multiple executive officials--secretary of state, attorney general, auditor, treasurer, superintendent of public instruction and many more--and compared state constitutions in this respect to the federal constitution, which does not provide for any elected executives other than president and vice-president. In 1966, Dr. Mitau at Michigan and in some work he conducted in Minnesota, indicated that as many as 80% of the population don't know who the secretary of state is, yet he is the chief election officer--often running for re-election at the very time he should be engaged in the administration of his function. Dr. Cunningham believes administrative officers should be appointed, responsible to the Governor, and he should be responsible for the conduct of the offices. The legislature should define the duties of the offices sufficiently so that you will get someone competent to perform them.

The second issue raised by Dr. Cunningham is the status of the Lt. Governor. There are indications that the Vice-president was originally given the job of presiding officer in the Senate simply because he had nothing else to do. This was in a time when both the federal and state governments had a minimum number of administrative functions to perform. Some states didn't even provide for a Lt. Governor--they found him superfluous. Therefore, the Lt. Governor should be required to be of the same party as the Governor, and could be an administrative assistant to the Governor. We should build an administrative organization that would fit a corporation with a budget the size of the state budget--9.1 billion as proposed by the present Governor.

Various states were discussed and which executive officials are still elected. It was pointed out that, in Ohio, the duties of the Auditor, Treasurer and Attorney General are all prescribed by law and they have practically no discretionary powers, no constitutional powers.

Another point raised by Dr. Cunningham was the separation between the post-audit and the pre-audit function. The post-audit should not be left to an administrative auditor, who should perform the pre-audit function. The post-audit, after the money is spent, is an accounting to the legislature. Congress has established such a function, and the idea comes from the old committee on accounts of the House of Commons. Dr. Cunningham suggests [illegible] applying business practices to the government. Senator Dennis asked how many elected state officials are provided for in the recently-adopted state constitutions--for example, in Michigan. It was pointed out that most still provide for 3, 4, or 5 elected officials because it is difficult to sell the electorate on the model state constitution which provides only for the election of a Governor. In Alaska, only the Governor and Secretary of State are elected. In New Jersey, only the Governor. In Michigan, the elected treasurer and auditor were eliminated and a legislative auditor replaced an elected state auditor. The theory of the single elected executive is that he is the person responsible for administration and enforcing the law. The executive delegates authority to other persons, but cannot delegate responsibility. If the elected executive is incompetent, then the people must blame themselves if state administration deteriorates.

The question of the legislative auditor is a question for the legislature, but is also a question for the executive committee if it is decided to eliminate the auditor as an elected state official, to define his powers in the Constitution, or transfer some of his functions to someone else, constitutionally.

Dr. Cunningham pointed out that perhaps the auditor, with respect to the pre-audit function, belongs in the department of finance. The state auditor presently also audits all taxing units in the state--cities, counties, etc.--which is a huge job. This takes a tremendous budget and a large number of employees. In California, the grand jury brings in outside auditors once a year and audits all the taxing units in that district.

Discussion followed about procedures to be followed by the committee in soliciting opinions on these matters from the public and from the concerned officers and persons who previously had the offices, before the committee makes decisions.

Reverting to the question of elected officials, it was noted that the secretary of state, an appointee, succeeds to the Governorship in New Jersey in the event the Governor is disabled. On the question of the Governor and Lt. Governor running as a team, it was noted that at least seven times a Lt. Governor of a different party from the Governor has been elected in Ohio.

The question was raised as to whether any minimum age limits should be placed on the Governor or other elected officials if the voting age is reduced to 18. It was noted that, in a list supplied by the Ohio Historical Society of ages of Governors when they took office in Ohio, none was under 30.

There was discussion about the idea of constitutionally limiting the number of independent boards and commissions or requiring all boards and commissions to be integrated under the principal department with which they are concerned. Should the legislature be restrained in its ability to create independent boards and commissions?

The meeting was adjourned with instructions to the Director to contact the chairman about future procedures.

Ohio Constitutional Revision Commission
Committee to Study the Legislature

Summary of Meeting
August 26, 1971

The meeting convened at 1:20 p.m. on August 26, 1971. Present were Chairman Skipton, Senator Taft and Mr. Montgomery.

Mrs. Hunter, research consultant for the Committee, distributed drafts of 16 revisions proposed for Article II and several memoranda affecting the legislative article for future study. The Committee discussed and acted upon 12 amendments or repeals as follows:

1. Special Sessions

The first matter to be discussed was a proposition for allowing presiding officers of both houses to convene the General Assembly in special session. An alternative to allow either the Governor or presiding officers to do so by proclamation was adopted, the Committee agreeing that there should be a requirement that the call be by proclamation to encourage specificity in the call. Article II, Section 8 will need appropriate amendment.

2. Qualifications of Legislators - Section 3

Mrs. Hunter pointed out that the Committee had agreed at an earlier session that qualifications as to age and elector status for election to the General Assembly not be modified and that Senators and Representatives be residents of their respective districts upon becoming candidates and maintain such residency during term.

Mr. Skipton noted that the lowering of the voting age to 18 had been specifically considered and explained that the reason for proposed changes had to do with the trend toward shorter residency for voters. Such trend, he said, applies to qualifications for legislators. Also involved, he said, are questions of reapportionment of the General Assembly, when districts are redesigned in such a way that an incumbent member might not be a resident of the same district that he now serves. Further remarks on this topic are summarized:

Skipton: Two policy questions must be considered: (1) Should a candidate be a resident of the district some period of time prior to election? (2) Should he maintain residency in his respective district throughout his term? The third alternative presented to the Committee reduces prior residency by simply providing that senators and representatives shall have resided in their respective districts preceding their election - a short and indefinite period - and provides that they must maintain residency during term. Such a provision eliminates reapportionment problems. It provides in effect that a person can move into a new district the day before election and still qualify. Such a solution avoids selecting a period of time (90, 60 or 40 days) and would not clutter the Constitution with matters of statutory filing times related to becoming a candidate. The requirement for retention of residency means that if a member moves, he vacates the office.

Hunter: The exception for absence on the public business would now apply to retention of residency and would be grammatically improved if it applied if members "are" absent rather than "shall have been" absent.

Skipton: The other alternative presented to the Committee limits prior residency to filing date and raises problems of interpretation.

Montgomery: Nevertheless. a person should be resident when he becomes a candidate.

Skipton: There is a practical question here as to what happens in the event of reapportionment. How much time between the taking effect of reapportionment and the time a would-be candidate must file is proper?

Montgomery: We should not avoid such a question merely because the solution is difficult of statement. What have other states done?

Hunter: Periods of prior residency vary. Some recent constitutions have relegated such periods to statute.

Montgomery: We must be concerned about people of national popularity moving into an area for the purpose of running - I. E. becoming instant residents.

Skipton: Courts have stricken residency requirements in many areas - e. g. welfare eligibility. At least we require here that a person become a resident before election, not after.

Montgomery: Should we not try to require that he be a resident on a date related to his candidacy?

Hunter: Tying residency to filing date gets into a statutory area. A preferable solution seems to be to relate residency to becoming a candidate.

Montgomery: Could we require residency prior to officially becoming a candidate? Then it would not be enough for a person to declare himself a candidate; he must do what the law requires that he do to become one.

Skipton: At the national level there are states where a man becomes a candidate for the presidency without wanting to become so. The Secretary of State simply puts his name on the ballot.

Montgomery: There is reason to leave it to the legislature to make the filing process as difficult as it wishes, except for residency.

Skipton: This provision must presume statutory law on the subject of how one becomes a candidate. I am still reluctant to use statutory language in the Constitution - i.e. describe how a nomination is made.

Montgomery: Perhaps we should refer to the law without spelling out what it is to contain. Could we relate residency to becoming a candidate "as provided by law"?

Skipton: I would agree to that qualification. The last phrase in the section ("unless . . . absent on the public business of the United States or this State) is in the existing Constitution and is intended to cover people in the Armed Forces.

The revision of the last alternative draft of Section 3 was agreed to, requiring residency on the day of candidacy, as provided by law. It was agreed that the reapportionment question was solved. Mr. Skipton pointed out that in effect we are saying that if reapportionment occurs, a person must make up his mind in a hurry as to where he must file. Usually the question does not come up that fast. If reapportionment occurs and districts are changed, he noted, the law would provide for some period of time for filing of petitions and the waging of a campaign. The change is not going to be instantaneous. The reapportionment of districts is generally known about in

advance, and a person has the opportunity to know if he wishes to change his residency. The change, Mr. Skipton concluded, is relatively easy. Residency is a matter of intent. Generally it can be declared by moving into a district and announcing candidacy.

3. Eligibility - Section 4

Hunter: Section 4 and the compatibility questions that it has raised were discussed at a prior meeting. The Committee was given a memorandum summarizing rulings of the Attorney General as to what constituted an "office" as opposed to "employment" and what was meant by "lucrative" office for purposes of ineligibility to membership in the General Assembly under present Article II, Section 4. Of the two drafts presented here (dated July 12, 1971) the first is the simpler. With the change made by pen it reads: "No member of the General Assembly shall, during the term for which he is elected, hold any public office under the United States or this State or a political subdivision thereof."

Skipton: The advantage to this proposed draft is that it eliminates numerous questions of compatibility, such as can an employee of the waterworks become a member of the General Assembly? Public employment would not be a disability.

Montgomery: I suppose the reason for such a provision goes back to a time when political leaders served in multiple positions. Those who were elected locally were the same as those who were selected for the legislature.

Skipton: The term "public office" is probably better defined than "employment" and thus in recommending such a change in Section 4 we eliminate a great many questions of compatibility. This means that school board members probably could not become members of the General Assembly. It might mean that trustees of state institutions would not be eligible. This is not much different than the present provision. In effect we are making more certain the eligibility of larger numbers of public servants.

Montgomery: (Noting the compensation language in the second alternative of the memorandum on this subject dated July 12, 1971) Do we need to be concerned about compensation?

Skipton: Alternative 2 leaves a loophole. Many public officers are not compensated. Members of boards frequently do not receive compensation, yet their interest in legislation to be adopted could be greater than one who receives compensation from a public position. Of course, in the case of the waterworks employee, he probably isn't going to be able to maintain a job and get to Columbus, so he must make a choice anyway.

Montgomery: What about him - and the post office employee. What proportion of the work force works for government? One out of seven or eight?

Skipton: It is substantial.

Montgomery: Do we not effectively take them out of the possibility of running?

Hunter: We definitely do by adopting alternative 2. It would extend to both public officers and employees.

Montgomery: I agree that a man should not hold two state offices or state and local or state and federal office. What about the question of the ineligibility of public employees?

Skipton: Alternative No. 1 makes public office a basis of ineligibility. The postal worker can run. The school board member cannot.

The Committee agreed not to put in language pertaining to compensation. It was pointed out in the discussion that those with the greatest conflict of interest might be those without compensation. If there is to be such a provision as Section 4, the Committee agreed, it should be limited to "public office" and not be restricted to public position with compensation. The Committee adopted the first alternative draft.

4. Who shall not hold office - Section 5

Hunter: Section 5 prohibits a person convicted of an embezzlement of public funds from holding office and persons holding public money for disbursement from having a seat in the General Assembly until the money is accounted for. Its elimination is proposed on the basis that the provision is essentially statutory in nature. Such a particular disqualification is more properly a matter of statute. Such provisions intrude upon the province of the legislature.

Skipton: This is more properly the subject of statutory law because the Constitution should not attempt to deal with all the specific facets of a position that would make one ineligible for public service. They could be extensive. Why should the Constitution include a few?

The Committee agreed that Section 5 is more properly the subject of statute. The Committee had already agreed that eligibility has to do with the qualifications of an elector, and conviction of a felony is related to this question. The Committee adopted the recommendation that Section 5 be deleted.

5. Organization of the house - Section 7

Hunter: The amendment proposed to Article II, Section 7 is to supply an apparent inadvertent omission from the Constitution. Section 7 provides for organization of the House but not the Senate.

Skipton: The change might be termed "housekeeping." This is strictly a revision of form and not of substance. The amendment to Section 7 was adopted.

6. Sections 10 and 15 - Right of members to protest; Where bills shall originate.

Hunter: Section 10 gives members of either house the right of protest and requires that such protest be entered upon the journal. There is provision in the Constitution for each house adopting its own rules of procedure. This is a proper subject of such rules. In fact, it is a subject of rule. Its elimination is therefore recommended.

Montgomery: Such a provision is superfluous. Taking such matters of legislative procedure out of the Constitution keeps it as simple and concise as possible.

Skipton: The rules adequately provide for this matter. No right has been denied that this Constitutional provision protects.

Hunter: Section 15 is regarded as being in the same category. It provides "Bills may originate in either House; but may be altered, amended, or rejected in the other."

Montgomery: Such a provision appears to be more fundamental.

The Committee agreed to give further consideration to the elimination of Section 15, and agreed that Section 10 should be repealed.

7. Vacancies in either house - Section 11

Hunter: An amendment is proposed to section 11 of Article II, having to do with the filling of vacancies in either house, the section now provides for the filling of a vacancy by appointment of the members of the house who are of the same political party as the person last elected. The amendment proposes use of the term "election" and "elected" instead of "appointment" and "appointed" throughout this section to eliminate possible conflict between this section and a number of other sections in the Constitution calling for various majorities "of the members elected" for legislative action. The change in terminology would appear to have no substantive effect in this section and would make it more consistent with other provisions in the Constitution.

Skipton: This is another "housekeeping" matter. The Committee agreed.

8. Secrecy - Section 13

Mrs. Hunter presented a brief memorandum having to do with the subject of secret sessions, as provided for in Article II, Section 13. This provision has its origin in the Constitution of 1802. Both Senate and House have rules that incorporate the Constitutional language of Section 13. The subject of secret sessions is submitted for Committee discussion, with no recommendations for change at this time.

Skipton: This matter was put on our agenda to invite comment from Committee members and others present this afternoon. Rules of both houses deal with secret sessions, and there was debate this year regarding the adoption of such a rule - questions about it were raised by the media. We invite comment from any of the ladies and gentlemen attending this committee meeting.

Comment: Sometime Government, the publication of the Citizens Conference on State Legislatures, in its analysis of the Ohio legislature, points out that although subject matter committees meet openly, the rules committees of both houses frequently meet in executive session. This practice is criticized.

Skipton: We have had no practice of secret sessions in this state, and with a two-thirds majority requirement we are not likely to have them.

Mr. Skipton then asked Scott Smith, Director of the Ohio Citizens Committee on the State Legislature, seated in the audience if he had comment.

Smith: One of the problems related to the question of closed hearings of any kind is that such a matter should not be prescribed one way or another in the Constitution. It is appropriate for statute or rule. It is a principle of good government that proceedings should be open. But the matter is not appropriate for the Constitution.

Comment: What is the rationale for closed meetings? At the federal level there are questions of national security, but what is discussed at the state level necessitating secret sessions?

Skipton: The early provision was used in wartime - I.E. in the War of 1812. The section goes back to 1802.

Montgomery: Such matters as national guard involvement are ones where conceivably a clear and present state danger could be present. Some provision for secret sessions seems desirable, and the two-thirds majority rule appears to be appropriate for its use.

Some general discussion ensued among Committee members, Mrs. Hunter and members of the audience regarding use of Section 13. Mr. Smith pointed out that there are instances where committees are investigating such matters as gubernatorial appointments or matters of personality in which they should have discretion to meet in secret. He asked whether or not there is any reference to standing committees in the Constitution. Mrs. Hunter said that there were not, and Mr. Smith pointed out that trying to deal with committee sessions in this provision might cause problems of consistency.

Skipton: To change this section might be interpreted as meaning a change of policy. By retaining the section in its present form we apparently endorse policies followed by the General Assembly for 168 years.

Montgomery: Perhaps open meetings should apply to all proceedings except extraordinary sessions.

Comment: People feel that they have a right to know what is going on. Open sessions encourage trust in the General Assembly. Is there some reason for retaining a provision that dates from 1802?

Skipton: Elimination of the section or revision of it would indicate a policy change. If the provision were shortened to provide for public proceedings without exception, interpretation of the intent of the change could have ramifications. Acknowledging the right of the public to know, we cannot guarantee the right of the public to know the full facts of anything. For example, much depends upon the line of questioning pursued by a committee. Not all goes into the record.

Montgomery: The section uses the word "proceedings." If interpreted by the Attorney General or court it would probably be viewed as applying to committees as well as to either house. Thus a two-thirds committee vote would allow secret committee sessions. The title of the section refers to "session" and not proceedings. Would a change of title not be more consistent with the body of the provision. The section in its present form appears to meet the needs of the General Assembly. A two-thirds vote of the rules committee would apparently be necessary for secret sessions.

Skipton: Unless a clear and present need to change is demonstrated, to correct a situation or remedy some abuse, amendment of the section does not appear to be necessary. If, for example, the legislature were meeting as a Committee of the whole in executive session, we might be confronted with a problem. One has not been demonstrated. The full Commission must make a decision on this matter.

The Committee deferred further consideration of Section 13.

9. Power of adjournment - Section 14

Hunter: Section 14 provides that neither House shall adjourn for more than two days without the consent of the other. The Clerk of the House suggested expanding this period to accord with the practice of having the first formal session of the week on Tuesday and to eliminate the need for Monday "skeleton" sessions to satisfy the rule. The change would make the section consistent with practice.

Montgomery: What about eliminating the section as archaic?

Skipton: The matter could be covered by rule, but it would have to be a joint rule. Expansion of the time in the manner proposed introduces certainty. To extend the period from two to five days seems to take care of all problems. A longer period of time would give more opportunities for irresponsibility.

The proposal to prohibit adjournment by one house without consent of the other for more than five days was agreed to.

10. Signing of bills - Section 17

Mrs. Hunter read a proposed amendment to Section 17 that would eliminate the requirement that the signing of bills and resolutions by presiding officers of each house be done publicly, in the presence of the house.

Skipton: What would be the situation if the Speaker were about to sign a bill and someone felt that it should be reconsidered? Is this the reason for requiring the General Assembly to be capable of transacting business - i.e. in formal session when bills are signed? Is there need for providing for such a situation in law or in the Constitution?

Montgomery: What is the reason for this section in its present form?

Comment: Could the reason for public signing be to require a witness of the action so that signature cannot later be denied? Is its purpose to guarantee that the presiding officer and not a secretary sign these documents?

Montgomery: The provision appears to reflect the theory of distrusting the legislature and the legislative leadership.

Skipton: Many provisions exist in the law requiring a ritual of execution. Some have been eliminated. They came into being at a time when few could read and have little validity in this day and age. The recommendation for this change came from the Speaker of the House.

The Committee adopted the proposed amendment.

11. Impeachment - a proposal to combine Article II, Sections 23 and 24.

Mrs. Hunter explained that the proposed amendment and combination of Sections 23 and 24 constitute a change of form, not substance. The purpose of the revision is to simplify and modernize the language, somewhat in accord with recommendations adopted in the Model State Constitution. One addition to the sections is the requirement that procedures for the trial of impeachments be established by law. The proposal does not adopt the approach of the Model State Constitution that allows the tribunal for the trial of impeachments to be established by law.

Montgomery: Impeachment for any misdemeanor in office is the language used. What is meant by misdemeanor - mere misconduct in office or misdemeanor as opposed to felony.

Hunter: This question has not been researched.

Skipton: Apparently malfeasance as opposed to misfeasance seems to be the intent of the section.

Because no attempt had been made to study interpretations of the present section, the Committee agreed to hold the proposal as a study item and to request more information on the questions raised.

12. Annual Sessions - Section 25

Mrs. Hunter read a proposal for amending Section 25 of Article II to provide for annual sessions and noted that the provision relative to first Monday of January falling on a legal holiday had a change made in pen to provide that the session should then commence on the succeeding day instead of the succeeding Monday.

Skipton: Actually, no change was intended here except to eliminate the start of a session on New Year's Day. The choice of the second Monday in January was rejected because the Constitution otherwise provides that the Governor and other state officers take office on the second Monday in January, and in deference to the dignity of the separate branches it was felt that the gubernatorial inauguration and convening of the legislature should not fall on the same day. If the legislature meets a week earlier, this means that it is organized and ready to transact business on the day that the Governor takes office.

Taft: An alternative would be to provide that the legislature meet annually "as provided by law." That is, the General Assembly could set the date for meeting in the second year.

Skipton: The proposal before us gives certainty to the matter.

Taft: There is merit in assuring that the process gets underway.

The proposal for annual sessions as drafted was endorsed by the Committee.

13. Elimination of procedural matters from the Constitution

Mrs. Hunter distributed a memorandum containing the rationale for eliminating procedural matters from the Constitution for further study. Mr. Skipton pointed out that if the Committee comes to agreement on the points made in the memorandum, it could possibly take general action on a number of provisions that would be affected by the issues discussed. The item was explained as an attempt to put together the general approach to eliminating matters considered procedural, which matters will be considered more specifically at a later date.

14. Recommending the elimination of Sections 15 and 22 from Article IV.

Mrs. Hunter referred to earlier Committee discussions in which it was agreed to recommend the deletion of these two sections from the Constitution as obsolete. They were considered in connection with the Committee review of provisions throughout the Constitution calling for extra ordinary majorities for legislative action. Section 15 requires a two-thirds vote for the passage of laws to change the number of judges

or to establish courts, and Section 22 authorizes the appointment of a Supreme Court Commission. The recommendation before the Committee (dated July 12, 1971) had been given to the Administrative Assistant to the Supreme Court for his comment. Mr. Skipton reported that Judge Radcliffe had written to the Committee, giving the recommendation his wholehearted support and expressing a willingness to appear to express his endorsement. The Committee agreed that the provisions are archaic and should be repealed.

15. Selection of officers - Section 8

An amendment to Article II, Section 8 was proposed to make the presiding officer of the Senate be the President of the Senate. Discussion also included the necessity of making appropriate revision in the Executive Article because the Lieutenant Governor presently occupies this post. The legislative role of the lieutenant governor is viewed as detracting from legislative independence from the executive branch. In response to question Mrs. Hunter pointed out that there is a current trend in the direction of making the legislative leader of the Senate be a member of the legislature.

Skipton: Two reasons exist for such a change. One relates to the ability of the legislative branch to control its own destiny. In the House the membership selects the Speaker. Why should not the Senate select its presiding officer? A second reason relates to the trend toward having the Governor and Lieutenant Governor elected as a team. In that event the presiding officer of a major branch of the legislature should be a member of that branch and not a member of the executive branch.

Taft: The two matters are related. If a Democrat were elected, should he preside over a Republican Senate?

Skipton: This Committe should collaborate on this matter with the Committee to Study the Executive Branch in the hopes that we can reach accord. For the present, this Committee goes on record as favoring the proposition that members of the Senate select their own presiding officer.

16. Committees and authority of the General Assembly to act after adjournment.

Mrs. Hunter explained that the proposed amendment to Section 8 contained in the memorandum with this heading had several purposes: to make the language governing the two-thirds majority vote consistent with other provisions (as agreed by the Committee at an earlier date) and to provide specific recognition of the committee system. Reference was made to a study memorandum and committee discussion concerning the authority of committees to act between sessions of the General Assembly. The amendment to Section 8 would eliminate questions as to their authority to act by specifically providing that they may be authorized to do so.

Skipton: The language regarding committees may sound superfluous, but specific provision as to what they may be authorized to do may have particular significance. The question of the power of committees to act in interim, after sine die, comes up from time to time. This proposal represents an effort to settle questions with regard to authority and to give specific recognition to the power of the legislature to provide rules for their operation. The Committee may wish to consider additional suggestions that would make certain that each committee wishing to act between sessions have specific authorization to act. To require that they may be authorized to act between "particular" sessions is designed to assure control by the General Assembly over committees during interim periods. Such a proposal would limit the power of the Committee Chairman to use his committee in any way that he chooses. Such a change would accord with federal practice where specific authorization to act is required. Because the

primary purpose of committees to act between sessions is investigative, they should have specific authorization, to avoid witchhunts. This proposal would be the first specific recognition of the committee system. It deserves further study.

It was agreed to continue consideration of this proposal.

17. Three reading rule and one subject rule - Section 16

Also distributed to the Committee were an amendment to Section 16, revising the rule requiring three readings of bills, and a memorandum discussing the requirement of Section 16 that bills be confined to one subject, to be expressed in the title. It was agreed that these two matters would be discussed in full at a subsequent meeting. Mr. Skipton closed the session by announcing that he would report matters upon which the Committee had reached agreement, without going into the specifics of recommendations, to the Commission meeting that was to follow the Committee meeting and hoped to get instructions from the Commission as to how formal recommendations for change should be presented. Formal Committee action, he said, would be the subject of another Committee meeting scheduled before the September 16, 1971 meeting of the full Commission. Mrs. Hunter distributed materials concerning the elimination of statutory matters from the Constitution and discussing the state legislature as a "continuous" or "continuing" body, both for discussion at a later meeting.

Ohio Constitutional Revision Commission
Committee to Study the Legislature

Summary of Meeting
September 13, 1971

Present at the meeting on September 13, 1971 were Chairman Skipton and Mr. Montgomery.

The purpose of the meeting was to review and invite comment upon revisions of the Legislative Article that had been agreed upon at the last meeting of the Committee on August 26, 1971 and that had in the interim been prepared in form to be submitted to the full Commission, along with comment, at its next meeting on September 16, 1971. Chairman Skipton opened the meeting by proposing discussion of the amendments and revisions and invited comment from Committee guests, consisting of two representatives of the Department of Development and one from the League of Women Voters.

The first items which the Committee hoped to act upon, he announced, were several provisions to be repealed as either obsolete, superfluous or unnecessary. Committee conclusions on this score were based upon several factors: (1) obsolete because act required has already been performed; (2) something already provided for in the United States Constitution; (3) part of the ordinary police powers, not requiring special provision; or (4) simply superfluous. The following matters were specifically discussed.

1. Section 5, Article II

Skipton: The Committee stands ready to accept any comments from anybody who wishes to comment for or against repeal of Section 5, providing that no person convicted of embezzlement of public funds shall hold office in this state nor shall any person holding public money for disbursement or otherwise have a seat in the General Assembly, until he shall have accounted for and paid such money into the treasury. Such a provision appears in a dozen or so state constitutions. It is considered unnecessary in view of other qualifications that have been established for legislators and other police powers that a state has that can govern in this situation.

Mr. Skipton directed attention to Comment to the Section as prepared. (Copies were distributed.) Visitors remarked that they were either not prepared to comment or had no objections, and the next item was introduced.

2. Section 10, Article II - Right of members to protest.

Mr. Skipton read the provision and noted that it is an old provision and one that appears in a dozen or so state constitutions. It has been variously interpreted, as noted in the Comment. Some states require the protest of two members in order to have the protest registered in the journal. It is a provision that has been used infrequently, as Comment indicates.

Comment: Some questions were raised as to purpose. Mr. Skipton noted that the reason was apparently to assure that reason for dissent be registered in the Journal. Today, he said, there is no problem about getting consent to putting anything in the Journal. This is rarely, if ever, denied. The only effect of this would be to assure getting reasons for dissent before the public. Today's means of communications and distribution by the media of matters of dissent suggest that one would have no trouble getting wider publicity than the House or Senate Journal would provide. Without further comment the next topic was introduced.

3. Elimination from Article IV of Sections 15 and 22

Skipton: Repeal of these two sections is based on fact that whatever necessity there was for them when adopted no longer exists. They are now superfluous. Repeal of these two sections has the endorsement of the Administrative Director of the Ohio Supreme Court.

Substance of the two sections was summarized by Chairman Skipton. No questions were raised.

Mr. Skipton then indicated that the next few revisions were considered matters of "housekeeping." That is, they are corrective in that they are designed to conform the organic law with practice or to supply obvious omissions from the organic law.

4. Organization of each house - Section 7, Article II

Skipton: This is matter of "omission." It is a simple amendment. Section 7 provides for organization of the House but not the Senate. The amendment would apply to "each house of the General Assembly."

Comment: Would this mean that the law has to be changed each session? Response: No, rules are adopted each session, but statutes relative or organization do not change that frequently.

5. Vacancies - Section 11, Article II.

Skipton: Another amendment here is corrective, not of substance, but of language. This is a section that was adopted just a few years ago. It is one to make language conform with language used elsewhere in the Constitution. It is to clear up the difference between the definition of election and appointment.

Hunter: The purpose is to avoid possible conflict because of the use of one term in this section (appointment) and the use of other terms (elected and election) in other sections dealing with majority votes required.

Comment: This would conform language, use a more precise term in provision for filling vacancies, and clarify what people meant in adopting this amendment. Questions were invited, but none were forthcoming.

6. Power of Adjournment - Section 14, Article II

Skipton: Another matter upon which this Committee is prepared to make recommendation is Section 14 of Article II. This is an administrative matter, to conform the Constitution with modern day practices. The section provides that either house could not adjourn, without consent of the other house, for more than two days, Sundays excluded. The Legislature frequently adjourns on Thursday and does not wish to return until the following Tuesday. If the limit were extended to five, rather than two days, the need for "skeleton" sessions on Monday would be eliminated.

Comment: Does this mean that there would be no more Monday sessions? Response: There could be Monday sessions, because the Legislature always adjourns to a day certain, but it would eliminate the necessity of returning Monday in "skeleton" session, solely to satisfy Constitutional rule. Either house would still retain control over its own calendar through adjournment resolution. What would be eliminated is an unnecessary skeleton session.

7. Annual Sessions - Section 25, Article II.

Skipton: Many would consider this a major change. It is more a matter of conforming to practice. Another amendment is being considered to this section - headed Special Sessions - and we might look at these two together. Here we would provide by Constitutional rule what appears to be a desire of both houses of the General Assembly and conform with the practice of the last two sessions to meet annually. The revision would provide that the General Assembly convene each year on the first Monday of January or on the succeeding day if the first Monday of January is a legal holiday. This has been accomplished by the legislature adjourning to a day certain in the following year in regular session, rather than adjourning sine die. Annual sessions are recommended today by most authorities in state government. The legislature itself seems to recognize the necessity. The amendment does not attempt to limit the length of the session or restrict the subject matter that may be taken up in any session. Some states place both time limits and subject matter limits on second year sessions. The Committee has chosen not to restrict the Ohio General Assembly in this way.

Another element, about which there may be some question, involves the fact that the Committee to Study the Executive Branch may be considering changing the date when the Governor is sworn in. Some interest has been registered about the time that elapses between election and the time of succession of a new administration. This Committee is proceeding on the assumption that the Governor will continue to be inaugurated in the January following elections. Therefore, we will not change the day of convening of the legislature. Another element is why should the legislature meet before the governor's inaugural? The Governor is to present his program to the legislature, and the question may arise as to why they do not meet at the same time. I believe that it is the feeling of this Committee that having the legislature meet and organize prior to inauguration of the Governor is probably wise. The Governor usually comes into office with advance preparation. The General Assembly, on the other hand, being a larger body, composed of citizen members, does not have the same opportunity. Here we are allowing sometimes only a week for the General Assembly to get organized and be ready to accept suggestions from the Governor. Practically, joint convention and inauguration would cause problems of congestion and detract from public exposure and recognition of the legislature.

Comment: Question was raised as to salary of legislators- is it annual, regardless of session? Response: Salary is statutory and is annual, regardless of meeting. Doubt was expressed that Committee would consider amendment regarding salary changes. It was pointed out that interpretations have said a member is entitled to the salary for two years at the moment that he is sworn in. He receives the statutory salary if he serves one day.

8. Special Sessions - Section 25, Article II.

Skipton: This may stir more varied opinions. The amendment regarding special sessions is intended to give presiding officers as well as the governor power to call a special session, and the only limitation is that either must issue a proclamation and state in the proclamation the purpose of the call. This is a very broad grant of power, without subject matter limits.

Comment: How would annual sessions affect this? Would the General Assembly meet most of the year anyway? Response: Neither amendment would limit time. These are independent amendments. Questions as to Governor proroguing General Assembly and calling special sessions were discussed. Chairman Skipton expressed view that there could be special session within a regular session.

If special issue came up, asked one member of audience, could the Governor dispense with the general session and require the legislature to take it up in special session? Response noted that there would be no purpose served. The legislature need not follow the Governor's wishes if it does not wish to, being a co-equal branch of government. Purpose of annual sessions and giving presiding officers authority to call special sessions is to improve status of General Assembly in relation to the Governor.

Further comment was raised as to the use of the term "presiding officers." Does this mean two people? Response: Presiding officer of each house must agree. Question was raised as to whether this should be clarified by specifying that the presiding officer of both houses may convene. Mr. Skipton noted that Committee did not choose to go with alternative allowing members to petition for special session for fear of opening up the power to frivolous exercise. Clarification question was referred to Mrs. Hunter.

Further question was raised concerning the Lieutenant Governor as presiding officer of the Senate.

Skipton: There is another suggested amendment that deals with that subject--i.e. who shall be the presiding officer of the Senate. An amendment is proposed to Section 8 that would provide that the presiding officer of the Senate shall be selected from its membership, which means that the presiding officer would be somebody other than the Lieutenant Governor.

General discussion ensued on this point. Little discussion on the point within the Ohio General Assembly was noted. Mr. Skipton noted that the amendment is one that had its genesis in increasing power of the legislature versus the executive branch. Also that it takes cognizance of a recommendation that may come out of another committee to provide that the Governor and Lieutenant Governor run as a team. If that should come about, there could be a situation where the presiding officer of the Senate, with power to call special sessions, would be unit of the executive branch. This question is getting recognition throughout the country. The current situation of the presiding officer in the Senate has been made to parallel the federal situation, where the Vice President presides over the Senate. However, the U. S. Senate is not the Ohio Senate, and the two are not even constituted the same. The purpose of each are different. There is nothing "equal" about any Senator; each state gets two regardless of size. The Ohio Senate has to be apportioned just as the Ohio House--i.e. they must represent equal constituencies. This is not true of the U.S. Senate. In other words, the purpose of the election of the Ohio Senate is different. Giving the executive a deciding vote in the Ohio Senate really means that a majority of the Senate could end up having the majority will thwarted. In several states this issue has gone to the voters, as part of a constitutional revision package. In Arkansas, it went down as part of the package. Nebraska, also, attempted to eliminate the Lieutenant Governor as presiding officer of its unicameral legislature, but again a package amendment was defeated. Getting constitutional amendments is difficult, and getting this kind of amendment adopted would be difficult because of the familiarity with the practice and the difficulty of people to see the rationale.

9. Signing of Bills - Section 17

Skipton: The next item that the Committee is prepared to make recommendation on is an amendment to Section 17. This is an effort to make the Constitution conform to practice. Frequently skeleton sessions are held for bill signing purposes. Although the Journal says the Legislature is in session, frequently there is only one other member present when the presiding officer signs the bills.

Mr. Skipton then read the amendment as proposed, noting deletions, and explained that the purpose of the amendment was to allow the presiding officer to sign a bill at any time, so long as the legislature is in session. Presumably it could be done in the privacy of his own office. Provisions such as this one, to make things public, go back to days when communication was not available, and there could have been skullduggery. Such requirements are of little import today.

Discussion: Other related matters have to do with what happens to a bill after it is signed. Signing it publicly gives it no more force of law.

Montgomery: What is rationale of having it signed while the house is "capable of transacting business?"

Discussion: Must a quorum be present? Vice of the provision, noted Chairman Skipton, is that reasonable interpretation would require quorum present. The provision has been "interpreted away." Mr. Skipton opined that author of the language was trying to give the legislature an opportunity at the last moment to stop proceedings. The language has been interpreted to mean nothing. This is the kind of provision that by practice and interpretation has become meaningless. Practice of other states was noted where even though there is a uniform effective date of legislation (such as in Illinois) there can be a long waiting period before legislation is signed by the presiding officers.

A question was raised as to whether this is part of the "recorded" part of the business of the house - i.e. the signing of bills? Would it still be "recorded" with such an amendment? Response: Yes, with appropriate discussion of this matter to be included in the comment.

10. Qualifications of Members - Age and Residence - Section 3, Article II

Skipton: This amendment affects residence qualifications of a candidate for the General Assembly. Necessity of treating with this section is based on fact there will be a reapportionment of the General Assembly. Many authorities believe that candidates are not going to know what district they are eligible to run in until very shortly before they are going to have to file. An incumbent may find himself a resident of a district different from the one he now represents. It is cognizant of the fact that a person may have to act quickly to qualify himself for the General Assembly. It attempts to ease such a situation. A new feature is to provide that a member shall remain a resident during his respective term. The exemption for being absent on public business is retained - e.g. if inducted into the armed forces or assigned by the state to some other place.

Question and Comment: Is there any option available during a redistricting for making provisions for persons finding themselves in a different district without disturbing present requirements? Response: Could have variety of contingencies provided for. This is attempt to have simple, uncomplicated rule, without elaborate description.

Elimination of waiting period was noted. Reason is the high mobility of the American public. Mr. Skipton pointed out state residency (six months) is still a factor. Some opinion was expressed to the effect that some district residency ought to be required, with provision for reapportionment. Mr. Skipton noted that reapportionment litigation could result in a question being in the court up to ten days before an election. Alternatives adopted in other states were noted - e.g. that one could choose to run in district he has previously represented if some part of the county he has previously represented is part of the district and other kinds of solutions. Provisions can be complicated and obtuse.

Mr. Nemeth (staff of Ohio Constitutional Revision Commission) noted that newcomer still has problem of convincing voters in new district that he should be elected.

Further discussion ensued as to residency, with Mr. Skipton pointing out that legally it is a matter of intent. Prior residency was the choice of the Committee. Recognition of the practical problems connected with reapportionment was noted as the primary reason for this amendment. A liberal alternative was adopted for both the near future and reapportionment problems and in order to keep the provision flexible for the future.

11. Eligibility (Compatibility) - Section 4, Article II.

Mr. Skipton explained the purposes behind the recommended change of Section 4 - i.e. to eliminate many of the problems of interpretation with which it has been plagued. He termed it a "liberalizing" amendment. It does abolish the vexing question of what is a "lucrative office under the authority of this state." Conflict of interest is at the heart of such a provision.

Question and Comment: Does this refer to military reserve officers?

Skipton: Yes, this would be applicable to them. This is one of the questions bound to come up.

Discussion ensued as to the application of the section to commissioned officers and the desirability of its application without some exception re officers in the armed forces. Also as to whether "employment" should be covered, as in the Model State Constitution. Mr. Skipton noted that the purpose of the Committee was to make it possible for large numbers of public servants to aspire to the General Assembly. Application to the military may impose unexpected burdens, and problems of interpretation are anticipated.

12. Secret Sessions - Section 13

Skipton: Committee is not prepared to act upon this section, but we do invite comment.

Mr. Skipton read the section, noted that such a provision is common to state constitutions, and expressed the Committee intent to provide a forum to people who wish to debate the issue or comment upon the section.

Comment: By allowing "secret sessions" by two-thirds "present" can these matters be "set up"? Extent of usage is in doubt. Rules of both houses provide for secret sessions in the same language as the constitutional provision. The adoption of rules was criticized by the media and particularly with respect to hearings of the committee studying campus disorders. Mr. Montgomery noted that unless there is "compelling" reason to change, the committee had rejected the idea of change in such cases. Mr. Skipton pointed out that in some cases the information cannot be obtained unless committee sessions are secret because people simply will not testify.

In concluding, Chairman Skipton announced that he would take the documents which had been reviewed to individual members of the Committee for the purpose of getting their concurrence or dissent. The meeting was therefore not adjourned, but continued, to reconvene, he indicated, in advance of the Commission meeting on September 16, 1971. (The meeting was reconvened as indicated, and adjourned prior to the presentation of the partial report of the Committee to the Commission).

Ohio Constitutional Revision Commission
Committee to Study the Legislature
October 6, 1971

Summary of Public Testimony

The Committee to Study the Legislature held a hearing at 1:30 p.m. on October 6, 1971, in Room 11 of the House of Representatives in the State House, for the purpose of receiving public testimony on a series of recommendations presented in a partial committee report on September 16, 1971, pursuant to Commission rule E-4. The committee report will be formally presented to the Commission for action by the Commission on October 19.

The following members of the Commission were present at the public hearing: Senator Taft, Representatives Thorpe, Russo, White and Fry, Mrs. Orfirer, and Messrs. Carter, Cunningham, Skipton (chairman of the Legislative Study Committee), Montgomery, Schroeder, Ostrum, and Carson.

Commission chairman Carter opened the meeting, stating that its purpose was to receive testimony from any persons present, and to offer commission members present an opportunity to question those who offered testimony and to discuss the committee proposals. The Chairman then asked Mr. John Skipton to preside. Mr. Skipton stated that the purpose of the meeting was to receive public testimony on recommendations of the Legislative Committee which were distributed at the September 16 meeting of the Commission, have been made available to the public since that time, and copies of which were available in the hearing room. He stated that the report under consideration is not the complete report of the Legislative Study Committee, but that the hearing is for the purpose of receiving testimony only on those matters contained in this report. He further stated that, after the Commission considers the Committee recommendations on October 19, those proposals adopted by the Commission will be presented to the General Assembly for action pursuant to procedures followed for any proposed constitutional amendment.

The first person to testify was Mrs. Richard Brownell, on behalf of the League of Women Voters. Mrs. Brownell's statement is attached hereto.

In connection with the proposal for annual sessions, Mrs. Brownell raised a question about the starting date of the session, which, at the present time under the annual session provision in section 101.01 of the Revised Code, can be as late as March 15 in the second year. With respect to the provision allowing the presiding officers of the House and Senate to call a special session, Mrs. Brownell questioned whether the language was clear enough to require the concurrence of both presiding officers for this purpose, and she also noted that the two proposals respecting section 25 (annual sessions and special sessions) need reconciliation.

Mr. Skipton asked if there were questions of Mrs. Brownell. Dr. Cunningham asked whether Mrs. Brownell or the League had a position on age eligibility for members of the General Assembly since the lowering of the voting age may make 18-year-old persons eligible in Ohio. Mrs. Brownell stated that the League had no position on this question and that her personal opinion is that any person eligible to vote should also be eligible to hold office.

Representative Russo questioned the effect of the annual session language, and whether this means that each year is a new session for the purpose of introduction of bills, or whether the General Assembly, at the end of the first year, would continue the practice of only holding over specific bills for consideration in the second year. Mrs. Brownell stated that the League has no position on this question,

and, in response to a question from Mr. White, that the League has no position on the question of limiting the number of days in a legislative session. Mrs. Brownell stated that the League's position is that there should be assurance that the General Assembly will meet every year, so that it can deal with current problems as they arise, and that the requirement for meeting annually should be in the Constitution.

Mr. Skipton pointed out that the annual session provision requires the General Assembly to convene each year, and this will have to be combined with the provision for special sessions, which states that the "regular" session of the General Assembly begins at a particular time, and that there is a possibility of making the General Assembly a continuing body for a two-year period.

Mr. Skipton asked whether there was anyone else present with a statement or who wished to testify on the committee proposals. He then stated that the committee would receive questions or proposals for further consideration and discussion.

Mrs. Molly Hood, a member of the Constitution Study committee of the Columbus League of Women Voters, pointed out an error in the committee report, in section 11 of Article II (vacancies). In the fifth line from the end of the section as it appears in the committee rport, the word "appointed" should be stricken and the word "ELECTED" inserted in order to maintain consistency with the purpose of the proposed amendment. Mr. Skipton agreed that this was an error and would be corrected. Mrs. Hood also pointed out, in conjunction with the proposal to add to section 8 of Article II a provision that the presiding officer of the Senate should be designated the "president" of the Senate and chosen from among the Senate membership, that the traditional term for the presiding officer of the Senate was "speaker" before the change in the Constitution which added the Lieutenant Governor as an elective state officer and designated him as the presiding officer of the Senate. The speaker of the Senate was the most important elective office after the governor. Mrs. Hood asked that the committee consider using the traditional term "speaker" instead of "president" of the Senate, and Mr. Skipton accepted her recommendation for committee consideration.

Lt. Governor John Brown offered comments on several items in the committee report. With respect to the proposal to repeal section 10 of Article II (right to protest) he pointed out the lack of anything in Ohio like the Congressional Record, in which any member of Congress may have recorded any item or matter he wishes; in Ohio the right to have a protest entered in the Journal is a very limited right. He believes this right to protest should be preserved in the Constitution, especially as it is now limited to a formal enactment or resolution of the House or Senate, and a member of the General Assembly has no other official way to bring before the public a matter he believes to be wrong or with which he strongly disagrees. Mr. Skipton asked whether the right should be limited in some way, such as requiring the concurrence of two members or limiting the amount of material that could be inserted in the Journal, but the Lt. Governor stated that he felt it was already sufficiently limited by the court decision. He feels the right should be in the Constitution, since legislative rules are subject to change, and may differ between the two houses. Mr. Thorpe pointed out that the right to protest is seldom used in the House.

The Lt. Governor proposed, for committee consideration, limiting the subject matter in the second year of the General Assembly if annual sessions are required by the Constitution. He proposed that the second year session be limited to fiscal matters, matters proposed by the Governor, and matters agreed to by 2/3 of the members.

Otherwise, in his opinion, much legislation will be reintroduced in the second year that has already been considered in the first year. He feels that if 2/3 of the members agree to the introduction of the matter, it is of sufficient importance that it should be considered, or if it is included in a message from the Governor. Budgetary matters, he feels, should be considered on an annual basis.

The Lt. Governor and several committee members discussed the effect of a sine die adjournment on pending legislative business and the carryover of bills from one year to the next. He stated that his proposal to require 2/3 approval for introduction of bills in the second year applied to new legislation, not carryovers. Mr. White pointed out that requiring 2/3 for introduction of new bills might shut out controversial legislation but legislation which was, nevertheless, important for the General Assembly to consider. Mr. Fry pointed out that the legislature would still have the prerogative to carry over bills considered important from the first year to the second. Mr. Carter asked whether the Lt. Governor considered it important to include these items--restricting the subject matter of the second year--in the constitution. The Lt. Governor replied that, because of the changeability of the rules, he thought these matters should be included in the Constitution. Mrs. Orfirer questioned whether the suggested restrictions did not impair rights and should not, therefore, be excluded from the Constitution, and whether the 2/3 agreement necessary would not keep out consideration of important new matters which the General Assembly should consider in the second year. Mr. Russo again stated he thought the second year might be construed as a completely new session, and that legislation from the first year could not be carried over.

Mr. White said that he felt there was implied in the annual sessions proposal that the job of being a legislator is now a full-time job, and that professional legislators would result.

There was further discussion about whether the annual session proposal would require a sine die adjournment at the end of the first year and entirely new beginning the second year, or whether the present system of considering that a "session" of one General Assembly is the term of representatives--two years. Mr. Skipton stated that the committee wanted to leave the provisions open so that the legislature had leeway to interpret them itself.

With respect to the special session provision, the Lt. Governor pointed out that there were practical problems involved if the intention was to require both presiding officers to concur in the special session call, since they might be of different parties or different opinions about the need for the session. Mr. Skipton replied that the committee recognizes these problems, but did intend that both presiding officers concur in the special session call.

The Lt. Governor then turned his attention to the proposal to have the presiding officer of the Senate chosen by the members from among their membership. He is opposed to this proposal. He reviewed the position of the Lt. Governor in other states, pointing out that most states designate the Lt. Governor as the Senate presiding officers and that several states have recently changed from having the secretary of state succeed to the governorship in the event of vacancy to having the Lt. Governor, also the president of the Senate, succeed. He mentioned the work of the National Conference of Lieutenant Governors in elevating the office of Lt. Governor. He reviewed the various functions assigned to the Lt. Governor in various states, pointing out the great variety in the types of functions performed other than as the presiding officer of the senate. He feels that the office of Lt. Governor should be enhanced, and that removing the function of presiding over the senate would be to the contrary.

Mr. Skipton stated that the committee was not trying to down grade the position of Lt. Governor.

Mr. White asked whether the Lt. Governor felt that there was merit in the idea that the Governor and Lt. Governor be elected as a team. Mr. Brown said that he was in favor of this idea and, further, that he favored preprimary selection of the Governor and Lt. Governor as a team by having them file joint candidacy petitions.

Mr. Carter stated that there was no effort to downgrade the position of Lt. Governor but that this proposal was based solely on the idea that it may not be appropriate to have a separately-elected official preside over the senate. Mr. Skipton stated that this proposal arises from the concern over the nature of the office of Lt. Governor, who succeeds to the Governorship, and who should be given additional administrative and executive responsibilities to prepare him for that position, as well as the concern of maintaining the independence of the legislative from the executive branch, especially should a vacancy occur in the office of Governor.

Mr. Fry pointed out that, in Oklahoma, the Lt. Governor was recently named head of Development and Mr. Brown pointed out the great variety of jobs which have been given to the Lt. Governor in other states.

Mr. Carter stated he felt that the Lt. Governor was asserting that his office should be a more effective one in state government, and perhaps increased effectiveness could be achieved in the executive branch only if the Lt. Governor's time were not consumed with the legislature. Mr. Brown stated that the duties were not too heavy, and that he felt the Lt. Governor made an effective presiding officer because he did not represent a district, but was elected by all the people. He feels the Lt. Governor could be of great assistance to the Governor in conducting state matters if the two have agreed to run as a team and so filed for the primary.

With respect to the provision for signing bills, the Lt. Governor stated that he felt a majority of the members of the Senate must be present for the signature under present provision, and he is in favor of changing that provision. He questioned whether the proposed language is clear enough that "session" would not be interpreted to include the language being deleted "capable of doing business" so that the situation which presently exists would continue. Mr. Skipton pointed out that this, again, is a problem of the definition of the word "session" which has two meanings--anytime before sine die adjournment, or the daily assembly of the body.

Mr. Thorpe asked why bills have to be signed at all. He suggests removing that requirement altogether.

Mr. Brown proceeded to several other matters, not part of the committee report. He suggests consideration of section 16 of Article II, pointing out the necessity of the motion to dispense with the complete reading of a bill. He suggests requiring reading by title only. Mr. Thorpe noted that the motion to dispense with the reading is made only on second reading anyway, and that the Supreme Court has ruled that this provision is not mandatory.

The Lt. Governor urged consideration of section 31 of Art. II, dealing with legislative compensation.

Mr. Skipton read a statement prepared by Sam J. McAdow of the Senate Clerk's office for Senator Taft. Mr. Taft was absent. The statment urges elimination of certain provisions in section 16 of Art. II (three readings on separate days, one subject and repeal of amended sections) and insertion of reading "by title only"

rather than reading the entire bill. The statement indicated concurrence with the change in section 17 (eliminating the signing of the bills in the presence of the house) and pointed out, as noted before, the dual meaning of the word "session." The statement further noted the new provisions requiring that a legislator remain a resident of his district during his term, and pointed out that this would cause a hardship in the case of reapportionment since he could not remain a resident of his district if he had to move into another district because his original district was changed. Further, the statement noted that the day a person becomes a candidate is open to varying interpretations.

Mr. White noted that the provision requiring that a bill have only one subject prevents the attachment of riders to bills in Ohio, as happens in Congress.

Mr. Skipton noted that part of the reason for the committee's proposals regarding legislator residence was because reapportionment will make it difficult for a member to have been a resident of his district for one year prior to election in a reapportionment year. He further stated that the proposal to require residency on the day a person becomes a candidate was intended to be as broad as possible, so that as conditions change or as election laws change, the Constitution will not have to be changed.

The chairman invited other comments. Mr. Carter referred to Art. II, Sec. 4, dealing with compatibility of public offices. He suggested that the phrase "except as expressly provided by law" be added to the end of the proposed section in order to give the General Assembly flexibility to define the types of public office which are inappropriate for a member of the General Assembly to hold.

Mr. Skipton noted that there was additional research on the question of compatibility, and the committee would possibly wish to consider this section further. Mr. Carter noted that there are two sides to this question, whether the General Assembly should be given the power to determine incompatible offices since they are ultimately responsible for this decision to the voters, or whether this is a matter which should be strictly regulated by the Constitution.

Mr. Russo noted the proposal to remove section 5 and expressed his opinion that its removal might enable the General Assembly to enact even more restrictive measures for eligibility for the General Assembly than this section. He believes that, presently, the General Assembly cannot enact more restrictive requirements for eligibility than provided in the Constitution. Several others noted that this is subject to other interpretations. Mr. White stated that it was possible the legislative body might establish other qualifications. It was noted that the Constitution presently permits the General Assembly to deny the franchise to certain types of people, and that you must be an elector to qualify for public office. Mrs. Orfirer questioned whether the omission of an item from the Constitution denies the legislature the power to enact. Considerable discussion ensued.

Mr. Skipton asked for further comments, section by section. There being no further comments, the meeting was adjourned.

League of Women Voters of Ohio
65 S. Fourth St. Columbus, Ohio 43215

STATEMENT TO THE COMMITTEE TO STUDY THE LEGISLATURE
OF THE OHIO CONSTITUTIONAL REVISION COMMISSION
Regarding Committee Recommendations
by Mrs. Richard M. Brownell, Chairman
LWV Constitution Committee
on October 6, 1971

The League of Women Voters of Ohio believes a state constitution should provide for a structure of government responsive to the needs of the people of Ohio. In order to achieve this a constitution should be flexible and concerned with fundamental principles. It should be clearly written, logically organized and consistent.

Members in all 74 local Leagues studied the Legislative Provisions of the Ohio Constitution in 1969-70. At that time our members agreed that the Legislative Article should provide that the General Assembly meet annually and that the provisions dealing with its organization and power should be broadly stated. Under those broad principles the League supports the following recommendations of the Committee to Study the Legislature: 1) The repeal of Section 5 of Article II and the repeal of Sections 15 and 22 of Article IV. 2) The proposed changes to Section 7, 11, 14, and 17 of Article II and one of the proposed changes to Section 25 dealing with annual sessions. We have no position for or against the other proposed changes.

The League of Women Voters of Ohio agrees that Section 25 of Article II should read: "The General Assembly shall convene each year . . ." Although in 1968 the Legislature passed a bill which included a provision for the legislature to meet annually, the League feels it would be more consistent to change Section 25 to state that the General Assembly meet eech year. This provision would strengthen the power of the legislature and also insure its ability to deal with problems as they arise.

The League agrees that Section 5 of Article II should be repealed. This provision deals with a specific prohibition of who shall hold office, which is not necessary to the constitution. It could be adequately handled by statutory law or by a rule of the legislature.

Sections 15 and 22 of Article IV are both outmoded provisions which no longer need to be in the constitution. A constitution should be brought up to date and remain flexible for changing times. Detailed and short term items are better left to statutory law.

The League questions the repeal of Section 10 of Article II. This section provides for the right of members to protest and to have this protest entered in the Journal. It does not seem to be a completely procedural matter, but rather a protection of the minority party or a minority group within the legislature. This provision gives them a chance to make public in the Journal their objections to some action taken in the General Assembly. This provision was most recently used in late May or early June of this year during the budget vote in the House. The wording of the amendments offered by the Democrats was not included in the Journal of May 28. The following week the Democrats, under this right to protest, had recorded in the Journal their proposed amendments. This sort of procedural matter would most likely be written in the rules of the legislature and the rules are written by the majority party. Therefore, it might be necessary to keep Section 10 of Article II to guarantee the rights of the minority party to protest.

The recommendations by the Legislative Committee to change the wording in Sections 7, 11, and 14 of Article II to bring them in line with current practice and to make the constitution more consistent conform with the League criteria of a good constitution. A constitution should be clearly written, kept up to date, logically organized, and consistent. Section 7 recognizes the fact that each house of the General Assembly should organize itself. These details should be in the statutes or in the rules of the Senate and the House and not in the constitution. Section 11 changes the word 'appointed' to 'elected' to make this section consistent with other sections of the constitution which state 'elected' members of the General Assembly. Section 14 increases the length of time either house may adjourn without the consent of the other house from two to five days, which is more consistent with current practice.

The suggested change in Section 17 of Article II falls into a similar position of bringing a provision up to date and more consistent with current practice. Signing of bills is more properly a matter for statute or rules of the legislature and this amendment adds desired flexibility and allows for the possibility of change in procedure as the legislative business becomes more computerized.

The League does not have any stand for or against the other proposals of the Legislative Committee. We would point out that both the proposal to allow the presiding officers to call a special session and the proposal to allow both the House of Representatives and the Senate to choose their presiding officers in effect strengthen the power of the legislature. This may very well be what the people of Ohio want in the future. The League believes it is important that both the executive and legislative branches of government be responsive to the needs of the people of Ohio. We hope that any changes in the balance of power between these two branches of government will continue to provide the kind of effective government Ohio needs.

The final proposed changes deal with eligibility and qualification for members of the General Assembly. The League again has no position for or against these proposals. We would only urge that any proposals for change in this or other areas of the constitution be carefully considered to allow for maximum flexibility for the provision to be applicable not only for today but for the future as well.

The League of Women Voters is impressed by the dedication of a number of the Commission members to the time-consuming work of constitutional revision. Carefully considered recommendations for constitutional revision can be of tremendous benefit in easing many of the governmental problems of the state of Ohio. We commend the Legislative Study Committee of the Ohio Constitutional Revision Commission for moving ahead with this important task.

Ohio Constitutional Revision Commission
Committee to Study the Legislature
October 19, 1971

Summary of Committee Meeting

The Committee met October 19, 1971 in the Commission office. Present were: Chairman Skipton, Messrs. Montgomery and King, and Senators Applegate and Taft. Also present were Mrs. Hunter, Mrs. Eriksson and Mr. Carter.

Mr. Skipton reviewed a letter from Mr. Schroeder, also a member of the Committee, concerning the committee proposals. Mr. Schroeder is opposed to removing the right to protest a legislative act from the Constitution (section 10 of Article II). Mr. Montgomery said that, after hearing the testimony at the public hearing, he felt perhaps the right should be retained in the Constitution and Senator Applegate agreed, stating that it might be difficult to convince voters that it should be removed from the Constitution. There was discussion about the meaning of "act."

Mr. Skipton stated that if, after discussion at the Commission meeting, it appears that there is not widespread consensus of support for a proposal, he feels that a motion to recommit the matter to the study committee would be preferable to the Commission taking negative positions - so that the matter can always be restudied, after further study and debate. Senator Taft commented that more publicity is obtained from a press release than from recording a protest in the Journal. Mr. King indicated he would prefer to leave the right to protest in the Constitution.

Mr. Schroeder agreed to the annual and special sessions proposals. He also agreed to the proposal in section 8, providing that the presiding officer of the Senate be chosen from the Senate membership. With respect to section 17 (signing of bills) he suggests eliminating "while the house over which he presides is in session" from the original committee proposal. Mr. Skipton noted that the committee had amended language for that section before it to consider today. He also supported the original proposal for amending section 3 (residence) and section 4 (compatibility) with the addition of "except as permitted by law" at the end, giving the legislature authority to spell out eligibility provisions. Mr. Skipton noted that, in section 101.26, the General Assembly has prohibited members from holding certain types of positions, going beyond the Constitutional provisions.

Mr. Skipton reviewed the new material prepared for the committee for this meeting.

Section 5 of Article II - additional comment, on the proposal to repeal this section. Mrs. Hunter stated that the additional comment was an effort to respond to some of the comments at the public hearing, and points out that other provisions in the Constitution already give the General Assembly additional authority to enact more restrictive qualifications than set forth in section 5, and the General Assembly has already done this by prohibiting convicted felons from holding office. Senator Applegate stated that the provision in section 4 of Article V gives the legislature more flexibility than the section proposed for repeal.

Section 10 (protest). Will probably be recommitted to the committee for further study.

Section 25 - a combined version of the two prior versions - annual sessions and special sessions. Combined version intends to make it clear that one General Assembly is comprised of two years with a mandated session in each year, also clarifies the

problem of the first Monday in January being a legal holiday. Mrs. Hunter explained the new version. Mr. Skipton pointed out that the new version permits the General Assembly to have the maximum flexibility in arranging its own procedures - whether it wants to be in continuous session, or adjourn sine die at the end of the first year, or recess, and to make its own rules for carryover of pending legislation.

Mr. Montgomery questioned the meaning of "the same day" in the second year. After considerable discussion, the committee changed the language to "the second Monday of January" of the following year. Senator Applegate questioned whether the annual sessions provision would affect budgetary matters, but it was noted that the matter of an annual or biennial budget is controlled by other constitutional and statutory provisions, and this proposal would not affect that problem. It was noted that the General Assembly began meeting biennially in the odd-numbered years (as opposed to the even-numbered years) following a 1905 constitutional amendment which changed the election of state and county officials to even-numbered years, so that the term of a Representative begins January 1 of the odd-numbered year.

In response to a question, Mr. Skipton stated that the legislative auditor question is not before the Commission this afternoon, but is still under study both by this committee and the Citizens Committee on the State Legislature.

Mr. King noted that he would be opposed to having the presiding officers call a special session unless assured that the presiding officer of the Senate is a Senator chosen by the members of the Senate. Senator Taft suggested that, if the proposal to change the presiding officer of the Senate is not accepted, the language of the annual-special session proposal be changed so that the president pro tem of the Senate be given the authority to issue the special session call with the speaker of the House.

Section 17 - signing of bills - Following the public hearing, the section was changed because of confusion about the meaning of "session." The intention is that bills and resolutions be signed before sine die adjournment, but not publicly nor during an actual meeting of the house. Mr. Montgomery raised the question whether signing is necessary at all for the validity of the legislation. Mr. Skipton replied that someone should certify the document as the act passed by the legislature; whether this requirement is in the Constitution or the law and who should perform this function is open to question. The function is a certification function, and Mr. Skipton, in response to a query from Mr. King, stated that the ceremonial nature of requiring public signing seemed unnecessary. Mr. King commented that he felt there was value to the public signing in order to assure that the duty is performed. Mr. King also stated that he felt that, although the signing should take place in the chamber, it need not be while the house is capable of transacting business. Senator Taft stated that the real protection against a "lost" bill would be recording the signing in the Journal, which could be done whether or not the signing took place in the chamber, and no matter when the signing takes place. Mr. Skipton pointed out that mere retention of "publicly" would not assure that the signing would take place in the chamber.

A question was raised as to whether there should be a time limit within which the bill must be signed, and Mr. Skipton noted the absence of any such limit in the present Constitution. Any such limit would limit the power of the General Assembly to write its own rules.

The question was discussed as to whether failure to sign invalidates the legislation, giving the presiding officer the veto right and Senator Taft indicated that perhaps, since this is a purely ministerial function, it should be transferred to the Clerk and perhaps inserted in section 16, requiring the clerk to certify the bill to the Governor. The Model State Constitution does not require signing.

It was agreed that the committee might study this matter further, after Commission discussion this afternoon.

Section 3 - Residency - A revised proposal is suggested, to take care of the situation during an apportionment year, so that the requirement to retain residency during term no longer applies if the boundaries of the district are changed by a plan of apportionment. It was noted that congressmen do not have to be residents of their districts, only of the state. The question was raised about permitting a person to move if any portion of his district is changed, and Mr. Skipton noted that it is difficult to determine what is meant by district. The geographical boundaries, of the number of people? How much change would be necessary? Therefore, it was decided to permit a person to move if any boundary was changed. Senator Taft stated that the important thing now is to find out whether the commission accepts the idea of the member remaining a resident of his district, and the language can be worked out later.

Section 31 - legislative compensation - Mr. Skipton stated that this is a new item, not one of which a previous recommendation was made. The change proposed would permit allowances for reasonable and necessary expenses to be paid in addition to salary to legislators. Allowances are presently prohibited. The recommendation will be submitted to the Commission but not acted on by the Commission today.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
November 15, 1971

Summary of Meeting November 10, 1971

The Legislative-Executive Study Committee met on November 10, 1971 in the Commission offices. Present were Chairman Skipton, and Messrs. Taft and Montgomery.

Chairman Skipton opened the meeting by announcing that its primary purpose was to reconsider matters referred back to the committee by the Commission at its meeting of October 19, 1971, restudied and revised, some with major revamping, with a view to resubmission to the Commission on November 18, 1971.

The following is a summary of the items considered and the discussion of each at that meeting.

1. Proposal for Annual Sessions and Special Sessions

The proposal to amend Art. II, Sec. 25, providing for annual sessions and authorizing the convening of special sessions by presiding officers of each house, was reconsidered by the Committee, in the same form as submitted to the Commission. The annual sessions portion was favored by all but one member of the full Commission present at its meeting of October 19, 1971. Consideration of the special session provisions had raised two questions to which the committee gave its attention: (1) whether a percentage of the membership of each house should request the call for a special session, as four members had favored at the Commission meeting; and (2) the matter of assuring that if presiding officers are to be given such authority, that they should be elected from the membership of both houses. Section 25 was re-referred for the specific purpose of making certain that the presiding officer of the Senate for this purpose would be elected, and staff indicated that this matter is taken care of in a package amendment, governing the election and duties of the Lieutenant Governor.

The committee members expressed themselves as still in favor of having presiding officers make the special session determination and call and asked that the position developed at the public hearing in favor of this alternative be added to the Commentary for resubmission.

2. Lieutenant Governor: election; substitution of executive for legislative duties

Chairman Skipton explained that the composite revision of sections in Articles II, III, and V is to provide for team election of Governor and Lieutenant Governor and to set out the duties of Lieutenant Governor, in addition to providing that the President of the Senate be elected from its membership. In other words, the original provision, amending only Art. II, Sec. 8 has been greatly expanded.

In the discussion of Article II amendments, Mr. Montgomery pointed out that Section 8 is cumbersome and could be improved by a division of its provisions into separate paragraphs. Question was raised as to whether the provision of Art. III, Sec. 16 that the Lieutenant Governor perform duties delegated by the governor and prescribed by law would require that exercise of duties and powers would require the appropriate authorization of both branches of government. Staff indicated that this is an "and/or" situation. And can be used in a cumulative sense and its use does not necessarily mean that both conditions be met. As proposed, the section means that the Legislature or the Governor can prescribe duties, according to the interpretation of staff. Chairman Skipton agreed that courts would normally construe "and"

to mean "and/or" in such usage.

Dissatisfaction was expressed over the term "delegated" to describe those duties of the Lieutenant Governor emanating from the Governor. Chairman Skipton suggested "assigned" as a more appropriate term, and the committee agreed. The committee also agreed on a proposal by Mrs. Hunter to re-write the new matter of Art. III, Sec. 16, for clarity, to read as follows:

"PERFORM SUCH DUTIES IN THE EXECUTIVE DEPARTMENT AS ARE ASSIGNED TO HIM BY THE GOVERNOR AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY LAW."

Next the original revision of Art. II, Sec. 8 was discussed, Mr. Montgomery noting that the sentence was awkward and could be divided because of the differing subject matter of the two clauses. In the ensuing discussion it was pointed out that the section contained mandatory and permissive provisions, and that the two could be separated. As originally proposed Section 8 contained one clause requiring each house to choose its own officers and another giving it all powers necessary for stated purposes. Other sections in Article II detail powers of the General Assembly, said Mr. Skipton, and some rearrangement would be logical. It was finally decided that Section 6 (subject matter of which is powers of each house, including power to compel attendance of absent members) is the logical place to put power to punish members for disorderly conduct, now a part of Section 8. Moreover, Section 7, having to do with the organization of each house, is a better place for inclusion of the provision governing choice of officers. Staff was instructed to make this division for cohesion and coherence and to provide the Commission with a clearer choice of alternatives.

3. Constitutional Procedural Requirements for Passage of Legislation--A Consolidation of Sections 15, 16, 17, and 18 of Article II.

Chairman Skipton described the consolidation of provisions submitted under the above title a "radical revision of Section 16." He pointed out that it represents an effort to put in one section of the Constitution all procedural requirements for passage of a bill. These include requirement for majority concurrence, the style of laws in Ohio, multiple "readings" of a bill and all steps leading up to presentation of an enactment to the Governor for his consideration.

Mrs. Hunter told the Committee that the package lacked a section dealing with passage over veto, which had been removed from present Section 16 and not yet incorporated into another section. Some discussion followed as to whether the procedure for consideration over veto should be changed.

Mrs. Hunter asked whether or not there should be provision for the Legislature to convene to consider vetoes made after adjournment--i.e. whether special veto sessions should be provided for. Chairman Skipton responded that the adjournment resolution currently provides for recess for the purpose of considering vetoes. It was agreed that the problem of veto after adjournment was insignificant. Mr. Skipton noted that only if measures were passed on December 31, then vetoed early in January would the question arise under present provisions because the General Assembly recesses until after opportunity to veto has passed. Mrs. Eriksson pointed out that even in the event of an adjournment sine die, the General Assembly could convene in special session if necessary under the proposed amendment to Art. II, Sec. 25. It was agreed that no special provision is necessary.

Whether the 3/5 majority necessary to repass should be changed was the next matter to be considered. Comment pointed out the reluctance of the committee to raise special majorities. An increase (e.g. to 2/3 majority) could create problems in a state as evenly divided as Ohio.

A third topic discussed on the question of passage over veto was whether the Governor should have power to reduce items in addition to the power to make item vetoes. Committee members agreed that if the Governor is to be given additional control over the spending of public moneys, such control should be related to the budgetary process--over spending--and not over the appropriation process. Item reduction was rejected.

Mrs. Hunter then explained the derivation of each paragraph of the consolidated procedure section. She noted that another gap in the package before the Committee was the revision of Section 9, requiring the keeping of journals, from which was taken the requirement for at least a majority concurrence in the passage of bills. The latter portion of Section 9 is a logical part of the new section, and Section 9 should be amended to show that the passage portion has been deleted for the purpose of incorporation here. She indicated that the revised Section 9 would be ready for submission to the Commission for its meeting on November 18, 1971.

The committee discussed the proposal of paragraph (C) in the procedural section that bill reading be replaced by a provision for "consideration" of a bill on three different days. The committee agreed that provision for "reading" of a bill, even by title is archaic. The section as proposed would still carry the protection that three days must elapse between introduction and passage.

Chairman Skipton pointed out that a radical departure from present practices is the requirement that the bill and amendments be distributed to all members prior to passage. Question was raised as to whether this would apply to so-called "clerks' amendments"--generally regarded as nonsubstantive in nature. The committee agreed that it would apply to such amendments, even changes in punctuation, offered for the purpose of compliance with the rules of code revision. Mr. Montgomery expressed the consensus of the committee on this point when he stated that reproduction of bills and amendments is no longer a problem and that every member should know exactly what he is voting upon. Question was raised about the practice in New York of requiring that copies of the bill <u>in final form</u> be available three days before passage. Mrs. Hunter pointed out that the constitutional provision in New York specifically prohibits floor amendments. The Model State Constitution adopts the three day availability provision but is silent as to floor amendments. Because of the tradition of floor amendments in this state, the Committee members did not favor adopting the three day rule. It was assumed that if such a proposal were adopted, there would have to be provision for recommitting bills to committee.

Paragraph (D) contains the prohibition against bills containing more than one subject and the additional provision that "no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed." Considerable discussion ensued on the meaning of the quoted provision which was removed without change from present Art. II, Sec. 16. Mrs. Erickson explained that its purpose is to prevent the passing of an act by referring to a prior act that has either been repealed or has been declared unconstitutional Passage of acts "by reference" is the evil at which this provision is apparently aimed, she explained. Mr. Skipton added that it prohibits

revitalizing a lapsed appropriation. If authority to make expenditures is to be reinstituted, it must be spelled out again and not by reference to an earlier appropriation.

As a sideline to this issue Mrs. Eriksson stated that there has been some interest in allowing introduction of the "short form bill." However, even if such a procedure were favored, she added, a bill could be introduced in incomplete bill form, but it would still come out of committee in a form meeting constitutional requirements. The present section would probably not prevent such a practice. The committee declined to take a position on the practice and favored retaining the present requirements. Mr. Skipton pointed out that computer written bills have eliminated much of the irritation that the present provision causes.

The quoted portion of Paragraph (D) uses the terms "act" and "law" and question was raised as to whether the terminology is consistent. Mr. Taft asked, "Does this really mean 'No act shall be revived and no law amended unless the new act contains the entire act revived or the section or sections of the law amended?'" Mrs. Eriksson questioned whether if by changing the provision to read that an act cannot be revived, the prohibition would continue to apply to the carrying forward of a particular appropriation item, prior to the lapsing of the appropriation act. She reiterated that the importance of the present language (unchanged in the proposal) is that it prevents incorporating by reference, a practice that keeps the reader of the act from knowing what the law contains.

Mr. Taft asked about the meaning of "section or sections" being amended and specifically whether this refers to Revised Code sections only. Replying that the provision is not so limited, Mrs. Eriksson stated that the Legislative Service Commission has advised that in amendment to an appropriation act the entire section must be repeated. The same rule applies to many special acts--i.e. acts without Revised Code sectional designations. Pursuing this same line of questioning, Mr. Taft asked why if Section 1 of an act is the enacting section for 10 Revised Code sections, one of which is changed a year later, Section 1 of the original act does not have to be repeated. Why, in other words, can the change be made by including only the one Revised Code section and not the section of the original act. In such a case, Mrs. Eriksson explained, the entire act is not being amended, only the law, which happens to be a Revised Code section. Thus, the entire section of any Revised Code section being amended must be repeated in full. The prohibition against the revival of laws has been applied so as to prevent enactments by reference. The revival portion of the section applies to appropriations as well as to cases where a law has been declared unconstitutional, she continued, and if the legislature wants to correct the unconstitutionality, it must do so by enacting the whole law over again. Moreover, an act that is a special act is law just as much a law as an act that contains Revised Code sections. It is for this reason that the prohibition on revival and amendment is written in terms of "no law."

The committee concluded discussion on this matter by deciding to leave the provision as is because apparently there have been no problems with its interpretation and it would be difficult to make the prohibition any clearer than it is at present. Similar sections from the constitutions of other states, including constitutions recently revised were examined; a style amendment was adopted by substituting 2 sentences for the compound sentence in (D).

Another matter discussed by the committee was a point raised by Jefferson B. Fordham in an article from the May 22, 1950 Ohio Bar Association Report--that Section 1c of Article II does not appear to have been clearly coordinated with the legislative

procedure provisions of Section 16 of that article. Section 16 declares that a bill becomes law when signed by the governor. Section 1c makes most bills take effect at the expiration of 90 days after filing in the office of the Secretary of State, and subject to further delay should a referendum petition be filed. It is silent as to effective date of a measure enacted over veto.

Mrs. Eriksson suggested that the language in 1(c) should be reconsidered, but added that this is a part of the subject of initiative and referendum, to be considered at a later date, along with other proposals affecting emergency measures. There was general discussion about the meaning of the provision in present Section 16 that a bill becomes "law" when it does not take effect for 90 days or longer under Section 1(c). Mr. Taft commented that this tags the point at which action of the legislature comes to an end but asked what is meant by saying that something is law if it is not yet in effect. Mr. Skipton was troubled by the fact that a reading of Section 16 by an ordinary citizen would lead him to believe that it is at this point that a "law" must be complied with. He stated that a constitution, being a citizens document, should be easily understood. If one has to look elsewhere for the "operative" effect of legislation, it becomes complicated.

Mr. Taft asked when an emergency bill becomes effective--when signed by the Governor or when filed with the Secretary of State. Mrs. Eriksson responded that such a bill apparently goes into effect when filed, simply because he puts an effective date on it. As a legal matter the answer is uncertain; the question can only be answered from the standpoint of what happens in practice.

Mr. Skipton pointed out that the effective date of a measure is subject to two delays--the 90 day provision and referendum. He would like some cross reference from Section 16 to sections 1(c) and 1(d).

A conflict was acknowledged between the provision in Section 16 that a bill "shall become a law" upon signature of the Governor and other sections referring to filing. The committee decided to retain the language of Section 16 (as revised) to avoid the result that nonfiling would prevent a measure from becoming law. Cross referencing at this point was not adopted because of the possibility of revision and renumbering of sections 1(a) through 1(g).

The question was raised as to whether an effective date can be postponed beyond 90 days. Mrs. Eriksson responded that the Secretary of State has interpreted the constitution to mean that the effective date of an entire act cannot be postponed and that for this reason extended effective date language has been written in recent years to apply only to portions of a bill--e.g. to Section 1.

Another matter discussed involving Section 16 is the situation of conflict where two bills affect the same Revised Code section and the bills have different effective dates. Mr. Skipton stated that the most recent expression of the General Assembly should prevail in such a conflict situation. The point was made that the Legislative Service Commission tries to catch such conflicts and submits amendments to avoid them. Mrs. Eriksson pointed out, however, that there are situations when nothing can be done about such a conflict when, for example, the legislature does not want to include changes made by the bill first passed in the bill passed later because it is not desired that the changes from the first bill take effect immediately. It is the requirement that amended sections must be set forth in full that causes the problem but the committee decided that it could do little but acknowledge the problem because it could not, by constitutional language, attempt to settle all conflict problems that result.

Section (E) of the new section contains the provision of present Section 17, requiring presiding officers to sign bills. Mr. Skipton pointed out that it has been re-written to state that such signatures serve the purpose of certifying that procedural requirements for passage have been met. The new language also contains specific provision for transferral to the Governor. The committee decided to take note of Mr. Fordham's criticism referred to above and to include in the veto provisions (1) a requirement that a bill passed over veto must be filed with the secretary of state and (2) a provision as to when it "becomes law." It was agreed that a new provision on veto be included in the package for submission to the full Commission on November 18 and that the section should be retained in Article II even though it affects executive powers as well.

It was agreed that one section, probably designated as Section 15 in Article II, would include all material relative to bill passage, through presentation to the Governor for approval. A second section, probably 16, would include provisions for veto, passage over veto, and the new matters referred to in the preceding paragraph.

The proposal before the committee provided that signed bills be presented to the Governor "within three days of passage." There was comment to the effect that this time limitation is impractical. The only time limit in the present Constitution, it was noted, is that bills must be signed while the General Assembly is in session. There was some discussion as to whether a time limit on signing should be inserted and a decision that Ohio has had no problem with presiding officers holding bills and the committee does not want to put in an arbitrary provision that could be ignored.

In its re-review of paragraph (C) the committee decided that although the present Constitution allows 2/3 of members to "dispense with the rule" on 3 readings (proposed to be changed to considerations) a more accurate phraseology is "suspend the requirement" and the change was adopted.

The final item to be considered was a proposal for combining Sections 4 and 19 of Article II, having to do with compatibility and eligibility, along with a new provision covering conflict between private interests and public duties. Mr. Montgomery was of the opinion that the compatibility section should exclude reserve officers in addition to officers of the state militia. Mr. Taft questioned the retention of the term "emoluments" in the portion of the Section that was derived from Section 19. What is meant by this term, he asked. Mr. Skipton read a dictionary definition that uses the term "profit arising from" office. It was agreed that reimbursement for expense would not be included. Perquisites (including the providing of an office or secretary) could be included. It was agreed that the term "compensation" would probably be adequate, and Mrs. Hunter was asked to give this matter further study.

The Committee then discussed the proposal for mandating laws governing conflicts of interest. Mr. Skipton questioned the singling out of the General Assembly for this purpose. There was discussion as to whether the proposal, calling for laws "regulating" conflicts would go beyond a statute requiring financial disclosures. Mrs. Hunter was directed to give this matter further study in the hope that language can be developed that would clearly cover disclosure statutes, if the Committee decides to go along with the idea of such a provision generally.

League of Women Voters of Ohio
65 South Fourth St. Columbus, Ohio 43215

STATEMENT TO THE OHIO CONSTITUTIONAL REVISION COMMISSION
Regarding the Lieutenant Governor: His Election
By Mrs. Richard M. Brownell, Chairman
LWV Constitution Committee
November 18, 1971

I am Mrs. Richard Brownell representing the League of Women Voters of Ohio. As I stated to you on October 6 the League of Women Voters believes a state constitution should provide for a structure of government responsive to the needs of the people of Ohio. In order to achieve this a constitution should be flexible and concerned with fundamental principles. It should be clearly written, logically organized and consistent.

My comments today are on the provisions before you concerning the lieutenant governor and his election. League members, in studying the executive portions of the constitution, agreed we should support efforts to have the governor and lieutenant governor elected as a team. We think this will provide for more cohesion and continuity within the executive department.

The provision before you which states, "The lieutenant governor shall perform such duties in the executive department as are assigned to him by the governor and exercise such powers as are prescribed by laws," allows for the governor and the legislature to assign duties and powers to the lieutenant governor as the times demand. We believe this flexibility in leaving the specific assignment of duties and powers to the governor and legislature is desirable. A constitution should contain the fundamental principles but leave the specifics up to the statutes so they may be changed as times and needs of government change.

With the lieutenant governor sharing more of the state executive and administrative responsibilities, there can be a more orderly succession in case of death or disability of the governor. As stated in the memo attached to your recommendations, there are many states that now have joint election of governor and lieutenant governor. The League favors this change in the Ohio Constitution.

The League did not study the provision you are considering which would remove the lieutenant governor's duty as presiding officer in the Senate. This means we have no position for or against the proposal.

Thank you for this opportunity to speak with you again. The League continues to be impressed with the time and careful consideration that has gone into drawing up these proposals for constitutional change. We commend the Constitution Revision Commission for their continued efforts on behalf of constitutional revision in Ohio.

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
December 9, 1971

Summary of Meeting

The committee met on December 9, 1971 in the Commission offices. Chairman Skipton and Mr. Bell were present, as well as staff members Mrs. Hunter and Mrs. Eriksson.

The committee discussed first the "residency" requirement in Section 3 of Article II, which had been recommitted to the committee by the Commission for further work. Mr. Skipton explained that removing the requirement that a member of the General Assembly has resided in the district for one year prior to his election was necessitated by reapportionment, which makes it difficult for a member to meet the requirement even if the reapportionment plan is not challenged, and impossible if the reapportionment plan is challenged and the boundaries of districts made uncertain. Because of the difficulties of knowing when a reapportionment plan may go into effect and when a candidate must file for the General Assembly, it was determined to provide simply that a person must be a resident of the district which he wishes to represent on the day that he becomes a candidate, which is interpreted by the committee as being the day he files his petitions to become a candidate. The committee also determined that a member of the General Assembly should be one of his own constituents, so that he could not live in one district and represent another during his term. During a period of reapportionment, however, maintaining residency also becomes a problem since the filing date comes 8 or 10 months prior to the end of the term and a member may have to move out of his present district in order to file for another district which may, in the future, contain some or nearly all of his present constituents or territory. However, because of the problems of attempting to write in the Constitution the circumstances under which a member could move, and because of the possibility of discriminating against a member of the General Assembly who would be denied the opportunity to move but who may be affected by a plan of reapportionment even though the boundaries of his district are not changed, the committee determined to permit any member of the General Assembly to move during a term in which a plan of apportionment is promulgated, by making an exception to the requirement that residency be maintained for that particular term.

It was noted that a person could move into the district on the day of filing as a candidate (however that may be defined by law) and that residency may be a matter of intent, legally, and no attempt is made to define in the Constitution what residency consists of.

As proposed, the section would reduce prior residence requirement from 12 to 8 months, under present law which has a February deadline for filing. This might vary in an apportionment year, if the apportionment plan were challenged and a court order changed the deadline for filing as a candidate.

Mr. Bell asked whether consideration has been given to the constitutional requirement of residence for voting, (presently 6 months in the Ohio Constitution) but it was noted that this committee has not dealt with that question at all, and it will undoubtedly be the subject of study by another committee.

Mr. Skipton pointed out the trend towards reducing, even eliminating residency requirements as a matter of federal law. Support has even been given to the elimination of registration requirements.

Mr. Skipton questioned the exception for a term in which a plan of apportionment is "made," asking if the term "adopted" would be more appropriate. The committee and staff consulted Article XI for language, rejected a phrase that related to an apportionment plan's becoming "effective"--a word that could be interpreted to mean the term in which the plan is used (the next legislative term)--and agreed upon the substitution of the word "adopted" for "made." Mr. Skipton noted the importance of using consistent terminology. Section 7 of Article XI uses the term "adopted" in speaking of "district boundaries."

Mrs. Hunter then pointed out that the residency exception for absence from the state on public business was deliberately dropped in the draft before the committee because it appeared to attach to prior residency and should be eliminated with prior residency, particularly because it does not logically "attach" to the provisions of the section as rewritten. Under Section 5 of Article V a person in the military services who is stationed in the state is not thereby considered a "resident" of Ohio for elector status. As to "military absence" the committee decided that if under Section 5 of Article V a person comes into the state on military business and does not thereby gain residency, it is logical to conclude that military absence from the state does not result in a loss of Ohio residency. Such an interpretation of Section 5 has the advantage of being applicable not only to members of the General Assembly but to other public officers as well. It was agreed that Section 5 of Article V would be considered later and determination made as to whether the converse of the rule it contains should be spelled out more clearly.

It was also agreed that so little is being retained of the present Section 3 that a new Section 3 is preferable. This is particularly important for the purposes of grammar and maintaining consistency in language. The section as rewritten applies to "a member of the General Assembly" rather than to "senators and representatives." The intent of the section, it was agreed, is that when a reapportionment plan is adopted, no one need remain a resident for the remainder of his term, regardless of whether he is affected by the reapportionment. One purpose of such an approach, it was agreed, is to make each constitutional section self evident, so that it can be read and applied without difficulty. No subjective judgment is necessary. The contingency is easily determined. The apportionment board can do nothing to change the interpretation of the section.

Sections 4 and 19 of Article II were then discussed. The Commission had referred back Section 4 of Article II for reconsideration, with directions to combine it with Section 19. Mrs. Hunter summarized the provisions of the rewritten section. The third paragraph of the version submitted to the Committee contained provisions applicable to private conflicts of interest. She explained that in the form presented the Legislature would be required to enact a conflict of interests statute or code of ethics that would apply to its members. The language was broad enough to permit enactment of a disclosure statute for this purpose. The first paragraph of the proposed section (from existing Section 4) was also altered to include in the exception for the militia an exception for the reserves. The possible phasing out of the reserve component and the desire to cover any military officer not included within the category of "militia" prompted the committee to change the phraseology of this exception so that it covers officers "of the United States Armed Forces."

Mr. Skipton asked whether the use of the term "public office" instead of "lucrative office" cleared up any problems of interpretation if the term proposed is not defined. Public office certainly has a more clearly defined meaning than

lucrative office, but the problem he posed is still one of definition. The question was put as to the legal significance of the term "office." Mrs. Eriksson replied that the term has a significance insofar as it has been interpreted by the courts, but trying to define the term in the Constitution is difficult and unwise. Mr. Skipton expressed the hope that if a court has defined the term "public office" to the committee's satisfaction, the statement of intent following the section should show that in using the term that definition was intended to be adopted. It was agreed that the committee should state that it was adopting a particular interpretation of the term and cite the authority for the definition. In the discussion of this approach the point was made that although it is possible to find a good court case that defines public officer as one who exercises independent judgment and has other described incidents attaching to his position, the problem remains that such a term must still be applied case by case. Even a good definition cannot completely get around the objection that the term is not specific. The suggestion was made and rejected that the section enumerate what is meant by public office.

Mr. Skipton proposed that any time a position is created in this state, the legislature could decide whether the criteria apply and declare a public office. In other words if the General Assembly calls it an office, it is automatically subject to the provisions of the proposed section. The section could even contain language to the effect that "laws defining what is a public office shall be passed to implement this section." Revised Code Section 101.26, for example, sets forth positions that may not be held by a member of the General Assembly.

It was finally agreed that the term "public office" would be used and that the comment would set forth the committee's interpretation of the term as defined by case law.

The committee then considered the third paragraph of the section--having to do with private conflicts of interest. Mr. Skipton read a Pennsylvania constitutional provision as follows: "Laws shall be passed requiring disclosure by legislators of relevant financial or occupational interests of legal or other professional practices which could encompass a conflict between public and personal interests ..." and requiring further the reporting of expenses by lobbyists. Mrs. Eriksson expressed the view that such a provision is extremely detailed for a constitution.

Mr. Skipton spoke of pending federal legislation on ethics and suggested that federal models be reviewed for language. From the Congressional Quarterly he read a very broad provision, revised by him to fit the Ohio Constitution, to the effect that "Laws shall be passed enforcing ethical standards in the conduct of legislators."

Subsequently the committee concluded that the matter of ethics, if it should be incorporated in the Constitution, should be considered in the broader context of public officers generally and therefore decided that the topic of conflict of interest and ethics be referred to subject matter committee, for referral to the committee studying public officers.

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
January 20, 1972

Summary of Meeting

The Legislative-Executive Study Committee met on January 20, 1972 in House Room 11. Present were Chairman Skipton, Dr. Cunningham, Senator Taft and Mr. Montgomery.

Chairman Skipton opened the meeting by announcing that a delegation from the Ohio Chapters of the Institute of Internal Auditors, Inc. wished to make a presentation to the committee. Mr. Pat Irish of Columbus, representing the Institute, was the first to speak. He began by directing the committee's attention to a brochure distributed in advance under date of January 20, 1972.

A summary of the remarks of Mr. Irish follows:

We are to recommend the creation of an Auditor General position. The position would be charged with "performance auditing." Now, what is "performance auditing"? It is a modern day expansion of the traditional financial audit. It seems to evaluate effectiveness of operations beyond accrual and accounting disbursements. The thrust of the performance audit is to report upon the degree of the effectiveness with which programs, policies and procedures are administered. Simply stated, performance auditing investigates and reports upon such questions as: How were the funds spent? Was there actually a need for spending? Did we get what we paid for? Did we get our money's worth? Did we accomplish the objective for which the funds were appropriated?

Performance auditing seeks to establish that we have a dollar for dollar return on goods and services paid for whether the performance is by the service of the state or by those contracting with the state. It is a matter of public record and scrutiny when our legislature approves a budget or authorizes an appropriation. Whether we all agree with the action of the legislature in appropriating tax dollars, the action of that body is credited with honorable intent. Yet after billions of dollars are appropriated by the legislature performance audit is abandoned save for occasional expose by the news media calling attention to poor performance, wasteful spending, unearned personal gain, or failure to accomplish the purpose for which the money was appropriated.

In performance auditing there is a systematic approach to review the administration of all programs and activities of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state with the prevailing question: Did we use all of our available resources, whether it be people, money or machinery, in a way that gives maximum return? The results of such a review activity is better performance and fewer possible indiscretions on the part of those responsible for the utilization of these resources.

Now, how would we insure that such a function in state government is objective, independent of all political influences and pressures, and responsible to the people of Ohio through their legislature? First, our proposal would prescribe that an individual be appointed who has only the highest qualifications of personal integrity and professional competency and possess sufficient experience in the field of performance auditing. Secondly, in order to remove him entirely from party or partisan influence the legislative auditor would be appointed by a legislative audit committee, composed of members of both House and Senate and members of each political party represented in the General Assembly. He would be appointed for an

eight year term and would be eligible for appointment to additional terms. He would be independent of and detached from all state operations in order to assure his independence and his ability to provide objective reviews. He would not be eligible for appointment or election to any other public office in this state during his term of office and for two years following the termination of his service in that post.

The legislative auditor would be authorized to employ independent accounting firms and legal counsel to make investigations pertinent to the conduct of his audits. In the event there is some question among you as to why we wish to establish another office of state auditor when we have an elected auditor of state allow me to point out some important discinctions between the two functions.

The present auditor of state is designated by the Ohio Constitution as an official and is elected by a partisan vote for a term of four years, concurrent to the term of state governor. He is a member of the executive branch of state government. Most of his duties can be characterized as operational as opposed to advisory or staff. On the other hand, the legislative auditor would be appointed by a bi-partisan legislative committee for a term of eight years, thereby legally freeing him of that political influence, conflict or obligation, and he would report to the public through the legislature.

The present auditor of state, by nature of his functions, is essentially a comptroller, or accounting officer. He keeps many records. In this capacity, he determines that supporting papers are in order prior to the disbursement of funds. He issues warrants. Contrast this to the legislative auditor, employing modern day performance audit concepts. He goes beyond the legality of payment and ascertains if the expenditure actually achieved the intent or purpose for which it was appropriated, and if it was handled in such a way as to give the public rather than individuals the full benefit of the state's resources used.

We do believe that the functions that are now within the scope of the state auditor--namely the bureau of inspections--has to be examined to determine that there are no auditing functions that would involve the state auditor auditing his own department. To accomplish this we believe that we would have to make a determination by a survey or investigation of just what is involved in those functions that are now in the state auditor's office.

Getting back to talking about performance auditing, and discuss the auditing functions of the state auditor in relation to the auditing functions of the proposed legislative auditor. An example--let's say that the legislature authorizes an expenditure for a specific program. The purpose of the appropriation and who is to receive the funds are prescribed by state law. The administration and distribution of funds are to be handled by county and municipal agencies. Disbursement of moneys would be made on the approval of recognized local officials. Administration costs must come out of the total appropriation. Now, let us take a look at the audit of this program as it is not performed and how it might be expanded. The present auditor's office makes payment for funds on the basis of vouchers or application by local officials. This is called pre-audit. This is essentially where state auditing today in Ohio ceases. The legislative auditor and his staff would pick up the trail from the state disbursing officers through all the administrative processes of the political subdivisions to the ultimate user or recipient. Naturally he would approach this on a test basis. He would determine the administrative costs involved in the dollar expenditure, to see that they were kept at a

minimum. He would check to see that there was no questionable involvement or gain of any individuals participating directly or indirectly in the program, that patronage had no influence on procurement of contracts, and that the purpose of the expenditure, for which citizens gave their approval, through the legislature, has actually been achieved.

The legislative auditor's singular responsibility would be to the public. His report and findings should be published within a given time after review by the legislative auditcommittee. His reports must be factual, precluding any challenge based on bias or favoritism.

The concept of performance auditing has been proven in many other states to be a significant development in improving the administration of state government. Legislatures in the larger states and in states with complex problems, such as we have in Ohio, cannot content themselves with the responsibility merely to pass laws and to authorize the expenditures of funds. Performance by state administrators of the state activities, the evaluation of the activity itself, and the accomplishments of its objectives are paramount in legislative scrutiny.

Now, what about the cost. Where performance auditing has been established, the measurable savings have been far greater than the costs of operation. The prime example is the General Accounting Office, which is the performance audit agency of the United States Congress. In 1970 the savings of the public funds credited to the GAO was $250,000,000. Some of these savings are of a recurring nature, and the cost of the operation of that office was $72,000,000. That is a return of $178 million over costs. There is also a very important intangible factor when performance auditing is conducted, namely the influence such a program has on public officials to conduct and administer the affairs of state in a prudent and judicious manner.

In summary, the division of power among the legislative, executive and judicial branches of government constitutes the most fundamental aspect of American constitutional theory and practice. A properly conceived and effectively established legislative review fundtion is essential to the survival of an effective legislative control system and a meaningful balance of power between the legislative and executive branches of state government. Such review must go beyond a determination that the funds were spent legally and honestly. It must include an examination of the manner in which public officials have discharged their responsibilities by determining whether the programs have been administered in accordance with legislative authorization and policy, whether the planned objectives have been achieved, and whether the program objectives were accomplished at a minimum cost and with maximum benefit being obtained for each dollar spent.

There is also another consideration that I think we must address ourselves to, in that there is a federal task force under the comptroller general of the United States who is developing a body of audit standards which are to be used in evaluating the audit systems of state and local government in order to determine the degree of reliance that can be placed on these systems in auditing the federally assisted programs in states and local governments. This is something we must consider also.

Therefore, members of the committee, I urge your inquiry, your thoughtful consideration, and ultimately your support for a constitutional amendment to establish the office of legislative auditor or auditor general to give the assurance

of the highest standards of performance possible from our government officials and those acting under their direction. Thank you.

Mr. Skipton then asked if others wanted to make presentations. Mr. Bower said that he had remarks to make. A summary of the remarks of Walter Bower follows:

My name is Walt Bower. I am also a member of the public affairs committee of the Ohio Chapters of the Institute of Internal Auditors. My discussion this morning will be confined to two major aspects of our program for a legislative auditor in the state of Ohio. These are the independence of auditing which it will bring about in the state and the aspects of post performance auditing, or as we like to call it, operational auditing, which are contained in our proposal.

In 1957 the Institute of Internal Auditors issued its revised and updated statement of the responsibilities of the internal auditor in which it defines the nature of internal auditing as follows: "Internal auditing is an independent appraisal activity within an organization for the review of accounting, financial and other operations as a basis for service to management. It is a managerial control which functions by measuring and evaluating the effectiveness of other controls." The statements then outline the objectives and scope of internal auditing, the authority and responsibility of the internal auditor, and then stresses "Independence is essential to the effectiveness of any internal auditing program." The statement specifically requires that the organization status of the auditor be at such a level and reporting to such a level as will assure a broad scope of activities and adequate consideration of effective action on the findings and recommendations made by the auditor.

To quote further "Since complete objectivity is essential to the audit function, internal auditors should not develop and install procedures, prepare reports, or engage in other activity which they normally would be expected to review and appraise." This in a nutshall is the concept of operational or performance auditing. Its universal acceptance by the internal auditing profession has established it as an effective and valuable control for management. Its effect has been to elevate the auditing profession from the era of the little clerk with the green eyeshade, on the high stool, who was primarily concerned with checking figures, to the computer age generalist, who concerns himself with management controls, management objectives, and operational efficiencies.

Let me illustrate for a moment the effect of this change on the auditing concept in industry and business. The traditional auditor was a checker of figures, specifically, financial figures. He was interested in assuring himself that these isolated figures were proper and authorized. The modern auditor also checks figures. But in addition he investigates the program and the system that generates these figures. The traditional auditor verified the accuracy of the inventory. The modern auditor does this also but in addition he determines the reasons for the inventory and its quality. Does it reflect poor planning? or uneconomical purchasing patterns? The traditional auditor confirmed accounts receivable balances. The modern auditor does the same thing, but in addition he evaluates the relationship with the company's accounts. The daily dealings with its customers. But beyond that, the auditor who uses operational auditing, reviews, analyzes, and evaluates areas such as personnel administration, production control, purchasing policies and practices, computer operations--indeed every area of business activity in order to determine whether these activities are being administered in compliance with objectives, stated plans, and according to a sound system of administration.

The performance auditor assures himself of the soundness of controls--be they financial, operation or administrative at every level of management. In this role the modern auditor has become the eyes and ears of management. During the past ten years several members of the Ohio Institute have served in various capacities on state commissions, including two little Hoover Commissions.

Moreover, the Institute's own role in working with state and federal audit groups exposed many of its members to the problems and deficiencies existing at government levels. Approximately a year ago the five Ohio chapters of the Institute decided to establish a committee in order to evaluate and hopefully improve the standards of auditing in the state of Ohio. The committee felt that progress and advances made by the auditing profession in industry could surely be applied to government. Certainly, the state's policy making body, the legislature, must have at its disposal an independent appraisal activity for review of the state's operations. The General Assembly must have a function which measures and evaluates its programs. Presently the auditor of state is the chief fiscal officer or comptroller of the state. He is charged with the responsibility for establishing financial systems, procedures and controls, and then has the added responsibility of auditing them. Can he, or the members of his staff who actually do the auditing, retain any kind of independence in the appraisal of these systems?

Our proposal is designed to remove from the auditor of state responsibility for self audit and to place this responsibility with a legislative auditor responsible to the state legislature. This in our opinion is the only way that independence, so vitally necessary to effective auditing, can be achieved.

The law in the state of Ohio at the present time provides that the auditor of state audit only to determine whether moneys have been expended legally. This is the limited, traditional, formal auditing. He has neither the responsibility nor the right to point out those instances where money may be expended foolishly or unnecessarily. Or where the same results could have been obtained by the expenditure of much less money. During the course of our committee's visits to various state officials in connection with the endorsement of our proposal for legislative auditor, we met with a member of the state department of finance, who in my opinion put it just about as well as anybody could. He was looking at a listing of various state expenditures, and he said, "I know that this money was properly appropriated; that it was spent legally because the auditor of state has examined it and approved the invoice. But what I don't know was whether the money was spent wisely. Did it need to be spent at all? Did the state get its money's worth?" This in a nutshell is what we call operational audit. And, if you'll examine the proposals that we have for a legislative auditor, you'll find that they incorporate the responsibility and duty of the legislative auditor to answer these specific questions.

In this regard I would like to quote the five major points that are contained in our position paper which encompass the operational audit function. These are the fact that upon examination inquiry will be directed to: (1) the soundness and adequacy of administrative operational and fiscal controls; (2) the extent of compliance with law; (3) the controlling and safeguarding of assets and resources; (4) the reliability of data information and reports; and (5) the controls over the quality of performance in carrying out assigned responsibilities. These are the modern aspects of operational auditing and they are aspects of auditing that are not being covered in the state of Ohio at the present time. The incorporation of the legislative auditor into the state constitution will put performance auditing

into the state. And the creation of performance auditing, under the direct control of the legislature, will advance the quality and effectiveness of all phases of our state government by many years. I urge you to consider this proposal and I thank you.

The next representative of the Institute to speak was Paul Glotzbach. His remarks are next to be summarized.

I do not have a prepared speech. I do want to call your attention to one of the schedules we gave you in our brochure, and that is appendix 2. What we are proposing here is not anything new. There are 22 states presently that have a legislative responsibility for auditing. And there are 17 states, of which Ohio is one, where there is no legislative branch responsibility for auditing. With the new income tax law with another billion dollars of revenue coming into the state in the future it is going to be very important to establish this audit responsibility with the legislative branch. Thank you.

Mr. Skipton then asked if there were further presentations. Mr. Wayne Ashby, partner in the accounting firm of Haskins and Sells and a member of the Ohio Society of Certified Public Accountants then made a statement in support of the Institute's proposal. The full text of Mr. Ashby's statement is appended to these minutes.

Members of the Institute expressed the willingness to answer questions. The dialogue between committee and witnesses is summarized as follows:

Cunningham: I have an elementary question, having to do with the title of the office--auditor general. For the time being we have the auditor of state. We may confound the electorate by having these two similar titles. Why not use comptroller of state, as is used at the federal level? Or comptroller general of the state, in order to divide the post audit from the pre-audit and let the auditor of state look into the matter of whether accounts are kept.

Irish: Since auditor of state is the chief fiscal officer, perhaps the title he should have is that of state comptroller.

Cunningham: As a matter of practical politics, how much objection can you expect to hear from people who will say that you are simply creating an additional post with essentially same duties. What will persuade them to vote for the establishment of such an office? How can you dichotomize the two positions for the man on the street?

Skipton: It might be difficult to persuade the public officials who are going to have the responsibility.

Discussion followed about the possible problems that would be involved in changing the title of the auditor of state to comptroller. The present office would be abolished and a new one created. This might be difficult to sell. It was agreed that it might be politically more feasible to leave the state auditor's office as is and create the new office with fitting title and duties. Dr. Cunningham suggested "comptroller general," or "comptroller of state." Institute representatives pointed out that in business a "comptroller" generally performs those functions that are handled by the auditor of state and the choice of terminology used in the proposal was influenced by practices in industry. Mr. Bower said that although the term "auditor" is associated with internal auditing in business practice,

nomenclature is unimportant and that what is important is that the legislative auditor be as non-political as possible.

Dr. Cunningham then asked how this is going to be accomplished. Isn't he going to be just as responsive to political pressures from the legislature as he is from the partisanship of elected officials. Mr. Bower said that they had tried to meet objections on this score by making the position appointive instead of elective and setting a long enough term that it overrides any political office. Also the legislative committee that appoints him should be as bipartisan as possible.

Bower: It should be stipulated in the requirement that it would take for the committee to remove him from office and establish such a majority that it would require members of both political parties to be for it before he could be removed for some cause.

Discussion followed about how to avoid having the state auditor audit himself. Mr. Montgomery suggested that the legislature could establish some kind of office that could in effect audit the state auditor. Mr. Skipton replied that the office is audited, every time there is a change, by use of an independent auditor.

Mr. Skipton then asked what the Constitution has to say about the duties and responsibilities of the elected state auditor. What would have to be changed to allow for the creation of a new office of legislative auditor?

Mr. Taft pointed out that there is no description of the duties of the office of state auditor. All of his present duties and powers are statutory. They could be repealed. Mr. Bower agreed that much of what they proposed could be accomplished by statute instead of constitutional amendment but pointed out that if the provisions with respect to the auditor of state are not changed there would be duplication of functions.

Skipton: The legislature controls this. The only constitutional question I see in your proposal is to make the term longer than the life of the General Assembly or the appointing authority. Is this a problem?

Discussion on this point ensued. There are commissions appointed for terms longer than the appointing authority. Board of regents, university trustees are both examples. Mr. Skipton again expressed his difficulty in finding a constitutional issue here. The legislature could alter the present duties of the auditor of state and create such an office as legislative auditor without constitutional change. Dr. Cunningham pointed out that there is a constitutional amendment pending before the 109th General Assembly to remove the state auditor as an elected officer. He could be appointed, and all of his duties be statutory. The duties could be divided into comptroller and auditor functions.

Mr. Taft asked about the operations of the GAO. Do they have a set of reports that they must prepare every year, or can they pick and choose whom to investigate.

Irish: They have their options, and it is a matter of priorities.

Bower: They have certain specific operations that they want audited within certain periods of time. Very little of it is done on an annual basis. They have requirements for audit, but the GAO sets the priority as to when they perform.

Institute representatives pointed out that one reason they preferred constitutional as opposed to statutory creation of an office is that what can be given by law can also be taken away. Dr. Cunningham responded that it is this attitude which the Commission does not favor. In this way a Constitution becomes a code. The people since 1850 have refused to trust their legislature. The fundamental law becomes cluttered with statutory material.

Skipton: My difficulty in seeing this as constitutional matter still remains. All of us can agree in principal with the theory and the desirability of having the operation proposed. However, as a long time public official I have most grave concern that it would work. The presentation talks about selecting a man of integrity, character and capability--does this suggest that elected public officials lack these traits? These kinds of statements contain an inherent slur on public officials. Another point has to do with "operational" activities. The presentation made frequent references to "management" yet the proposal is not talking about putting this in the managerial side of government. Putting it in the legislative side of government is not compatible with these statements. Insofar as someone is going to make decisions about intent-- whether it has been carried out in a particular program--how is the person investigating to know what that intent is? On the management side of a corporation it is easy to know. Daily, monthly or at will, one is going to be told what the intent is. If there are doubts, one can get instant clarification. When you talk about legislation, there isn't any such thing. There is nobody you can call and ask "What did you really mean to do?" No legislative committee could be created that could tell. Courts are full of questions involving the interpretation of legislative intent.

Continuing--another question has to do with provision that the legislative auditor reports to the legislature. How can this be squared with statement that he is to be independent of politicians? There is no one any more political than a legislator and nothing any more political than a legislative body. If he is independent, how does he report to them?

Response indicated that this happens in private enterprise, too. Auditors are given the independence by management to investigate on the basis of what they think should be done, but findings may not be accepted.

Mr. Skipton responded that he could see the operation working well in a managerial setting--or within department of finance. In the legislative setting it is difficult to see how it would work. He then brought up another question--assignment of priorities. He understood the position to have been stated that even the legislative committee to which the auditor would report would not have the authority to make assignments of what areas to investigate next.

Bower: To a degree that is our contention. However, we would set up a requirement that for example all functions within the state must be audited within a two or three year period. The priority as to when he would do it would lie with the auditor himself. He wouldn't be absolutely independent.

Skipton: Wouldn't that give him tremendous political power? Ability to make the decision and timing represents great political power.

Dr. Cunningham pointed out that probably the auditor would be subject to direction, as the Legislative Service Commission directs the research on research subjects.

The priorities are determined by the members of the Commission, which is legislative. The researchers are supposed to be nonpolitical.

Discussion ensued about operations of the General Accounting Office. After the Hoover Commission started its investigation, it was discovered that it was almost impossible to audit the accounting procedures of the military because of their auditing techniques. Congress directed the GAO to establish a uniform accounting system to provide a means for post audit. Dr. Cunningham used this example to describe how the legislative direction might come.

Mr. Skipton then asked how the legislative auditor would work with respect to review of highway department operations. Hundreds of millions of dollars are involved annually in its functions. How would it work, he asked, in deciding whether best route was selected for a particular highway.

Response: Inherent in the auditor's duties is to spot and point out any problems he sees. He has the obligation to report them. He must review the claims made by the various people involved. He is the independent third party who reviews the claims on both sides. He provides the independent appraisal. In this kind of an audit, the auditor cannot come to a factual answer. Both sides are right to some extent. It provides a review by someone without an ax to grind on either side.

Glotzbach: The auditor is not technically qualified to say how a particular road should be built. And he wouldn't. What he would do is to come in later to see why this particular stretch of road took four years instead of the estimated two and he would come in after to find how and why they spent $5 million more than they said that they were going to. Those are the kinds of things that the post auditor would review.

Mr. Taft then asked, if conclusions are reached in such an area, could the legislature then do anything about the findings? What could be accomplished by taking such a piece of information to the legislature? To the executive yes, but what can the legislature do at that point? Appropriation is made in one lump sum, not by individual stretches of highway, so even in the appropriation process it is difficult to see what the legislature can do with the information.

Response indicated that in industry this procedure has a deterrent effect.

Colloquy followed about role of the state auditor in catching illegal expenditures. Problem of foolish or unnecessary expenditures and how they would be eliminated by the proposal continued to trouble members of the committee. Mr. Taft pointed out that it is frustrating to sit in the legislature because one is not an administrator. What can the legislature do even if one knows about wasteful practices. One value mentioned is publicity. Mr. Montgomery said that he continued to be impressed with the deterrent effect of having such a facility. He expressed concern about going beyond fiscal matters, however.

Taft: The state auditor audits every political subdivision. Would the legislative auditor be limited to the auditing of state government or would it extend to school districts, counties, etc.

There was response that it would extend to subdivisions as well. Discussion followed about hypothetical investigations of a particular school system or other

governmental unit. The concept of "management efficiency" poses problems.

Bower: We are concerned with facts only and not opinions.

Mr. Skipton agreed that it is not through fraud that big losses occur but that it is through projects that should be abandoned or no longer have relevance. He was still troubled about what kinds of information can be returned to the legislature that it can act upon. Differences exist in the operations of programs around the state. What can the legislature do to balance? What will the reports suggest that it do?

Response indicated that there would be complete evaluation of conditions in the particular areas involved and report on the factors involved. Mr. Taft suggested that there have been many studies on problem areas and all the solutions have at one time or another been proposed to the legislature. Probably all the things that a good auditor would suggest to remedy school inequalities have been suggested. The political feasibility is another question.

Mr. Taft expressed interest in seeing the product of other state legislative auditor offices. Mr. Irish introduced a published audit of the county and state hospital program in the state of Hawaii. The state has a very progressive legislative auditing function with constitutional sanction.

Mr. Taft asked if it is better to have such a study made by an arm of state government or to have the legislature hire an accounting firm as a consultant for a specific purpose. He suggested that if an agency is acting on a selective basis (the reason for his question about the operations of the GAO) it might be better for the legislature to appropriate funds from time to time for specific audit reports, to be done by an independent firm. The Hawaii study was done by a consulting firm for the legislative auditor.

Mr. Bower replied that he believes a legislative auditing office acquires familiarity with the various agencies that an outsider coming in cold cannot have. Even when an outside consulting firm is hired, the permanent office can be of great help to it in making the necessary studies and reports.

Mr. Skipton restated his understanding of the objectives of the proposal but also his doubts that a structural change in government can accomplish these purposes. Supposing a report comes to the legislature on a particular subject it can be impugned by a variety of groups representing particular interests, who demand another report, more to their liking.

In business or in the governor's office there may be satisfaction with one long report. But everyone is not going to be satisfied with it in the legislature. Almost by the nature of the activity there will be as many people who do not want to accept the report as people who do. Whatever the safeguards with which you surround the legislative auditor these kinds of differences in point of view, objections and motivations are going to be there and you are in an atmosphere where people have a right as citizens to press and fight a particular action.

There was a general feeling that the proposal does not pose a constitutional question, although the committee is just getting into its review of the executive article and will consider the proposal as it does so.

Statement of Position

Mr. Chairman, members of the Constitutional Revision Commission, I am D. Wayne Ashby, Jr., a partner in the accounting firm of Haskins & Sells, and a member of The Ohio Society of Certified Public Accountants, the professional organization consisting of 4,000 CPA's in the State, on whose behalf I am speaking.

One of the purposes of the Ohio Society of CPA's is to promote fiscal responsibility and understanding through promotion of good accounting and auditing practices.

Over a long period of years, the skills and techniques of professional CPA's have been documented, tested, and refined resulting in the development of accounting principles for the uniform handling of financial transactions under similar circumstances and auditing standards for the auditor in the reviewing of recorded financial transactions of a public or private enterprise. These accounting principles and auditing standards have been codified by the national CPA organization, the American Institute of CPA's and have become recognized and generally accepted by professional, business, and governmental agencies.

For clarification, an audit can be defined as a review of the recorded financial transactions of a public or private enterprise. The person making this review, the auditor, is a professionally qualified individual who has had no interest in

recording transactions. The auditor's goal is to arrive at a decision as to whether or not the transactions are recorded in a manner that properly reflects what actually happened and are in accordance with what the properly constituted authorities have directed should happen.

One of the basic standards involves the matter of independence of the auditor. To comply, he cannot take part in the authorization, payment or recording of the transactions. This means that if he is to be independent, he cannot have played any role in creating the transaction that he is auditing.

The State Auditor is the chief accounting officer of the State. Under present law he is charged with approving and recording all expenditures made by the State and subsequently with ascertaining that these transactions were correct.

An office of legislative auditor would change this. It would create needed independence by separating the creation or disbursing functions from the reviewing or inspection functions. It would also provide added comfort to the public by giving the General Assembly a means of insuring that monies appropriated have been properly disbursed.

A very close parallel to the matter currently under consideration is evidenced in the Federal Government, wherein the General Accounting Office, "the auditors of the departments and agencies of Federal Government," are employed by and responsible to the Congress of the United States.

With the complexities of modern-day government, and the financial involvement of the government in so many varied aspects of the society, it is absolutely essential that expenditures be subject to proper and adequate review to determine that they are in accordance with legislative desires. Further, it is essential that the audit function of government be sensitive to the most efficient mode of expenditure, as well as with compliance. As a part of his duty, the Legislative Auditor would make operational recommendations and suggestions to the Legislature resulting from conducting the audits of the various governmental divisions. These recommendations would provide the Legislature with the information necessary to make sure that the funds were being expended in an efficient manner.

In order to safeguard the public funds of the State of Ohio and merit the confidence of the public that the proper expenditure of these funds is being made, it is essential that the review (audit) of public funds be performed by a person with a high degree of proficiency and obvious independence as to the transactions being audited.

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
February 11, 1972

Summary of Meeting

The Legislative-Executive Study Committee met on February 11, 1972 at 20 S. Third Street. Present were Chairman Skipton, Messrs. Carter, King, Mallory, Montgomery and Shocknessy, and Mrs. Hunter. Two representatives from the State Auditor's office, Dr. Lynch and Judge Reiser; Mrs. Donahey, the State Treasurer, and Mr. Eggert, the Director of Securities and Trust for Ohio were also present to make presentations to the committee. Dr. Cunningham, who was scheduled to present his rewrite of the executive article to the committee was ill and could not be present.

Chairman Skipton opened the meeting by introducing the representatives from the State Auditor's office, and Judge Reiser informed the committee that Dr. Lynch, who is the chief examiner for the colleges and universities in Ohio, could best explain the situation.

A summary of the remarks made by Dr. Lynch follows:

We are here to discuss the role of the office of state auditor. I feel strongly about the role which the auditor plays, and I feel that the State Auditor's office does not, at present, have a proper control over the expenditure of funds. In 1965, the pre-audit function was taken away from the Auditor of State's office for educational institutions in Ohio, and now the universities conduct their own business out of the rotary funds collected from their fees. The State Auditor's office can only post-audit the funds and cannot pre-audit them. We feel that there should be a transmission of funds to the Auditor of State's office as there was previously. This would avoid many problems, and if this function were returned to the State Auditor, auditing could be more properly carried out. The Auditor is the watchdog of the treasury and can better perform that service for the taxpayer if he has complete control of auditing functions. Section 3345.05, which spells out this disposition of funds and gives authority to educational institutions to retain funds under the control of the Board of Trustees, should be repealed.

Perhaps it is up to the legal minds to decide whether such a change should be statutory or constitutional. I do think it is the feeling of the Auditor of State that the change should be constitutional. It would give the Auditor more authority. Statutory law is more elastic and could revert back. At present, the Auditor is just listed in the constitution as a member of the executive branch. His functions are not outlined, and as a result, some accounts are never audited. I think there should be a constitutional amendment giving the State Auditor all pre-audit and post-audit functions.

As far as having a legislative auditor, I feel this is like auditing yourself. Because the legislature is the appropriations body, they should not audit themselves. The office of auditor should be left completely independent, and elected statewide by the people of the state, the taxpayers, for best functioning. In this way, the auditor is responsible to the taxpayers, and is independent of any branch of government, in keeping with an accounting philosophy. Of course, an outside firm would audit the auditor. The problem with setting up a legislative auditor is that the person is

appointed by the people who are appropriating the money. It is already necessary to make sure that funds are spent for the purpose for which they were intended. The auditor is primarily concerned with fiscal matters, but other concerns have to enter into the auditing--policy in regard to expenditures, for instance--it is a comprehensive role. We are constantly being called on to make recommendations to educational institutions, for instance, on the behalf of the auditor's office.

Chairman Skipton asked if any of the committee members had questions for the representatives from the office of State Auditor.

Senator King asked Dr. Lynch if the problems were the same for all accounts that the state auditor is responsible for. Dr. Lynch responded that that was correct. The problem at present is that the State Auditor cannot audit until after the money is spent and the bill has come in. The greatest abuse right now is in the area of travel. And, of course, the number of state educational institutions has increased from 4, which it was when this practice went into effect, to 35.

Mr. Montgomery consulted the Constitution and reported that he couldn't find very much on the office of State Auditor. Dr. Lynch responded that all of the provisions for the office of State Auditor at present are under statute.

Judge Reiser commented that it would be much better to have it all spelled out in the Constitution, and that they felt that at least the basic duties should be included. Chapter 117. creates the Bureau of Inspection and all the basic duties are spelled out. This could be summarized and written into the Constitution in one paragraph, and this is the position which we support.

Dr. Lynch and Judge Reiser thanked the committee for the opportunity to present their position.

Mrs. Donahey, the Treasurer of State, was the next to speak to the committee. She made a short statement to the effect that she has asked the state computer center to furnish her with all the items relative to the office of Treasurer of State. When she receives the report, she will be able to present to the Commission the information as it relates to the elected executive officials, particularly the office of Treasurer. She felt that the Constitution at present does not set forth clearly and explicitly the duties of the Treasurer of State, and she would like to appear at a later session of the Legislative-Executive Study Committee. The treasurer's office is in much the same position as the auditor and the secretary of state. The Constitution says that you have them but there is not a definition of their powers and duties.

Mrs. Donahey continued that everything dealing with the Treasurer is legislative. As far as the Constitution goes, it is very broad, and doesn't really define. The Constitution doesn't say that the treasurer should invest moneys, and yet of course, this is what the office is supposed to do. The treasurer, by legislation, must account for all money, yet the Constitution says nothing about investment policy, or whether tax payments should be made to the tax department or directly to the Treasurer. It does not say in the Constitution that the Treasurer should invest the state funds. The Treasurer is the custodian of the funds, and it is the Treasurer's job to deposit these moneys in such way as to gain interest income for the state.

Chairman Skipton said that if constitutional provisions are to be written, the big question is whether or not retirement funds are to be included in the investment authority of the treasurer or outside that authority. Senator King added that at

present, these funds are outside the authority of the Treasurer, and that this is prescribed by statute.

Mrs. Donahey responded that she felt that the retirement systems should be left outside of the investment authority of the treasurer, because the retirement systems can invest in stock. The treasurer of state cannot because she cannot invest in anything for over two years. Retirement systems are not strictly and solely public moneys. Mrs. Donahey continued, adding that a certain amount of the taxes are earmarked for certain purposes according to the Constitution. Money can be invested, however, until it has to go to the specified area, and the interest can then go into the general revenue fund. A good amount of revenue is gained in this manner. The determination of banks in which the money could be deposited depends on the highest interest bid by each of the banks bidding for the funds, but the attorney general ruled that the money cannot be deposited in banks outside of Columbus, so when warrants are cashed in other parts of the state, the money is wired.

The question was raised by the committee to Mrs. Donahey that one of the tasks facing the commission will be to determine to what extent the office of Treasurer should be elected vis a vis appointed by the governor, and Mrs. Donahey was asked for her opinion.

Mrs. Donahey strongly felt that the office should be elective. The people of the state of Ohio should elect the treasurer because elected officials are needed. I don't believe our forefathers felt that there should be so much power invested in the Governor to appoint all those officials, and I don't think that there should be now. It might be more difficult on the national level to elect so many officials, but on the state level where people are close and get to know all their officials, I firmly believe that we should have our elected officials. I firmly believe this, and I couldn't see it any other way.

Mrs. Donahey concluded her remarks and said that she sould speak to the study committee again after she had more complete information.

Discussion by the committee followed on the subject of Auditor. The role of GAO at the federal level was discussed. This body has a great deal of latitude as to what is investigated or audited. Only periodic reports are required. The Internal Auditors Assn. of this state has already made a presentation to the committee. The Internal Auditors Assn. supports what would be called a legislative auditor, and they have borrowed many of the GAO principles: long term appointment, and highly independent auditorship. The GAO, on the federal level, is the watchdog of the executive branch; it is an arm of Congress. It is an independent agency created by Congress, so it is in a sense a legislative auditor. One question seems to be whether or not this should take place on a state level. The Constitution at present says very little about the State Auditor, and the position could conceivably be reduced to one person and his secretary if the Legislature wanted to do so.

Legislatures which have been supporting legislative audits have not wanted somebody that really pre-audits or somebody who is auditing fiscal accounts--they want somebody who is auditing to see if the purpose of the action by the legislature is being followed and that the function is being achieved efficiently. This really requires a different kind of auditor, because this is performance auditing.

Whether or not the auditor could be part of the executive branch, as opposed to being independent or a bureau which was set up by the Legislature is a fundamental

question. It was discussed as to what is a constitutional matter and what is a legislative matter. If you believe in strong representative government, then the legislature already has the authority to do these things if they so choose. The question is do the people of Ohio feel strongly enough about this that they want it in the Constitution--to supersede the legislative authority that they have now?

Chairman Skipton said that he had some serious questions in his mind as to whether or not this was a matter for a constitution.

Senator King said that he felt that it probably should be somewhat more specific in the Constitution--moreso than just that an Auditor should be checking on the money, but that much could be left to the Legislature.

It was discussed as to what should be left to statute and what should be included in basic law. Mr. Montgomery stated that the Constitution should perhaps include some basic duties, because at present, there is not a thing about what he is supposed to do. If powers are going to be completely specified in the Constitution, the problem is going to arise that any redistribution which is desired in the future will be that much more difficult to achieve. Mr. Carter noted that if you believe in representative government, then the Ohio Constitution today is the epitome of constitutional drafting. This seems to be the gut question--what should be in basic law and what should be in statutory law? The most direct response from the people has to be the Constitution because the legislative route is still indirect or two-step. This is the fundamental question which is involved.

Basically, it was felt that there is definitely a need for an auditor, but that really the legislature could even establish its auditor by law. The point was raised that the legislature really could specify intent more clearly in their legislation about exactly how money is to be spent--but that the complete discussion of the auditor and his responsibilities needn't necessarily be a constitutional matter.

Chairman Skipton closed the meeting, adding that the committee is going to have an interesting time working with the executive branch because there are several important matters which, from talking to Dr. Lynch and Mrs. Donahey, seem to be highly controversial, because they are strong proponents of their point of view, which can't be disregarded.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
March 29, 1972

SUMMARY OF MEETING

On March 29, 1972, a meeting of the Legislative-Executive Committee was held in the Governor's Cabinet Room. The Governor met with the Committee. Committee members present were Representatives Mallory and Norris and Messrs. Cunningham, Mansfield, Montgomery, and Shocknessy. A summary of the remarks made by Governor Gilligan follows:

I would like to say at the outset that I admire your perseverance and attention to detail in this undertaking upon which you have embarked. The comments that I wanted to offer for your consideration today are rather roughly designed. They amount to suggestions for your further study and thought, rather than any clearly designed amendments to our present Constitution. I think the problem is that every state in the union has found that the whole problem of constitutional revision has been a perplexing one. I know that you as a subcommittee are concerned with only one portion of the Constitution and have looked at what happened in other states--some have done a piecemeal job and some have attempted the constitutional convention route--an all or nothing job. I'm still not satisfied as to which is the more appropriate or efficacious means of achieving the basic government charter that is necessary to provide a framework for a government that is responsive to the needs of the people. I'm sure the members of this commission are aware that, to put it mildly, things have changed substantially in Ohio since 1851. By and large, however, most of the basic concepts contained in the 1851 Ohio Constitution have not changed. I believe it is, to use an old phrase, time for a change. The change that is needed is not merely a change of language but a change of concept.

There is always resistance to change. Books such as Future Shock have been written on the subject. I'm going to propose substantial changes, and I'm certain these changes will be, in some minds, and in some quarters, controversial, because they are changes. In this case, however, controversy is good, because it will force complete evaluation to be made of the existing situation--the existing Constitution. To fully understand the governmental organization of today it seems to me that one has to look at history.

The first Constitution of Ohio reflected the popular political thinking of the day rather than any deep philosophical concepts. Ohio had existed until that time under an appointed Governor--General Arthur St. Clair--who was exceedingly unpopular. As a matter of fact, there was considerable feeling that he should not even be able to address the Constitutional Convention. St. Clair had in diverse ways thwarted the desire that had been frequently expressed for a larger degree of self-government. The framers of the Constitution therefore gave great power to the general assembly but kept them in check by annual election of the entire house of representatives, and annual election of half the state senators. The only other annual election was that of the governor--who had very little power, not even the power of veto.

In addition to making the laws, the general assembly appointed the secretary of state, the treasurer, the auditor, the judges of the supreme court and the judges of the courts of common pleas. The secretary of state was given some duties in the first

constitution, but neither the treasurer nor the auditor were. As a matter of fact, there is no reason stated for either of those offices. No discussion at the first constitutional convention was devoted to the role of administrative state officials. There were bigger and more important issues for the framers of the Constitution to resolve. One such question concerned slavery, which received more discussion than any other aspect of the Constitution.

The streamlining of state government was not even foremost in the minds of the delegates to the constitutional convention held in 1850. The question of chartered monopolies was the leading issue of the times. However, at this convention the problems arising from the election of administrative officials by the general assembly also demanded attention, and the problem was disposed of in the expeditious, politically popular way other than a way which was logical and well-though out. On the problem they faced, there is a paragraph in The History of the State of Ohio by Eugene Rosenbloom. The paragraph reads as follows:

> "The election of state administrative officials and judicial officials by the general assembly had been working so badly that public opinion was demanding direct choice by the voters. Much of the time, the assembly was taken up with the distribution of the spoils of office rather than with matter of legislation. The judicial system had been under fire for many years because of the delays and inefficiencies of its proceedings. The Supreme Court was required by the Constitution to hold court in every county once a year, a nearly impossible task with 85 counties to be visited in 1849. With Supreme and Common Pleas judges elected by the assembly, spoils politics often governed their selection, and the choices were often bad. Popular election was the solution generally advocated."

The reason for mentioning the emphasis at that time on the use of legislative elective procedure to put the administrative and judicial officers into office is that now proposals are being brought forward to take that power away from the people and to put it in other hands--so we see that, from time to time, we change our attitudes as to where that very important power should lie.

The point of my historical remarks is that there is no particular magic involved in the way our present state government administration was conceived. Merely because our Constitution has now been in effect since 1851, does not mean that it is now inappropriate to think of changing it.

We might well reappraise the present structure, examine it carefully, and see if it can be revised and improved. As public officials, we are vitally interested in providing services to the people in the most responsible, efficient and effective way. I think the Commission has acted wisely in recommending that the Governor and the Lieutenant Governor run as a team. This would permit a Governor to assign definite administrative responsibilities to the Lieutenant Governor, and he or she will, in fact, be more knowledgeable and able to assume full responsibility for operation of the state in the event of the death or disability of the Governor; and in recommending that the Lieutenant Governor be relieved of responsibilities in the Ohio Senate. There is, to me, no logical reason for an executive to have any vote in a legislative body. This is also fundamental to our doctrine of separation of powers.

Let me say now that even when a Governor has an interim period of something approaching two months from the time when he is elected in November and takes office in January--two months is little enough time to select people for the cabinet positions, to do the whole job of reappointing people at the second and third levels is a very important task of the executive branch of government. With the governor dying or being relieved of office for some reason or the other, and his successor coming in from another party, presumably vast and far-reaching changes would have to be made in a number of hours. I think this would precipitate chaos and it seems to me to be totally unnecessary.

Beyond that, the President has indicated in this administration and in earlier administrations to employ the Vice-President's talents for two reasons. One, he can stand in for the President in a great many occasions, when important matters of state are of concern; secondly, it helps to acquaint the Vice-President, or in this case, the Lieutenant Governor, with what is actually going on in the machinery of government, preparing him to take over should he be required to do so. This executive branch of government is organized presently into 23 departments, 87 bureaus and agencies, and 161 boards and commissions, and I think that there isn't anybody in shoe leather today who knows how it all fits together, and of course, it doesn't. At the very least, the Lieutenant Governor of the same party as the Governor, and relieved of his legislative duties, could be responsible to the Governor and could be of very substantial use to the administration in terms of being able to preside over and regulate the activity of many of these agencies, boards, and commissions.

I wanted to move then to comment that I have urged the legislature and encourage you to strongly consider the repeal of Article VIII, Section 12, which sets up a one year term for the Department of Public Works. Not only is this type of measure inappropriate for a Constitution, but it also places within the Governor's cabinet one individual who potentially has no necessary loyalty or no necessary corresponding views with a new Governor. For instance, we have underway in Ohio today something approaching 600 million dollars in construction facilities of all kinds, exclusive of highways. This is under the administration of the director of public works. It is burden enough to the Governor to see that these structures are properly built, equipped and operated, without having to possibly work with a man who is a holdover from a previous administration or, even if he serves in his own administration, does not serve at the Governor's will, and cannot be removed within the Constitutional limit of one year. I think that it is important that that clause be changed.

I think that the Committee should also consider whether or not it would be appropriate for the Governor to be given the power to appoint the Superintendent of Public Instruction, and thus amend Article VI, Section 4. I have no very strong recommendation to make to you on this. As in almost any other structural change, you gain something, you lose something. But I think one of the points to be considered is that the whole field of public education is one of the major responsibilities of any state administration. We're currently spending, for instance, under the new biennial budget which was recently adopted, in the field of primary and secondary education, a billion and a half dollars in this biennium. We have an enormously complex public educational system--as well as the problems in the area ofprivate education. The Governor today has a great deal of responsibility in this field, but virtually no authority. Happily, this administration and Dr. Martin Essex have been able to get along very well. We see eye to eye. I have gone to the State Board of Education and asked them to review their present

situation and the future of public education in Ohio, and spelled out some possible areas of concern and trouble, and they have responded very quickly by setting up committees to study subjects and report back. But I do see the possibility of friction between the executive branch of government and the superintendent of public instruction in some future administration which could cause very grave difficulties indeed.

I have some other recommendations to make, which might seem to be of a minor nature, but as long as we're talking about revision of our Constitution, we might as well address ourselves to them. Twice in the Bill of Rights, the word "men" is used where I feel the word should more properly be "persons". In Article I, Section 1, and in Article I, Section 7, I also feel another right should be added. It should read, "No person shall be discriminated against in any way because of ethnic background, race, religion, sex or age." It is time Ohio officially recognized that bigotry exists, and that persons are being hurt by it. Article I, Section 7, reads, in part, "...it shall be the duty of the General Assembly to pass suitable laws....to encourage schools and the means of instruction." I would recommend this commission consider the insertion of language in the section which would compel the state to equal financial resources for the education of each child in the primary and secondary public school system. As you are perfectly aware, in five states in the union now, state and federal courts have held that it is aviolation of the state constitution or of the federal constitution to finance public education as it is presently being financed in those states and to some degree in this one--which doesprovide unequal funding to the schools our children are attending and has a very direct impact on the quality of educational experience available to these children. If equality of opportunity in this country has any meaning at all, and I believe that it does, and I believe that the American people believe that it does, it certainly has to apply in the field of education where these children are getting their start in life. We haven't done a very good job at that in Ohio and in other states, and I think we can do a far better job in the future, and I think that one way to do it is to commit ourselves in terms of our basic governmental charter to the explicit proposition providing equal educational opportunity to children, and to spell that out in terms of financial support. I am sure that each member of this commission is aware of the wide disparities in the funding of education from school district to school district. It is in my mind the most unfair form of discrimination which now exists in Ohio. It is also one of the most devious forms of discrimination in existence in this country today. It dictates that vast numbers of children have inadequate education because their parents happen to live in "property tax poor" school districts.

I would say to you that we attempted legislation last year to rectify this situation by providing a ceiling of tax millage to support education--25 mills--so that all taxpayers would be treated the same--it provided as well for the firsttime that the state guaranteed to every child--to the district education the child--$680. We didn't quite achieve that, although we moved in that direction. I think at some time very close in the future, we are going to have close to that in Ohio, so that we would be well advised to commit ourselves to that course in the language in the Constitution. This of course begs the question about the support to children attending private schools. You are all aware that there is a case in a court in Ohio right now challenging the state's right to give funds to the parents of children attending private schools. Of course, we have no way of knowing how that case is going to come out, although it is the feeling of the people in the administration who designed that approach to this kind ofthin that, within the limits set by the federal constitution, it is essentially patterned after the G.I.

Bill of Rights after 1942. I think this will hold up, but our constitution really isn't very helpful in setting forth guidelines for the future in this most difficult area. I happen to be one who believes very strongly that private education has a very great role to play in our society. It is a very great resource--at all levels--and I think that the State of Ohio would be much poorer in many respects--if the private schools were to disappear. And they are threatened in many ways with extinction--if we're willing to see that happen as a people, we can say so. If we think that the government of the State of Ohio should have the authority to support in whatever way or degree, private education, or to help the children whose parents want them to be educated in private schools, then I think that we might well set out certain constitutional guidelines to insure that that becomes governmental policy in the future.

In the field of taxation, I of course feel strongly the current provision permitting a graduated state income tax should be retained. However, the provision limiting exemptions of $3,000, in my judgment, should be deleted. It is patently discriminatory to those having large families.

I feel the provision dealing with preemption should be studied to see if this provision is necessary, and to see if this might not be prohibiting a more intelligent tax structure from being developed in this state. Taxation, in my judgment, must be based on ability to pay whether at the local or state level.

I also feel the intent of the fifty percent turnback provision to local government is good; however, the language is too restrictive. The state gives away to local government or to persons in programs administered by local governments, far more than fifty percent of its income. I am speaking specifically of Highway, Education, and Welfare funds. The language should be broad enough to allow these kinds of funds to be counted as being turned back to local government.

$750,000 may have been an intelligent debt ceiling in 1851. Today it severely restricts our ability to build for the future. I think there is general agreement the debt limit in the constitution should be less restrictive. I also think that this commission would be heading in the right direction by studying and recommending a flexible debt limit related to the state's total resources.

In the field of local government, Ohio has over 3,000 units of local government, each established, allegedly, to provide specific functions or services for the citizen. Each has a defined area of jurisdiction, yet the overlap in area and authority is vast. I have set in the field a commission on local government to study the structure of local government with an eye toward the updating and upgrading and streamlining the services our citizens want and deserve. I hope the Revision Commission and the local government commission can work closely together so that if constitutional revisions are necessary to provide a better system of delivery of local government services, this commission is aware of the need and can respond to it.

In terms of changes within the executive department of government, I've said that we are organized presently into 23 departments, 87 bureaus and agencies, and 161 boards and commissions. There is no very reasonable design of this executive branch of government that is discernible, at least to me. I believe we have introduced a bill into the General Assembly almost a year ago that asked that the Governor be given by the Legis-

lature the same power that the Congress has given the President-that of changing offices and departments and making other structural changes in the executive branch of the government subject to legislative veto--by executive order, and if within whatever time period were set up--sixty days or whatever, the body of the legislature had not rejected the change, it would take the force of law. I think that in what lies ahead of us, making state government, in this and other states, more effective--an effective part of our federal system of government--we are going to have to have the kind of executive flexibility which forso long has characterized American management. I think it's fair to say that if you were to take today any successful large corporation in the United States and to review its executive structure today and compare it to what it was twenty years ago, you would find vast and significant differences. The order of the day is change. I think we unnecessarily jeopardize the effectiveness of government as a service institution if we wrap it up in a constitutional strait-jacket. Such changes are unnecessarily restrictive. I would not ask that the executive be given strictly unlimited powers in this field, because obviously structure is related to program or to service, and the legislative program as representatives of the people is indeed the first branch of government. They have a very legitimate concern with the structure that the executive sets into being and how he operates, and they have control over the purse strings so through these guidelines they can determine service levels in any category. As I say, they have an appropriate and quite legitimate concern with structure. At the same time, as we have been discovering, an attempt to streamline and modernize the executive branch of government by taking up one bill at a time to the general assembly and putting i through the committee procedures and so forth, can be a pretty cumbersome and exasperating sort of exercise. And if we are going to make the state government what it must become, I think that I earnestly suggest that you give serious consideration to providing that power constitutionally to the executive, subject to legislative review, so that the Governor, ten years hence or twenty years hence, will be able to adjust his administrative structure to keep up with the needs of the times. We have presently four different major bills before the General Assembly, and we are quite hopeful that they will be approved this spring. The bulk of the legislation which this administration has submitted presently to the G.A. has to do with the executive branch and making it more effective. I think the job could be done a lot more swiftly, a lot more efficaciously, if the executive were provided with the power and authority in terms of the constitution.

In general, I would like to urge this Commission to keep any proposed changes in the Ohio Constitution as general as possible. It is impossible and unwise to legislate with a Constitution. Conversely, it is entirely possible to draft revisions in such a way as to deliberately or accidentally create a situation in which a Governor or General Assembly twenty or fifty years from now will be unable to act efficiently and responsively to provide needed services to the people of Ohio.

The Governor then invited questions from members of the committee.

Dr. Cunningham: Do you generally support the idea of doing away with the so-called "elected administrative officers"--the secretary of state, attorney general, treasurer of state, and auditor?

Governor Gilligan: I will say sir, that in times past, I have recommended that such offices be made appointive by the Governor instead of elective. I can see some role for the Auditor being perhaps appointed by the legislative body rather than by the Governor. I did not make this explicit at this time, because I thought it would be regarded as discourteous to my fellow officers at the state level to do so. They hold office presently by will of the people as do I, and I think that the members of this Commission are aware of the arguments on both sides. I was just attempting to point out that these appointments lay within the legislative body, and then, in effect, were given to the people, and in some states, so far as these offices are concerned, the appointive power has been given to the executive. I think it's something you should consider, but I have just refrained from making my recommendations quite explicit.

Dr. Cunningham: Some states have been making the post-audit function a legislative appointment. Is this one of the things you are talking about?

Governor Gilligan: Some states have been making successful use of this. I think it accords very well with the responsibilities of the separate branches of government. We're using the finance director in that way today within this administration. And, in effect today, the legislature comes back, and reviews at the end of a fiscal year, by auditing our books, what we've been doing with the money. Quite frequently, they turn to the Auditor's accounts in order to get it, so I think that that is something for you to consider.

Mrs. Hunter: I wondered if I might ask you if you have any feelings about the adequacy of the pardoning power in Section 11 of Article III.

Governor Gilligan: I have no particular quarrel with the language as it presently exists. We have some work going forward in this field to improve the functions of the pardon and parole commission--there are enormous problems in this area, but they are more administrative problems than in terms of powers. I think that if we're to have the kinds of reforms within the penal system that I'd like to see take place, we're going to have to expand the activities of the pardon and parole commission--and I must say that I think the assigning to the Governor alone the power of pardon and granting executive clemendy is something in my mind which stems back to the divine right of kings rather than any logical approach to the responsibilities of dealing with people who have been through our judicial system. I have no objection to the power residing in the Governor's office but I'm saying, so far as exercising it, what I'm struggling to do is to get a system which will provide to the Governor far more information in depth, far more information in dealing with these cases.

There were no further questions, and Mr. Montgomery thanked the Governor for meeting with the committee.

Ohio Constitutional Revision Commission
May 12, 1972
Legislative-Executive Committee

Summary of Meeting

The Legislative-Executive Committee met on May 12, 1972 at 10 a.m. at 20 South Third Street in Columbus. Present at the meeting were Chairman Skipton, Representative Norris, Messrs. Cunningham and Mansfield, and staff members Hunter and Gertner. Chairman Skipton called the meeting to order, which commenced with a presentation of Dr. Cunningham's proposal for revising the Executive Article of the Ohio Constitution.

Dr. Cunningham: I will summarize my proposals since you have been given the entire proposal--a suggested revision of the executive article for the Constitution of Ohio. Elected administrative officers such as the auditor of state, attorney general, secretary of state, and treasurer of state were made elective and remained in the Constitution that way as a result of a grass-roots philosophy that, in my opinion, never has worked, and that is that the people at large can provide accountability in a public officer without discriminating between the executive officer who is responsible under our system to the electorate (the governor and/or the lt. governor), and those people who are simply chosen for their ability to perform specific functions and enforce the law as written. We hold the legislative process responsible, and we still do, and I still hope to, because they are the ones to determine policy and should be held accountable for that policy. The executive, and the executive alone, should be pinpointed with the responsibility for the administrative process, and if anything goes wrong with the administrative process, which is simply one of his two arms of operation, he alone should be responsible. An example of this is the school system in this state. The people tend to hold the Governor accountable, but give him no authority whatever to do anything with reference to the educational process--particularly the two lower levels. He does transmit the budget, and he does have the power of item veto, but he does not have control. The elected board of education was created which completely nullified any control or leadership that an executive may have in that area. This board may now, as a matter of practical politics, be so entrenched that if we wanted to get rid of it, we couldn't. I personally don't think that there's anything so mysterious about education that it couldn't be administered like welfare or any other function of government, by a single headed department, perhaps with the popular input with an advisory commission or board.

And one of the principal arguments about the auditor is that he does not even have the final accountability of the public funds of this state. Somebody should have the responsibility as to the post-audit function, as we heard from the C.P.A. Association. But some of these elective administrative officers have no discretion whatsoever--but no policy forming discretionary powers. The attorney general, for example, has no discretion whether he is going to let prostitution or gambling flourish in this state--because if so, he is violating the law.

We have a variety of solutions to the elected executive official question all the way from New Jersey to Louisiana, and very few of them, with the exception of New Jersey, are consistent at the moment. In other words, one or other has been paying tribute to the direct prejudice of the rank and file by electing, say, the attorney general, or the secretary of state, or somebody else, or three or four, but nonetheless they fall exactly in the same category. They have no executive powers- when you consider the function of the chief executive as we conceive the office, as created in the Constitution of the U.S. My proposal would drop these offices from the Constitution as so called elective executive offices. The supreme executive power would be vested in the Governor. If we adopt the alternative, which I have no great criticism with, particularly if we have the lt. governor elected as currently suggested in tandem for four years, and eliminate him from presiding in the Senate, the lt. governor, like the Vice President, could take care of many functions as administrative asst. I make him administrative asst., but if we use the tandem recommendation then of course the election will be for a gov. and a lt. gov. There should be no limitation with respect to numbers of departments, and it should be up to the discretion of the legislature, but we should eliminate wherever possible a board or commission operating as an independent board or commission. If we have a board or commission we should make it functional--to perform quasi-legislative or a quasi-judicial function, like the Public Utilities Commission.

With respect to the Treasurer's office, I believe Mrs. Donahey wants more spelled out in the Constitution on the theory that she and her office will remain elective and her powers and duties spelled out in the Constitution. I have eliminated the Treasurer as an elective office, because that office is part of the fiscal function--and the treasurer is only a subordinate office, just like the internal auditor is, as opposed to the post-audit, which is simply a legislative function to check up on things and make sure that they have been carried out in the manner prescribed by the legislature. The Auditor tends to mix the pre-audit with the post-audit operation. It's one man performing two functions. So just picking up, you would find your two functions, however, the legislature might choose to arrange them, your external and your internal fiscal function. You would have to integrate it under the department of finance, and your auditor and treasurer, whatever you might want to call them, will simply be part of that function.

Looking at the administrative chart, the attorney general is chief legal advisor, and therefore he should be director of the dept. of law enforcement, which includes a division of criminology, county prosecutors, and county public defenders. This would provide legal aid without a legal aid association. You will notice as I go through the suggested article III that I limit the governor with respect to pardons and paroles so that the governor may not use pardons as political football. Therefore, a quasi-judicial board passing upon the merits of pardons and paroles to aid in the rehabilitation of criminals would be created, all under the dept. of law enforcement. You notice that I would put highways and highway safety and any other construction under the jurisdiction of public works. Public health and the department of education would be the same way with two advisory boards advising the department of education, a board of education for primary and secondary and a board of regents for higher education and state universities and colleges, but certainly not autonomous administrative boards. And then at the end because we don't have anyplace else to put it is the dept. of liquor control and the liquor control board. The dept. in the first place shouldn't be a state function--but since it is a business monopoly and less and less becomes an item of law enforcement and

more and more a business contribution to the tax input, and we have no other place to put it, so we just tack it on as a separate operation. The secretary of state is the last executive officer in a staff position, providing the recording and publication functions under the governor and a function as the chief elections officer of the state, with the lt. governor acting as chief administrative asst. to the governor in the field of the nuts and bolts of the everyday politics of the state and law enforcement generally. And to that end, you notice that I support the proposal that the Commission has subscribed to, being the tandem election of the lieutenant governor with the governor, when taken out of the Senate which has been a traditional position, and orient him to whatever powers, duties, and functions which the legislature and/or governor may assign to him.

Another question I have raised is a specification of the age limit for the governor. I also recommended when we were discussing our legislative proposals that, by the 26th amendment reducing the voting age, it became in my opinion and in the opinion of some of the constitutional writers of the past, necessary to specify an age limit dealing with elective officers--for certain highly responsible positions. Therefore I recommend that the governor (or governor and lt. governor) be required to be 30 years as a minimum and I will withhold my recommendation for the legislature because I have already indicated that I believe that a senator should be 25 and a member of the house 21.

And last, you will note that I eliminate Article III, section 6,--commander in chief of the militia and the provision on election returns, and filling of vacancies by the governor and so forth, because I think they are adequately taken care of, and if they are specified in the article "as provided by law" the legislature can use its own discretion, and we must trust our legislature to do what it's sworn to do.

Mr. Skipton: We have agreed to hear a Representative of the Treasurer of State, Mrs. Donahey, who is going to present her more developed views on the office of Treasurer of State. Mrs. Donahey did appear before the committee several weeks ago and generally expressed herself, but asked the opportunity to appear again to expound on her ideas concerning the office more fully. She has asked her deputy, Mr. Wayne Maloon, to come here this morning and and appear in her stead.

Mr. Maloon: Mrs. Donahey is sorry that she is unable to be here this morning and she did say that she was grateful for your remembering her and sending her this invitation. Since the last time, she has secured from a Computer Service Center any items pertinent to the Treasurer of State in the Constitution, and has made up a little statement which she wanted me to distribute and then give her opinion.

To: Members of the Ohio Constitutional Revision Commission

From: Gertrude W. Donahey, Treasurer of State

I requested the state computer service to furnish me with all items relative to the Office of Treasurer of State.

Upon receipt of same, after careful scrutiny, I find that the constitution does not set forth explicitly the duties and powers of the Office of

Treasurer of State.

I would therefore like to request that the following be inserted in the Ohio Constitution:

"The Treasurer of State is the Chief Finance Officer and Custodian of all state monies, to whom shall be paid all state taxes levied by the General Assembly of Ohio, and shall be responsible for collection and accounting of same."

Mr. Maloon: Well, I think that pretty clearly states what the lady is interested in, but I could attempt to answer any questions that you might have.

Dr. Cunningham: If the office of treasurer is not an elective constitutional office, this provision would not have to go into the constitution.

Mr. Maloon: We are assuming that the office will stay in the constitution as an elected official.

Dr. Cunningham: There's another alternative, too, and that is to say "would be responsible for all state monies--as provided by law" which would leave it up to the legislature to determine what items would be in your custody and what would be your responsibility.

Mr. Maloon: I feel that the treasurer feels that this is now the problem--and this is why she wants it spelled out in the Constitution. Some taxes are now being collected by someone other than the Treasurer of State, and Mrs. Donahey feels that they should be collected by the Treasurer. And the accounting should be done by the Treasurer. We are collecting most taxes, but there are some which we do not collect, and we feel that these things are the main function of the Treasurer of State's office.

Dr. Cunningham: In my opinion, the Treasurer's office should not be a constitutional office. If it is, then the Constitution should contain a simple statement giving the Treasurer such powers and duties as are provided by law.

Mr. Skipton: Does Mrs. Donahey or you wish to address yourself at all to this question of whether the Treasurer of State should be an elective or an appointive office?

Mr. Maloon: I know she feels it should be an elective office, and I am sure that she would be happy to come and talk to you.

Mr. Skipton: I think it would be helpful if she could address herself to that question, and give us her arguments. That aside, we can look at the recommendation here with the assumption that the office of Treasurer would continue to be an elective office. Does any member of the Committee wish to ask Mr. Maloon any questions relative to the completeness or the effectiveness of this provision--for example "all state monies"--I am sure this is a term subject to varying interpretation. Can you elaborate somewhat on the definition of state monies? There are a lot of so-called fees for service--even the

liquor dept. funds--are they state monies until they become profit? How would you interpret that?

Mr. Maloon indicated that he was not prepared to interpret the statement.

Mr. Skipton: When Mrs. Donahey appeared before the committee previously, somebody raised the question of the retirement funds. Are these transactions handled through the Treasurer's office? It was not at all clear to me. Are these monies collected by the Treasurer? Is the Treasurer custodian of any of these funds?

Mr. Maloon: I think we are custodian for most retirement funds, possibly all, but we don't have the power for investment of these funds.

Mr. Skipton: Which raises the question, does custodial power imply investment power?

Mr. Mansfield: Would it be out of order to suggest that if Mrs. Donahey can't come back, she write a memorandum to explain this terminology?

Mr. Skipton: I think that would be very helpful--to have Mrs. Donahey's comments in writing.

Mr. Maloon agreed, and Mr. Skipton thanked him for coming.

The committee returned to a discussion of Dr. Cunningham's proposals. Mr. Skipton noted that his proposal reduces the number of elected executive officials to the Governor and the Lieutenant Governor.

Dr. Cunningham: Originally, I proposed the lt. gov. appointed, as almost a city-manager form, which no state at present has in that form. They have an executive asst. who works with the governor, but it isn't in the Constitution anywhere. I felt we might give the lt. gov. a status, as long as he is an appointive officer, to perform a purely administrative function. He does not constitute the status of a representative office, therefore, if the governor becomes temporarily incapacitated, he can take over, but to take over permanently, he has to get a mandate of the people he represents. And that's the reason I think a lt. governor who would want to succeed under those circumstances would have headway as a result of being an administrative asst. And he would receive a sizable salary. However, I am also agreeable to having him elected in tandem with the governor.

Mrs. Brownell: What do you provide for in the provision for succession?

Dr. Cunningham: He would succeed not to exceed six months--if there became a permanent vacancy in the office of Governor, then he would have to run for confirmation of the people. If he lost, then there would be a special election. (This is assuming an appointed lt. governor.)

Mr. Mansfield: Do you mean then, that there might have to be two special elections, one to see if he were confirmed by the people, and another to elect a new governor.

Dr. Cunningham: If he were rejected, then it would be provided for succession to the office unless you provided for a special election. But not necessarily under my provision, which would provide in a case where the lt. governor was not confirmed, the president of the senate, who was originally elected instead of appointed, would succeed to the office.

It was questioned as to whether the provision written by Dr. Cunningham necessitated the Lt. Governor's giving up that position in order to run for confirmation as Governor. It was generally felt that the provision would have to have some clarification.

Mr. Skipton: Can you address yourself, Dr. Cunningham, to whether the duties of the executive officers ought to be spelled out in the Constitution, as Mrs. Donahey has requested, for instance.

Dr. Cunningham: I follow the theory that the Constitution is a framework of government; it isn't supposed to have all the ifs, ands, and buts in it, and the moment you start defining and limiting unless there's some special reason for it, it should be left out. These duties should not be included. Otherwise your Constitution becomes cluttered, and our tendency thus far in our proposals has been to clutter.

Mr. Skipton: There has always been one question about the short ballot that has disturbed me, because I am a political animal. I have always felt that before I could go all out in supporting a man for governor of this state, I wanted to know a great deal about him--see him under trial as a public official--with all due respect, I'm not certain that the ability to be chairman of the board of a huge business corporation would make someone capable to be a good governor. So I have always been concerned with eliminating completely some stairstep to more important public life. We wouldn't have very many stairsteps by which people could move if we eliminated all statewide executive public offices, except Governor. Maybe we ought to have at least one or two besides the Governor.

Dr. Cunningham: But a secretary of state or an auditor or a lt. governor who presided over the Senate--is there some proven mystique about him that would prove that he would be a good governor of the state?

Mr. Skipton: My point is, you get to see how good a politician they are.

The meeting continued after lunch with presentation and discussion of several of the research papers which had been prepared for the committee by the Commission staff.

Mrs. Hunter: I will quickly summarize the memorandum called State Elective Executive Officials--Research Study No. 7. It reports on the numbers of states that have changed from provisions for elective executive officers, in recent years, to provide for appointed officials. The Governor is an elected state official in all fifty states. The lieutenant governor is elected in all the states except in Tennessee where he is elected by the state senate from among its membership. The secretary of state is provided for in the Constitution in all the states except Delaware, Hawaii, Maryland, N.J., N.Y., Penn., Texas and Virginia, and is elected by the people in all the states where he is a constitutional

official except in Maine, New Hampshire and Tennessee, where he is chosen by the legislature. Getting down to the offices of treasurer and auditor, the treasurer is not a constitutional official in Alaska, Hawaii, Maine, Md., Mich., New Hampshire, N.J., N.Y., Tennessee and Virginia. In Maine, Maryland, New Hampshire and Tennessee, he is provided for by the Constitution but elected by the legislature--in other words, there are several possible alternatives there. 27 states provide in their constitutions for the election of an auditor by the people, and two additional states, Georgia and Maine, provide statutorily for his election. Rather than go through the variations other than the ones I have mentioned, I might mention the present trend to do away with a large number of elected officials--as in the Alaska and Hawaii Constitutions. The Model State Constitutional provision also endorses this trend. Those who argue for the retention of statewide elected officials rely on the Jacksonian theory of direct popular control of as many phases of government as possible, or that too much power would be concentrated in one individual if the governor has responsibility for appointment of the heads of all departments. The study does give you an idea of what states have initiated this trend and the arguments in the literature for going along with this trend.

Mr. Skipton: It must be said that this does point out that when states were electing ten or more officials, we did have a problem. And a reverse trend set in. We probably don't see it as much today in the executive branch as we do in the creation of, for instance, the state board of education. I guess the important thing is that we realize that in any one period of time in order to accomplish certain objectives, people may look for an alternative course of action by which the same thing can be accomplished. One way to look at this is whether the people of Ohio have been frustrated by electing a particular person as Treasurer of State or Secretary of State--has this created a problem which we would want to change? This is what the research says to me--whenever there is a problem, some answer must be found for it.

Dr. Cunningham: We must not lose sight of the principal purpose of representative government--to have a legislative body which represents the constituency. And therein lies the responsibility. Now the legislature violated their trust between 1800-1850, and for that reason, the electorate arranged that situation. Public administration says that the way to pinpoint responsibility is to designate your chief executive and then give him commensurate authority.

Mr. Norris: The problem I find in all these proposals is that they seem to be a move to establish executive supremacy among the three branches. Now we have three branches of government to serve as checks on each other, but in addition we have checks within each of the three branches. And what we are being asked to do here is to remove the checks from within the executive branch. For instance, within the legislature, we have two houses--we serve as a check on each other. In the judicial system we have three levels of courts which serve as a check within the branch. The present executive set-up--you have the auditor, the attorney general, and the chief elections officer to serve as checks on each other within that branch. Anytime you withdraw that and concentrate it all within one office--one man--the governor, you have of course eliminated that, and you have executive supremacy. Now I think you can work for better efficiency and still retain the checks within the executive branch. I see little reason for a lieutenant governor. I see little reason for an elected treasurer--the treasurer serves no checking authority. But so far as an auditor, an atty. gen., and a chief elections officer are concerned, I think they serve a very valuable function of being independent of the chief executive.

These other offices do serve as a practical training grounds and there are a number of governors that have come from these offices--with very valuable training. So I do feel that you can consolidate somewhat within the executive department, but I don't think you can do away with all the checks on the department.

Dr. Cunningham: Don't you distinguish between what the auditor does today and what he does tomorrow--the internal audit vs. the post-audit?

Mr. Norris: Well, I have no problem with setting up a post-audit function in the legislature. But I don't think it follows that you abolish the office.

Dr. Cunningham: No, you're not abolishing the office--you're creating two--a comptroller general, whatever you want to call him, and you're creating an auditor who is administering the budget and the accounting system.

Mr. Norris: I would agree that the governor should have more control over education.

Mr. Mansfield: Another thing the governor mentioned is his lack of effective control over public works. All the people that we have been talking about so far, with the exception of the office of lt. governor haven't been mentioned by the governor.

Mr. Norris: The Director of Public Works has a one year term--so every outgoing governor leaves the new governor with a Director of Public Works he may not like for a year. I think the department of education ought to be appointive under the governor.

Dr. Cunningham: I do not agree with keeping the Attorney General an elected official.

Mr. Skipton: Are local county prosecutors bound by the opinion of the Attorney General?

Mr. Mansfield: As I understand it, when he asks for them, he is bound by the opinions. I'd like to have that checked though.

Dr. Cunningham: And you have asked, too, about governors, down through history who have disagreed with their auditors or treasurers about the appropriation of funds, and that is exactly what has happened. The auditor has said you can't spend that money and the governor has said yes, I can. And the atty. gen. has decided with the governor or against the governor. And the governor goes to the Court and asks for a decision--he overburdens the court. But it doesn't make any difference that he was an elected officer or an appointed officer.

Mr. Mansfield: What I am suggesting is that if the atty. gen. is appointed by the Governor, he is always going to come up with decisions that are acceptable to him.

Dr. Cunningham: But you can disagree with a decision even if he is appointed.

Mr. Skipton: I personally haven't had too strong feelings about which officers should be elected and non-elected. I have felt over the years that really we were loading burdens on the atty. gen. that we shouldn't have--narcotics control, etc.

Mr. Mansfield: One other thing to consider is that we are all human and tend to consider who was in the office we are talking about at that point.

Nancy: The memorandum which I am going to talk about is Length of Gubernatorial Service--this is Section 2 of Article III, the executive article in the Ohio Constitution. This section at present provides for the term of office of the state elected officials that we have been discussing; a four year term of office for the state elected officials. It also includes the stipulation that no person shall hold the office of governor for a period longer than two successive terms of four years. These provisions were adopted in 1954 when there was feeling that the governor should not be able to remain in office for longer than two successive terms of four years.

Previous to this, a great many of Ohio's governor had served for more than one term. 19 governors had served for two terms; 18 of these serving a two yearterm (previous to 1954) and one governor, Rhodes, serving for two four-year terms. And of course, Lausche is the outstanding example, having served five times. It is important to note that these multiple terms were not necessarily consecutive--and in five instances, I believe, a governor served for one or two terms, and then after an interval out of office, returned to serve additional time.

At present 24 states do not limit the number of terms a governor may serve, and most of them, 17 of them, provide for four-year terms which has been the trend lately, reflecting the feeling that a two year term is not long enough for a governor to develop his policy program in office. The main reason for removing a term limitation from the constitution is felt to be that in limiting the number of terms that a governor might serve, you are eliminating from an election the candidate who is going to be the most familiar to the people, and if the people want to re-elect a candidate, they should be able to do so. Unlimited gubernatorial elections are opposed because it is feared that unlimited re-election allows a governor to build up a political machine in office, and that it is always difficult to unseat an incumbent.

The next page gives a chart showing the states which do have limitations in the constitutions and their term lengths. Ohio is among the group which is limited to two four-year terms. The interesting question about the language in the Ohio Constitution at present even if the Commission should decide that the term should remain as it is, is that it is not exactly clear whether a person who has served two successive terms as governor may serve again after an interval out of office, or whether the language is a strict limitation, which would limit an individual who was governor for two terms to that period of service as governor. The memorandum shows the language from the Constitutions of all the states which do limit the governor to two consecutive terms according to their language, either with interval or without, which can't be made clear from just the constitutions, so that you can see how these provisions are worded in the various states.

I might also add that the Model State Constitution maintains that the number of terms which a governor may serve should not be limited, with the rationale that it is a possibility that bossism may occur in office, but limitations of this kind restrict the right of the people to elect the Governor they wish. Also included in this memorandum is a list of the terms of Lt. gov. and Atty. Gen. and Sec. of State.

Mr. Norris: What is the basis of the argument that a two-term Governor can't run for re-election after being out a term?

Nancy: The wording is "no person shall hold the office of governor for a period longer than two successive terms of four years." The question is whether "period" in the Constitution refers to the total amount of time an individual could serve as Governor or to a specific time interval, after which another individual held the office, when a governor might return to office for a second "period" of two terms of four years.

Mrs. Hunter: There might be cases from other states interpreting similar language.

Mr. Norris: I like the limitation of no more than two successive terms, although, I think a fellow ought to be able to run again after an interval out of office, even if he has served for the eight years. One of the arguments against this, however, might be that he gets stale after being out of office.

Dr. Cunningham: The prototype, the federal limitation, was written after F.D.R., and then the states started copying it.

It was generally agreed that the Ohio provision is somewhat ambiguous.

Mrs. Hunter: I think we should next discuss the memorandum on Executive Reorganization, to which Governor Gilligan alluded in his remarks to this committee. There are two major questions involved here--the first being whether there should be a constitutional ceiling set on the number of executive departments, and the second is giving the governor reorganization powers subject to legislative veto.

On the question of limiting in the Constitution the number of executive departments, the memorandum gives the views of the Model State Constitution and the Governor's Conference of the Council of State Governments. Both propose limiting the number of executive departments to 20, and both deal with the question of giving the governor reorganization powers. On p. 5 is listed some of the states which have adopted a constitutional ceiling on the number of executive departments--the rationale for this being to discourage the natural tendency among state legislatures to create new agencies for carrying into effect new policies--the result being a limitless number of agencies.

Mr. Norris: Maybe we ought to add in there "among state legislatures and governors."

Mrs. Hunter: The paper also includes a summary of the arguments in behalf of constitutionally limiting the number of executive departments. The arguments against such limitations in constitutions are found on p. 7 of the study--the limit on the number of depts. may result in an inefficient grouping of unrelated activities--the existence of a limit may contribute to a proliferation to get around constitutional limitations--the limit may be arbitrary--and also that the same objectives might be more flexibly achieved by statute. You have, further, a discussion of what is to be included in provisions limiting the number of depts. and also a discussion of providing for such limitation by statute.

The second major question discussed in this study is that of providing for executive reorganization subject to legislative veto--a proposal to give the governor power to initiate plans for administrative reorganization subject to the approval of the legislature. These are the two questions discussed--you have in addition some tables on what other states have done in regard to limiting the number of executive depts., and also in regard to providing for executive reorganization.

Dr. John Millett, Chancellor of the Board of Regents, was next to speak to the Committee. A summary of his remarks follows:

Mr. Chairman and members of the committee, I appreciate your willingness to let me appear for a few minutes here this afternoon. I requested the opportunity to do so because I felt that you should have the benefit such as it may be from hearing a contrary view to that which was expressed by Mr. Lynch of the Auditor's office on February 11th. In the discussion at that time, you may recall, Mr. Lynch raised some questions about the status of the state universities in Ohio in relation to the authority of the Auditor of State and made reference to the statute which had been enacted by the Ohio General Assembly in 1965 altering the status of the state universities. He suggested that not only should the statute be repealed, but that it might be preferable to prevent such legislation in the future by writing a provision into the Constitution of the State of Ohio. I must respectfully disagree with all these points, and suggest that there is more to the whole matter than was, perhaps suggested by Mr. Lynch. I think that the basic problem involved here is twofold--one is the nature of the state university as an organizational entity, and the second is the nature of the role of the Auditor of State in state government. On this first issue, let me point out very emphatically my own personal belief that is that our state universities in Ohio are not agents of state government. They are most comparable to, I think, a government corporation, rather than an executive agency or dept., and they certainly aren't thought of as a board. The statutes now say in Section 3345.011 that every state university is a body politic and corporate. Our state universities handle substantial funds which do not come from appropriated funds of the state of Ohio. On the average in this state, and it varies from institution to institution, only about 1/3 of all income annually is derived from state appropriations; 2/3 of the income is derived from charges to students, from federal govt. grants, from gifts, contracts, charges to patients in a teaching hospital.

Let me refer to the situation which existed prior to 1965 and the situation which has existed since 1965, explaining the relationship of the state universities to the Auditor of State. But before I do that, let me make a comment or two about the role of the Auditor of State in state government. There is a long controversy in this matter, and not just in Ohio, but in other states; and long controversy in the federal government about the role of the GAO and the Comptroller General of the U.S. As a political scientist, I would say that the authority conferred by statute on the Auditor of State makes him a Comptroller in state government rather than an auditor, at least in the way that I would define the role of auditor. And I think there is considerable question about the relative roles of a comptroller and an auditor. What the statute of 1965 did was to put the auditor of state in a role of auditor, as I would define that role, in relation to all state university expenditures and not just part of them, as was the case prior to the statute of 1965. Prior to 1965, our state universities had a dual financial system in every

case--fees which were collected from students for instructional purposes were deposited in Columbus with the Treasurer of State and were subject to reappropriation by the state legislature each biennium. Charges collected from students for room and board, and for general purposes, were not deposited with the Treasurer of State, but were retained under the jurisdiction of the Board of Trustees of each individual institution. All federal govt. grants, gifts, all contractual, endowment, and special income were retained by each individual institution in accordance with the appropriation ordinances of the Board of Trustees, and were audited by the State Auditor but not controlled by the State Auditor. On the other hand, the state appropriation to each university and the student fees collection for instructional purposes, as I said, were deposited to the Treasurer of State. Against this particular source of income, each state university prepared a payroll, the same way that an executive dept. or my office does, vouchers, and so forth--these were all brought here to Columbus. The checks in payment were written by the Auditor of State and then the state university came to Columbus to pick up the checks and then mailed them to the people they were to pay. On the other hand, for all other bills, the institution wrote the check itself, and dispursed it immediately, without coming to Columbus before doing so. Now this was the procedure prior to 1965 when we were on the verge of a very substantial expansion of our state university system here in Ohio. In 1965, we had 6 state universities, only 2 or 3 two-year campuses--none of them yet finished-- and we had a total enrollment of something like 65,000 students. Now we have in the State of Ohio, 11 state universities, one state affiliated university, a medical college, 42 campuses and a total of 290,000 enrollment. On the verge of such a tremendous administrative expansion, as was clearly forecast in 1965, and in light of the fact that universities were considered to be responsible enough to handle 50% of their income, there seemd to be no reason why they shouldn't be able to handle 100% of their income. A great deal of administrative congestion could be avoided by changing the system and the whole program could be achieved on a more effective and decentralized level, and with modest administrative cost. And I believe, indeed, that that has been accomplished, by the change in the law that took place in 1965. No one has looked at what would be the administrative cost today of going back to the organizational arrangements which existed prior to 1965, but I am convinced that those administrative costs, both in the Dept. of Finance and in the office of the Auditor of State would be substantial in order to perform this function the way it was performed prior to 1965.

I think not only have we achieved substantial administrative efficiency, as a result of all this, I think we have achieved a degree of autonomy--we have academic freedom which we would not have otherwise achieved. And to my knowledge, and I think to the knowledge of the Auditor of State, there has been very little abuse. This move in 1965 was accompanied by another move which I think is very important. The auditor of state assigned a resident auditor--one or more--resident auditors on every university campus. Incidentally he is appointed by and responsible to the Auditor of State but his salary is reimbursed to the Auditor of State by the university as an administrative cost of the state university. Beyond that, this auditor performs a continuing post-audit of every expenditure that is made. And recently where two or three indications have arisen of malfunctioning, it has been pointed out by these auditors--and the universities have undertaken to correct the error. I think this is a very substantial safeguard to all of the people concerned, but I repeat, that only 1/3 of the funds concerned come from the taxpayers of the state of Ohio. I believe that the whole system operates quite effectively

the way it is now structured, and I for one, would see no reason why any change is necessary, and particularly, see no reason why a change should be made through constitutional prescription.

Mr. Skipton: The Board of Regents over the years seems to have tried to get state support for higher education down to an amount per capita. Of course there are other schools besides state schools.

Dr. Millett: You are right, Mr. Chairman. Let me point out that a community college under chapter 3354 of the Revised Code, should the statute of 1965 be repealed, would continue to operate just the way it does now. And that would mean under the same financial arrangement. I fail to see that if a community college or a technical institute or the University of Cincinnati are all considered competent, then why is Ohio State suddenly incompetent? Or Miami--or Kent?

Mr. Skipton: We have to find a rationale which is based on some constitutional principle--whether the state has state schools or whether the state subsidizes higher education.

Dr. Millett: I think the concept of the state university as a state government corporation is a viable concept and a truly advantageous concept. I would hate to see it lost. That is a matter of legal status at present. I am not advocating that this should be written into the Constitution at all--I think this is something that can be settled by state law.

Dr. Millett then discussed the constitutional provisions dealing with education.

Dr. Millett: I did notice the Governor's remarks about education when he met with this committee with some interest. I do think that an appointed board with staggered terms is a satisfactory administrative arrangment in any level of education. The role of the governor gives him the authority in the field that is appropriate to the governor. The constitutional issue, then, seems to be whether or not the board should be independently elected or appointed by the governor and approved by the senate--and my preference would be for the second.

The constitutional provision in the Ohio Constitution concerning education was clarified, and it was pointed out that it provides only for elementary and secondary education. It is required that there be a board of education, as provided by law. The legislature has provided for an elected board, statewide, which then appoints a superintendent of public instruction--who is presently Dr. Martin Essex. The provision in the Constitution is not very extensive. (Article 6, Section 4)

Mr. Mansfield: When the governor talks about having more power in education, what does he mean?

Mr. Skipton: He wants to have an appointed board of education instead of the elected on which is presently provided for by the legislature. He wants to appoint the director of a Department of Education, much the same as any other department. Essentially what

the Governor is saying is that this is an area for which he has to take a great deal of responsibility and over which he has very little control. The question of how much discretion the executive should have also becomes involved.

Mr. Mansfield: But what is the executive in our system supposed to do, in theory? Not a whole lot, except administer what the legislature tells him to.

Dr. Cunningham: That is what we are trying to liberate him from now.

Mr. Mansfield: I do think it is incumbent upon us to keep in mind the division of govt. as it was set up.

Mr. Skipton: Well, I do feel that we have generated some interesting discussion at this meeting. Perhaps Nancy could excerpt some of the remarks made here today and write up a news release to keep the public aware of the issues which we are discussing.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
September 22, 1972

Summary of Meeting

The Legislative-Executive Committee met in House Committee Room 11 on September 22, 1972, at 9:30 a.m. Attending were Chairman Skipton, Senators Applegate and Taft, Representative Norris, Dr. Cunningham, and Mr. Montgomery. Staff members Sally Hunter and Nancy Gertner were also present. Mrs. Brownell of the League of Women Voters and Mr. Nate Gordon of the Office of the Governor also observed the meeting.

Mr. Skipton began the meeting with a consideration of dates and times for the meetings of the Committee. He urged monthly meetings until recommendations in this area are finalized. The commission, as I understand it, plans to meet once a month, alternating Fridays and Thursdays. Perhaps we can arrange our meetings around the Commission meetings, as we are doing today. Is this convenient? I do believe that when we have something that will be of interest to lots of people that we might hold our meetings in different cities around the state; but I do not know what kind of decision the Commission has made on this.

Now, we have a number of questions that have been posed. The staff has made a list of questions relating to the executive article. I hope you have all had an opportunity to look over that. Does this list adequately cover the questions, or are there suggestions for additional topics? The questions have been divided into broad headings, beginning with the first one, the executive department generally.

Mrs. Hunter: This is about which executive officials should be provided for in the Constitution, which should be elected, or appointed, and what powers and duties, if any, should be set forth for them in the Constitution. We've had some testimony from the auditor's office and we have had some testimony from the treasurer's office and written testimony from the attorney general's office--so this is a question we can consider. We will also be discussing the lt. governor today and what details can be in the Constitution regarding the powers and duties of the lt. governor. So we will cover the lt. governor today but that will leave the auditor, treasurer, and attorney general as offices about which we have not yet reached a conclusion although we have had some testimony. We have also had some material presented on the legislative auditor.

Mr. Skipton: I think we will let each one of these officials present their case for the retention of their offices, because to make any broad generalizations would simply create problems for us.

Dr. Cunningham: Each one must be justified in terms of its inclusion or exclusion. I think in the final analysis they are all administrative offices including the attorney general. There is nothing sacrosanct about an attorney general, when you really get down to the final analysis. But everybody has his own opinion. I just put them all together because I view them in an administrative category.

Mrs. Hunter: The next general question is about the appointment of officials. "If the Constitution should provide for appointed officials, should it specify by whom they are to be appointed and removed?" and an examination of whether or not the appointment

provisions now in the Constitution are in need of clarification. We also have some sources listed here and there is more research that can be done. The third question is related to the first--whether there should be powers and duties of constitutional officials other than the governor and lt. governor provided for in the Constitution. This ties in with what officers should be provided for and how much information should be provided about each office. Two other questions under this first broad topic are one that we will be considering today--the broad topic of the powers and duties of the lt. governor. This has already been considered by the Commission in its legislative recommendations. The last question here relates to some testimony this committee received from Dr. Millett and Gov. Gilligan--whether the state board of education and the superintendent of public instruction should be appointed by the governor.

The next topic has to do with executive and administrative organization, and we have already completed some research on this about whether there should be a constitutional ceiling on the number of executive depts. The sources are listed. The somewhat related area is whether or not the constitution should deal with the whole broad area in regard to administrative organization. Another question which was noted in the general area of research was whether or not there should be an earlier date for gubernatorial inauguration. This is connected with the duties of the governor in the area od executive organization and whether or not his functions might be enhanced if the inauguration was to take place at an earlier date. The next general category has been labeled executive qualifications. Should the constitution set the minimum age and or other qualifications for the governor and lt. governor? Some questions are posed which relate to the administrative powers of the governor. This is really closely related to the general topic of executive and administrative organization, but the general question is what is the governor's role in policy making and how much control should he have over administrative agencies? Then, should there be provisions in the constitution relating to the governor's ability to reorganize administrative agencies? And if so, what limits should be placed on this power, and should the legislature be limited in establishing agencies in the same way? Finally a third question is, to what extent should administrative functions be provided for in the constitution? In examining this, there have been recommendations from some sources for the establishment of a Dept. of Administration or its equivalent in the Constitution so that this group of questions could be examined together, and just what other agencies should be spelled out. Finally, a question relating to the governor's powers to investigate any part of the executive branch and enforce compliance with laws by proceeding against any other executive officers--what does the phrase "supreme executive power" in the Constitution now mean, should the governor's investigative or disciplinary powers be spelled out in the Constitution? On the next page, I guess there's one more question relating to the administration powers of the governor--should there be in the constitution explicit directions to the legislature to provide by statute for the financial and other support needed by the incoming governor to prepare properly for issues confronting him?

The next general category involves questions which appear to relate to the legislative powers of the governor. One that was raised in material before us is whether or not the governor and/or other executive officials ought to be able to have seats in the General Assembly or to introduce bills or to take part in the discussion on bills in which they are interested. The second question which we will be talking about today is whether there should be a constitutional provision for a state budget. Should there be a constitutional mandate that the governor submit a budget and recommend sources of revenue? These are the two general questions under legislative powers of the governor.

The next category is the one entitled Gubernatorial Succession and Determination of Disability, A research study has already been provided on this subject, and I think we may also get to this today because we are going to be talking about the Lt. Governor as first in line in succession to the governorship in the Constitution. So the general question to be examined is what constitutional machinery should be established for determining gubernatorial disability--whether or not the governor is incapacitated or absent and who, then, will decide when the lt. governor should take over? There are several questions related to that--what is the best way to provide for gubernatorial succession--should the line of succession be spelled out in the Constitution or should there be a special election or should it be as prescribed by law--we will see what some other states have done on the general question of providing for gubernatorial succession and have some discussion on this.

Topic No. 7 has to do with the length of gubernatorial service and the questions we talked about at the last meeting, I believe, on the two-term gubernatorial limits. Specifically, whether it should be rewritten to eliminate the ambiguity which has been noted in its present form.

The next topic, again, you have received materials on the topic of executive clemency and also Dr. Cunningham's materials, and that is whether or not present powers are adequately provided for and whether they should be modernized.

Now, we have included together under Topic #9 the question of several provisions that have been called obsolete or unnecessary or statutory by various commentators on the Constitution. So the Committee might want to observe these various provisions together as not a part of the organic law. These include the state seal, some of the provisions for election returns (if they aren't obsolete, maybe they should be removed to another part of the Constitution), the general question of the militia. Finally, and this may well be included in the obsolete section is the question related to style changes. Should a single constitutional section applicable to all state officers and prohibiting changes in compensation during term replace the present sections which do this? These present sections are scattered through throughout the Constitution.

Senator Applegate: Along with the question on state budget, we might want to discuss a provision for an annual budget.

Mr. Skipton: Are there any other topics that members of the committee think should be added? The first topic that we have on our agenda today is the question of whether the office of lt. governor should be provided for in the constitution, and how much should be specified about that office. You will recall that in our consideration of the legislative article, we did adopt recommendations relating to the lt. governor. The Commission has already expressed the feeling that the office of lt. governor should be retained as an elected constitutional office. As you recall, there was a recommendation as to how he should be elected--shall we review the provisions which the Commission has previously acted upon in our legislative recommendations?

Mrs. Hunter: In our legislative recommendations, we recommended retaining the lt. gov. and we recommended that he be elected in tandem with the governor. We did not however specify in the constitution that he be nominated with the governor. We just said that the nominations be as provided by law, but that there be tandem election. Both of these recommendations parallel the recent recommendations of the National Conference of Lt.

Governors which you received in the material for this meeting. Further we recommended that the lt. governor be assigned executive duties by the governor or as provided by law--in other words we made him an executive officer, and we deleted the provision naming him as President of the Senate. Again the National Conference of Lt. Governors, while it takes no position on deleting the Lt. Governor as President of the Senate, does call for a strong executive position and clarification of the executive duties for the lt. governor--so this again parallels the recommendation of the National Conference of Lt. Governors. We have not yet taken a position on succession or discussed succession. The National Conference of Lieutenant Governors in addition to calling for team election and a full-time position, also feels that the succession provisions in state constitutions ought to be clarified, recommending that the lt. governor be retained as the first in succession but raising other questions about how disability is to be determined, whether the lt. governor becomes acting governor or actually becomes governor, and other related questions that we will be considering today. So at least in two-thirds of the National Conference Recommendations, the Commission has already acted in accord.

Mr. Montgomery: Isn't this really already kind of moot, in light of what we have already decided?

Representative Norris: I don't like what we did, but I don't see any reason to open it again.

Mr. Skipton: I want to make sure that everybody understands this very thing--that the Commission has already adopted these amendments. There were two or three little things involved, such as the question of nomination on the tandem election, and I just wanted to see if this was a thing you wanted to get into. Do we wish to add a recommendation? Or do we want to leave that for legislative determination? Any desire to take that up? O.K. Then we are in accord with what the Lt. Governor's own conference recommended, too. It's surprising how much in agreement we are. Now another question that we can treat in terms of this office is about the duties and functions which can be prescribed by the governor and the general assembly. There are no further feelings on that? Now the one question which we didn't attempt to clarify any further was the question of succession--under what conditions. Now there is the Lt. Governor's Conference--apparently it provides for succession even in the absence of the governor. Is there any interest on the part of the committee in dealing with this question? in the Constitution?

Senator Taft: It seems to me that the serious question in this area is dealing with disability--not just every time the governor walks over the state line. The question is when you determine disability or how you determine disability.

Mr. Skipton: As you well know, there has been great discussion on this at the national level, and in almost every constitutional revision body that has deliberated since the late 1950's. There have been all kinds of emergency provisions to insure the continuity of the government in crisis. And I don't believe they have ever resolved this even at the federal level--concerning the President of the United States.

Representative Norris: Our proposal from the Commission was silent as far as criteria to determine disability?

Mr. Skipton: It was never really treated.

Mrs. Hunter: We never really did get to that. We were concerned primarily with the

legislative article and this is part of the executive article. We were only concerned at that point with replacing legislative duties with executive duties.

Representative Norris: Assuming that we take the tack of death, resignation, or incapacity, aren't you pretty much stuck with giving the general assembly the authority to promulgate the criteria? Isn't it too hard to put into the constitution a definition of incapacity?

Mr. Montgomery: Well, I think that's true, but I think you have to determine who makes the decision, and by what means, and by what vote--the mechanics of making the decision.

Representative Norris: I don't mean the G.A. would take a vote--he is or he is not disabled--but I mean that they would prescribe the qualifications as to how disability is determined.

Mr. Montgomery: What happened in Alabama with Wallace?

Comments: Alabama has a specific provision for absence. The absence rule became effective after 20 days, and it is until the Governor steps back into the State. The provision is very explicit.

Senator Taft: Being in a good mental and physical state, just being out of the state shouldn't put an absence rule into effect. We don't have any provision if the President of the United States is traveling around the world, for instance.

Mrs. Gertner: You all received Research Study No. 10 quite a while ago, so you might not have recently read it, but I did find that there are two opposed views which define absence: one being a strict view which defines absence as any time the governor leaves the state and would call for temporary succession to the office at that point. And the other view is that absence from the state only occurs when the activities of state government could not continue, feeling that in modern state government, the governor can control what goes on in the state by long distance telephone if he just goes to another state for a day or to Washington, this kind of thing. But it is interesting to note that this National Conference of Lt. Governors does feel that absence should be defined by statute as physical absence from the state. The Model State Constitution takes the opposing view.

Dr. Cunningham: And there is the other question--about whether these provisions should be constitutional or statutory provisions--and of course, I feel that they should be material for the statutes.

Mrs. Gertner: The different Constitutions that I have included in my paper indicate which of the material is left up to statute.

Dr. Cunningham: The federal constitution provides a whole procedure as to how you can declare and how long the incompetence of the presidency can continue, so that the vice president succeeds to the power, as acting president, and when he succeeds to the power as president.

Mr. Montgomery: I think it is a basic enough decision that it should be spelled out in the Constitution--the procedure for determining whether a governor is not going to be

governor anymore. I think this is something that the people probably want to express themselves on.

Dr. Cunningham: You can get into the same hassle that you got into many years ago with impeachment and rendered impeachment unusable under the present system--with the legislature dominated by one party and the executive another party.

Representative Norris: Just to get things moving I move that our recommendations on succession by the lt. governor be limited to succession upon the governor's death, resignation, removal, or incapacity, and that they do not include a provision on absence.

Mr. Skipton: I don't think there will be any objection to that.

Mrs. Hunter: Absence isn't included now.

Mr. Skipton: Alright, we'll rule out the question of absence. Really, the only question we have here is whether or not we should have a constitutional provision related to the determination of disability.

Dr. Cunningham: I won't go along with a constitutional definition, but I'll second Representative Norris' motion.

Mr. Skipton: As I understand it, all Mr. Norris' motion does is remove the question of absence. So now we still have the question of deciding whether we say anything in the constitution relating to the determination of incapacity. What does the present Constitution say?

Mrs. Gertner: It's Sections 15 and 17 of Article III. Section 15 reads "in case of the death, impeachment, resignation, removal, or other disability of the governor, the powers and duties of the office, for the residue of the term, of until he shall be acquitted, or the disability removed, shall devolve upon the lt. governor.

Mr. Skipton: Don has expressed himself and he believes that we should have a provision on who shall determine incapacity. Did I understand you to have a firm conviction on that, Dr. Cunningham?

Dr. Cunningham: Yes, I believe that the legislature should define incapacity.

Representative Norris: That would generally be my view too. Although I guess I feel that way because I don't know of any alternative. Do you have any idea?

Mr. Montgomery: No, I just think that it is such a fundamental issue that the people should have an expression on the matter, and the only way that they can do that is through the constitutional process. All I think we should have is some mechanics for getting to it--how it is to be accomplished.

Senator Applegate: Let me ask a question. Are all incapacities disabilities--or is disability just a part of it? Are there other reasons that you can be incapacitated?

Representative Norris: My motion didn't use the word disability--it used incapacity.

Senator Applegate: It is really more of a general term and can take other cases into it.

Dr. Cunningham: Don't forget that incapacity could be mental. It could mean incapable of exercising power. There is no provision in the constitution at this moment distinguishing between mental and physical disability. You leave it up to the legislature in the final analysis.

Mr. Montgomery: I worry a little bit about the legislature being dominated by one political party or the other--and the executive of another party or the same party--with the decision being made along those lines--and depending upon who the lt. governor is. Of course, they are still running in tandem, but still, I'm not sure if I could be totally comfortable about that situation. I'm afraid the political specter gets too involved.

Mr. Skipton: We may be thinking of two different things, here. The legislature could spell out incapacity and how it is determined--but the thing you are hung up on is who makes that decision--who decides that incapacity, and what you are interested in primarily is some determination of what body is going to do that. What do other states do? Sally, do you have anything on that?

Mrs. Hunter: Well, the Model State Constitution says that the Supreme Court shall have original, final, and exclusive jurisdiction to determine absence and disability, and to determine the existence of a vacancy and all questions concerning succession to the office or to its powers and duties. The Model Constitution took the position that it is going to end up in the court anyway, so it spelled out that the Supreme Court has original and final jurisdiction.

Mrs. Gertner: I have copies of the proposed Maryland Constitution provisions--this was the constitution that went down in defeat after the Md. constitutional convention--but it provides that after six months of temporary succession the Governor's office is deemed vacant. This is in a case of succession where the governor asks the lt. governor to take over his office. Then in cases of disability, the G.A. passes a resolution which is sent to the Supreme Court, which makes the disability determination. Some states have different boards, even with doctors and psychiatrists, to make this kind of disability determination. The six months in Maryland is when the governor asks the lt. governor to take over. The legislative determination of disability takes place in a case, say, when the governor might not be willing to step down. This is the kind of problem we're talking about. There is no problem when the governor is aware of his disability.

Mr. Skipton: The only time this would ever come up is when the governor would refuse to recognize his own disability.

Mr. Montgomery: This happened in one state, didn't it, where a guy was in an institution?

Mrs. Gertner: Yes, that is in the research study. It took place in Louisiana where Governor Long had a mental disability.

Mrs. Hunter: The provision of the Federal Constitution is located on pg. 10 of the research study.

Dr. Cunningham: That is the provision that was used by Eisenhower when he was ill and was incorporated into the constitution as the 25th amendment.

Mr. Skipton: My only feeling on it is that one way or the other--it must be provided for. We can require that the legislation prescribe the provision or we can spell it out in the Constitution. I don't believe it can be something that you just leave hanging in the air and have any meaning to it.

Representative Norris: The Model State Constitution, section 5.08, section E, reads, "The supreme court shall have the original, exclusive and final jurisdiction to determine absence and disability, and all questions concerning succession to the office or to its powers and duties." Now, what that means to me is that if somebody wants to file a lawsuit, that is where you file it. That doesn't mean to me that the Supreme Court can automatically start an inquiry if somebody thinks that the Governor is disabled. Now, maybe the Supreme Court ought to be the body to decide, but I don't think that's what this says. Now this is a real good provision that ought to be included at any rate, because that makes the Supreme Court the one to decide and it doesn't have to go through every court the whole way up. But if we decide that the Supreme Court should be a board of inquiry then we're going to have to write that. But this doesn't provide that.

Mr. Montgomery: If we just completely ignore absence, I realize that this is a remote thing, but what happens when a guy just doesn't function. He has the capacity, but he removes himself from the state and goes fishing or whatever, he doesn't resign--he just goofs off. The removal process would be the only mechanism you would use.

Dr. Cunningham: This Maryland provision takes care of that--a resolution of the assembly, to get it started, and a ruling by the court.

Mr. Montgomery: We just wouldn't want to prolong continuous absence.

Mr. Skipton: I would agree to the drafting of a provision giving the Supreme Court the original jurisdiction relating to the question. The question is how does it get to the Supreme Court? Can it constitute itself a Board of Inquiry, or does somebody have to take some action to get it there? Do we have any thoughts on that?

Senator Taft: There's got to be a trigger. The only kinds of cases we are talking about are cases where the governor is so physically sick that he can't really comunicate--he's been in an automobile accident and he's unconscious--or a case of mental disability--which is more likely--where he is very, very sick, but the last think he wants to do is give up being governor.

Mr. Montgomery: What about the joint resolution? Upon joint resolution of the G.A., the Court convenes itself as a Board of Inquiry--that puts you through two steps. But is there any reason why you wouldn't get a joint resolution.

Dr. Cunningham: Yes, if it becomes a political battle and you have to get a 3/5 majority.

Mr. Skipton: If it is a political battle then it is subject to all kinds of debate. After all, at that point, all kinds of other forces come into play.

Representative Norris: All you are doing by the joint resolution is calling the Supreme Court into session as a Board of Inquiry. Then it is out of the political arena.

Mr. Montgomery: What I am worrying about is if nothing happens and the situation just prolongs itself. Should we have an alternative--maybe to let the chief justice--

Mr. Skipton: If there is that much question about it, maybe they shouldn't act anyway.

Senator Applegate: Once the General Assembly gets rid of it, and it goes to the Supreme Court, well, they're not totally devoid of politics either.

Mr. Skipton: If it is agreeable with the committee, I will ask the staff to draft a provision for our consideration requiring a joint resolution of the Ohio General Assembly which would trigger the Supreme Court to convene as a Board of Inquiry...

Representative Norris: As an alternative to that provision, and I assume that that provision would have the original and exclusive jurisdiction bit in it, Sally just showed me a provision of the Illinois Constitution which does exactly that, but rather than have the Supreme Court convene as a Board of Inquiry, it provides that the legislature shall by law prescribe the way disability is to be determined. That would give us different ways to look at it.

Dr. Cunningham: Then the constitution provides the enabling act giving the supreme court the jurisdiction that you suggest, but leaving it up to the legislature to provide the procedure.

Representative Norris: That's what Illinois does. That would give us two clear-cut alternatives.

Senator Taft: Would that provide for the method by which the legislature determines disability or the method by which the Court determines disability.

Mrs. Hunter: The General Assembly shall by law specify by whom and by what procedures the ability of the Governor to serve or to resume office may be questioned and determined, and the Supreme Court shall have original and exclusive jurisdiction to review such a law and any such determination, and in the absence of such a law, shall make the determination under such rules as it may adopt. So if the legislature fails to prescribe..

Dr. Cunningham: There's your two enabling acts in your constitution.

Mr. Montgomery: What she just read says that the legislature can make the determination, and in its absence, or when it doesn't make the determination, the Supreme Court does.

Mrs. Hunter: By law, though, it prescribes the procedure. It says what the General Assembly shall do. But if it fails to make such a law, the Supreme Court could adopt rules to cover the situation.

Mr. Montgomery: I am still thinking that it is ambiguous as to which body decides whether the governor is or is not disabled.

Mrs. Hunter: The court.

Representative Norris: Under that provision, the court could, by law, prescribe that the G.A. should set up a board or a panel...

Mr. Montgomery: It makes it a little too broad; to make that determination.

Representative Norris: I'm just asking that she draft that provision along with the other one so that we can look at both.

Mr. Skipton: I would not object to the requirement that the General Assembly somehow had to go on record, because I would like to see the triggering mechanism composed of elected representatives of the people. The chance of getting troublemakers involved and what not is much greater if it is opened way up.

Senator Taft: The federal constitution refers to a majority of the executive dept. heads.

Dr. Cunningham: No, it's a majority of both houses if the notice doesn't come from the President's cabinet or the President. Then a resolution of both houses by majority vote is the trigger.

Mr. Skipton: There is really only one other question that comes to my mind and that is the matter of duration--the time that the governor is incapacitated in a four year term. Anybody concerned with this?

Representative Norris: Well, don't you just provide for that in the provision. If the Supreme Court becomes a Board of Inquiry, why then it would define the duration, the nature--you would have the same thing. It would have the jurisdiction. If the Court is going to define the disability then it should maintain the jurisdiction.

Mr. Montgomery: Then, would it, on its own, trigger the reexamination?

Dr. Cunningham: The governor could petition to be reinstated.

Mr. Skipton: As long as we understand that the question exists, we might look for a solution. The other question that comes up is how do you describe the successor. Is it agreeable with you to call it acting governor?

Senator Taft: Well, it would be where there was a temporary disability.

Mrs. Gertner: Some of the constitutions provide that say when the lt. governor takes over the office of governor, that he is acting governor for six months, at which point the office is considered vacant, and he really becomes governor.

Mr. Montgomery: In a vacancy, then, there's no possibility of reinstatement.

Mrs. Gertner: Not after a certain time, but then that is up to you to decide whether you want to put such a time limitation into the constitution. Another matter is if it is not the lt. governor who is succeeding to the office, but a member of the legislature or someone else--take Speaker of the Senate. The possibility exists that since the

Speaker of the Senate was not elected by the entire state, perhaps there should be a provision to hold a special election after a certain period during which the Speaker of the Senate held the office. Some people who have done research in this field believe that someone who has not been elected by all the people of the state should not hold the office for longer than a stated period.

Mr. Montgomery: We have to look at succession beyond the lt. governor.

Mrs. Gertner: And to decide if you want to provide for a further line of succession in the Constitution or if that is to be provided by law, after the Lt. Governor.

Mr. Skipton: Should there be a limit as to how long a person can serve as acting governor before a special election?

Representative Norris: I am not sure that that is one question. If you have an acting governor, then that assumes a temporary disability. If you have a new governor created by a vacancy, I don't see any problem there. If you decide you want to have the possibility of a special election, you could just follow the provision we have for state senator; if the vacancy has occurred in the first 18 months or whatever, why then, o.k, he's got to run. But if it occurs 25 months into the term, there's no election.

Mr. Montgomery: You wouldn't require the lt. governor to run since he has already been elected statewide, if the people elected him as lieutenant governor, then they elected him to succeed to the governor, if the governor was incapacitated, so that decision has already been made. I'm not concerned by that one so much as I am the one with the Speaker.

Representative Norris: I'm just saying that we can consider such a draft.

Mrs. Gertner: Do you want to hear the provision from the Alabama Constitution? It says, "however, should both the governor and the lt. governor be removed from office, die, or resign more than sixty days prior to the next general election at which any state officers are to be elected, both offices are to be filled at that election for the remainder of the term." That is just an example.

Mr. Skipton: I am inclined to try to short circuit many of these provisions. I believe that when an acting governor is installed, if it is the lt. governor, then there is no trouble whatsoever. If you get down farther in the line of succession, there is another question here and I believe we should consider what this further line of succession is going to be. And when you get back to that question I am inclined again not to designate any particular officials that are going to succeed. I think you are better providing the mechanism for making that choice, let's say..."the general assembly shall designate an acting governor--they can pick somebody from their own ranks, they can pick anybody... or provide for an election."

Mr. Montgomery: Is this done in any of the constitutions?

Mrs. Gertner: Having the General Assembly provide for a successor--it happens in Virginia, I believe, after a certain point in the line of succession.

Mr. Montgomery: The Model Constitution, of course, doesn't have a lt. governor.

Mrs. Hunter: That provides "as prescribed by law."

Mr. Montgomery: What do we do today? Do we go past Governor to Lt. Governor?

Mrs. Gertner: Yes. The second part of the provision, section 17 of Article III, provides that if anything should happen to the lt. governor the office would go to the Speaker of the Senate and then the Speaker of the House.

Representative Norris: I would think that the General Assembly could make the determination of a member of the same party as the Governor had been.

Mrs. Gertner: What he is talking about is again one of the problems that is brought up by those who oppose legislative succession at all, and the alternative that is proposed by the people is that other statewide elected officials would assume the office in any case where the lt. governor could not do so. This is what the new Illinois Constitution does. I am just trying to present all the possibilities.

Mrs. Hunter: This refers to <u>elected</u> officers in the Illinois Constitution.

Mr. Skipton: I think we should at this point postpone discussion of the succession order following the lt. governor until we have discussed whether these officers are to remain elected. But it is something that we will have to face at some time. This is a basic question.

Mr. Montgomery: There is more meat to it now than there used to be.

Senator Taft: Part of the theory is that he has only been elected in a part of the state, but the truth is that he has been elected by all these elected in parts of the state--so in that sense is elected by all the representatives of the people.

Mr. Skipton: And if you have that line of succession it just makes it like musical chairs. But you could have them all incapacitated at once, today.

Mr. Montgomery: The chance of losing both the governor and lt. governor at once is not impossible.

Mrs. Hunter: There is one additional question and that is concerning the governor-elect in office. This is not provided for in the constitution, and it is pointed out as a possible weakness in the Hilder Report because the attorney general has said that the term governor in the constitution does not include governor-elect, so if there were a situation where the incumbent could not hold over because of the limitation on term, what happens? In other words, there ought to be some provision for filling a vacancy if the governor-elect dies, or cannot take office.

Senator Taft: And then again, if we change the status of the lt. governor, what is the status of the lt. governor-elect.

Mrs. Hunter: In the Model, then the lt. governor-elect becomes the governor.

Representative Norris: Swear in the lt. governor...

Mr. Skipton: I'd have no difficulty accepting that; would anybody else? Draft us a provision, Sally.

Mr. Skipton: The next item we have on the agenda is this question of obsolete, unnecessary or purely statutory provisions in the Constitution in the executive article that we might delete. Bill, when you went through the Constitution did you find these? Sally, do you have a list? Let me ask one other quick question--the state budget is the third item on the agenda. What I was really trying to resolve there was whether we would treat in the executive article the governor's duties and powers in regard to the budget or whether that would be something in the financial article, and this makes some difference whether we consider this one or some other committee considers it. Do you have any quick comments on this.

Senator Applegate: I think it should be retained by the legislative and the executive.

Dr. Cunningham: It never is an executive budget. It is an executive proposed budget.

Mr. Skipton: Sally, do you have any obsolete provisions you would like to call our attention to or provisions that might well be removed?

Mrs. Hunter: Well, I might call your attention to sections 3 and 4 of Article III, which have to do with election returns. They are obsolete and at any rate what are they doing in the executive article? The elections returns ought to be deposited with the Secretary of State rather than the president of the senate. This procedure could be covered in the elections article instead of the executive article.

Representative Norris: Have we ever done that? I don't remember it ever being done.

Senator Taft: It's done; check the journal.

Mr. Montgomery: It also delays the inauguration of the governor.

Senator Taft: I am sure that it dates to a time when procedures were more difficult.

Representative Norris: Mr. Chairman, I am sure that sections 3 and 4 can be deleted; really all four says is that returns must be certified to the sect. of state, and that is really all that is necessary.

Mr. Skipton: Sally, the motion has been made. Give us a rationale for doing this at the next meeting.

Mrs. Hunter: Section 6 provides that the governor may require information in writing from the officers of the executive branch on any subject relating to the duties of their offices.

Dr. Cunningham: Does this go out if we have no so-called constitutional executive offices?

Mrs. Hunter: That really is involved in that section also. It is felt that this section is unnecessary in terms of the other powers of the Governor.

Mr. Montgomery: I certainly think if we retain statewide elected offices, the governor ought to retain this authority, now. Not that he doesn't have the authority--but this gives the recipient the duty of responding. He is the chief executive officer and they

are the members of his department.

Mr. Skipton: It is certainly a power that you don't take away very lightly, so I believe that we should consider it along with the powers of the governor.

Mr. Montgomery: There are two grants of authority in that section anyhow, really the last section of that clause, "shall see that the laws are faithfully executed," you could always drop that out.

Dr. Cunningham: Well, the answer to that is how do you do it?

Mr. Montgomery: To me that is the basic responsibility of the governor, and I would like to see it retained.

Mr. Skipton: What's the next one here?

Mrs. Hunter: There's the whole question of the militia that maybe ought to be examined with Article IX, the article on the militia. There is the immediate question of the State Seal in Section 12 we might also consider. "There shall be a seal of the state, to be kept by the governor, and used by him officially."

Mr. Skipton: I read a feature story on the state seal recently--seems it dates back to the 19th century. It's in the Revised Code. The description of the seal put into the Code was to end all changes.

Dr. Cunningham: Aren't most seals in the possession of the secretary of state?

Mrs. Gertner: I believe in Ohio it was in possession of the sec. of state until 1851 when it was put in possession of the governor. There is a research paper on it that I'll make sure you all get.

Dr. Cunningham: What was the reason for changing it?

Mrs. Gertner: I don't believe that the reason for it was given at that time.

Representative Norris: Does your paper indicate what the reasons are in law that require the use of the seal? I wonder what use of the seal is still required. We could search the Code.

Mr. Skipton: I think we should have a computer search on references to the seal.

Mr. Montgomery: I would like to see it.

Mr. Skipton: Does the current Constitution just describe the seal...does it require its use anywhere?

Mrs. Hunter: It just says there shall be a seal, kept by the governor...and used by him officially, and it shall be called The Great Seal of the State of Ohio.

Mr. Skipton: Well, from my point of view, we can just ignore it.

Representative Norris: I guess I would want to know whether there is something in the statutes which is based on its required usage.

Mr. Skipton: We will get that search and make sure about that. From the standpoint of constitutional revision, as long as there is no requirement about its usage in there, the mere fact that it exists is no reason for it to be a requirement of the Constitution. The only question I might have is whether it would delete any requirements for its use.

Dr. Cunningham: The only thing I know of would be extradition papers.

Mr. Skipton: Well, we don't want to put any such requirements in the Constitution.

Mrs. Hunter: There are a number of sections that were commented on in the 1950 Wilder Report in the chapter by Dr. Harvey Walker. Sec. 20 is probably related to section 6 so maybe we want to postpone it, but it is the section which says the officers of the executive department and the public state institutions shall...submit reports to the governor..which he shall transmit to the g.a.with his message. Dr. Walker observed that this was better left to statute and that it wasn't being followed anyway, and that there was no point to its conclusion in the Constitution. But you might want to reserve this until we get to the question about the officers.

Then, he also pointed out a number of sections, in Article XVI, which is the miscellaneous article which seemed to be related to executive questions. Sec 1--seat of the govt.--this is something the legislature would have the power to do anyway. Section 2 is the provision on public printing. This could be eliminated. Sec 3 requires the accounting of receipts and expenditures as shall be provided by law. Dr. Walker observed that this is really related to finance and that the legislature can provide for this anyway. Is there any feeling on whether that should be removed to finance?

Representative Norris: If that were not there, the General Assembly could still require it done.

Mrs. Hunter: Sec. 4 relates that no citizen shall be elected or appointed to any office in the state unless he shall have the qualifications of an elector, which would require residence...a residence requirement even to be appointed to office. Dr. Walker commented that the section seemed misplaced and also questioned extending the residence requirements to appointing somebody.

Mr. Montgomery: That is really limiting. We've had that twice, in Gilligan and O'Neill administrations. Even 30 days is pretty bad when you want him right now. When you think about notice being given to a previous employer and this stuff, he could very well not have access to someone's talents for two months. I think this should be eliminated except for elected offices.

Mr. Skipton: Any others, Sally?

Mrs. Hunter: The provision [illegible] duelists holding office.

Mr. Skipton: We can do without that.

Mrs. Hunter: Section 8 says there may be established in the secretary of state's office a bureau of statistics, and so forth. This again the general assembly would have the power to create withoutthe provision. I think that is all for the time being. There is this question on the militia, but I think that we should wait and consider it all at the same time.

Mr. Skipton: Sally, one other question I wish to raise. Of all the questions that we have outlined today, which would you like to see us consider at the October meeting?

Mr. Montgomery: We got into succession the heaviest, didn't we?

Dr. Cunningham: It seems succession and term of office because there have been discussions about the number of terms a governor can serve.

Mr. Skipton: I will do that and also attempt to get one or two of the elected state officials in to present their case.

The next meeting of the committee will be held on October 19th at 9:30 a.m., the morning of the Commission meeting.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
October 19, 1972

Summary of Meeting

A meeting of the Legislative-Executive Committee was held in House Committee Room 11 on October 19, 1972 at 9:30 a.m. Attending the meeting were Chairman Skipton, Senator Applegate, Representative Norris, Messrs. Montgomery and Shocknessy, and Dr. Cunningham. Chairman Skipton told the Committee that the major purpose of the meeting was to hear from Mrs. Donahey, the Treasurer of State at 10:00 and the Attorney General, William J. Brown, at 10:30.

Mr. Skipton: We specifically asked them to give reasons and their views of how their office should be treated in the constitution. Our assumption is of course that they will recommend the continuance of their office as a constitutional elected statewide office. We're hoping that we will get some ideas that will allow us to fairly understand and treat with their views on these offices. In November we hope to hear the Auditor and the Secretary of State on the subject of their constitutional offices, and in December, we will probably ask the Governor and the Lt. Governor to come and speak. In January, we will start to make recommendations to the Commission, and my feeling is that the committee should be able to complete its recommendations on the executive office no later than the March meeting. In other words, we should complete the assignment that has been given to us by that time.

Mrs. Donahey could not attend the meeting, and sent Mr. Brothers, and her deputy, Mr. Wayne Maloon as representatives of the office of Treasurer of State to express her views.

Mr. Brothers: My name is Merrill Brothers. I am Counsel for Mrs. Gertrude W. Donahey, Treasurer of State, and with me is Mr. Wayne Maloon, the deputy treasurer of the state of Ohio.

Mr. Skipton introduced the committee.

Mr. Brothers: I understand that we are here today in response to a request of the Legislative-Executive Committee of the Ohio Constitutional Revision Commission, and a letter sent to us by Mr. John A. Skipton, its chairman, asking the Treasurer of the State of Ohio to express her views with regard to the possibility of constitutional revision outlining in more detail the duties and responsibilities of the treasurer's office and as the duties relate to the other executive offices. I am here to report to you that Mrs. Donahey is pleased to cooperate with you in anyway that we can. She does have some definite viewpoints with regard to a constitutional revision as pointed out in the letter for your use here. She feels that the position of Treasurer of the State of Ohio should be an elected office as it is at the present time. She feels that any constitutional revision that clearly sets forth the relationship of the treasurer's office with the auditor's office, for example, where we have a day to day money check as it is, is good. We now handle over forty different accounts under the statutes and the legislature did pin this down a little bit more in 1968 with the enactment of Section 4745.02 which is a coverall section to make sure that license fees are paid

to the treasurer. When the treasurer receives these funds, she notifies the agencies of the licenses, and licenses can be issued or renewed. Mrs. Donahey feels that the checks and balances that are presented by the work between the treasurer's office and the auditor's office is a good thing that is an example of good government. It is not her intention to broaden the treasurer's duties or responsibilities, but that a more clear, delineated statement of the duties and responsibilities would add to the credit of the state of Ohio, and provide the people of the state of Ohio with a better way of knowing how the treasurer takes care of the money of the govt., which is the purpose of the office. Anytime you have a clear cut standard to operate an office you have a good basis for efficiency. Now we have at the end of this letter submitted for your review language which could be used as a basis for any change that might be made in the Constitution. We also believe that there should not be any constitutional revision having to do with the treasurer's office unless there would also be a delineation of the auditor's office, the atty. gen., etc.

Dr. Cunningham: Why should the office be elective, rather than maintaining the responsibility of accounting by a post-audit?

Mr. Brothers: The two most important things in govt. are the rights of people and what's happening to their money. We don't think there's anything wrong with the people selecting the custodian of their money and having the right to point to that custodian when they don't think it's right.

Dr. Cunningham: If they have the time, the place and the circumstance, or the abilities to know all the details--but the expertise necessary for that is usually not in the competence of the so-called masses--they have to rely on somebody with confidence.

Mr. Brothers: Well, we are at loggerheads, doctor, but I'll give you an example. I was a candidate for the supreme court on three different occasions and they rejected me three different times--now I don't want anybody telling me that the people don't know what they are doing.

Dr. Cunningham: Well, I'm not saying that the people don't know what they are doing--that is in the area in which they are competent, but I don't think the people have competence in every area. For instance, I wouldn't go out and on the corner of High St. get the first person that came by the carve out my liver if I had a liver malady. I'd look for the very best internal medicine man and the very best surgeon in town. And that's exactly what I mean. We have a tendency to overestimate the mystique of the masses and pass the buck. The second question is, why can't the legislature in carrying out the legislative mandate have the representatives of the people delineate your problem.

Mr. Brothers: Oh, they can, doctor, and have.

Dr. Cunningham: Exactly--why burden down the Constitution forevermore with that kind of matter?

Mr. Brothers: The only thing that comes to mind is this--the governor of the state seems to think that the atty. gen. and the auditor and the treasurer are depts. of the governor's office. Anything that can be done to set forth that the treasurer's office is elected and is responsible for certain things aside and apart from all other departments of the government would be desirable. Now you understand me, doctor, I don't

care if they never change what's in the constitution right now. I am here only to say that our attitude is that we are willing to cooperate and if you are going to change it, change it good. Because this is very difficult to put in language as you said--the step by step procedures--but that is not what's indicated here.

Dr. Cunningham: I think the legislators, chosen by the people, have more time and competence to do that than make that decision in terms of the people themselves.

Mr. Brothers: They've got some forty sections here (in the revised code) where it is actually done. All of the different accounts and things that we handle and how we handle them have been set up by thelegislature. I have a list of them.

Dr. Cunningham: You have said two things--first that theoffice be elective,and second, that it be completely delineated in the document.

Mr. Brothers: Oh, no, if you will read the language that I have prepared there for you as a starter, you will find that it simply says that the treasurer would be the custodian of all state monies and all income from any source from anyplace supported in whole or in part by govt. funds, to be accounted for on a daily basis and to be checked out on a daily basis with the auditor's office. It is not intended that there should be a constitutional change, at least from us, that would spell out each and every move that we make, but it would clear up in some areas some of the things that go in these rotary funds and other functions in the state where people are writing and then honoring their own vouchers.

Rep. Norris: Mr. Chairman, just a couple of questions. Merrill, about the language that you propose--just your general concept. I assume you're advocating a change of bringing the collection of the state income tax back into the treasurer's office. Is that correct?

Mr. Brothers: Well, that set-up is actually a play on words, really. The checks are made out to Mrs. Donahey, the treasurer. The taxation dept. collects then and sends them over to us. The only complaint that we registered at that time was that the state was going to lose money this way because of the time lag between the tax commissioner's people get the money and when we get it, and that's true, but now, I don't care to go into it that much, but we have the same amount of work to do under the present arrangements, except that instead of opening the mail, as we do with all the others, getting the money to the bank the same day, or the checks to the bank the same day, and sending the paperwork to the agency involved, now the paperwork goes to the tax commissioner's office and we don't get it until they're ready to send it.

Rep. Norris. So you really don't see that this would change that procedure.

Mr. Brothers: No, not this, because you see the treasurer is being paid. The check has to be made out to her.

Rep. Norris: You mentioned being custodian for all agencies--two examples and I'd like you to comment on them. First state universities--

Mr. Brothers: This would change the situation with the state universities.

Rep. Norris: You would be the custodian of funds for the state universities.

Mr. Brothers: They would have to do just like every other agency and dept. of govt. that operates on state funds. I don't feel that there's anything holy about the universities--and I think that they should be more than willing to provide the same standards as all the other depts. of govt. and particularly with regard to those rotary funds.

Rep. Norris: Ohio, of course, has a system of private colleges. At the present time I don't think of examples of direct support although we certainly have examples of indirect support, tuition grants to students. But let's assume that as may very well be possible, that the state makes a direct grant to them, but doesn't really control them anyway. Now would the fact that the state is making a direct grant to them, and in other words, supporting them in part, require that the treasurer becomes the custodian of all the funds.

Mr. Brothers: Frankly, I didn't think of this situation. It would be my off-hand opinion that that would not be necessary, particularly if the grants sent to students because there's a difference between the operation of the university--the cost of maintaining it. Now on the grant, directly to the school, you might have to switch some commas around for that, but I didn't think of the situation--I didn't know of it, in fact.

Rep. Norris: The dividing line would be essentially one of control--the state would have to have control over the agency I assume, before you would feel that you ought to manage its finance affairs.

Mr. Brothers: That's correct.

Mr. Montgomery: I would just like to know if you could tell us in how many states the treasurer is elected.

Mr. Brothers: I am sorry that I don't have that complete information with me, but I can bring it to you. We have made a run down on all the states--it was in connection with the deposit of money in state banks.

Mr. Shocknessy: The council of state governments would have that information.

Mrs. Gertner: We've had that information before but I do not have that research paper with me--on State Elected Officials.

Rep. Norris: Along the same lines as universities and colleges, how about school districts? Because of course many of our public school districts receive more than half their funds from the state.

Mr. Brothers: Again I did not take that into consideration. We intend to deal with income from places that belong to and are supported by the state. There's nothing holy about this language. It's just a starter for you, if you want it at all.

Mr. Skipton: It's this same old problem--defining your terms--what is an agency in the state of Ohio?

Mr. Montgomery: The rationale for elected officials statewide, being described at least somewhat in general, in the constitution makes some sense. If it isn't going to be elected, if it is going to be appointed by the governor, then it isn't necessary. But if we leave things like they are it probably would avoid some conflict--not only in the treasurer's office but in the other elected offices as well. The constitution is perfectly silent on duties.

Mr. Brothers: It's my personal opinion that the treasurer could continue to operate under the constitution as it now exists.

Mr. Montgomery: The fact that no duties are described, though--you're telling us does create some conflicts.

Mr. Brothers: It could and probably does. If the constitution said exactly how things are to be done, if she were the custodian of all the funds, as I have in here, it would be a good guide for the legislature on any bills that they have. We would know when we get around to the paying end of this exactly what would happen. It wouldn't hurt a thing--absolutely nothing.

Dr. Cunningham: From a fiscal standpoint, why couldn't the director of finance do exactly what the treasurer does--the same thing, with a post-audit. I don't want to involve the auditor in our discussion because we're talking about the treasurer which really is a comptroller function.

Mr. Brothers: Just what are you talking about on a post-audit, doctor?

Dr. Cunningham: What I am saying is what does the treasurer do, or as you propose the treasurer to do, as an elected officer, that a director of finance could not do as an administrative official, with an appropriate post-audit? That I don't think you have sustained as a matter of your thesis.

Mr. Brothers: Well, the answer to your question is you could turn the whole thing over to Ohio National Bank if you wanted to. The question is who do you want to handle it? It's going to be handled in much the same way, the question is who do you want to handle it. Do you want the governor to appoint somebody there or do you want the people to have somebody with responsibility to them?

Dr. Cunningham: Not at all. Not if you put the responsibility in a post-audit. And the post-audit has the responsibility, and you define it.

Mr. Brothers: You would have an office of post-auditor--I don't understand.

Dr. Cunningham: A post-auditor who post-audits all the accounts. The money would come in--be appropriated, and then disbursed--that's the function of the post-auditor.

Mr. Brothers: Who would write the checks under your arrangement?

Dr. Cunningham: The disbursing officer of the dept. of finance.

Mr. Brothers: Then you don't want an auditor either.

Dr. Cunningham: A pre-auditor, yes, to be sure that the money is being disbursed according to the budget or according to the law as it is interpreted. You don't need a treasurer to interpret the law--your attorney general is constituted for that.

Mr. Brothers: Well, I see what you are getting at. What you would have then would be somebody under the governor who would write the audit vouchers for the expenditure of money and the finance director would see to it that they are paid, which would replace an independent agency--the auditor of the state--writing the checks upon the completion of the proper voucher and the treasurer of state honoring what is presented the same.

Dr. Cunningham: You'd better have proper vouchers there because if he didn't, the post auditor would certainly jump down his throat come post-audit time, which would be annually, or whatever was required.

Mr. Brothers: You would then be creating one office and dropping two. It's a question who do you want to handle your money?

Dr. Cunningham: But you're talking about pinpointing responsibility, and that's exactly what I'm doing. Also, you would hold the governor responsible if something went haywire with the system, which you can't do now because he passes the buck to the elected officers.

Mr. Brothers: We don't have that problem because they have to present a proper voucher for expenditures out of a proper fund to the auditor before a check is even written.

Dr. Cunningham: Then why elect him?

Mr. Brothers: Then why not?

Dr. Cunningham: Appoint him and let him go on about his business, on the basis of competence as an accountant, as a lawyer, as a budgeter, on the basis of his administrative expertise and not as a "politician", republican or democrat. What difference does it make?

Mr. Brothers: Let me say this to you. We're a 5½ billion dollar operation in the treasurer's office and daily we come out even with the auditor's office. You find any 5½ billion dollar operation that is in private corporations and they won't account for their money as well as we do for ours.

Dr. Cunningham: Even a bank teller has to account for every penny that is put into his cash box in the a.m.

Mr. Brothers: I'm not really at odds with you, because I just wanted to make sure what you were talking about. I think it boils down to who do you want to do it.

Dr. Cunningham: I'm not opposed to electing anybody, but I am opposed to the principle of dispersing of responsibility and giving bedsheet ballots to the masses like we are doing at our American primaries in this state and in every other state at a time when people neither have the time or the ability to find out who they are or how competent

they've been in their office. They can't even, in the final analysis, rely on the label Republican or Democrat.

Mr. Brothers: But those are the people we work for and this is their government and they have a right whether they are ignorant like you say they are or not to vote for who they want to handle their money. There never will be a day in this country when the people aren't smarter than the politicians or the govt. officials, and I don't care where you go to get them. Some people would like to have it that only C.P.A.'s could be candidates for auditor and only top-notch executives. We're supposed to be a government from the people--I think that the people have done a great job running the govt. We need specialists in this day like we need a hole in the head. We need somebody that can communicate with the people, and if maybe they don't know what is going on, if they ask, we ought to be able to tell them. And I don't think kindly of people that know all of the intricacies of some high level profession and don't know how to tie their necktie. This is a people corporation, not a specialist corporation, and it's done a fine job.

Mr. Shocknessy: We have to balance efficiency in government and efficiency as modified by our concept of democracy--govt. coming up from the people. And we can theorize about it all we like--but eventually we will have to take a position, but this is related to philosophy of which is better govt. I don't ever use the word "masses," but anyhow, that's what the confrontation on the table is I think.

Mr. Brothers: We're not selling constitutional changes--neither are we bucking constitutional changes--but we would take the position that in government throughout the century it's been good govt. to have checks and balances. If the Constitution is to be changed, set up good standards that we can live by and that the legislature can use as a guide in their work.

Mr. Shocknessy: Well, I think all we can do is just about what you said: exercise our best judgment in making our recommendations, and I think that maybe this commission does have a responsibility to choose a philosophical concept about what is intended in our system. I think we have to pay respect to the tradition of our system as it has evolved over the centuries. That's all I have to say.

Mr. Skipton: Are there any other questions? We appreciate your coming, Mr. Brothers.

Mr. Brothers: I appreciate the opportunity to be here.

Mr. Montgomery: Can we get the information about how many treasurers are elected?

Mrs. Hunter: It is in one of the studies and I'll try to find out.

Mr. Skipton: The attorney general has arrived, and we will introduce him at this time.

Mr. Brown: I understand the reason that we are assembled here today is to discuss the problem whether the attorney general should be elected or appointed. The atty. general's office is much more than meets the eye--as most people who are familiar with govt. can tell you. Number 1, we not only represent the governor but we represent the legislature; we represent all the officials in the executive side of the govt. We also repre-

sent the supreme court. But, because of the way the courts are now interpreting the Constitution, there is also the common law power of the atty. general which makes the atty. general the atty. for the people. And he certainly cannot be answerable to one person. We also represent in a functional manner the various facets of local, county, and city govt., because of our opinions that we must write for the various political subdivisions that may be requested by a local county prosecutor. We also have much authority in the area of investigative work and are also termed as the watchdogs for state govt. As of right now we have 42 attorneys general, and 8 that are appointed in various manners. Some are appointed by the supreme court. Pennsylvania's is appointed by the Governor. Some are appointed by the legislature. Now whoever does the appointing is of course going to appoint one of their own philosophy, and I think that the atty. general, because of the functions that he plays in govt., must have his own independent philosophy--he can't be answerable to any one facet of govt. He must be answerable to the people of the state of Ohio.

Dr. Cunningham: You use the term responsibility in two senses when you say you would then be responsible to the governor and now you are responsible to the people. Because afterall the ultimate responsibility is to the people even if appointed. You presuppose that an atty. general has discretion, like the legislature has, when as a matter of fact there is very little discretion involved. You simply enforce the law as it is written.

Mr. Brown: I disagree. Number 1, there are quite a few different interpretations of the law. Number 2, the philosophy of the atty. general's office is geared to the man who is there. Of course it would be democrat or republican according to the Governor if he were appointed. Certainly Governor Gilligan would never have appointed Bill Saxbe. The trend is getting away from appointing the atty. general. I can't give you the exact dates, but many, many years ago, the atty. general was appointed in nearly all the states, and it is now going the other way because of the various powers he has and the use of the atty. general, which has caused the people to say we want this fellow elected so that he doesn't have to answer to anyone but the people. I am my own man, and I think every atty. general that has been in this office has been his own man. I answer only to the people, and if the governor is wrong or the secretary of state is wrong, or the treasurer is wrong, I tell them.

Dr. Cunningham: Please give me an example of one thing that you do that is purely discretionary that is not beyond the discretion of an administrative officer according to statutory or constitutional law.

Mr. Brown: I will give you in one area such as environment. We have what we call a Water Pollution-Air Pollution Control Board, but we have used the common law power of the attorney general to bring actions not only for the betterment of the environment but also in the area of consumer problems--we are the people that are doing the best we possibly could in the area of consumer law to assist the consumer in getting the best for his dollar. In the area of law enforcement, state govt. hasn't been very responsive in the area of drug investigation. We have been fairly responsive in the area of rehabilitation and education, but now, due to the atty. general's office, we have fielded a crew of undercover agents to assist local law enforcement. Now there's no constitutional basis for this--this comes from here.

Dr. Cunningham: No, it comes from the law; enforcing the law as it is written.

Mr. Shocknessy: I want to make a rather general comment about the attorney general. Senator Bricker has told me that he considers his service as atty. general the most satisfying of any of his public service. Now I disagree that the office of atty. general does not provide great scope in the exercise of judgment. Judgment does control the exercise of law as enunciated in the Constitution. The development of the law in this country has been the development of law as judgment was exercised and the law interpreted. Our Constitution wouldn't have survived unless it had been subject to changes of interpretation and wisdom derived from experience and judgment. Now with respect to what the atty. general does, the atty. general of Ohio is the supreme court of Ohio until the court speaks. The atty. general of Ohio is called upon to give opinions and those opinions are binding and they are authoritative and they are pedestals upon which law proceeds until a court says otherwise. Now I think those judgments are the free exercise of not merely the knowledge but the wisdom and experience of the atty. general. I for one would hesitate to subject the atty. general to the control of the executive. Another way that you could say it--I think the chief executive needs independent advice, he needs independent advice from someone who is in no respect responsible to him, someone who when he walks into the door of the executive office, the governor knows, is going to tell him what he believes, not what the governor wants to hear. And I think only an independent officer can do that. The chief legal officer of any organization and the chief auditor both should be independent of the executive. The executive has every responsibility and should get independent advice from his legal officers.

Rep. Norris: We've only really talked about the atty. general's status as a constitutional officer. Do you have any opinion as to whether or not the provision in the Constitution dealing with the atty. general ought to be expanded in any regard?--so far as further delineating the duties of your office, or is that something that could be done by the general assembly? Are you satisfied with what's in there, I guess, is what I'm saying or do you have further suggestions?

Mr. Brown: I will be happy to supply this commission with that answer. I am not prepared to shoot from the hip today. It has been our policy because of mistakes in the past, to think about such things. I could probably rattle off thirty things right now, and I'd go home and tomorrow morning, I would say I shouldn't have said all that. If you would like for our office to prepare suggestions for this commission as to the scope of what the atty general's office does or should do--if you would want that--we would be glad to assist you in anyway possible.

Mr. Skipton: I don't believe that we're asking you for that--it's if you think that would be desirable and what you think would be desirable.

Rep. Norris: I'm thinking just about constitutional area--not from scope from a legislative standpoint, and maybe all you'll tell us is that you are satisfied with what is in there.

Mr. Brown: I'll take that back to my office, and we'll certainly discuss it, and we will give you an answer, but as of right now, I don't believe that it would be best to give you an answer.

Mr. Montgomery: Just to amplify that point, the authority would come from three

possible sources--the Constitution, which is silent; and the statutes; and the third is this common law power which intrigues me. What is the scope of this common law power?

Mr. Brown: This power is not one that has been defined completely yet. You'd have to pull from the statutory powers molded with the common law powers, and go from there. There are various areas. We are now pondering research in the area of civil rights.

Mr. Montgomery: It would seem to me that any public official could take on to himself common law powers which are as Mr. Shocknessy said, an extension of judgment, and you can develop your own private police force.

Mr. Brown: No, that's not true. There is no statutory authority for a direct power. But this is an area of what we would call judgment--the legislature does control the pursestrings, but it is up to the elected official and his philosophy to where he would like to allocate his resources which were given to him by the legislature. The legislature does not specify in which directions the grant they authorize should go--the legislature authorizes a block of money and then it is up to the individual office holder and his philosophy to decide where the money will go--he allocates the funds where he sees there are various areas he would like to see worked on. Prior to July 14th we were using licensing laws as consumer protection laws--we felt a company was not doing service to the people. Now we have a better law. In conflict of interest, Ohio has some moderate legislation, and we again used the antitrust theory under the common law to file suit against a trustee down at Ohio University.

Mr. Shocknessy: The atty. general is the legal officer of the state, and he isn't a police officer, except as police authority may be conferred on him. And these investigators are ancillary to your office. But we get a little far afield when we talk about common law power in these offices. I think these offices are limited to what the Constitution and the code say. I don't know. I can't recall anyplace where that code gives common law authority to a public official. What we concern ourselves with is the integrity of the office as it is defined in the Constitution and in the code and what other powers or limitations this commission may want to recommend with respect to the office in the Constitution.

Dr. Cunningham: My point could simply be summed up in a few words. The atty. general's an adviser, not a judicial officer as judicial officers are defined. He uses discretion as everyone uses discretion. But he isn't using the kind of discretion I'm talking about when you talk about the discretion of an elected officer. He doesn't have it.

Mr. Shocknessy: He is a quasi-judicial officer.

Mr. Skipton: Where do the powers to prosecute come from in the atty. general's office?

Mr. Brown: These are statutory powers. To prosecute in the criminal areas with the exception of conspiracy to defraud the state, which has never been used, they're limited to where the governor would ask us to intervene.

Mr. Montgomery: You never bring a direct criminal action, do you?

Mr. Brown: Yes, we do, but the power to do that is very limited.

Mr. Skipton: For example, you mentioned this one firm that you brought under licensing securities, did you really initiate that or did the licensing dept. request you to?

Mr. Brown: The licensing dept., the securities division, let us use their name.

Mr. Skipton: I get your point. Any other questions for Mr. Brown?

Mr. Brown: Thank you very much for listening. Feel free to contact my office if you need more help, individually or as a commission.

Mr. Skipton: You might be interested in our schedule, Mr. Brown. Our schedule calls for this committee to complete its research function probably during December, and in January, the committee will probably begin to act on specific recommendations for changes, so if there is any additional suggestions that you wish to make particularly in terms of revamping language or giving this committee your rationale for your point of view, we would appreciate having them just as soon after the first of January as possible.

Dr. Cunningham: One more question for the atty. general. Would you personally object to being chosen by the supreme court of the state, as atty. general of the state, and either you or they designate from a competent list of lawyers--your deputies?

Mr. Brown: Do you mean that the supreme court would appoint my deputies?

Dr. Cunningham: Yes, and yourself.

Mr. Brown: Yes, I would. Because I am not answerable to the supreme court. I am answerable to the people of the state of Ohio. If I were appointed by the supreme court then I would be reflecting the supreme court's philosophy.

Mr. Shocknessy: I don't think the judiciary ought to appoint the executive dept. officers. I offer that as response. I think it would be a violation of the principle of separation of powers.

Mr. Skipton: Thanks to the atty. general for coming. I think we can continue our discussion without him. This is interesting. Sally is going to do some research on the common law powers of the atty. general.

Dr. Cunningham: Preferably the supreme court should enunciate it as within the jurisdiction of the state, as the common law principle.

Mr. Skipton: Anybody like to elaborate a little in reaction to the presentations we had this a.m.

Dr. Cunningham: Well, I don't think the atty. general supported his thesis, that the atty. general has to be elected for some mystical reasons.

Mr. Montgomery: Whether or not we go the full step and make them appointive officers, the Constitution should not be silent on their duties. It's a matter of how far you

want to go. But this business of saying nothing begs this philosophy of common law and such, and we're going to create super powers in govt. where none were ever intended.

Mr. Skipton: I would agree to that. I don't want to delineate all their duties--but this relationship. Sally, do you think you can draft a statement of their views from what we've heard?

Mr. Montgomery: This thing about using licensing authority--it's dangerous. He was taking it upon himself for initial criminal jurisdiction.

Mr. Skipton: What about the legislature conferring duties on the atty. general as recently?

Rep. Norris: Well, I think a lot of that is the result of there being no where else to put it. We had a dept. of public safety bill, but it did not pass and there is no place within the executive branch for some law enforcement function. Many of the functions that I have had in legislation delegating functions to the atty. general are a result of having no where else to put them. All those investigatory powers in the organized crime control act I would have placed in a dept. of public safety.

Mr. Skipton: We're talking about philosophy here. I feel that there should be more than one elected state officer. Afterall, we've used our elective system here as proving grounds for many candidates. I'd like to have a few choices before you put the guy in a really powerful spot.

Rep. Norris: Well, Doug and I have been here together at least two times--when you have a very strong governor with control of both house of the g.a. and every elected official of the same party and there were a lot of things that didn't happen that would have happened in my opinion if those state officials were appointed offices, even though they were in the same party.

Mr. Montgomery: If we could get the ministerial people out and focus on the policy making people.

Rep. Norris: I have some flexibility about the office of treasurer.

Dr. Cunningham: Historically, the atty. general has been elected, without rhyme or reason.

Mr. Skipton: If you make him an appointive officer, the governor could appoint his own successor when he was aware that he was incompetent.

Mr. Montgomery: There are some parallels that you can draw to the federal govt. but the state system is so involved that you can't draw any. Many of the depts. are taking on legal counsel in addition to the attorney general's office so maybe this isn't too bad. Maybe we should make him a quasi-enforcement officer and allow legal advice to come from legal counsel. By that device we'd be taking away his function as an advisor to state government.

Dr. Cunningham: Well, we shouldn't put any limit on the number of executive departments because you can't anticipate need.

Mr. Skipton: I believe that we probably will get into this allocation function. The next meeting will be on November 16, 1972, at 9:30 a.m. in House Committee Room 11, and we'll hope to hear from the Auditor and the Secretary of State.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
November 16, 1972

Summary of Meeting

A meeting of the Legislative-Executive Committee was held on November 16, 1972 in House Committee Room 11 at 9:30 a.m. Attending were Chairman Skipton and Mr. Montgomery. Mrs. Hunter and Mrs. Gertner of the staff were also present. Present to make remarks on statewide constitutional elected offices were Mr. George Farris and Mr. James Marsh, representing the office of the Secretary of State, and the Honorable Joseph T. Ferguson, Auditor of State.

Mr. Skipton asked Mr. Farris to present his opinions on the office of Secretary of State.

Mr. Farris: Most of the secretaries of state in the U.S. are elected, although quite a number of them are appointed. I guess the prime one where they are appointed is in N.Y., appointed by the Governor. I was very much surprised to find the variance in duties of the sec. of state. Most do conduct the filing of corporations as we do here in Ohio, although a large number do not. In many cases there is a special commission. There was a time when most of the secretary of states sold license plates. The gov. took this away from the sec. of state in Ohio because the licensing section was viewed as being the basis of a very strong political organization, and it does have those possibilities--it's almost like the probate judge and his appointment of appraisers. Many sec. of states still sell license plates--many of them do not. The operation of election laws--all secretarys of state in the U.S. as far as I know have some function in connection with the election laws--although, for instance in California, the secretary of state is a statistician and that is about all. Elections are run by a commission in districts. About the only thing that the secretary of state in California does is to get together the final totals.

I think the Sec. of State should be an elected official. I think that in the process of an overcrowded ballot--which is the thing that bothers everybody--the very few number of state officials which we present to the populace is not a large contributing factor even to the voter. But I am of the opinion that we ought to have someplace in which a man grows in this political system and one way of doing that is to have other political offices than that of the governor. I was sorry to see Congress abolish having a congressman-at-large. There ought to be someplace where a bright young man who we don't know what he is going to be like should be able to run a statewide campaign. I'm sorry that it is now impossible to do so. I remember a statement of Fred Johnson's--which I consider classic--he said if we could have for governor the man we nominated, we'd be all right--but something happens to him by the time we elect him governor. I know what you're like as an individual, I don't know what you're going to be like if you suddenly get elected attorney general. I have to watch and I can't tell until I see. I would prefer that our US Senators and our governors be people who have worked their way through other elected offices--I would feel much more at ease when I retire with my state and my govt. in the hands of people who have gone through it, and for this reason I am primarily against the process of combining these offices. It does give us independence.

If the secretary of state by any constitutional amendment should be made an appointive officer, then some move should be made to move the elections under some other form of control. I do not believe that the present control that the secretary of state has over elections should be added to the additional powers of the governor. I think if there was any idea of combining the offices then the whole election operation ought to be moved to some form of commission-some form of an independent nature, subject to control, possibly by the governor. You can make some tremendous errors in the moving of responsibility. I don't know if you remember, but the Auditor of Illinois--if they hadn't caught him, he probably would have bankrupted the state. He was able to do so because Illinois had a system of govt. which didn't have proper checks and balances. As you remember, he was not only Auditor but had complete control of the charitable trust fund--he was in fact the supt of banks, and he was the Auditor of his own position. Somebody ought to be in an independent position, to check on the powers of another.

Now, functions of the secretary of state, basically. In the constitution at the present time, outside of this provision about statistics and the fact that the sec. of state is on the apportionment board, which they just happened to throw in, basically our office is like the rest of them, outside of the governor--the constitution doesn't tell you anything. As a result, these officers, such as the sec. of state, and even the treasurer, are subject to politics, and I have a feeling that maybe some rather broad scope of control on the legislature should be made in condition to the sec. of state's office responsibility.

I'll give you some examples where I think we have some things badly located. Basically, we are a licensing agency. If we are going to continue to be a licensing agency, as we were traditionally, we should have all licensing powers. Or if they are going to put some in the dept. of commerce, they should put it all there. Because all the people who write to us from out of state think that we are the licensing agency. I think that the secretary of state ought to control those things which are statistical in nature and I think this is the way it is. We keep the original constitution; we keep as you know the enrolled and the engrossed bills, and we are responsible for certifying laws passed by the legislature. This is, I think, secretarial in nature--we do keep records of the commissions issued by the governor--and we keep records of the lobbyists, and I think this is secretarial in nature. But I think that all the things which are secretarial in nature and are being done around the state probably should be consolidated into the secretary of state's office along this line. One very good bill which we got passed asked for a lot of money and we couldn't get the appropriations, so we had to get the governor to turn it down--was to let us be the administrative officer for professional corporations--doctors, dentists, lawyers--because then basically we would be the record keeper, so then you could write us, is the man a doctor or a dentist--I think all those things where you are requiring certified copies of official documents, a person authorized to certify this man is a duly qualified or elected person, or duly appointed by the governor, or any type of organization or anything which requires state approval--possibly should be assigned to the sec. of state's office as the basic idea. Now corporations--a dozen different things on it. Should you combine franchises and tax division? Franchises and corporations work pretty close together. Another element in the corporation law is the division of securities. A lawyer finds out in the basic idea of getting a corporation started, we're going to run him through three places, basically, we have duplicate lists and duplicate cards. An economy would possibly be a consolidation of the three, with the basic function someplace but a record keeping centralization. Did you ever try to get a dissolution--we'll run you all over this town, because there is no central set-up, and releases are required to be made. This is my general idea of this.

Mr. Montgomery: Do you think that the Sec. of State's office should be elaborated on in the Constitution itself?

Mr. Farris: I think there should be some general constitutional areas so if at some future time the legislature puts something in a ridiculous spot, you possibly would have some idea of saying that this is unconstitutional. Record keeping facilities, that is what I am talking about. You see, it's like being the director of commerce. If the Governor wants to, the director of commerce is the most powerful man in the Governor's cabinet. But if the governor doesn't want him, he doesn't have anything to do. You just take all these agencies under the dep.t of commerce and have them report to the Governor's office. But basically we have in mind that the director of commerce is the most powerful man the governor has to appoint, with all these agencies under him. But if the governor doesn't desire to have it such a way, he can be the biggest appointee that has a secretary and that's all and that is the whole business. All I am saying is that knowing the whims of the legislature, there ought to be some way of referring to this record keeping, the keeper of the official records.

Mr. Montgomery: One thing is that at the local level elections are bipartisan--this is an apparent inconsistency.

Mr. Farris: It's bipartisan all the way. You just have one man--how can you bipartisan one man--you're stuck on this. Actually, we apparently gave up on the idea of finding a non-partisan person to conduct elections--there isn't any such animal, so we gave up, and said, basically, we have two parties, and everybody fights. I don't know what would happen if we got five parties and there's a possibility that one of these days we will. Luckily, we're back to two, but suppose we really had three strong parties, boards of elections themselves would be very difficult.

Mr. Marsh: I think our elections system has in it sufficient checks and balances that nobody can really steal elections now, and that's probably the way it should be. Just to elaborate a little bit on what George said, I think the sec. of state's position is that his office should be elective. If you decide to amend theconstitution to specify the duties of the office, we think that it should be done in a general way. We have no objections, we think it would be helpful--but if you leave that area alone, we wouldn't seriously quarrel with that either. I think that just about sums up our position.

Mr. Farris: I remember when Gertrude Donahey became Treasurer--the question was just what does the treasurer do? According to the constitution, he's treasurer--that's all. They just left it blank. Now obviously when we first started, he just started being treasurer, I guess, and we built it up with sections along the line. You see, the Auditor has some things relating to the Sec. of State's office. You try to run down deeds on state-owned lands, and the average lawyer thinks it's in the sec. of state's office--which is where it should be. I don't mean the functioning of it, but if the state owns lands, and these are the records--then where should it be kept--in the sec. of state's office. This has traditionally been in the auditor's office, and I have no objection to it, but it isn't logical.

Mr. Montgomery: Aside from the constitutional revision aspect of this, aren't you suggesting that it might be a good idea to have a little Hoover commission in this state?

Mr. Farris: It probably would be good if we acted on the results at one time. But the problem with the thing is that a few things are changed and then nothing happens.

Mr. Skipton: Would you draft such a provision covering this record-keeping?

Mr. Farris: Yes. And there are other things too. John, you brought up that the Bureau of Vital Statistics really ought to be under the sec. of state. I agree with you that eventually statistics ought to be centrally located. At the present time, we do have you know, the rules and regulations of all agencies. We did pass a law because rules and regulations were in such a bad state that we did get some legislation enacted by which, if you as a lawyer, want a copy of a certified rule, I can give you the rule and it's got a standard form.

Mr. Montgomery: Do you have any function as to court reports?

Mr. Farris: No function as to court reports at all.

Mr. Marsh: You'll find various things interspersed in the code. Anytime the g.a. gets an idea to do something they may give the sec. of state some responsibility or give the responsibility to some agency to report to the secretary of state.

Mr. Skipton: Does the sec. of state have what you might call enforcement powers in relation to any of these records?

Mr. Farris: Yes, we have a basic statute which says that we have the power through the atty. general to make people furnish us with the proper statistics--township trustees and so forth. We've never had to actually do it--there's been a number of times that we have threatened it--in order to get it, but we really have the power to contact any agency in this state for records and they must be suppled. The punitive provisions are usually assigned to the atty. gen. or the local prosecutor. We have some enforcement sections with regard to corporations, for instance if your agent isn't properly appointed, but basically on failure to report of many of these business functions it is the same thing that they use on fictitious names and that is, if they aren't properly reported you don't have the right to go to court.

Mr. Montgomery: These licenses that you issue--do you determine the suitability of the applicant in any respect?

Mr. Farris: No, we do not--if you mean do we have some type of administrative determinants as to whether this man should or should not be a policeman--it is just a ministerial function.

Mr. Skipton: I believe we understand the elections function, and I believe that we understand the recording function, but it might be well for you to furnish any language in terms of what you think might be desirable in terms of constitutional functions. And if you'll accompany that with a rationale for what you propose. If you'd do that, we would appreciate it very much. I am impressed with what you say about the independence of elections--but I don't think we will have very much trouble with that. Thank you gentlemen.

The Honorable Mr. Joseph T. Ferguson, the Auditor of State, was next to speak to

the committee on the subject of the constitutional status of his office.

Mr. Ferguson: I have a statement which I'll read. I understand that one of the things that you talked to Mrs. Donahey and Bill Brown about was the possibility of putting all state offices under the governor.

Mr. Skipton: The trend in recent constitutional revision has been towards what they call the short ballot, reducing the number of elected officials.

Mr. Ferguson: Well, I'm not too much in favor of the short ballot. I'm in favor of the public getting what is coming to them. They might get a short ballot and get short-changed at the same time, which they no doubt would if they put all the elected officials under one public official. Government is growing so fast that you just can't have all the public officials and duties under one public official. I think the governor's got more right now than he can handle--any governor has more--not speaking about any particular governor, but all governors.

First of all, I want to say that I am absolutely opposed to changing the Auditor of State's office from a constitutionally elected one to a politically appointed office. I don't think the Governor should appoint the Auditor, Treasurer, or Attorney General of the State of Ohio. The Auditor's office has been a constitutional office since Ohio was granted statehood. The Auditor was elected first by the Legislature, and then in 1851, the constitution required that he be elected by the people. Probably the most compelling reason for keeping the Auditor's office a constitutionally elected one is the separation of powers theory: that is, having an independent auditor to check on the fiscal operations of the executive branch of govt. The Auditor of State's duties are such that it is in the interest of the Ohio taxpayers--and the public--that they not be under the control of the Governor, or the Legislature. The Auditor should be free to administer his office without the interference of an appointing officer. An appointing head, no matter how sincere he might be, might try to persuade--or force--an Auditor to do things that would not be in the best interests of the people, if he wanted to keep his job. That also applies to the Treasurer of State and Attorney General of Ohio. And with the millions and millions of dollars the state of Ohio spends and will spend in the future, it is mandatory that the state have an independent watchdog over the treasury--a job that the Auditor of State's office can perform at this time. We have the experienced personnel, the system and the programs for doing a good job. To change the office from its current setup would--in the process of change--cause much upheaval and a breakdown of the system of accounting. The Legislature authorizes the programs and appropriates the funds--but the only way it knows if the programs work or the money is spent wisely--is through the auditing done by the Auditor's office.

I believe the taxpayers in Ohio are intelligent enough and capable enough of choosing their own public officials, who would be answerable only to them, and not under the thumb of a governor, or the legislature, or any other set of public officials. The framers of the constitution knew what they were doing in making the Auditor's office independent of both the governor and the legislature. Their reasons back then are just as valid today. They rest mainly upon the concern that there be an independent agency with the proper authority to maintain a control on govt. spending. In line with this, I am seriously thinking of initiating an amendment to the constitution--to place all auditing duties in the State under the auditor of state--and all tax collections of the state under the treasurer of state. We also are going to ask the Legislature again to

provide the additional manpower for the Auditor of State to get on with his job. Right now, the Bureau of Inspection and Supervision of Public Offices is limited by the Legislature to 300 members.

The responsibilities of the Auditor's office are constantly expanding. The latest program that will cause more work for the Auditor's examiners is federal revenue-sharing. The Auditor will be responsible for the Federal Govt. to see that the money is spent according to the Federal Act and United States Treasury regulations. However, creation of councils of government, regional transit authorities, vocational schools and community and technical colleges over the past several years have increased the workload on the limited number of examiners in the Auditor's office. In closing I want to say that I think Ohio is entitled to good auditing. And they are getting it from me. They always have. And as long as I am auditor they always will. I would never accept appointment as Auditor from any official. I only want to be elected by a majority of the public. And they alone should be the ones to pass upon my work. I think that applies also to the Treasurer of State and the Attorney General of Ohio.

Mr. Montgomery: I have a question, Mr. Ferguson. On page one, next to the last paragraph, you state that the legislature authorizes the programs and appropriates the funds, but the only way it knows if the programs work or the money is spent wisely is through the auditing done by the Auditor's office. You don't really make determinations on whether programs are working well--don't you just determine the legality of the expenditures?

Mr. Ferguson: If a program isn't working well, yes, the examiners are supposed to put everything in their reports. If a program is not being carried out properly, we report them.

Mr. Montgomery: You make a determination as to whether or not the legislative intent has been carried out?

Mr. Ferguson: Yes.

Mr. Skipton: I think an example of Mr. Montgomery's question is for example, the legislature starts a program for training of mothers on ADC or something like that. Whether the program works or not is determined by how many mothers got jobs as a result of the expenditure of funds and resources on the program. That's probably not the sort of thing that your current auditor's do, but at the same time, your auditors, as you point out, aresupposed to know whether those funds went to people who were eligible or qualified.

Mr. Ferguson: We have had quite a job down in the welfare dept. I must know that the check is correct, and I have kept a close watch on this chiseling and these stolen checks, and under me, costs have been cut down considerably.

Mr. Skipton: You did mention sponsorship pf an amendment to place all auditing functions in the control of the State Auditor. Can you elaborate on that a little?

Mr. Ferguson: Yes, we have never audited the Industrial Commission--we have the authority but we never get the funds. That is one that should be audited. In fact, the industrial commission secretary asked me to audit them this year, but we don't have the money. A lot of our audits are charge-backs, but in the state depts. they are not charged back, they are on appropriations, and we've never audited the Tax Commission.

Now I attempted to audit that once, and I had quite an argument over my authority to audit them, because of the secrecy that they must maintain over the tax returns. We don't audit the unemployment compensation and there are several of those big depts. that we have never audited that I think we should audit. All this huge delinquency in tax collections--if business firms don't pay those taxes then they shouldn't be allowed to continue operating and collect those taxes. If we catch a little fellow in the court house of your home town of Marietta, if they are two or three thousand dollars short, we prosecute him, and he'd be sent to the penitentiary, but these fellows collect a lot of money out here in some of these business concerns that don't pay it in in their tax collections, and they're getting paid a commission to collect those taxes, and I think they're just as responsible as those other fellows. If I had all the auditing in the auditor's office, I'd check them out.

Mr. Skipton: At the present time the Constitution doesn't say much about the duties of your office.

Mr. Ferguson: No, they don't say much about the duties of any of our offices. It creates our office, but it doesn't say anything about our duties, and that's the main reason I want the constitutional amendment.

Mr. Montgomery: Do you think then that the Constitution should provide some language as to what your duties are?

Mr. Ferguson: I think it should, and as to what the duties of the others are too.

Mr. Skipton: Do you have any suggestions on what the constitutional responsibilities should be?

Mr. Ferguson: It should provide that the Auditor does all the auditing for the state of Ohio. Now we're going to do the auditng for the federal govt. here. The federal govt. says that I have the second best auditor's office they've found in the U.S. We're doing a wonderful job, and I'm not pinning any roses on myself, but we do have a good Auditor's office. Our office is just about evenly divided politically, and I think that that's the way the Auditor's office should run. We check both democrats and republicans, and there's no such thing as an independent as far as I'm concerned.

Mr. Montgomery: I'd like to ask you a question as to why you think the auditor should be elected instead of some other form. At the federal level, we don't have an elected auditor--we have a comptroller appointed by the Congress--with a long term appointment--why is it necessary at the state level to have an elected auditor and not at the federal level?

Mr. Ferguson: If I would be appointed by the governor and the governor would say, I want you to do this or that, and you don't do it, then he could fire you. And maybe that's not the best interest--he might tell you to cover up this finding on John Doe.

Mr. MontgomeryL That about appointment by the legislature? They appropriated the money, for a given project, and they want to know how the money is spent.

Mr. Ferguson: The legislature is there to make laws and not to administer them.

Mr. Montgomery: You don't think there should be a function like a legislative audit?

Mr. Ferguson: No, that would put the legislature in the administrative section of the government. In my opinion, I think it is unconstitutional.

Mr. Skipton: Well, I'm sure that you would have no objections to the legislature creating any agency of its own of an investigatory nature, but you still maintain that it is a separate function and should be in the executive.

Mr. Ferguson: Well, I won't have to depend on the legislature so much if the constitution enumerates what we've got to do--they've got to appropriate money for our jobs. I've got another section law in there that says that I can appoint as many examiners as I deem necessary. One offsets the other. We've got over 9,075 audits that we've got to make over a period of two years. Now that office is growing tremendously, and the only thing that is status quo is the counties--they've got 88 counties. Everything else has grown.

Mr. Skipton: Are there any agencies of state govt. created by the g.a. that have been given auditing powers other than your own?

Mr. Ferguson: No, I don't think so.

Mr. Skipton: In other words, there are no state agencies that by law have been excluded from an audit by your office?

Mr. Ferguson: No. Now our office is subject to audit by the governor. But the law says that they audit you when you leave office. I think that they should be audited every year. Each one of us should be audited by the governor annually, because our office is growing too, and we handle money. Now we're just finishing an audit of one of our own depts. where they handle money by our own examiners, because I want to know that the money is properly accounted for. That's the land office.

Mr. Soliday--Head of Municipal Auditing: There are some departments where it is questionable whether we have the authority to make an audit, however, we do make these audits in that they receive federal funds. There are three divisions in the Auditor's office. In December, 1972, the State of Ohio will receive $207 million from federal revenue sharing. Out of that 207 million, $69 million will go to the state of Ohio. And of course this requires an audit. We started on this federal revenue sharing program before it became a reality--we started setting up our program. Now we're going to make the audit whether we are certified to do so or not, but I'm sure we will be because we are equipped to do so. This audit will be filed with the federal govt.

Mr. Skipton: When you say certified, you mean that the federal govt. will accept your audit?

Mr. Soliday: The way it stands now is that ten of the largest cities will be audited by federal auditors. There is no assurance that this will happen, however; the auditor of state's audit of federal revenue sharing will probably be accepted.

Mr. Skipton: You would be a contractor with the federal govt.?

Mr. Soliday: They would certify us as being qualified to perform the audit.

Mr. Montgomery: If this is federal money, why would a state official audit the expenditure of federal funds?

Mr. Soliday: No, as soon as the money is received, it is required, according to this bill that the money shall be deposited into the political subdivisions of the state into a federal revenue sharing tax trust fund. As soon as this is deposited it is public money and we audit all public funds. As soon as it is deposited into the treasury at the local level, it becomes public funds.

Mr. Skipton: What troubles me is you seem to be concerned about whether you are certified or not. If it becomes state moneys, or moneys belonging to subdivisions of state, don't you have enough authority right now to audit them. You really don't need any federal certification.

Mr. Soliday: That's right, that isn't the question--it's a question of the additional workload that is going to be required to audit these millions of dollars.

Mr. Skipton: This does pose a question in my mind of whether or not with the federal govt. obviously starting the trend of collecting taxes and distributing them to other subdivisions, whether or not the federal govts.' strings on that is going to include power over the auditing.

Mr. Soliday: There are eight general levels as this money is received at the local level that it can be used for.

Mr. Skipton: We as a committee would be very interested in suggested constitutional language dealing with the question Mr. Montgomery raises relating to the functions of the auditor and the responsibilities of the state auditor. If you would, the committee would appreciate very much having you suggest such language, together with an explanation giving your rationale for the language you suggest. Keep in mind that we are talking here about the constitution and not a statutory law. We are not thinking in terms of specific duties in relation to specific funds, but we are talking about constitutional language dealing generally with your functions. I'm sure the committee would appreciate having your views on that in concrete form.

Mr. Ferguson: How soon do you want it?

Mr. Skipton: This committee does have a time schedule. We hope to start considering these kind of things sometime in January, so if we could have it sometime around the first of the year, it would be fine.

Basically, before we can talk about any amendments relating to any of these executive offices we have to decide how many of them are going to continue as constitutional offices. And really until we do that it is difficult to make any progress. We can go through and find agreement on obsolete sections that should be repealed or amendments for greater clarity or style, that sort of thing, but you don't go very far until you decide the basic question of how many you are going to recommend as constitutional offices. We probably could settle the question of these problems of succession for the governor, these questions dealing with disability--but I don't really know how you get

into any of these, until you make those basic decisions.

Mr. Montgomery: I have to confess that as of right now, I continue to have more respect for what the founding fathers did, although I think there ought to be some clarification. I'd rather take the more obvious changes first. I believe there may be substantial opposition to eliminating some of these elected officials.

Mr. Skipton: Well, if we just look at the arguments for a shortened ballot, these things are highly theoretical. I believe the question for us is how well or how poorly have the people of Ohio been served by the current classification of executive officers. Have they been served badly? Do we have any documentation that says that the people of Ohio have a poorer government because we have six elective officers? Put in a different way, has the implementation of the responsibilities of the chief executive, the governor--what handicaps has the election of the other officials imposed upon the governor?

Mr. Montgomery: And I see also, John, in the testimony of these state officials a thread which am sure goes all through public office of maybe not an intentional but certainly an enlargement, taking on to themselves, of other than powers conferred upon them by the legislature, and if this is true of the offices we have talked about, it has to be true of the governor himself. And to repose more power in that office....we have seen what has happened to the presidency in this country --and there is great sentiment at the federal level for cutting down the power of the president, rather than adding to it. I'm not so sure that I would agree with increasing the governor's power to allow him to appoint all the major officers.

Mr. Skipton: I have always felt that the real basic issue here is whether there is too much power in the executive as opposed to the legislative, not among the various officers in the executive.

Mr. Montgomery: John, there is one point on this Sec. of State--you have two sections down here in Article XV, that you want to examine. Orally, he said he was in favor of deleting them, but I don't think we have that in the record.

Mrs. Hunter: Mr. Montgomery brought up the question that we should also request the opinion of the sec. of state on the deletion of these two sections in Article XV. The committee had agreed that there was no point in having this in the constitution, but I think that we should have a formal opinion from the sec. of state on that. What I have put together here is a little history of the section and the rationale for deleting them. There will be more of this material coming up.

Mr. Skipton: If we get to the point where we write specific constitutional language dealing with the functions of all these officers, many of these things may just melt right into that. If we re-write all this, this will be part of a re-write, and there won't be a need to delete it.

Mr. Montgomery: We should have an expression from the official involved, don't you think? It's much easier that way to present it to the rest of the committee.

Mr. Skipton: Maybe we could draft a letter to the sec. of state asking for his opinion on this specific question.

Mrs. Hunter: And presumably each official will be furnishing us with his own idea as to language concerning their offices.

Mr. Skipton: We've asked each one of them to put into writing their own suggestions--

Mr. Montgomery: But we haven't asked each one of them to give their recommendations on obsolete questions involved with their offices. Is the sec. of state the only office that raises the question of obsolete questions?

Mrs. Hunter: I'm not sure of the answer to that but that can be checked out.

Mr. Skipton: Did we run our own check on the constitution? We must have a tab of all the references to each of them in the constitution somewhere.

Mrs. Hunter: Oh, yes, we do, but maybe this should be put together and discussed as the committee deals with each office.

Mr. Skipton: The thing is that if you write a new section, spelling out their functions and powers, all this material just washes through the same filter, and can either be left in or taken out.

Mrs. Hunter: But maybe it would be helpful to compile it for each one so that it could be before the committee. Another thing I don't believe has been found would be some representative statements from other constitutions on duties of executive officials that might be helpful just for comparison purposes. Perhaps for the next meeting we could put that together.

Mr. Skipton: I don't know that that would add a great deal, because as George Farris very frankly expressed it, the functions and responsibilities vary from state to state. The only rationale there is for them is a date in time, it was desired for political reasons to put this function there or there, and that's how these things grew. But they grew like topsy, very seldom have these functions ever been assigned or allocated on the basis of some sincere decision that it's the best way to do it. You take the licensing that was referred to--that is why we are going to have a very difficult time writing a general statement about licensing functions, because in many states the issuance of an automobile license is a patronage thing. George referred for instance to the machinations of the auditor in Illinois but he didn't refer to the machinations of the sec. of state--some guy had $800,000 in shoe boxes in his hotel room. The money came from the favors he did in the course of issuing license plates. Even if we know that 40 secretaries of state issue license plates--I don't know what good it does us.

Mrs. Hunter: No, I really didn't mean that, and I would assume that most of those duties would be statutory anyway--but if there has been a general attempt to describe in general terms in a constitution--that kind of thing. I don't think we've looked at that.

Mr. Montgomery: You know that's what the counsels for all these officers are going to do--the first thing they're going to do is go to the other state constitutions to see what it says about his office. Wish they could send you a copy.

Mr. Skipton: I wonder where the term Secretary of State comes from...the secretary of

state at the federal level is foreign affairs, but I think at the state level it was meant to be a recorder's office.

Mr. Montgomery: Like a county recorder.

Mr. Skipton: And I believe that the intention was that he would be the keeper of the records of all kinds, and if the office is to continue as such, we would almost have to say that. Actually there's only one function there in my mind which dictates some special consideration and that is the elections. All the administrative functions that the secretary of state handles--there's really no question about that. The only question that remains is about the elections system and whether or not there should be an official, independent...

Mr. Montgomery: As far as the election machinery, that's a very difficult problem to solve. As far as creating a commission to make it completely independent or at least bipartisan like it is at the county level, would be expensive and cumbersome. As far as actually getting the job done, this particular Secretary of State runs a fairly efficient operation. Would it be more efficient, or any better to have a commission do it? The only thing that you would add in is a complete semblance of bipartisanship.

Mr. Skipton: The thing that I thought the discussion of that office might really perform considerable value as an education--people don't really understand our elections system. They don't understand why it is set up the way it is right now, let alone how you might improve it. We keep ignoring the fact that our elections system up until the time we actually vote in the general election is a party mechanism. Primaries are for the purpose of providing machinery by which a political party organization can select its nominees for public offices. Everybody has the tendency to keep thinking this isn't parties making selections--it's why people can't understand why Democrats have one choice of rules for choosing a president and Republicans have another. They don't have to be the same. Electoral machinery is cloaked with the authority of power in government. We sometimes misunderstand its function. Look at how your election boards are set up at the county level. The secretary of state's role is as an arbiter. He settles differences--otherwise he doesn't have a lot to do about it. The secretary of state may certify appointments.

Mr. Montgomery: His greatest power really is in setting up the form of the language of the ballot itself--in the phrasing of the questions to be voted on and so forth. That is really a subtle power which has been enormous.

Mr. Skipton: He has that function because he is the authority, the expert on the election laws. The legislature would have a very difficult time if it didn't have some kind of elections commissioner who is studying and making recommendations and that kind of thing. But even there we have an elaborate kind of setup of election board officials that meet periodically regarding the changes in the elections laws, so again, that is dominated by the party organizations. I think whatever you do in this area you have to keep in mind the functions that are being performed and why we even have the functions. Really, in the matter of giving somebody control of elections, it's simply having somebody to be the parliamentarian.

Nancy Duffey: I would like to point out that the LWV is involved in a nationwide study of elections. We have 88 county boards of elections interpreting the laws, and the

sec. of state has traditionally been reluctant to impose his regulations. Perhaps constitutional language should require greater uniformity. Some people are cut out of their franchise because equality of treatment isn't required.

Mr. Skipton: You must remember you've got this much larger question of whether control should be at a local level or a higher level.

Mr. Montgomery: A voter still has access to the courts. As long as the board was bipartisan, it would be that no party was favored, or no candidate was favored.

Mr. Skipton: You could, as they talked today, mechanically have state registration and everybody would use their social security number.

Mr. Montgomery: The legislature could speak on the subject, for uniformity.

Mr. Skipton: I guess the basic question for us is, is the administration of the election laws sufficiently important that an independent elected official should administer them?

Mr. Montgomery: I am inclined to leave it as it is. There is no compelling reason to change it. Unless there is a compelling reason to change the constitution, I think we should leave it alone. We can philosophize all day, but really, it has stood the test of time.

Mr. Skipton: What about the auditor's office--does that follow the same reasoning too?

Mr. Montgomery: Yes, but not the treasurer. I think the financial officer of the governor, appointed by the governor, could pefform the treasurer's function as long as an independent audit took place.

Mr. Skipton: If we sat down to write language concerning the auditor of the state of Ohio it's wholly possible that he would lose part of his responsibility. He would probably lose what he now calls his pre-audit, which is the strongest clout that he exercises. The post-audit doesn't give him much political clout.

Mr. Montgomery: An audit should be limited to fiscal matters of the expenditure of money only, and if the legislature wants to engage a legislative audit to determine program results, that's something that should be a creation of the legislature, independent of the fiscal audit. But because the constitution is silent on the matter, the same thing we saw in the atty. general's office on common law powers, when no boundaries are set down, they want to enlarge on what their duties are.

Mr. Skipton: I really do believe that if we write much constitutional language, we would almost by definition eliminate big chunks of the functions the auditor performs, because I'm sure that we would say that all this pre-audit can be performed by a dept. of finance, or some other ministerial agency, and the audit function would become a post-audit, and I believe that we also have to recognize that the g.a. itself has the right to establish its own law, through its investigatory powers. I personally have felt that the use of the term audit in terms of the legislature is a misnomer--that audit is a program audit and should be a program audit--not a fiscal audit.

Mr. Montgomery: Has the legislative intention been observed? That's not an audit.

Mr. Skipton: That's right--it's an examination to determine whether or not its will has been carried out, and we don't need C.P.A.'s adding up the figures. But what they need is people who can decide "did this job training program train people who found jobs," which is something different. I see problems with both of the officials we had here. We had some pretty strong opinions expressed by Mr. Shocknessy on the atty. general as I recall.

Mr. Montgomery: Yes, he felt that the governor's legal advisor should be independent as I recall. I don't know if I agree with that. The legal advisor doesn't need to be independent--the governor is the one that is responsible and he should have the right to choose, in my opinion, his counsel, and if he gets bad advice, it's his neck that is on the line. I don't agree with Mr. Shocknessy on that.

Mr. Skipton: I tended to question him too. We have in a constitutional officer of that sort--what you're saying is in effect, I have to take into my confidence an attorney in whom I may not have any confidence. And I don't have any leave to seek other counsel.

Mr. Montgomery: Well, this business of the atty. gen. being the atty. for all the people--and some of these things that we've found from the atty. general's testimony really worry me. I think the matter of atty. general really needs a lot of discussion.

Mr. Skipton: There's been again, a lot of misinformation or misunderstanding on the part of the people as t the role of the atty. gen. They have a tendency to relate the atty. general to the prosecuting atty., and he is not really a prosecuting atty. He is legal adviser to the governor, and that's about it.

Mrs. Hunter: I think although the term common law power is used, however, that the atty. general's powers are found in the statutes and not in some general area termed common law. I think that this memo on the subject does conclude that the atty. general's powers are mainly statutory.

Mr. Skipton: This is again another one of these places where if we start writing constitutional language on the atty. gen. I'm sure that we can start raising questions whether or nor he has been assigned the proper functions.

Mr. Montgomery: As chief legal officer for the state, he would only act through the governor in initiating these actions. He can bring actions when the governor requests him to on statewide concerns--that's when he becomes atty. for all the people. He can't decide, I believe, in his own mind, that now is the time for me to initiate an action upon my own because I think the people are wanting me to, or that the people could petition him to engage in an action, but I think that what he says in his statement leads me to believe that he thinks that this is his role.

Mr. Skipton: To me, this again gets to part of a much larger picture--the tendency through the statutes has been to make the atty. gen. more and more of a prosecutor and less of a legal advisor. If you are going to think of him in terms of being a state prosecutor, then we've got a larger question here of state police and the state judiciary system and its control over the courts in the state, and this is a whole new question. It might be that you'd have to conclude that you can't decide on the atty. gen. until you decide what this whole police power thing is going to be as far as the state. If the Commission is going to recommend that there be a complete state judiciary, with

state judges, and state police instead of local ones, then you can have a prosecutor at the state level, and many of the recommendations we are going to get into in this judiciary thing will involve the creation of a state prosecutor.

Mr. Montgomery: Well, what you're saying John, is when we examine the constitutional offices, we really ought to examine them in the light of what other committees are going to come up with. Because they all have a definite relationship to local state offices.

Mr. Skipton: Actually, if you're going to start short ballot, start down in the counties. I'd hate to sit down here and thing of codifying in the constitution what the atty. gen. does now. Frankly I believe that many of these functions that are assigned to the atty. gen. ought to be taken away from him and put somewhere else. This is how these functions have grown. Alan Norris said, he was looking around for a place to put the responsibility and he couldn't find any other place--it wasn't a conscious selection of it, it was a matter of elimination. Looking for somebody to volunteer, you might say.

It was decided that the committee would meet again before the next commission meeting, prior to the Commission meeting, in an attempt to resolve some of the questions and report to the Commission on the Committee's progress. It was decided that the next meeting of the Legislative-Executive Committee would be held on Thursday, December 7, at Scot's Inn in Columbus in Room 374-376 at 3 p.m.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
December 7, 1972

SUMMARY OF MEETING

A meeting of the Legislative-Executive Committee was held on Thursday, December 7, at 3 p.m. at Soct's Inn in Columbus. Attending were Chairman Skipton, Senator Applegate, Representative Norris, Dr. Cunningham, Mr. Montgomery and Mrs. Sowle. Also in attendance were Mrs. Eriksson, Mrs. Hunter, and Mrs. Gertner of the Commission staff.

Mr. Skipton: My feeling is that you can't do much with the executive article until we do decide what executive officials should be provided for in the constitution, and then the question of which should be elected. These are two separate questions. Which officers should be provided for in the Constitution? Does anybody have a thought that they would like to espouse?

Dr. Cunningham: I don't see that we should name any except the governor and the lt. governor, and designate that they should be elected in a tandem form. And that depts. be provided by the legislature. I think it is redundant to list prospective depts. and the legislature indicate another arrangement. I agree with John Millett that we shouldn't have to have a limited number--it should be a matter of need as to what depts. there are and what form they should take--single-headed, or a board or commission. I prefer a board or commission, but that is my own point of view. I see no reason why the constitution should name the atty. general, the auditor, the others--that should be legislative matter.

Mr. Skipton: Does everybody understand that what Dr. Cunningham is saying is that he considers those offices which are now named in the Constitution and which are elected at present as departmental kinds of functions. He would treat them the same way that he would treat the executive branch of govt. in the organization of depts.

Mr. Montgomery: There would be no independently elected auditor, atty. general, all those kinds of things?

Dr. Cunningham: Not as such.

Mr. Montgomery: They would all work for the governor.

Dr. Cunningham: Yes--in the carrying out of his constitutional mandate to see that the laws are enforced and how the laws are enforced should be a matter for the legislature to designate, as we do at the federal level. We have certain depts. to do it, with powers and duties.

Mr. Montgomery: Do you think that the public would buy that?

Dr. Cunningham: You've got it at the federal level.

Mr. Montgomery: But do you think that the people of Ohio would buy that?

Dr. Cunningham: I don't see why not.

Mrs. Sowle: I would agree that I would like to see as few specified in the constitution as possible unless there's some special need. The question in my mind is whether the appt. of the executive officials should be under the control of the governor or the legislature.

Dr. Cunningham: I would agree that that could be an alternative--for example, the post auditor should be chosen by the legislature. There is also the suggestion by some that certain other officers might also be chosen by the legislature--for example, the atty. general, to take him away from the executive--so he would be nominated by and removable by the legislature. To take him under the separation of powers away from the executive--, but to talk about the atty. general as having common law powers or quasi-judicial powers; historically, that doesn't exist in the U.S.

Mr. Skipton: Perhaps we had better try to get some of these numerous questions boiled down. I can see the creation of depts. by the general assembly but I have had too many personal experiences with the legislators attempting to dictate the management of depts. of govt. and even to the point of inserting themselves--because once you say they shall have that power, you know who they'll appoint. A member of the legislature shouldn't be able to appoint himself to the executive.

Dr. Cunningham: Well, that's the reason why in my original statement I eliminated that prospect. I simply indicated that it should be left up to the legislature to designate the functions and who should perform those functions. Then who would appoint them would have to be determined by statute. I don't see that we can gain anything at all by putting it into the constitution.

Mr. Skipton: Is there any possibility that the general assembly can create on its own an elective state office.

Mr. Montgomery: It did create an elected state school board.

Mr. Skipton: Should we specifically provide for that kind of proposal or should we have a specific prohibition against?

Mrs. Sowle: I still have a question in mind about whether the creation of the office ought to be in the hands of the legislature or the executive branch, since it is a legislative office. I can envision particularly as the times are changing rapidly one governor not wanting the set-up that the previous governor had. He may want a completely different situation--and maybe he should have the freedom to design his own executive office.

Dr. Cunningham: But you wouldn't state it in the constitution?

Mrs. Sowle: What would be in the constitution is that this would be in the governor's power, to set the offices.

Mr. Montgomery: I know this sounds like a good idea but when you envision the man being governor for four years, only four years--let's say they change every four years, and there would be no continuity in the system if you allowed them to easily change it.

And they will. You find the man, and then according to what he can do, you create the job. Kissinger is a perfect example. I think the legislature should create the job.

Mr. Skipton: He raises the basic question here of whether or not it is necessary to give a governor such power in order for him to be an effective servant of the people. Another aspect of this, too, is that constitutions aren't created just to give power, as much as they are to limit power--people are concerned more with the limitations on power in a constitution than its grants, so it's important that we don't get too carried away with the granting of powers. For example, the governor of Ohio is not without power--we don't have to do anything to change the constitution to give him power, unlike some states whose constitutions hamper the governor. He even has the reorganization power--he has the power to move moneys around, and all that sort of thing. We don't have any really serious situation around here. I think we have to keep this in mind when we think about what we are recommending to the people.

Mr. Montgomery: I don't think we should make it easy for a governor to change the structure--because of the need for continuity. I'm not saying it shouldn't be kept up to date--it's a matter of who should do it.

Mrs. Sowle: I really am questioning the value of continuity for the sake of continuity. I think that there should be great flexibility--maybe it ought to be restructured every four years because the needs are changing at least every four years. And maybe what is traditional isn't going to best meet the needs of the time. I think corporations are going into a state now where change and reorganization are becoming more frequent because they can't be rigid. I don't think continuity is a value in and of itself when you are talking about administration.

Dr. Cunningham: Section 2, Paragraph 1, as I suggest: "The supreme executive power shall be vested in a governor." Paragraph 2: "The executive dept. shall consist of all state elected--if we have them--and appointed officials and employees except those of the legislative and judicial depts." 3: "In addition to the governor and the lt. governor, there shall be a sec. of state, auditor, atty. general, and such additional officers and depts. of govt. over which they shall preside not to exceed____ number, if you want to... I don't like that....as shall hereafter be established by law. All present or future boards, commissions, bureaus and other agencies of this state exercising administrative or executive authority shall be assigned by the governot to the dept. of which their respective powers and duties are to him germaine--and this would be eliminated if you have the governor--lt. governor as tandem.

Mr. Skipton: What you are saying is different from what Mrs. Sowle is saying. You still would say that the general assembly will create that structure.

Dr. Cunningham: As to their powers and duties and what they shall do, and that's what they do now really.

Mr. Skipton: It gets a lot more specific than that. This is the kind of thing we run into. Maybe we should discuss this--why do we have what we have. That may help us understand the provlem. We have what we have because there are constituencies that want it that way--these are not offices of govt., these are interests of the people, which are expressed by their elected representatives. If we talk about giving supreme power to the governor to say no, about this or that, we run into conflict with these constituencies.

Dr. Cunningham: The legislature could go right ahead and do the reorganization.

Mr. Montgomery: Going back to our assignment, this is constitutional revision. This is not an ideal situation and an ideal society--it's practicing the art of the possible. I think what we should start with is the assumption that what we have has really been pretty effective for a long time, and the least change we can accomplish is probably going to be the most successful. If we try to do too much, we're probably going to be unsuccessful.

Dr. Cunningham: Heads of depts. are subject to the appt. and dismissal of the governor now.

Mr. Montgomery: I think it's pretty radical to eliminate the elected officials.

Dr. Cunningham: You certainly aren't going to get anything by giving it to the people--they neither know nor give a darn.

Mr. Skipton(to Senator Applegate who has just arrived): Dr. Cunningham has said that he would give the supreme executive power to the governor and that he would exercise that power. There would be no other offices provided except as functions or depts., and the legislature would provide for these. In other words, if there would be a dept. of law, the legislature would create it. We have had one suggestion that doesn't debate that but that doesn't support it entirely either, and that is that the governor should have very broad reorganization powers of govt.--powers that may even transcend the ability of the general assembly to create the depts. It has been proposed that we look at this not so much from the theoretical point of view as from the point of view of what are the problems facing the people of Ohio or the state that demand some change. This is an approach which might enable us to come to agreement faster than if we did it theoretically. It is the philosophy that unless we have the reasons to make the changes, we should make only the minimum number.

Dr. Cunningham: We are doing that now. My proposal does exactly that. It leaves to the legislature the power to define the power of the officers and create them. And of course provides for the election of the governor and the lt. governor in tandem, simply as a matter of expediency.

Mr. Skipton: Once we decide which officers should be provided for in the constitution, the question follows concerning should they be elected officers.

Mr. Montgomery: I have a concrete opinion. I think all of the present officers who are provided for in the constitution should continue to be provided for in the constitution except, perhaps, for the state treasurer.

Mrs. Sowle: Why would you eliminate the treasurer? Why do you single him out?

Mr. Montgomery: The treasurer is not a policy-making position. It could be handled by a dept. of the governor's such as the finance dept. The auditor is a little different because you can make a pretty good case that he is a double check on everything--an independent double check--and whether it actually works that way or not isn't important as long as that is the way people perceive it to be. So I can't eliminate that one and I would like to eliminate the atty. general, but for the same reasons, it is not

possible. I think he should be the governor's lawyer--pure and simple--and that is all, but historically it doesn't work that way. I'd like to define the job so that he doesn't take on additional powers.

Dr. Cunningham: What's the difference between the treasurer's function and the secretary of state's function?

Mr. Montgomery: You upset too much traditional machinery to change the secretary of state.

Dr. Cunningham: What you are doing is talking about practical politics and not drafting a constitution.

Mr. Montgomery: No, I'm talking about making revisions which can be accomplished.

Mrs. Sowle: In other words you think the constituencies of the offices of secretary of state and atty. general are too strong to make a revision in that area possible. I can understand the secretary of state--it's simply a matter of ignorance on the subject of the atty. general's office, as to the nature of the constituency.

Mr. Skipton: I could agree theoretically with Dr. Cunningham, but basically I just don't feel that people will accept the idea, that the constitution of the state shouldn't say more about state govt, than that there shall be three branches of govt. I just believe that they expect the constitution to define that structure a little more specifically.

Dr. Cunningham: I specify certain officers and permit the legislature to create others.

Mrs. Sowle: You don't include the treasurer.

Dr. Cunningham: Auditor is divided intro two positions--pre-auditor and post-auditor which would be chosen by the legislature. The pre-audit would be purely administrative in the dept. of finance.

Mr. Montgomery: I would be willing to eliminate the secretary of state but it begs the question of how you are going to handle the elections machinery--so it means the creation of a board or commission to handle elections. But if you can work that out, I would be willing to drop the secretary of state. It's a purely administrative job with no policy-making whatsoever.

Dr. Cunningham: He shouldn't be occupied running for election at the same time that he is supposed to be passing on the kinds of things that have taken place in Hamilton and Cuyahoga counties.

Mr. Montgomery: The thing is that if you want to do away with the secretary of state then you have to think of some way of constitutionally addressing yourself to the elections process. You'll be creating a board or something in lieu of it.

Dr. Cunningham: Well, we're giving it to him as an administrative officer.

Mr. Montgomery: I don't think so--I don't think the people are going to buy that. I

think they want some independent control of finances and the elections process. I think those are two things that people will hold pretty dear.

Dr. Cunningham: Their representatives will take care of it in the elections laws.

Mr. Skipton: This is of course the basic problem. We're on the basic question of whether or not the constitution should specify who should be provided in the basic structure, in the executive branch of govt. We haven't gotten to the question of which of them should be elected yet. We're really trying to decide should the constitution specify any of these.

Dr. Cunningham: I said, by way of summary, that we should have a governor, and lt. governor (elected tandem) and that there should be a sec. of state, auditor, atty. general and such additional officials and depts. of govt. over which they shall preside not to exceed _____ as may hereafter be provided by law.

Mr. Skipton: At some point we are going to have to say you do have six or seven officers name in the constitution. We're going to have to take them one by one and we're going to have to say is this an office which should be specified in the constitution.

Mr. Norris: You're deciding who you are going to specify and then which of those should be elected or appointed. I have no question in my mind basically to naming those we have now--I suppose the only question in my mind would be the treasurer. After the governor, I would say that the most necessary officer would be either the auditor or the atty. general--I don't know how to rank those two. Secretary of state--you get involved with this elections thing, and Treasurer--well, I would be just as glad to see that office either way--make that office appointive or not.

Mr. Skipton: We may be confusing here the two questions of how they're chosen and which are to be provided for in the constitution. My guess is that it would be very difficult to sell the people of Ohio that there isn't somebody who is going to take over the treasurer's function, somebody going to have the chore of counting the money.

Mrs. Sowle: Assuming we took the treasurer out, and we used Dr. Cunningham's language, that wouldn't be eliminating the office. We would be leaving it up to the legislature, as to whether it should be there or not.

Dr. Cunningham: It would be a comptroller in the dept. of finance.

Mrs. Sowle: But it would be up to the legislature to make that decision.

Mr. Montgomery: I think that the constitution should provide that the legislature may provide for other offices.

Dr. Cunningham: We could provide for a comptroller-general in the director of finance's office.

Mr. Skipton: Are there functions we need to add? I don't know any corporate body that doesn't have both a treasurer and a comptroller. There always has to be an accounting organization and a disbursing official. The legislature can do a budget without a budget executive.

Dr. Cunningham: We have a superintendent of budget now. You can't withdraw money until you prove that the money is available and has been allocated to that fund.

Mr. Montgomery: That's not what I call a budget officer.

Mr. Skipton: The comptroller is the administrative control in the system for the budget. He doesn't have to make up the budget and he doesn't have to supervise who makes up the budget--you could have no budget, just a series of appropriations, and somebody would have to exercise some control saying when the money has run out, and there's no more. What I'm trying to do is get back to the original question of what things are so basic that you know that you're going to have to provide for them one way or the other. And if any of these functions include any of those officers that are currently enumerated in the constitution then I see no reason why they can't continue to remain in the constitution and then we get to the question of how they should be chosen. But if there's going to be a treasurer, you might as well enumerate it.

Dr. Cunningham: In the constitution? Why not leave the legislature in control? Afterall, they control all the budgeting--they decide whether the revolving fund at the universities goes into the auditor's funds or they don't.

Mr. Skipton: All I'm saying is if these are functions that are going to be performed, and the constitution provides for their performance now, I don't see that there is the necessity to explain to the 11 million people of this state why I want to eliminate them.

Mrs. Sowle: I look at what we're trying to do just a bit differently in the sense that the constitution is really a limitation upon the legislature. I think the question that we ought to be addressing ourselves to is what of these offices do we want to insure that the legislature doesn't change if it is within the legislative discretion.

Mr. Skipton: If we're going to eliminate these we will have to go to the people and say we're eliminating them, and say why we're eliminating them, and I'm afraid that this wouldn't be easy to do.

Mrs. Sowle: Well, we'd be eliminating the word treasurer but we're not eliminating the function.

Mr. Norris: But we would be eliminating the treasurer as a constitutional elected office. The people would have no way of knowing if the legislature was going to reestablish it.

Dr. Cunningham: The people have no way of knowing how good the treasurer's going to be now--or even if he knows what a dollar sign is.

Mr. Norris: I think the point is what is the electorate going to be lookin at at the time it is an issue on the ballot. I think they will look upon it as the constitutional elimination of the treasurer.

Mrs. Sowle: But if that is the way they phrase it, they are not correct. We're not eliminating the treasurer--I'm just trying to get a framework here--we're saying that it's up to the legislature.

Mr. Norris: That's what you're going to tell me, the voter, and that's how you're going to sell me? I think he's bringing up a real practical problem. To me you would be eliminating a treasurer that I've got a vote on.

Mrs. Sowle: I think the voter is not going to ask that question. I think the voter is going to read through that list and just go right on his way--I think the only way that question might come up is if there is a constituency under the treasurer that might make it a political issue.

Mr. Norris: But however it comes to the attention of the electorate, it does come to its attention.

Mr. Montgomery: If we look back at this when we started, I think we would all say, as we looked at the offices, that the only one there was a pressing need to change now was that tandem election thing. It didn't make any sense for a guy to have no executive work and to be called an executive officer and be doing something over in the senate. But when you look at the others it may be unnecessary and it might be desirable to change it but there's really no pressing need to change any of it. Now if you think you have to change one, I'd be for changing the treasurer--but even that one--it's a small price to pay for a successful revision of what we need to revise.

Mrs. Sowle: I can buy that.

Mr. Skipton: It's interesting that most new constitutions that have failed have failed over these kinds of questions.

Dr. Cunningham: And many of them have eliminated the treasurer and the auditor, and left it up to the statutory matter for the preservation of funds.

Mr. Skipton: Well, somebody's going to have to make a motion.

Mr. Norris: I think we should maintain as constitutional offices the offices of auditor, sec. of state, treasurer, and atty. general.

Dr. Cunningham: I think treasurer should be struck out of that. The rationale for this has already been given. The treasurer is purely ministerial and doesn't belong in the constitution.

Mr. Applegate: I think from the standpoint of practical politics, it would be an unwise decision to leave out the treasurer. Journalism in the state would tell the people that we are changing the structure and that we are taking away one of the great sacred things. I would vote against this suggestion.

Mrs. Sowle: I think that it isn't worth it if the treasurer issue would make other things difficult.

Mr. Skipton: I think the toughest thing is whether or not we specify the selection and what form the selection of each office, including treasurer, will take.

Dr. Cunningham was the only member of the Committee to feel that the treasurer should be deleted from the constitution. The other five members of the committee

who were present disagreed with Dr. Cunningham, so the treasurer remained as a constitutional office in the committee's consideration of the executive article.

Dr. Cunningham: I think there should be an amendment to the title of the term Auditor. I think the term Auditor should be Auditor-General to imply post-auditor only. The Auditor-General is apost-auditor and he has no jurisdiction over pre-audit.

Mr. Montgomery: You should also describe what an auditor's function is if you do this. I think we should make an attempt to say, in the constitution, in general, what these people are supposed to be doing. I think the auditor, like the atty. general, has a gross misconception of what his job is. I think the auditor should deal with the money end of it and not all the rest of it because it is an unnecessary burden on the govt.

Mr. Skipton: Does the term imply that? Now, will this in anyway be confused with the comptroller-general function or anything like that?

Dr. Cunningham: The comptroller-general is a post-auditor.

Mr. Skipton: But they also use that for investigative purposes.

Mr. Montgomery: Are you going to say what his job is in the constitution?

Dr. Cunningham: No, the legislature is going to say what his job is.

Mr. Skipton: That's my concern; when we change the title on one of these we're going to have to explain it.

Mr. Montgomery: I think it improves the image and we can cut it down to size when we get into the description.

Mrs. Sowle: We haven't talked about whether we are going to specify in the constitution the powers and the duties of these officers. The legislature could define it anyway it wanted to, unless we define it in the constitution, even if we say auditor-general.

Mr. Skipton: That's going to be another question.

The title change was agreed to by the committee.

Mr. Norris' suggestion that the present constitutional officers enumerated in the constitution in the executive article continue to be so enumerated was agreed to by all except Dr. Cunningham.

Dr. Cunningham: I object to the definition of what officers do in the constitution. These should be statutory. This is for the record.

The question of selection of the enumerated officials was next considered by the Committee.

Dr. Cunningham: I feel that the sec. of state, atty. general, and auditor-general, and treasurer, and directors of such additional depts as may hereafter be provided by law should be appointed by and may be removed by the governor and they should hold office at his pleasure and should continue in office until removed or succeeded.

Mr. Norris: I disagree--I feel very strongly as I mentioned before about three of those.

Mrs. Sowle: I think it might be helpful to take these offices up separately.

Dr. Cunningham: You can't have administrative responsibility without making the governor responsible and pinpointing him as responsible for the conduct of his subordinate officers in the performance of administrative functions. All of these functions are administrative.

Mr. Norris: I'm a great believer in the separation of authority--the separation of powers--under our present constitution--and I think there should also be the separation of powers under the executive branch. I think it has worked very well. I don't think we should eliminate the separation of powers from the executive branch and leave the other ones. I think the chief elections officer is one of the important functions of state govt., and as a result, I think that is a valid place to separate authority within the executive branch and it's certainly created no problem that I know of. It has worked very well.

Mr. Montgomery: I agree with him.

Mr. Applegate: I think Mr. Norris stated it very well.

Dr. Cunningham: There is one point that hasn't been mentioned for the record and that is a point that I have made before--the sec. of state is the chief elections officer, and should be a free agent during elections--seeing that the elections law is enforced and not seeing that he himself is reelected. That is one of the reasons I feel he should be an appointed officer--and perform his duties in a semi-civil service position. Decisions concerning elections might have been made in recent years in different ways had he been an appointed officer instead of an elected one, and operating as a purely free agent, administering the law as it is written.

Mr. Montgomery: Of course, if he is appointed by the governor, he might operate differently too because the governor told him to.

Mr. Norris: My observation is that the most independence you can grant to a man is through his own selection. I can't tell the other members of the legislature that I know anything more than they do, or that they're responsible to me because they have their own mandate.

Mrs. Sowle: I think that the office should be elective if it includes the elections function. I feel that the elections function should not be in the secretary of state's office, and if it is not, then the sec. of state should be an appointive office, but if supervising elections is in that office, it should be elective. I would prefer to see the elections function in a board created by the legislature.

Mr. Montgomery: That makes a lot of sense but then you have to get into creating elections machinery which has been working pretty well now.

Dr. Cunningham: He would provide then a secretariat for the governor, recording documents and issuing maps and copies of the constitution and so forth.

Mr. Skipton: The general public views the secretary of state as a judge of the elections system. This is the one element of his job that makes most of us believe that he should have some independence from the governor. We all know too well how much mischief can do with elections. The governor has so many levers to use in influencing what happens politically speaking. I'm not sure the public would want you to give him control of the elections system also. This theory that he is accountable for it doesn't quite work either. I'm inclined to vote to make the sec. of state an independent office.

Dr. Cunningham: Many states have a bi-partisan elections board chosen by the leadership of both houses of the legislature--I think this is what you were referring to.

Mr. Montgomery: Couldn't we solve this by describing in the constitution or in law that the sec. of state shall be the chief elections officer, and then have a state recorder that would take over the functions that he now does in the office of the governor?

Dr. Cunningham: Write it in the elections laws.

Mr. Skipton: Most of these things that we're talking about are putting more legislation in the constitution than is in there now.

Mrs. Hunter: The constitution does not give the sec. of state any duties with respect to elections--but only about returns of elections and receiving amendments. He is not designated as elections officer as such---those duties come by statute.

Mr. Montgomery: There are few duties for any of them. It's all legislative.

Mr. Applegate: I wonder how much of the sec. of state's office time is spent on elections in comparison to the recording function.

Dr. Cunningham: The recording function--I would say that the function as elections officer is about 90% of his function--the rest only 10%. Corporations might entail 10-15%

Mr. Montgomery: I wonder if we can do anything about this. His recording function is being performed in many places in state government that it shouldn't be. There ought to be one centralized place, so maybe after having a state recorder as an administrative function would be a great improvement.

Mrs. Sowle: It would be possible to define, if we do go into definitions of duties, to define the duties of the secretary of state in such a way as to exclude the elections function. Then the legislature would have to find another way to do it.

Mr. Applegate: You mean still retaining a sec. of state with a sole duty as elections officer?

Mrs. Sowle: No, I'm suggesting the possibility of defining the sec. of state in such a way as to exclude the elections function and just leave him as a recorder.

Dr. Cunningham: You don't draft constitutions that way by negative action. You just leave it out.

Mrs. Sowle: Then the legislature could give it right back to him. I think that if my objective were to be served, you have to do it this way. I'd be interested in what our legislative members would have to say about the commission approach to the elections function.

Mr. Applegate: Well, I've never seen such a state board in action. I feel that the elections office should be the sec. of state, elected by the people, and if you want to set up administratively an appointive state recorder, by the governor, then it would be something else.

Mr. Norris: I guess the key to me is independence and accountability. I like to think that the people who vote think about what they are doing. To me, a constitutional officer is just about the most independent guy you can get. He's a fellow who is elected statewide. Accountability, it would seem to me, is there also. A legislative commission would have to be a constitutional commission--one which you would say would be a constitutional commission to oversee elections comprised of six members, three of each party--that kind of thing, and appointed by the legislature, however you wanted to do it--that would give you your independence, perhaps, on the other hand, I'm not sure about accountability.

Mr. Skipton: I believe that there's just a wide misunderstanding of the elections machinery and how it actually runs on the part of many of the people. Elections machinery is essentially party machinery and the laws we have were passed to attempt to insure integrity in that political process, but it's also had other aspects too. The reason we have primaries isn't really to help parties make a selection--it's to give that selection to other groups of people. As it does stand now we do have in every county a bi-partisan elections board and this board is equally divided in numbers between the two major parties. The role of the sec. of state is all this is he is the odd man, and when there is a deadlock between these people administering the machinery, at the local level, he becomes the man who makes the decisions.

Mr. Sowle: If he will make it, because if he won't it can deadlock the whole situation. We had such a situation in Athens. So it can't always work that way.

Mr. Skipton: At the state level, his principal responsibility is one of advising the g.a. at writing the rules of the game, and also the formulation of the questions on the ballot in itself. He makes the rules about how ballot issues are going to be set up--uniformity in the construction of ballots around the state, etc. But he's not elections czar or anything like that. He's not exactly running that machinery. The reason so many people believe that he is running the machinery is that they are reporting to him. Local boards have to tell him the results. He gets it all on the tabulating machinery--it's really again part of the recording function. He could be given, though, some policing powers.

Mrs. Sowle: I see a definite relationship between the sec. of state's recording function and his elections function, but I don't like the relationship. I think that it works out very nicely for the sec. of state having them together because being the recorder gets one's name all over the state, and the sec. of state--in Illinois for instance--can be untouchable. I can see the signature without looking. As a matter of practical politics, it has made the secretary of state very easy to reelect, but I don't think that's logical or in the public interest.

Mr. Skipton: Again what we are talking about here is an entirely different function. It's the licensing function that you are remembering--the sec. of state in Ohio no longer has that function, although he did at one time. There are all kinds of functions that might be assigned to the secretary of state--he does have the corporate franchise. This is an office which is hard to understand what does go on there.

Mr. Montgomery: We've heard that a lot of things have been given to him when they couldn't think of anyone else. You look over the guys that are available to do the job.

Mr. Skipton: I'm just as glad that it has been taken away from the governor so that he doesn't have his name on all those things. I allowed this discussion to go this far, because it may help us later, but I think we should decide on this sec. of state office now and go on.

The Committee voted on whether or not to have the sec. of state as an elected official. Four members of the committee voted that he should be elected. Dr. Cunningham and Mrs. Sowle voted that he should be appointed. Mrs. Sowle added the explanation that she would also remove him from the elections function.

Mr. Skipton: We have three other offices, here, what's the next one? Is there any discussion on the Atty. General?

Mr. Montgomery: I'm definitely in favor of the clarification of his duties.

Mrs. Sowle and Dr. Cunningham voted that the Atty. General should be an appointive office, appointed by the governor. The other four members voted that he should be elected, so that was the decision of the committee. Dr. Cunningham felt that someone other than the governor should appoint him and favored the legislature appointing him.

Mr. Skipton: One of the reasons I'm not getting into duties first, because we really would write a lot of legislation into the constitution if we were to include all the things we think about their functions. When we get to that, we may have to force ourselves to reconsider some of our feelings on this. The next one is auditor-general. Any discussion?

Dr. Cunningham was the only committee member who felt that the Auditor-General should be appointed, so the Committee decided that he should be retained as an elective office.

Mr. Skipton: Next is the treasurer. Any discussion?

Two members of the Committee, Dr. Cunningham and Mrs. Sowle, felt that the treasurer should be an appointive office. The other four members of the committee felt that it should be an elective office. Mr. Montgomery stated that his no was an unenthusiastic no.

Mr. Skipton: Really, this helps us get along, and when we get down to this question of powers and duties, we can talk about the rest.

Dr. Cunningham: Mr. Chairman, do you have in mind making recommendations to the Commission on December 15th?

Mr. Skipton: I don't believe that we can do that. We may throw these decisions that we have made out for comment, but we won't be going to the commission with final recommendations yet.

Mr. Montgomery: Do we have any memorandum concerning the general enumeration of powers of constitutional officers in any other states?

Mrs. Hunter: Yes, we do. We looked at the duties in about six other new states. Most of the older ones, like Ohio, are silent.

Mr. Skipton: Let's have some discussion on whether or not we should attempt to amend in any way this provision dealing with the length of the gubernatorial term. It has been felt that there is ambiguity in the present provision. It is a two-headed question: we can recommend the end of limitation on gubernatorial term, or should we make an effort to remove the ambiguity and retain the limitation?

Mr. Norris questioned what had been intended when the provision was written into the constitution. The staff agreed to check on this. It was felt that the legislative intent should be examined.

Mr. Montgomery: I think it should be clarified. I think you're just asking for a disruptive lawsuit which would do not good at all.

Dr. Cunningham: Illinois says, for example, that the governor shall have not to exceed 8 years in office and that is unequivocal. Eight years service, and then you can't be governor. I have always felt that eight years was enough.

Mr. Skipton: You'd be in favor of having a limitation. Any member of the committee who would be in favor of the elimination of the limitation? Do you prefer a limitation?

Mr. Applegate: I think eight years using language like that would clarify it.

Mr. Montgomery: I would prefer a limitation, specifically related to draftsmandship, and not in anyway related to policy. I think we have to be sure of what was intended, and try to respond and do it better.

Mr. Skipton: You would accept the decision of the people to put a limitation on it, and believe it should continue.

Mrs. Sowle: I have not formed an opinion on this yet.

Mr. Skipton: This is one of the things I am wide open on. I would take the view of the Committee. I do think that we should clear up that thing if we are going to keep it, and send out a recommendation so that it could be acted upon by the legislature and say voted on no later than next November before the next election. It would be a lot better if it could be voted on in May, to tell the truth. With a question of this kind, people are going to be starting to line up to contest for office, and they won't know what the situation is, and I think we have to decide whether we should step in and try to clarify the situation.

Mr. Norris: I really think we need to think this through. Let's assume we decide that the recommendation is to be two consecutive terms, so that a man could serve another term

later on or two consecutively later on, after an interruption. Now if we put that on the ballot in November, right away we're lining up either for or against Jim Rhodes. If you go the other way, you've got the same thing. Of course, if he decides early in the year that he isn't going to be a candidate, then we could proceed.

Mr. Applegate: The intent of that in the first place was to limit it to eight years--otherwise, why put it in?

Mr. Montgomery: I think it was at any one time, so that there would be a break in his power building.

Mr. Applegate: I think we should first find out what the intent was from its author. This is something that we should perhaps have with all our statutes.

Mr. Skipton: Well, now you're all alerted to the political problem that may come up. This thing was tied to the four-year term which came up at the same time. We've also got another thing we might discuss. We've discussed gubernatorial succession before, and also disability. We really dealt with this heavily at one time. I would like to get your reactions so that the staff can start putting something together. Most of our discussion at past meetings had dealt with the disability thing, but on succession, it was strictly to leave it to people who were pre-determined, not to appoint anybody by the governor. It would have to be some elected official--say speaker of the house or speaker pro tem, but not make it in such a way that the governor could pre-determine his successor by appointing a new man to the office before succession would occur. Does anybody object to that sort of thing. Whoever is in the line of succession should be somebody who has been elected; that's about the basic thing. On disability, the difficult one is who initiates the proceeding and who decides that disability exists. Again, my feeling is that things like this shouldn't be left up in the air but should be very specifically expressed. The question is, who are you going to give the power to raise the question of disability--and that is the most difficult one. Should it be the legislature, should it be say another officer of govt., should any group of citizens be permitted to petition for finding a disability. Does anybody have any ideas?

Dr. Cunningham: Anybody filing a petition before the supreme court--it should be in the original jurisdiction of the supreme court.

Mr. Montgomery: I like the joint resolution.

Mr. Norris: I remember, however, we had decided it should be initiated, I know it ended up in the supreme court.

Mr. Skipton: In our previous discussions, I know the consensus was that the final jurisdiction should be in the supreme court but how it got there--how it was triggered--was not settled.

Mr. Montgomery: I think a joint resolution is the most practical way and the governor himself could make an expression to the legislature saying that he has had it; interested people could appear before the legislature on the matter; but in any case the legislature would be responsible. I thought your suggestion on having the supreme court take it up within so many days was superfluous; as long as they had to decide it within so many days. I can't see that that makes any difference--I just don't think it is necessary

to specify that they must start considering it within 48 hrs.

Dr. Cunningham: A joint resolution can be as ineffective as impeachment procedures, because it becomes a political football eventually.

Mr. Montgomery: They're not deciding it--all they're doing is putting the question before the Supreme Court.

Dr. Cunningham: Sure they are making the decision--that the Republican governor is crazy--he's incompetent.

Mr. Norris: But if you have tandem election, you eliminate a lot of the political part. So that if the question is is the governor disabled, the legislature then at least would have an easier political decision because all they're doing is just disqualifying one Democrat in favor of another Democrat.

Dr. Cunningham: Well, there's something to that.

Mr. Montgomery: I think it ought to be tough. The Governor should also have the right to undo the action. He should have the right to petition directly to the supreme court.

Mr. Norris: I think Md. has an interim disability--where the guy was only the interim governor, and then after six months they had to put out a final decree. I like that.

Dr. Cunningham: He was only acting governor for the first six months.

Mrs. Sowle: It could be continuing jurisdiction.

Mr. Norris: Maybe you ought to allow the jurisdictional question to be raised on any day during the probationary period.

Mr. Montgomery: We might have permanent disability mean any disability, the prognosis of which would be for the term, not for life, and the court would have to ask the question will this be a disability for the term, if so it's permanent, and if so they take one course. And if it is strictly a temporary matter, like Wallace, where his mind is obviously fine, he ought to have the right to return to office.

Mr. Skipton: There are many complications here and I believe that they should be in a package which hangs together and I'm going to ask Mrs. Hunter to work on this, in a draft for our next meeting.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Legislative-Executive Committee
March 20, 1973

Summary of Meeting

The Legislative-Executive Committee held a meeting at 10:30 a.m. on March 20, 1973, in the Commission office. Attending were Chairman Skipton, Mr. Norris, Mr. Shocknessy, and Mr. Montgomery, and Staff members Mrs. Eriksson, Mrs. Hunter, and Mrs. Gertner.

Mr. Skipton opened the meeting dicussing the statewide elective executive officials: Secretary of State, Auditor of State, Treasurer of State, and Attorney General. The committee had previously agreed that the ballot should not be shortened and that these officers should continue to be elected. There were some dissents from this, however.

Mr. Skipton: We're talking about the executive article of the Ohio Constitution and a basic question that arises is how may elected statewide officials there should be in the executive.

Mr. Shocknessy: The basic question is whether or not there should be these officers.

Mr. Skipton: If you are committed to the principle that the governor should be the sole executive officer of the state, then it automatically raises the question of whether there should be other elected officials or not. This is the question the committee considered, and we didn't have a unanimous vote. But the feeling was they should be elected, at least that was the feeling of the majority of the committee.

Mr. Shocknessy: There isn't any question to me that the atty. gen. should be an independent elected officer, and the auditor should be an independent officer. I don't have strong feelings about the treasurer and the sec. of state.

Mr. Skipton: I think we can resolve this quickly: does anyone have a different point of view?

Mr. Norris: My feeling has been that the atty. general and the auditor, and I see some reason for retaining the sec. of state as an independent office, because as chief elections officer, I think he should be independent. On treasurer, I feel that it is close, but I don't see any reason to change.

Mr. Shocknessy: I think the atty. gen. has got to be free to tell whoever is governor exactly what he thinks. This is the same for the auditor, as it is in all corporations. The auditor must report to the board , so must the atty. On sec. of state you can make a pretty good case for either way--elections are significant there. I think there is much to be said, however, for combining the treasurer and the director of finance. I'm not negotiable on auditor and attorney general. On the others, I would go either way you got a majority vote. I don't think the sec. of state has enough to do.

Mr. Montgomery: He could be assigned all the other record keeping functions which are now dispersed, but that really should be a legislative decision.

Mr. Shocknessy felt that the comments concerning the committee's recommendation

should include the committee's feeling that this be done. Mr. Montgomery mentioned that this is the similar problem which the treasurer complains of--that her function is dispersed. Mr. Shocknessy felt that the treasurer's office is purely custodial--she only puts money in banks.

Mr. Norris said that he felt that no one had shown any reason for removing the treasurer, and that therefore there was no reason to do so. Mr. Skipton said that, philosophically, the only reason he could see to make a change was if there was some compelling reason, or an obstacle, or defect to the effective functioning of state govt. If the governor is frustrated or handicapped, that is one thing. He does not believe that is the case, however. Mr. Norris mentioned that the elective officers serve as checks and balances in the executive branch of government.

The committee expressed unanimity on this point. It was noted that Dr. Cunningham and Mrs. Sowle had expressed the opinion that some of these officers should not be elected, and Mrs. Sowle had expressed interest in how elections might be handled other than by the Secretary of State. She was thinking of another independent agency. Mr. Shocknessy spoke against the idea of experimentation in that area. He felt that it is important for the committee to make clear that it is not just out to reorganize if it is not necessary.

Mr. Skipton: Should there be any more specification of the duties of these statewide elected executive officers? The constitution presently is almost totally blank on this subject. Mr. Shocknessy felt that the less that is specified in the basic document, the better off we are.

Mr. Norris: For attorney general, we might insert language such that "he shall be the chief law officer of the state". I don't see any harm in putting it in and there may be merit in doing so.

Mr. Shocknessy: The attorney general is not the governor's lawyer; he is the lawyer of the state of Ohio. He has to be an independent officer, operating for the people. My view about the attorney general is that what the governor doesn't do, he does.

Mr. Skipton: There seems to be a real question about how much of a prosecutorial role the attorney general has. How much initiative can he exercise on his own?

Mr. Norris: There are some limited sections in the Code giving him some powers.

Mr. Shocknessy: I don't think we should be too specific in basic authorities--in the constitution.

Mr. Norris: Can we use the language "shall be the chief law officer of the state and shall have such duties and powers as may be prescribed by law". I think that is self-executing.

Mr. Montgomery: I think that would follow with a provision for the sec. of state--"he shall be the chief election officer, and have such powers as duties as prescribed by law."

Mr. Norris: Is there a reason for using the term law officer instead of legal officer?

Mrs. Hunter: That is the statutory terminology--that is the only reason.

Mr. Shocknessy: Legal us an easily misunderstood term. It gets to be descriptive. I'm inclined to stick with law officer.

Mr. Skipton: Law officer can sometimes get into law enforcement. What is the relationship, say, of the attorney general to the justice system of the state? Where does he stand in relationship to enforcement?

Mr. Norris: He doesn't really acquire powers because he is chief law officer, his specific powers must come from the General Assembly.

Mr. Montgomery: The attorney general can exercise no intiative on his own to prosecute--the governor or another state official can call on him to do so, however.

Mr. Skipton: This whole question of administration of justice is involved in the executive and the judiciary.

Mr. Shocknessy: The temptation of that office is to make the most of it--that's part of the problem we're dealing with.

Mr. Norris: We don't want the atty. gen. to say "I'm the chief law enforcer of the state." So maybe if you leave the word out in the constitution that does say something.

Mr. Shocknessy: You could change it to he is the law officer <u>for</u> the state, and then there's no question about it.

Mr. Skipton: Should the attorney general have any prosecutorial role?

There was agreement that that shouldn't be put into the constitution. The legislature should have authority under the constitution to do such things as developments suggest concerning each office.

Mr. Skipton: This has been my view--when these types of evolutionary changes occur, there has to be flexibility.

Mr. Norris: I'll move the adoption of one of these drafts. I move the adoption of draft #3, changing "of" in the first line to "for".

Mr. Skipton: What about "chief"?

Mr. Norris: I have no problem with that. Mr. Montgomery said he liked it and that it was descriptive.

Mr. Skipton: "The attorney general is chief law officer for the state and shall have such powers and duties as may be prescribed by law." Does that take care of it?

The motion was adopted.

Mr. Skipton: Let's take up the other one that we have discussed somewhat--the sec. of state. We have already decided that he should be elected.

Mr. Norris: I think Draft #2 does the same thing for the sec. of state that we did for the attorney general.

It was noted that the language was not identical, and agreed that it should be changed to be the same form. Mr. Norris moved adoption of Draft #2--Secretary of State with the stated changes: "The Secretary of State is the chief election officer of the state, and shall have such powers and duties as are prescribed by law." There was some discussion about the most appropriate tense for these provisions. Part I of the commission report was consulted, and it was felt that provisions should be consistent.

Mrs. Hunter: On the other constitutional provisions in other states concerning the sec. of state, I do see that the others do use this "shall" form.

The committee changed the provision to read "shall be the chief election officer" and "shall have".

Mr. Skipton noted that any reference to keeping official records, etc. was being left out--this was felt to be material for legislative consideration. It was felt, by the committee, however, that the legislature should look into the record keeping duties of the sec. of state, with a view towards consolidating them.

Next, the committee considered the treasurer of state.

Mr. Montgomery: If the others have a broad, general phrase, the treasurer, should, too. It should say what the treasurer is, without going into detail. "chief custodian of state funds" or "taxes" or something like that.

Mr. Shocknessy: I don't like "all taxes"--"all state funds" might be better.

Mr. Skipton: The tax issue is a small part of this--the biggest thing is all the other funds. If you are going to have a treasurer, you have the basic question of what funds the treasurer isto be in charge of. Should each university have its own bank account? Should workmens compensation, retirement funds, and so on be under the treasurer's control?

Mr. Norris: You could say "the treasurer of state shall be custodian of such state funds as may be provided by law."

Mr. Skipton: Unless we wish to work a major alteration in the handling of state funds, you're going to have to eliminate custodian of <u>all</u> funds and say "shall have such powers and duties as are provided by law."

Mr. Shocknessy: We could say the treasurer of state shall be custodian of all state monies assigned by the g.a.

Mr. Norris: Let me try this language on you: "The treasurer of state shall be custodian of such state funds as are provided by law, and shall have such other powers and duties as are provided by law." I think that is consistent.

Mr. Montgomery: I don't like that "as provided by law" twice. "The treasurer of state shall be custodian of such state funds, and shall have such powers and duties, as are provided by law." I think that will do it.

The language concerning the treasurer was approved by the committee.

Mr. Skipton: We can now move on to auditor. The committee agreed to change the title of the auditor, by a majority, to aduitor-general. This was to imply that the office have post-auditing functions.

Mr. Norris: How about this? "The auditor of state shall be the chief accounting officer, and shall have such powers and duties as are prescribed by law."

Mr. Skipton: We may invite trouble with "chief accounting officer." The auditor now exercises tremendous authority over county officials--the auditor is not just an auditor for the state.

Mr. Shocknessy: I'm afraid we could get into a lot of trouble using the term "auditor-general".

Mrs. Eriksson: Dr. Cunningham was opposed to the auditor performing other than post-audit duties , and he felt the term "auditor-general" implied that.

Mr. Shocknessy: The proposition itself is a good one.

Mr. Norris: How about the language "shall verify that moneys appropriated by the g.a. are spent according to law" as proposed in Draft #2. Does that affect anything he now does?

Mr. Skipton: That doesn't do any violence to anything he now does--he just doesn't do it.

Mrs. Eriksson: He does a great many other things.

Mr. Skipton: This is a function that we should think about very seriously. I'm not sure we understand what powers the auditor now has--he doesn't exercise all the powers he now has. There are many unanswered questions here--I don't want to write constitutional language which would be interpreted as a mandate to use some of those powers.

Mr. Norris: Your thought is that we shouldn't call him anything, and should just say that he has such powers and duties as are provided by law.

Mr. Skipton: My inclination is to do just what we have done for the treasurer--make that description just as bland as we can make it.

Mr. Shocknessy: I seriously think it should be "auditor of state".

Mr. Skipton: I would prefer that we don't use any language that infers a mandate for him to prescribe accounting systems.

Mr. Shocknessy: What kind of language could we put together that would be consistent with the other state officers?

Mr. Norris: You could leave out calling him something and just say the auditor shall have such powers and duties as are prescribed by law.

Mr. Skipton: I would not object to language that said that he is a post-auditor of some sort.

Mr. Shocknessy: Then you have to interpret that.

Mr. Skipton: Is there any standard way that has been interpreted?

Mrs. Hunter: The most common provision, like that in the model state constitution, is that the legislature shall appoint an auditor, to serve at its pleasure, to audit public records and perform such duties as are provided by law.

Mr. Norris: How about the auditor shall be the auditor of public accounts?

Mrs. Gertner: The 1970 Illinois constitution reads "shall conduct the audit of public funds of the state," and continues that he shall make reports and investigations as directed by the g.a. and so on.

Mr. Skipton: We could specify that he has authority to audit all public accounts, which he now has authority to do, and I wouldn't object to that.

Mr. Shocknessy: I'd be perfectly willing to say that the auditor of state has the authority to post-audit all public accounts. The implication there, although it doesn't say it, is that he only has post-audits, and that's what he ought to have. I'm opposed to thispre-audit deal.

Mr. Skipton: We have two pre-audits now, and I'm always wondering why we need that.

Mr. Norris: "The auditor shall audit public accounts and shall have such powers and duties as are prescribed by law".

Mrs. Eriksson: Do you want to say public accounts of the state?

Mr. Shocknessy: We could even say "the auditor shall have authority to make post-audits of all public accounts and such other powers and duties as are prescribed by law".

Mr. Skipton: I have no objections to that.

Mr. Shocknessy: It's pretty simple and it gets down to what he ought to do. It gives him a post-audit authority and such additional as prescribed by law.

Mr. Skipton: The legislature could create its own performance auditor.

Mrs. Eriksson: How about "public funds of the state"? If you don't specify of the state, is this going to lock into the constitution that the auditor will audit accounts of political subdivisions?

Mr. Norris: How about this: "The auditor shall conduct post-audits of such public accounts as are prescribed by law.

Mr. Skipton: If you are going to make him an auditor, I wouldn't mind if you say "he shall have authority to audit all public accounts."

Mr. Shocknessy: You could say "of the state of Ohio".

Mr. Norris: "The auditor shall audit such public accounts and shall have such powers and duties as are provided by law."

Mr. Shocknessy: He should be limited to post-audit.

Mrs. Eriksson: How about the "auditor of state shall have authority to conduct post-audits of public accounts, and shall have such powers and duties as are provided by law."

Mr. Shocknessy: If there is any question about what public means, I'd be perfectly willing to add of the state of Ohio, to be perfectly clear.

"The auditor of state shall have authority to conduct post-audits of accounts of the state and shall have such other powers and duties as are prescribed by law."

Mr. Norris: What we're saying is he shall have authority to conduct post-audits of all accounts of the state and shall have such other powers and duties as are provided by law.

The provision was agreed to by the committee. It was felt that it should read "auditor of state" even though it does not presently read as such, rather than "auditor-general."

Mr. Skipton: We have left the status quo, and we have cleaned up the language. We have done something which was very important to Dr. Cunningham--we have limited the auditor to post-auditor. Now we have this problem of succession and how we determine the problem of disability of the governor of the state. Sally, would you explain this draft?

Mrs. Hunter: First of all, it answers the question of who determines whether or not the governor is disabled. That was the first question discussed by the committee, so it is the first topic covered in the commentary, however it is the topic of section 16, and not section 15. The draft gives the supreme court the original, exclusive and final jurisdiction to determine disability. The present constitution says nothing. The second matter that is taken care of by section 16 is to provide that it is the general assembly that shall be the triggering mechanism for getting the problem before the supreme court, by resolution, rather than saying "shall prescribe by law", it provides specifically that by joint resolution adopted by a 2/3 vote, the question of whether the governor has a disability shall be decided by the court. It also allows the governor to transmit his written declaration to the court claiming that the disability no longer exists.

Mr. Shocknessy: What about his opportunity to oppose the resolution in the first instance?

Mrs. Hunter: This is not specifically covered by this draft.

Mr. Shocknessy: It may be implied, but dealing with something this basic, it is important to spell it out. "After due notice and hearing"--you've got to give a hearing. It should be "after due notice to the governor by the court, and hearing..." We want to make it procedurally sound.

Mr. Norris: The supreme court has the duty to notify the acting governor when the governor petitions to be reinstated.

Mr. Shocknessy: I don't think this has to provide for governor-elect.

Mr. Norris: May I make one other suggestion? When you draw up that sentence on hearing, can you add in the word "public"?

Mr. Shocknessy: All hearings are public. The supreme court can't hold a hearing that isn't public.

Mr. Norris: I would hope so, but since this is the basic document, I think it should be specified.

Mr. Skipton: This is the sort of thing on which we can well afford to use extra words.

Mr. Norris: On the first page, it says "any person serving as acting governor shall have the powers, duties, and compensation of that office." You could construe acting governor to be an office.

Mrs. Hunter: Section 16 retains the present line of succession, although it restates it, somewhat.

Mr. Shocknessy: You know its always possible the acting governor can be disabled too.

Mrs. Hunter: Yes, section 17 attempts to recognize this is the second paragraph--in a case where for any reason the governor-elect was unable to succeed to the office, the lt. governor would succeed to the office for the full term. We didn't make any specific provision for a problem in the office of acting governor, because the line of succession is given.

Mr. Shocknessy: The guy is acting governor temporarily--so we have to provide if something happens to him.

Mrs. Hunter: You don't think that is adequately handled by section 15?

Mr. Shocknessy: I think it would be if we didn't use the term acting governor. If you had said lt. governor shall act as governor or shall serve as governor, but once you have set up a new status of acting governor, then you have to treat it differently.

Mr. Norris: I think that term "acting governor" sounds like a new office, and it can get you into a lot of trouble.

Mr. Shocknessy: Say "the lt. governor shall serve or act as governor" and then you can treat him the same way. You can say "he shall serve as governor until the governor's disability is terminated." Then the rest of this thing will go along all right.

Mr. Norris: Is the lt. governor still lt. governor when he is governor?

Mr. Shocknessy: No, I think then that office is vacant.

Mr. Montgomery: You can't provide for everything--it would be impossible.

It was agreed that new succession and disability drafts would be prepared for the next meeting.

The meeting was adjourned.

Ohio Constitutional Revision Commission
March 26, 1973
Legislative-Executive Committee

Summary

The Legislative-Executive Committee met on March 26th at 10:30 a.m. in the Commission offices. Attending were Chairman Skipton, Senator Applegate, Mr. Montgomery, and Mrs. Sowle. Also present were Staff members Mrs. Eriksson, Mrs. Hunter, and Mrs. Gertner.

Mr. Skipton presented Part 2 of the Article III report, recommending the retention of sections 5, 6, 7, 8, 9, 12, 13, 14, and 20 without change, and the referral of section 19 to another committee. Mr. Skipton went through it section by section, discussing the purpose of each of the provisions. Mr. Montgomery asked if it was part of the committee's role to make purely technical changes in the constitution (spelling and grammar) as it went through these sections which are not having any substantive changes made. Mr. Skipton said that it had been the policy of the commission to make technical changes when substantive changes were being made, but that he felt that it was perhaps better not to take chances with sections by making only minor changes. Mr. Montgomery expressed the feeling that we shouldn't give our blessing to a document which has obviously recognizable errors in it, and that perhaps since we were going through the constitution anyway, technical changes should be made, and that we should explain this type of changes to the voters as purely technical. Mrs. Eriksson said that she would check in some of the California materials, because California was a commission which dealt in piecemeal form with the constitution as we are doing, and see if any of the revisions which that commission made were technical only.

Mr. Skipton explained that sections 5, 7, 8, 9, and 14 were being retained for the reasons stated in the Staff report, because no one who testified to the Committee gave any reason for deleting them. The Governor did not make any expression on the sections concerning his powers, and Mr. Skipton did not expect that he would have any opinions on this matter. It was noted that even though these sections were all added at the same time, they do have many stylistic differences. The subjects of each of the sections were discussed. Section 5 grants the supreme executive power of the state to the governor. Section 7 provides that the governor shall communicate to the General Assembly at each of its sessions and recommend such measures as he shall deem necessary. Section 8 provides for the governor's power to call special sessions. This corresponds to the similar power recommended by this commission that legislative leaders be permitted to call special sessions. It was pointed out that the power of the governor to call special sessions could also be used when the g.a. was in recess, if the governor felt that there was something that needed immediate consideration. Section 9 provides the governor with the power to adjourn the g.a. when there is a case of disagreement between the two houses as to the time of adjournment. Section 14, similar to section 4 in section II which provides who may hold a seat in the g.a., provides that no public official, of the state or of the U.S., may execute the office of governor. "Except as herein provided" is included as part of that provision, to cover a case where there has been succession to the governorship by another public official, i.e. the lt. governor, president of the senate or speaker of the house, as provided in the present constitution.

Mr. Skipton reported to the Committee that there had been some discussion after the last meeting about the state seal and whether the provisions relative to it should be

retained in the executive article of the constitution. He said that it was his feeling that this is something which should not be subject to frequent change, and that if there was a constitutional provision, this was less likely. The seal has historical significance, and should thus be a matter of constitutional importance.

The recommendation to retain sections 6 and 20 of Article III also were discussed by the committee. Section 6 provides that the governor may require written information from the other state elected executive officials, and shall see that the laws of the state are faithfully executed. Section 20 provides that the officers of the executive dept. and of the public state institutions shall report to the governor, at least five days preceding the opening of each regular session of the g.a., and that the governor shall transmit these reports to the g.a. along with his message. Mr. Skipton said that one of the important reasons for the retention of these sections corresponds to the retention of the state executive elected officials, which the committee is also recommending, and that these sections provide for communication between the governor and the other state elected executive officials. It was agreed that they conferred necessary power and authority on the governor.

It was also recommended that Section 19, which provides for the compensation of executive officials and a provision that their compensation be neither increased nor diminished during the period for which they are elected, be considered along with other sections relating to public officials by a Committee of this Commission on Public Officials.

The report on Part 2 of Article III was unanimously accepted.

The Committee next considered Part 1 of the Article III report of the Committee. Mr. Skipton reported that this report was prepared by the staff as a result of the discussion at the last meeting at which, he, Mr. Norris, Mr. Shocknessy, and Mr. Montgomery were present, and that he wanted to see if it was representative of the thinking of the committee. The report is concerned with the statewide elected executive officials, presently named in the constitution: Secretary of State, Auditor of State, Treasurer of State, and Attorney General. The report recommends the retention of each of the officials as constitutional and elected officers, and recommends a single sentence to be added to Section 1 (which names the officers) or elsewhere in Article III of the Constitution concerning the basic function of each of the offices.

1. Secretary of State--The only question asked about this one was why it says chief election officer instead of elections, and it was noted that this was the way it was phrased in the statutes. The secretary is also provided with "such powers and duties as are prescribed by law", which would include the recording function.

2. Auditor of State--a) It was noted that the Auditor is given authority to conduct post-audits, but not mandated to conduct them. b) It was pointed out by Mr. Skipton that the committee wanted to stress the post-audit function, and that pre-audits would be a matter left up to the legislature. c) Mrs. Sowle questioned whether all accounts of the state includes political subdivisions. The "state" is not a clearly defined term. For Sec. of State, chief election officer of the state includes local elections. Is accounts of the state meant to include accounts of political subdivisions? Mrs. Gertner and Mrs. Hunter clarified that it was not meant to include local accounts and political subdivisions, according to the expression at the last meeting. This is presently something that

is left up to the legislature and should continue to be.

The committee wants to give the G.A. authority to specify which public accounts should be audited. The sentence was changed to read:

THE AUDITOR OF STATE SHALL HAVE AUTHORITY TO CONDUCT POST-AUDITS OF ALL ACCOUNTS OF THE STATE, AND SUCH POWERS AND DUTIES, AS PRESCRIBED BY LAW.

"As prescribed by law" is intended to modify both authority and powers and duties, and will leave specific granting of power up to the G.A. The committee agreed on this version. There was some question as to whether or not other should be included before powers and duties, but the committee finally decided that it shouldn't--there is no other in the other provisions.

3. Treasurer of State--The provision concerning the treasurer provides that the treasurer shall be custodian of such state funds and shall have such powers and duties as are provided by law. Mrs. Sowle asked what funds the treasurer now has. It was pointed out that the universities keep their own funds under the present law. "As are provided by law" also modifies such state funds in the provision--the committee wanted to avoid constitutionally defining that term--to be provided by the legislature as it is at present.

4. Attorney General--The provision concerning the atty. general provides that he shall be the chief law office for the state and shall have such powers and duties as are prescribed by law. Mr. Montgomery noted that the attorney general would continue to exercise powers and duties prescribed by law and not "common law" powers. Mrs. Hunter said that the Commentary expressed the committee's intent on this score. Mr. Skipton explained that the term "chief law officer" was chosen because the committee agreed that it would be up to the general assembly to develop or expand the prosecutorial role of the attorney general, and the committee declined to freeze such matters into the Constitution, although it has noted that in recent years the attorney general has come to exercise a greater prosecution function. Studies in the administration of criminal justice have recommended such a direction, he pointed out, but the committee, having examined the attorney general's statutory powers, felt that any extension of them should be in the hands of the legislature, and it selected a statement about the attorney general that makes its intention on this point clear.

The report was unanimously accepted by those members of the committee present. Mr. Skipton said that he felt that the opinions of the missing members of the committee should be considered, and that the report would be mailed out to the members of the commission, to be considered at the next commission meeting. Another committee meeting would be held before the commission meeting to discuss provisions on succession and disability, which Mrs. Hunter is completing, and to discuss several miscellaneous sections which will be deleted.

Ohio Constitutional Revision Commission
Committee on The Executive
April 29, 1971

State Elected Executive Officials

The Ohio Constitution provides for the election by the people of six executive officers--The Governor, Lieutenant Governor, Secretary of State, Auidtor of State, Treasurer of State, and Attorney General.

The Governor is a constitutional official, elected by the voters, in all 50 states. Alaska, Arizona, Maine, Maryland, New Hampshire, New Jersey. Oregon, Utah, West Virginia, and Wyoming have no Lieutenant Governor; in Tennessee the Lieutenant Governor is elected by the State Senate from among its membership; and in the remaining states he is elected by the people. A Secretary of State is provided for by the Constitutions of all states except Delaware, Hawaii, Maryland, New Jersey, New York, Pennsylvania, Texas, and Virginia and elected by the people in all states where he is a constitutional official except in Maine, New Hampshire, and Tennessee, where he is chosen by the legislature. (In Alaska, the Secretary of State succeeds to the Governorship if the governor dies or is disabled.) An Attorney General is provided for by the Constitution and elected by the people in all states except Alaska, Connecticut, Hawaii, Indiana, Maine, New Hampshire, New Jersey, Oregon, Pennsylvania, Tennessee, Vermont, and Wyoming. In Connecticut, Indiana, Oregon and Vermont, the Attorney General is elected by the people but is a statutory, not constitutional, official; in Maine, he is provided for by the Constitution but is chosen by the Legislature.

The Treasurer is a constitutional official elected by the people in all states, except Alaska, Hawaii, Maine, Maryland, Michigan, New Hampshire, New Jersey, New York, Tennessee, and Virginia. In Maine, Maryland, New Hampshire, and Tennessee, he is providef for by the Constitution but elected by the Legislature.

Twenty-seven states provide in their constitutions for election by the people of an Auditor, and two additional states (Georgia and Maine) provide for his election by the people, but he is a statutory, not a constitutional, official. He is a

constitutional official, but chosen by the legislature, not the people, in Colorado, Hawaii, Louisiana, Michigan, New Jersey, and Virginia.

California, Connecticut, Florida, Maryland, Nevada, New York, South Carolina, and Texas, which do not constitutionally provide for the election by the people of an auditor, do so provide for the election of a controller; some states provide for both. (The new Illinois Constitution eliminates the elected Auditor and provides for an elected controller.)

These six officials are elected by the people and provided for in the Constitution in a majority of the states, but there is great variation among the states in the number of popularly elected executives established by the Constitution. The number varies from one (New Jersey which provides only for a popularly elected Governor) or two (Alaska, Governor and Secretary of State) to as many as 13 (Louisiana) agencies provided for in the Constitution and headed by one or more popularly elected officials. In addition, the statutes of some states provide for additional officials to be elected by the people. (For example, a state board of education is created by the Constitution in Ohio but election of the Board by the people is provided for by law.)

Except for the office of Governor, it is apparent that there is no uniformity among states, concerning either which executive officials are to be provided for in state constitutions or which are to be elected by the people. The fact that the official is not provided for in the Constitution does not mean, of course, that he does not exist in the state--all states, for example, have an Attorney General although he is not a constitutional official in 12 of them.

Trends

Although scholars, political scientists, and others have argued for some years that the number of elected state officials should be reduced, it is difficult to spot an amendment trend in this direction among the states. The newer state constitutions do, however, generally provide for fewer elected officials--the new

Michigan Constitution (adopted in 1963) eliminated an elected state treasurer and auditor, replacing the auditor with a legislative auditor. (Colorado has recently adopted a constitutional amendment eliminating the elected auditor and providing for an auditor chosen by the legislature.) The new Illinois Constitution, which takes effect July 1, 1971, eliminates an elected head of the education department, and the Alaska Constitution provides for only two elected officials--a Governor and Secretary of State. Hawaii's new Constitution provides only for an elected Governor and Lieutenant Governor (and Auditor elected by the Legislature) but adds an elected Board of Education. New Jersey, also with a relatively new Constitution, provides for the election only of a Governor. An Auditor is provided for in the Constitution, but he is chosen by the Legislature.

A study committee of the National Governors' Conference, an arm of The Council of State Governments, attributes the small amount of activity in this area to the fact that: "Few legislatures have been willing to submit amendments to reduce the number of independently elected department heads who have competitive administrative authority."

Models

The Model State Constitution vests the executive power of the state in a Governor, elected by the people, and does not provide for any other elected executive official. (Article V, section 5.01). The comment to the section states that "All authorities on executive organization agree with the position embraced by the Model State Constitution for more than 40 years that administrative power and responsibility should be concentrated in a single popularly elected chief executive," and points out that federal executive power is concentrated in the President and not distributed among other officials elected by the people. (The Model State Constitution also requires the legislature to appoint an auditor to perform the post-audit function and report to the legislature and to the governor.)

The National Governors' Conference Study Committee on Constitutional Revision

proposes a Model Constitutional Article for the Executive which provides for the election of a Governor and Lieutenant Governor and no other executive officials. The Committee states: "The election of only the Governor and Lieutenant Governor meets the criteria of strengthening the Governor's role in controlling the administrative apparatus and strengthening party responsibility." If a state feels it necessary to provide for more elected officials than these two, the committee recommends election of the Attorney General and Auditor, in that order.

Arguments

Strengthening the office of the Governor and centralizing administrative responsibility are the primary reasons for wishing to reduce the number of independently-elected officials to perform particular executive or administrative functions. Bennett M. Rich, in the National Municipal League publication (1960) "The Governor" states:

> "Those concerned with constitutional revision in the 1800s were interested not in administration but in greater public participation in government - the electoral franchise and popular election of executive and judicial officers. One consequence of these reforms was a host of popularly elected constitutional officers, averaging in 1950 about thirteen per state.
>
> As state service and regulatory functions grew in number and in scope, administrative problems assumed ever-increasing importance. The "fragmentation" of the executive branch, resulting from the over-zealous pursuit of popular election, came to be viewed with concern. The coordination of expanding state activities became increasingly difficult and the development of responsible government seemed impossible in the absence of a single focus for the total program.
>
> . . . . .
>
> The greatest single impediment to executive unity lies in the constitutional designation of top officials who obtain office by popular election or by legislative election."

The Maryland Constitutional Convention Commission, reporting to the Governor and the General Assembly in Maryland in 1967 the text of a proposed constitution, stated that "one of its (the Commission's) guiding objectives should be the strengthening of each of the independent, coordinate branches of government . . . . The establishment of an executive branch with responsibility, accountability and authority requires that primary attention be given to strengthening the office of

governor." The Maryland Commission recommended the election only of a Governor and Lieutenant Governor, and eliminated the Attorney General and Controller from popular election.

Those who argue for the retention of elected executive officials in addition to the Governor and Lieutenant Governor rely largely on the Jacksonian theory of direct popular control of as many phases of government as possible. Generally, specific arguments for retention of particular elected officials amount to: (1) tradition; (2) fear that too much power would be concentrated in one official if the Governor has responsibility for appointments for all departments. With respect to the Auditor, it can also be argued that, to the extent he performs a post-audit function, he serves as a check on the other executive departments (to insure that expenditures are in accord with law) and should, therefore, be independent of gubernatorial appointment. Of course, some states have solved this problem by making the officer who performs the post-audit function responsible primarily to the legislature, not to the Governor nor to the people. A similar argument may be made for retaining the Attorney General as an elected official--that, to some extent, he serves as a check on gubernatorial power by interpreting the law to the Governor and advising him.

Ohio Constitutional Revision Commission
Committee on The Executive
May 3, 1971

Questions Relating to the Executive Article

In examining the present Executive Article of the Ohio Constitution for clarity, fixing of executive responsibility, obsolescence, and related matters, as well as examining the concept of separation of powers, other state constitutions, model executive articles, and literature on the subject of executive powers and responsibilities, the following questions are raised for committee consideration:

1. Which executive officials should be provided for in the Constitution and elected by the people? Should the two-term gubernatorial limit be retained?
2. What should the powers and duties of the Lieutenant Governor be, if this office is to be retained?
3. If the Constitution should provide for appointed officials, should it specify by whom they are to be appointed? and removed?
4. What is the best way to provide for gubernatorial succession? Is the Ohio Constitution clear on this point? Should there be provisions for election?
5. Who should determine whether and when a Governor becomes disabled? Is the Ohio Constitution clear on this point?
6. What is the Governor's role in policy making and how much control should he have over administrative organization? Should there be provisions in the Constitution relating to the Governor's ability to reorganize administrative functions and, if so, should there be limits placed on this power? Should the legislature be limited in any way in its authority to establish new agencies for the performance of administrative functions? To what extent should administrative functions be provided in the Constitution?
7. Should the Governor and Lieutenant Governor be elected as a team to insure that they are members of the same political party?
8. Are the Governor's power to call the General Assembly into special session and specify the subjects to be considered and to adjourn the General Assembly proper

executive powers? Should they be changed in any way?

9. Are any of the provision in Articles III, IX, or VII obsolete? Should any be eliminated because they are strictly statutory in nature?

10. Should there be constitutional provisions for the state budget? If so, what should they be?

11. Are the appointment provisions clear?

12. Should any powers and duties be specified in the Constitution for constitutional officials other than the Governor and Lieutenant Governor?

13. Should the Constitution provide any qualifications for eligibility for an executive office other than being an elector?

14. Should the Governor's power of pardon and reprieve be modified in any way?

Note: Some of the questions listed above (Lieutenant Governor's role in the legislative process, Governor's power to convene and adjourn the General Assembly, the budget, appointments subject to senatorial advice and consent, as well as the Governor's veto power over legislation) are appropriate subjects for joint consideration of this committee and the committee studying the legislature.

Ohio Constitutional Revision Commission
Committee on the Legislature
May 11, 1971

Article II - Legislature

General Approach.

I would agree with the following statement by a commentator on legislative improvement. "Much of the work of constitutional revision so far as the legislature is concerned is . . . a matter of determining not what should be added to the constitution but what might properly be taken out of it."[1]

The provisions of most state constitutions are based on distrust of the Legislature. The attitude of the Commission should be that the Legislature can exercise all of the legislative functions with as few limitations on procedure and subject matter as possible.

Issues involved for discussion.

1. At the outset we should consider the question of a bicameral versus a unicameral legislature. As a theoretical matter there is today little justification for a bicameral system: apportionment has eliminated the argument that one house is "geographical" and one "population" representation; the ever increasing cost of staff and other support activities for the Legislature suggests that the present system is unnecessarily expensive. The sixth edition of the Model State Constitution (MSC) recommended by the National Municipal Leage in 1963 as revised in 1968, provides for a single chamber. The comment to the MSC states (4.02):

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[1] quoted in Salient Issues of Constitutional Revision, page 69

"Most of the claimed virtues of unicameralism have been realized in the Nebraska experience during the past 30 years. Nebraska's single house with 49 members has permitted more easily the pinpointing of legislative responsibility than in sprawling two-house legislatures. Fewer bills have been introduced and a higher percentage of them passed. The prestige of membership has risen and in the view of many observers so has the quality of candidates.

On the other hand, and in spite of the far more extensive experience with the bicameral system, there are no data to support the claim that the second house is a constructive check against hasty action."[2]

However, the established two house tradition in Ohio plus the absence of any clear demand for change, either here or in other states, suggests that any attempt to make so drastic a change would be futile. In "Salient Issues of Constitutional Revision" one commentator concludes a discussion of the issue as follows:

"But in reality many of these improvements can be made within a bicameral system. States having and retaining two houses--and this includes all but Nebraska--should carefully review the structure and procedures followed and the quality of members elected. Perhaps this will remain the chief means of improving legislative institutions for the road to unicameralism seems a rough one indeed. The Kansas Commission on Constitutional Revision, recognizing "the hold of tradition and the widely varying views that exist" on this issue, "decided that an effort to achieve the practicable, less-than-perfect, is to be preferred to a vain attempt for the ideal."[3]

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[2] sixth edition of Model State Constitution, page 43.

[3] Salient Issues of Constitutional Revision, page 73.

2. The assignment of this Committee specifically excludes the question of initiative and referendum from consideration at this time. However, since it now appears in Article II as a reservation from the grant of legislative power to the legislature, we should at least consider whether it should still be referred to in Article II and what general pattern a provision on the initiative and referendum should follow. For example, would it be sufficient to provide in an article on Suffrage that:

> Laws shall be passed to provide for the right of initiative and referendum on all laws of the state, county and municipal governments.

Does sufficient judicial power exist to assure that the rights granted would be protected by the adoption of legislation?

3. Consideration should be given to the format of Constitutional amendments. For example, if it is decided to shift a section into another Article, should the amendment covering Article II make the shift now or should the amendment simply ignore that section and allow it to be transferred and revised at the same time in a later amendment proposal?

4. There are a number of provisions in Article II which should be deleted, e.g. divorces by legislature, mechanics' liens, eight-hour day. They seem to have no rational purpose today. However, research by the Commission should be developed to show why these provisions were adopted originally and why that reason no longer exists. Where obsolete sections are deleted, the Commission must be prepared to assure the voters that no substantive rights are being affected.

Ohio Constitutional Revision Commission
Committee on the Legislature
May 11, 1971

Following is a list of questions regarding the structure, procedures, and organization of the General Assembly which might be considered by the Committee in its study of the first part of Article II.

1. Should Ohio have a unicameral, rather than a bicameral, legislature?
2. Should representatives have four-year, instead of two-year terms? If so, staggered? Should senatorial terms be changed (presently four years, staggered)?
3. What factors should render a person eligible or ineligible to be a member of the General Assembly? Age? Residence? Be an elector? Holding other office? Conviction of crime?
4. Are the various specified quorums and majorities for legislative action satisfactory?
5. Should some provisions be left to law, such as keeping journals, details of filling vacancies?
6. Are the investigative powers of the General Assembly and its committees clear?
7. Should the General Assembly be a continuous body? If so, for what period?
8. Should the General Assembly be able to call itself into special session?
9. Are the veto provisions to be retained? Are they satisfactory? Consider: extraordinary majority for passage over veto, time Governor has to consider measures, problems with item veto. (Consider in conjunction with the committee studying the Executive)
10. Should the requirement of public proceedings be retained? Modified in any way?
11. Should the details in sections 16 and 17 regarding bills be retained in the Constitution? (Three full and distinct readings, one subject, signed in presence of house, etc.)

12. Should members of the General Assembly be enabled to receive allowances or reimbursement for expenses in addition to compensation? (section 31)

13. Should annual sessions be required by the Constitution? Is the first Monday in January a satisfactory date for commencing session?

14. In conjunction with the Executive committee:

Are the provisions respecting senatorial advice and consent to gubernatorial appointments satisfactory? (section 21 of Article III)

Should the Lt. Governor continue to serve as President of the Senate with the power to vote when the Senate is equally divided?

Should the Governor continue to have the power to call a special session? And specify the subjects to be considered? Adjourn the General Assembly under certain circumstances?

Should a provision for post-audits of expenditures by a person appointed or elected by the General Assembly be written into the Constitution?

Eligibility - Members of the General Assembly (Section 4 of Article II)

Art. II, Sec. 4, determining "eligibility" to the General Assembly, provides specifically as follows:

> "No person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to, or have a seat in, the General Assembly, but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

Basically three questions have arisen under this section: (1) whether the situation involves "holding office under the authority of the United States; (2) whether the position in question constitutes an "office" under authority of the United States or this State; and (3) whether the office held under authority of this State, if so determined, is a "lucrative" one.

The section has been interpreted by the Ohio Attorney General many times and by Ohio courts upon fewer reported occasions, sometimes in terms of "eligibility" to office and sometimes in terms of the compatibility of dual offices. Specific research was requested as to such holdings in order to show the committee how this constitutional provision has been interpreted. The following findings are reported to the end that the committee can decide whether this provision or a comparable one should be retained.

Cases and opinions dealing with the phrase "holding an office under the authority of the United States" have been few. The court syllabus of an 1899 Ohio Supreme Court case (State ex rel. Allen v. Mason,) 61 O.S. 62, is as follows:

> "A clerk in the United States pension agency, serving by appointment for a period not exceeding three months, and compensated with money of the United States appointed for that purpose by congress, having no duties defined by law nor discretion to act independently of the director of the pension agent is not 'holding an office under the authority of the United States' within the meaning of Section 4 of Article II of the constitution of the state which renders persons so holding office ineligible to membership in the General Assembly."

In its brief opinion, the Court reasoned that since the relator performs no duties except such as by law are charged upon his superior, the pension agent, his position is not an office but merely an employment.

In 1917 the Ohio Attorney General confronted the question of whether a member of the board of registration (provided for by federal act to determine questions of military exemption) holds office under authority of the United States. Again, the question was resolved in terms of whether the position in question constituted an office. The Attorney General, citing the fact that the federal act providing for appointment of the board was an emergency, that the position was established "merely for some definite and specific purpose and when this purpose was not fulfilled ... duties will be at an end" and that this body was "not required to continue in office," held that the two positions were not incompatible. Citing cases defining "office," the Attorney General expressed some uncertainty in concluding:"...there is a great variety of opinion in reference to what the word 'office' or 'officer' really should include. For this reason it might be well, if you should think best, to accept the resignations of any members of the general assembly who have been appointed members of the board of registration, and appoint other persons to fill their place. However ... I am of the opinion that members of the boards of registration are not strictly within the term "officers"

and that a person could hold a position on a board of registration and at the same time be a member of the general assembly." 1917 Ohio Atty Gen. Ops. 82.

In 1917, also, the Ohio Attorney General construed the exception for "officers of the militia" to attach to state offices only in concluding that if a member of the general assembly should accept "office" either in the civil or military service of the United States, he would thereby forfeit his office as a member of the general assembly; if he accepts a mere employment either in civil or military service of the United States, he would not forfeit his office. He added that inasmuch as Art. II, Sec. 4 refers to officers only, that he was of the opinion that a member of the general assembly could enlist as a private in the United States Army and not forfeit his membership in the general assembly but that an officer in the United States army could not hold a seat therein. The Attorney General reasoned that whether one is an officer depends upon exercise of functions independently. Bond is an indicia of office. Duties imposed by statute and not by a superior also indicate an office as opposed to a mere employment. 1917 Ohio Atty. Gen. Ops. 1087.

The Ohio Supreme Court had little difficulty in holding, in State ex rel. Leland v. Mason, 61 Ohio St. 513 (1900) that a member of the general assembly who has accepted an appointment to a federal judgeship, thereby for force of section 4 of Article II of the constitution, becomes ineligible to a seat in the general assembly and ceases to be a member of that body, and is not entitled to payment of salary thereafter.

Often cited as a good exposition of what constitutes an "office" as opposed to "employment" is an opinion of the Ohio Supreme Court in 1892, dealing not with the constitutional provision at hand but with Art. X, Sections 1 and 2, then requiring all county officers to be elected. Being challenged was a statute providing for appointment by the clerk of courts of a stationary storekeeper for Hamilton county, giving him duty to purchase and have charge of various office supplies, fixing an annual salary to be paid from the county treasury, and requiring bond. The Court held that this constituted an office to be filled by appointment and therefore conflicted with the then provisions of Article X. The Court here said:

> "It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the propoerty of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office.", State ex rel. Brennan, 49 Ohio St. 33, 38

In 1911 the Ohio Attorney General opined that a delegate to a constitutional convention holds a lucrative office under authority of this state. The statute providing for election of such delegates provided the "same compensation and mileage" as allowed members of the General Assembly for one year, and the question of "lucrative" was resolved on this basis. As to whether such a delegate is an officer, the Attorney General, concluding affirmatively, said:

> "The delegate is elected by and represents his constituents in a convention held for the purpose of altering, amending or revising the state constitution. His is a duty of the highest type, that of revising, or amending and altering the fundamental law of the state. True, his term of office is not definitely fixed other than to the time necessary to faithfully do and perform the particular things for which he was elected, but as stated in People v. Bledso, 68 N.C. 257, 'Duration and slaaries are not of the essence of public office. The duty of

acting for and on behalf of the state constitutes an office.'"

The opinion added that the question posed involved possible "incompatibility of time as well as duties" because the legislature, while adjourned sine die, was subject to call, and if so, the same person could not hold his right to sit in both meetings. Its conclusion is ambiguous at best:

> "I am, therefore, of the opinion that while a member of the general assembly is eligible to be elected a delegate to the constitutional convention, public policy would demand that such member resign as a member of the general assembly before accepting the office of delegate, as he would be in no event, were the general assembly reconvened in extraordinary session, entitled to have a seat in the general assembly, since his office of delegate to such constitutional convention is a lucrative office under the state, and so forbidden under our constitution herein cited (Art. II, Sec. 4)." 1911 Ohio Atty Gen. Ops. 49, 53

Again in 1911 the Attorney General ruled that a lecturer at a farmer's institute, appointed and compensated by the Ohio state board of agriculture, is not an officer but a mere employee and therefore is not within the constitutional prohibition. 1911 Ohio Atty. Gen. Ops. 914.

On the other hand, he held that a position on the board of trustees of public affairs of a village is a lucrative office under the authority of the state, within the comprehension of Art. II Sec. 4, and that therefore such position may not be held by a member of the General Assembly. Here statutes authorized the appointment of such board, subject to council confirmation with successors to be elected, and the Attorney General assumed "that the office of member of the board of trustees of public affairs is a lucrative office . . ."

In 1912 the Ohio Attorney General ruled that membership on a township board of education was a lucrative office, held under authority of the state under Art. II, Sec. 4, and that a personholding such office cannot occupy a seat in the general assembly at the same time, nor can he be elected to the general assembly whilst holding the former position. Here the Attorney General distinguished townships and township school districts, for purposes of the exception, and called the position a lucrative one without citation. 1912 Ohio Atty. Gen. Ops. 11

In the same year the Attorney General held that under Art. II,Sec. 4, a person who accepts appointment to position of Health Officer in a village is not eligible as member of general assembly and may be refused salary as such member because of the prohibition relating to "lucrative office under authority of the State." Statutes authorized appointment of a village health officer by council and entitled it to fix his salary and provided that if a municipality failed to establish a board of health, the state board could appoint such an officer and fix his salary and term. 1912 Ohio Atty. Gen. Ops. 10

Again in 1912, the Attorney General responded that since the office of a village board of education is not a lucrative office, a person holding such office is eligible to and may at the same time have a seat in the General Assembly. Here, he noted, statutes provided no compensation for the office. 1912 Ohio Atty. Gen. Ops. 13

In a short opinion given in 1913, the Attorney General said that when one is elected to any city office, he ceases to be a member of the General Assembly under

Art. II Sec. 4. 1913 Ohio Atty. Gen. Ops. 46 The Ohio Supreme Court in State v. Gillen, 112 Ohio St. 534 (1925) denied quo warranto to oust the mayor of a municipality from his municipal office on grounds that he was elected to the General Assembly and discharging duties of that position. Ineligibility, said the Court, relates to membership in the General Assembly.

In 1914 the Attorney General issued an opinion that under Art. II, Sec. 4 a member of the general assembly cannot hold the office of coroner and still serve as member of the general assembly. Noting that the statutes relative to office of county coroner provided for biennial election, bond and oath, filling of vacancies, and fees, the Attorney General found it "clear that the office of coroner is a lucrative office under the authority of this state." 1914 Ohio Atty. Gen. Ops. 687

In 1915 the Attorney General said that a member of the Ohio general assembly cannot serve as clerk of a village board of education of which he is member and receive a salary as such clerk because this is a "lucrative office" and violates Art II, Sec. 4. Although the office of member of board of education of a village district is not a lucrative office, he said, statutes providing for organization of the board by electing officers and clerk and providing for payment of clerk and treasurer made the position a lucrative office. 1915 Ohio Atty. Gen. Ops. 327

In 1918 the Attorney General said that a professor in the state normal college at Athens, Ohio holds merely an employment, and that therefore he is eligible to hold at the same time the office of member of the general assembly under Art. II, sec. 44. Clearly, he said this was a state institution and a lucrative (salaried) position, however a professor is not an officer but a mere employee under control and authority of the board that employs him. 1918 Ohio Atty. Gen. Ops. 415.

In 1927 the Attorney General concluded that there is no constitutional inhibition against a member of a county board of education serving as member of the General Assembly. Although the statute provided for payment of a $3.00 per diem and mileage to cover actual and necessary expenses incurred, no other compensation was provided and the office of member of a county board of education was, therefore, not considered a "lucrative" one. 1927 Ohio Atty. Gen. Ops. 881.

In 1955 he confronted the question of whether incompatibility characterizes the offices of member of the General Assembly and member of a city board of education. Here R. C. 3313.12 provided that the board of any school district other than a county school district could provide for compensation of its members, not to exceed $3.00 per member for regular meetings attended, from funds raised by local taxation. Citing earlier statutes and ambiguity in the title of amending legislation, the Attorney General concluded that legislative intent was to recompense for expenses, and not to provide "compensation" despite use of the term. The membership in question, he concluded, was not an office which provides other compensation than actual and necessary expenses. 1955 Ohio Atty. Gen. Ops. 684.

The Attorney General's ruling in the same year that acceptance by a member of the General Assembly of employment by a local school district as a school bus driver operates to vacate such individual's office is not based upon Art. II Sec. 4. Noting no hesitancy in concluding that the position here in question is a "mere employment" and not an "office" becuase the incumbent was not "invested by law with a portion of the sovereignty of the state," the ruling was based upon statutory prohibition against members accepting appointment, employment, or office ... from any executive or administrative

branch or department of the state which provides other compensation than actual and necessary expenses. 1955 Ohio Atty Gen.Ops. 730

In 1964 the Attorney General in one opinion considered compatitility under Art. II Sec. 4 between membership in the general assembly and various municipal positions. An appointive officer of a charter city, he said, is ineligible by force of the constitutional provision, to serve as member of the general assembly during such appointment because charter cities are authorized by Art. XVIII, Sec. 7, so the office is one "under authority of this state." In the same opinion the Attorney General said that a department head of a municipality whose office requires him to make administrative decisions is ineligible to serve as member because the head of a department holds an "office," as that term is used. A clerk or one who performs mere clerical duties within the department of a municipality who is in the unclassified service, he held further, may serve as elected member of the general assembly.No opinion was rendered as to such a clerk in the classified service, the Attorney General noting that if the position held is only that of performing clerical duties or as a deputy, there would not be a conflict with Art. II Sec. 4, but that the statutory employment restriction noted in the preceding paragraph could apply. 1964 Ohio Atty. Gen. Ops. 879

The most recently reported opinion raised the question of whether a state senator in Ohio may also hold the office of village solicitor, either within his senate district or outside thereof, where the solicitor in question served as such for the two villages and received salary for all three positions. Resolving the issue in terms of whether the position of village solicitor can be considered an "office," the Attorney General, replying negatively, cited a 1915 opinion that village solicitor is not an office, "being appointed by contract, fulfilling only contractual duties, serving for an indefinite term, and not being obligated to tak e oath or give bonds, is not 'official' within 4672 G. C. which stipulates that these duties shall fall upon any official serving in a similar capacity to that of prosecuting attorney or city solicitor." 1969 Ohio Atty. Gen. Ops. 39

The General Assembly has, by statute, defined certain types of positions prohibited to members of the legislature. Section 101.26 of the Revised Code as last amended in 1965, reads as follows:

> No member of either house of the general assembly except in compliance with this section, shall:
>
> (A) Be appointed as trustee, officer, or manager of a benevolent, educational, penal, or reformatory institution of the state, supported in whole or in part by funds from the state's treasury;
>
> (B) Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;
>
> (C) Accept any appointment, employment, or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses;

Any such appointee, officer, or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer, or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. Any member of the general assembly who accepts any such appointment, office, or employment shall forthwith resign from the general assembly and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. This

section does not apply to members of either house of the general assembly serving an educational institution of the state, supported in whole or in part by funds from the state treasury, in a capacity other than one named in division (A) of this section, school teachers, township officers, notaries public, or officers of the militia.

In summary the opinions discussed in this memorandum have found "ineligibility" to the general assembly or "incompatibility of office with general assembly membership under Art. II Sec. 4 in the following situations:

Office in the civil or military service of the U. S.	1917
Federal judgeship	1900
Delegate to a constitutional convention	1911
Village board of trustees of public affairs	1911
Township board of education	1912
Village health officer	1912
Elective city office	1913
County coroner	1913
Clerk of village board of education	1915
Appointive office in charter city	1964
Department head of municipality	1964

Eligibility or compatibility has been found in the following instances:

Clerk in the U.S. pension agency	1899
Member of federal board of military registration	1917
"Employment" in U.S. civil or military service	1917
Lecturer at farmer' institute (compensated by state board of agriculture)	1911
Member of village board of education	1912
Teacher in public schools	1913
Professor in state normal college	1918
Member of county board of education	1927
Member of city board of education	1955
Municipal clerk in unclassified service	1964
Village solicitor	1915, 1969

Ohio Constitutional Revision Commission
Committee to Study the Legislature
June 9, 1971

Research Study No. 3

Majorities Required for Legislative Action

Under the Ohio Constitution various majorities are necessary for specific legislative action as follows:

SECTION	SUBJECT
Art. II Sec. 6	"a majority of all the members elected to each House, shall be a quorum to do business
Art. II Sec. 9	"no law shall be passed, in either House, without the concurrence of a majority of all the members elected thereto"
Art II Sec. 11	Appointment to fill vacancy by members of house affiliated with same political party as person last elected to seat which has become vacant by adoption of resolution - "The adoption of such resolution shall require the affirmative vote of a majority of the members of the Senate or House of Representatives, as the case may be, entitled to vote thereon."
Art. II Sec. 13	proceedings of both Houses to be public "except in cases which, in the opinion of two-thirds of those present, require secrecy"
Art II Sec. 16	"Every bill shall be fully and distinctly read on three different days, unless in case of urgency three-fourths of the house in which it shall be pending, shall dispense with the rule.
Art II Sec. 16	Passage over veto - "three-fifths of the members" elected to each house - "except that in no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage"
Art II Sec. 23	Impeachments - House of Representatives to have sole power "but a majority of the members elected must concur therein Trial by Senate - "No person shall be convicted, without the concurrence of two-thirds of the Senators."
Art. II Sec. 29	"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract intered into; nor, whall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly
Art. III Sec. 21	Appointments subject to advice and consent of the Senate - "No appointment shall be consented to without concurrence of a majority of the total number of Senators provided for by this Constitution, except as hereinafter provided for in the case of failure of the Senate to act.
Art. IV Sec. 15	Laws to increase or diminish number of judges and to establish courts - "two-thirds of the members elected to each house shall concur therein ..."

Art. IV Sec. 17 — Removal of judges from office - "by concurrent resolution of both Houses of the General Assembly if two-thirds of the members, elected to each House, concur therein ..."

Art. IV Sec. 22 — Supreme Court commission -"The General Assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such house* shall concur therein . . . for the appointment of a like commission ..." (* So in original on file in office of Sec. of State. Should it read "each"?)

Art. XVI Sec. 1 — Constitutional amendments proposed by either branch of the General Assembly - "if the same shall be agreed to by three-fifths of the members elected to each house. . ."

Art. XVI Sec. 2 — Calling of constitutional convention - "two-thirds of the members elected to each branch of the general assembly"

Some of the above provisions provide for passage by a stated majority of members "elected" to each branch. In light of the provisions for filling vacancies by appointment, some consideration should be given to revising or harmonizing such provisions.

In addition, a report was requested upon the comparative majorities required for specific legislative action in other states. Accordingly, the constitutional legislative vote required on four of the above actions are tabulated below, with constitutional citation for each. (The New Hampshire Constitution was not available at the time of making this tabulation, and appropriate figures will be supplied later.)

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite.	Legislative vote for submission	Const. Cite.
Alabama	R-no provision	Art. 4, Sec. 63	Majority elected	Art. 5, Sec. 125	3/5 all members	Art. 18, 284, 285 287. Am. XXIV	majority elected	Art. 18, Sec. 286, 287
Alaska	R-advancement by 3/4 of house	Art II, Sec. 16	2/3 except revenue and approp. bills 3/4	Art. II Sec. 16	2/3 vote in each house	Art. XIII, Sec. 1	not specified	Art. XIII, Sec. 2, 3, 4
Arizona	R 2/3 of members	Art. 4, Pt. 2, Sec. 17	2/3 all members	Art. V, Sec. 7	majority members	Art. XXI, Sec. 1	No provision	Art. XXI, Sec. 2
Arkansas	R 2/3 of members	Art 5, Sec. 22	Majority each house	Art. 6, Sec. 15	majority members	Art. 19, Sec. 22	———	———
California	Read by title on 3 days in each house 2/3 of members	Art. 4, Sec. 8	2/3 all members	Art. IV, Sec. 10	2/3 members elected	Art. XVIII, Sec. 1	2/3 members elected each branch	Art. XVIII, Sec. 2
Colorado	Read by title when int., at length on 2 different days. Unanimous	Art. V, Sec. 22	2/3 of members elected	Art. IV, Sec. 14	2/3 members elected	Art. XIX, Sec. 2; Art. XX[illegible], Sec. 1	2/3 members elected to each house	Art. XIX, Sec. 1
Connecticut	No prov.	———	2/3 all members	Art. IV, Sec. 15	3/4 total members; but less than 3/4 in first sess. plus majority vote second session	Art. XII	2/3 total members each house	Art. XIII Sec. 1, 2, 3

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over veto	Const. cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
Delaware	No provision		3/5 of all members elected	Art. 3, Sec. 18	2/3 members by two successive general assemblies with intervening general election	Art. 16, Sec. 1, 4	2/3 total of each house	Art 16, Sec. 2-5
Florida	R 2/3 vote	Art. 3, Sec. 7	2/3 vote	Art. 3, Sec. 8	3/5 members	Art. 11, Sec. 1,5	No legislative action	Art 16, Sec. 4,5
Georgia	R 1st and 2nd reading by title only. No provision	Sec. 2 1907	2/3 vote	Sec. 2-3015	2/3 members elected	Art. 13, Par. 1, 3	2/3 all members each house	Art. 13, Sec. I, Par. 1,2,3
Hawaii	Pass 3 readings in each house on separate days. Requires copies No provision.	Art. III Sec. 16	2/3 of all members	Art. III Sec. 18	2/3 majority vote or majority vote at 2 successive sessions	Art. XV, Sec. 1, 3, 4	no provision	Art. XV Sec. 1, 2, 4, 5
Idaho	R 2/3 of house	Art. III, Sec. 15	2/3 of members present	Art. IV, Sec. 10	2/3 members elected	Art. XX, Sec. 1, 2	2/3 members elected to each branch	Art XX Sec. 3,4
Illinois	R no provision	Art 4, Sec. 13	2/3 all members	Art V Sec. 16	2/3 members elected	Art XIV, Sec. 2	2/3 members elected to each house	Art. XIV, Sec. 1
INdiana	R "by sections" 2/3 of house but not to be suspended on final passage	Art 4, Sec. 18	Majority of all members	Art 5, Sec. 14	Majority of members (2 successive gen. assemblies with intervening general election	Art.16, Sec. 1, 2	___	___

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
Iowa	___	___	2/3 of each house	Art. III Sec. 16	Majority (2 successive general assemblies with intervening general election	Art. X, Sec. 1, 2	No provision	Art X, Sec. 3
Kansas	R-2/3 of house	Art 2, Sec. 16	2/3 of all members	Art II, Sec. 14	2/3 of all members	Art IV, Sec. 1	2/3 members elected to each branch	Art. XIV, Sec. 2
Kentucky	R-majority	Sec. 46	Majority	Sec. 88	3/5 of members elected	Sec. 256-257	Majority (2 sessions)	Sec. 258-63
Louisiana	R-no prov. Bills revising code or adopting criminal code, legis. prescribes.	Art. 3, Sec. 24	2/3 of all members	Art. 5 Sec. 15	2/3 members elected	Art. 21, Sec. 1, 2	___	___
Maine	_____	_____	2/3 of each house	Art. IV, Sec. 2	2/3 members of both houses	Art. X, Sec. 4	2/3 concurrent vote both houses	Art. IV, Pt 3, Sec. 15
Maryland	R 2/3 of house	Art III, Sec. 27	3/5 of each house	Art. II, Sec. 17	3/5 of members elected	Art XIV, Sec. 1	No provision	Art. XIV Sec. 2
Massachusetts	___	____	2/3 of members	Pt. 2, C 1, Sec. 1 Art. 2	Majority in joint session; 2 successive general assemblies with intervening general election	Am. XLVIII 1-5 as amended by Am. Art 81	_____	_____
Michigan	R-no provision	Art. IV, Sec. 26	2/3 of all members	Art. IV, Sec. 33	2/3 of all members	Art. XII Sec. 1	No provision	Art. XII, Sec. 3

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
Minnesota	R - 2/3 of house	Art. IV, Sec. 20	2/3 of all members	Art. 4, Sec. 12	Majority of members elected	Art, XIV, Sec. 1,2	2/3 members elected to each branch	Art. XIV, Sec. 2, 3
Mississippi	R-2/3 of house	Art. IV, Sec. 59	2/3 of all members	Art. 4, Sec. 72	2/3 of each house not less than majority elected	Art. 25, Sec. 273	———	———
Missouri	Read by title on 3 different days	Art. III, Sec. 21	2/3 of all members	Art. III, Sec. 32	Majority of members elected	Art. XII, Sec. 1, 2(a), 2(b)	Simple majority	Art. XII, Sec. 3
Montana	———	———	2/3 of all members	Art. V, Sec. 40	2/3 members elected	Art. XIX, Sec. 9	2/3 members elected to each house	Art. XIX, Sec. 8
Nebraska	Read by title when introduced; amendments printed and read at large before passage.	Art. III, Sec. 14	3/5 of members elected	Art. IV, Sec. 15	3/5 members elected	Art. XVI, Sec. 1	3/5 members elected	Art. XVI, Sec. 2
Nevada	R-2/3 but not on final reading	Art. IV, Sec. 18	2/3 of members elected	Art. IV, Sec. 35	Majority of members elected	Art. XVI, Sec. 1	2/3 members elected to each house	Art. XVI, Sec. 2
New Jersey	R-3/4 of members	Art. 4, Sec. 4 Par. 6	2/3 of all members	Art. V, Sec. 14, Par. 14	3/5 members elected or by majority vote in two sessions	Art. 9, Sec. 1-7	———	———

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
New Mexico	____	____	2/3 members present and voting	Art. IV, Sec. 22	Majority members elected	Art. XIX, Sec. 1, 5	2/3 members elected to each house	Art. XIX, Sec. 2
New York	Printed and on desks 3 days prior to passage	Art.3, Sec. 14	2/3 of all members	Art. IV, Sec. 7	Majority (2 successive general assemblies with intervening gen. election)	Art. XIX, Sec. 1	No provision	Art. XIX, Sec. 2
North Carolina	R No provision	Art. II, Sec. 22	_____	____	3/5 each house	Art. XIII, Sec. 2	2/3 of all members each house	Art. XIII, Sec. 1
North Dakota	2 separate days; first reading title only unless full demanded	Sec. 63	2/3 of members elected	Sec. 80	Majority of members elected	Art. XV, 202, Am. 28, II; 25	____	____
Ohio	R 3/4 of house	Art. II, Sec. 16	3/5 of members elected	Art. II, Sec. 16	3/5 of members elected	Art. 3, Sec. 1	2/3 members elected to each house	Art. XVI Sec. 2
Oklahoma	R-final reading required at length	Art. V. Sec. 34	2/3 members elected	Art. 6, Sec. 11	Majority of members Elected	Art. 5, Sec. 3; Art. 14, Sec. 1	No provision	Art. 24, Sec. 2
Oregon	By title only 2/3 dispense	Art. IV, Sec. 18	2/3 of members present	Art. VI, Sec. 15b	Majority members elected	Art. XVII, Sec. 1	No provision	Art. XVII, Sec. 1

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over Veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
Pennsylvania	"Considered" on 3 different days	Art. 3, Sec. 4 25% may request full reading	2/3 of all members	Art. IV, Sec. 15	2/3 members elected	Art. XI, Sec. 1a and b	____	____
Rhode Island	____	____	3/5 of all members	Art. XV, Sec. 1	Majority (2 successive general assemblies with intervening gen. election	Art. XIII	____	____
South Carolina	R. may provide by rule for title only	Art. III, Sec. 18	2/3 of all members	Art. IV, Sec. 23	2/3 elected first passage; majority second	Art. XVI, Sec. 1,2	2/3 members elected to each house	Art. XVI, Sec. 3
South Dakota	Read twice, by title and number and title once and in full on final	Art III, Sec. 17	2/3 of members present	Art. IV, Sec. 9	Majority members elected	Art. XXIII, Sec. 1, 2	2/3 members elected to each house	Art. XXIII, Sec 2
Tennessee	R. No provision	Art. II, Sec. 18	Majority	Art. 3, Sec. 18	Majority elected first passage; 2/3 elected second passage	Art. XVI, Sec. 3	No provision	Art. XI, Sec. 3
Texas	R 4/5 of house	Art. 3, Sec. 32	2/3 of members present	Art. 4, Sec. 14	2/3 members elected	Art. XVII, Sec. 1	____	____
Utah	R. No provision	Art. VI, Sec. 22	____	____	2/3 members elected	Art. XXIII, Sec. 1	2/3 members elected to each branch	Art. XXIII, Sec. 2, 3

State	Dispensing with 3 readings. R means 3 readings required	Const. Citation	Passage over Veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
Utah	R. No provision	Art. VI, Sec. 22	____	____	2/3 members elected	Art. XXIII Sec. 1	2/3 members elected to each branch	Art. XXIII, Sec. 2, 3
Vermont	____	____	2/3 of members present	Ch. II, Sec. 17	2/3 senate, majority house first passage	Ch. II Sec. 68	____	____
Virginia	R-4/5 of members	Sec. 50	2/3 of members present (majority of elected)	Art. V, Sec. 76	Majority. (2 successive general assemblies with intervening general election)	Art. XV, Sec. 196	Majority members elected to each house	Art. XV, Sec. 197
Washington	____	____	2/3 of members present	Art. 3, Sec. 12	2/3 members elected	Art. 23, Sec. 1	2/3 members elected to each branch	Art. 23, Sec. 2,3
West Virginia	R-4/5 of members	Art VI, Sec. 29	Majority of members elected	Art. 7, Sec. 14	2/3 members elected	Art. XIV, Sec. 2	Majority members elected to each house	Art. XIV, Sec. 1
Wisconsin	____	____	2/3 of all members	Art. V, Sec. 10	Majority (2 successive General Assemblies with intervening general election)	Art. XII, Sec. 1	Majority each house	Art. XII, Sec. 2
Wyoming	____	____	2/3 of members elected	Art. III, Sec. 19	2/3 members elected	Art. XX, Sec. 1-2	2/3 members elected to each branch	Art. XX, Sec. 3, 4

State	Dispensing with 3 readings. R means 3 readings required.	Const. Citation	Passage over veto	Const. Cite	Legislative Proposal of Amendments (Vote required)	Const. Cite	Legislative vote for Submission	Const. Cite
Puerto Rico	Printed, Read, referred and return with written report	Art. III, Sec. 17	2/3 members each house	Art. III, Sec. 19	2/3 members elected	Art. VII, Sec. 1, 3	2/3 of total of each house	Art. VII, Sec. 2
Model State Constitution	Printed and on desks 3 days prior to passage	Sec. 4.15	2/3 of all members	Sec. 4.16	Majority of all members	Sec. 12.01	Majority of all members	Sec. 12.03

Source of first four columns: examination of constitutions
Source of second four columns: Thirty Years of State Constitution-Making, 1938-1968, National Municipal League (1970)

June 14, 1971

Qualifications of Legislators

Under Art. II, Sec. 3, Ohio Constitution, senators and representatives "shall have resided in their respective districts one year next preceding their election; unless they shall have been absent on the public business of the United States or of this State."

They are also subject to Art. XV, Sec. 4, providing that "(n)o person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. Under obviously archaic provisions of section 5 of the same Article XV, duelists are ineligible for office.

From the requirement of Article XV, Sec. 5 that persons elected or appointed to office be "possessed of the qualifications of an elector" one must look to Article V, Sec. 1 for definition of "elector." This section provides in part:

> "Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

Section 6 of Article V denies the privileges of an elector to an "idiot, or insane person."

Section 4 of Article V provides: The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime."

Finally, Section 5 of Article II provides the further restriction that:

> "No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this State; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury."

Pursuant to Section 4 of Article V the Ohio General Assembly has disenfranchised felons and made them ineligible to hold office under Revised Code sections 2961.01 and 2961.02 as follows:

> "Sec. 2961.01. A person convicted of a felony in this state, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust or profit. The pardon of a convict restores the rights and privileges so forfeited, but a pardon shall not release a convict from the costs of his conviction, unless so specified."
>
> Sec. 2961.02. A person who has been imprisoned in the penitentiary of any other state of the United States, under sentence for the commission of a crime punishable under the laws of this state by imprisonment in the penitentiary, is incompetent to be an elector or juror, or to hold an office of honor, trust or profit within this state unless he has

received a pardon from the governor of the state in which he was imprisoned."

The question of "eligibility" to a seat in the General Assembly, determinable under Art. II, Sec. 4 and involving the holding of office "under the authority of the United States, or any lucrative office under the authority of this State" will be examined in an accompanying memorandum, reporting the interpretations of this section under the broad heading of "eligibility."

The purpose of this memorandum is to report upon qualifications regarding age, residence, and elector status under the constitutions of the 50 states. Elements of the category of elector status are not always noted. The memorandum concerns itself chiefly with the legislative article in each case. In addition, a criminal conviction disqualifies a person from being a legislator in Arkansas (Art. 5, Sec. 9), Kansas, Mississippi, Nevada, Oklahoma, South Dakota, Virginia, West Virginig, and Wisconsin. United States citizenship is specifically required in Maine (5 years), New Jersey, New York, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, and Wyoming.

Qualifications of Legislators

State	Age	Elector Status[1]	State Residence (next preceding election)		District Residence (next preceding election)
Ala.			3 years	BOTH[2]	1 yr. and reside in dist. during term.
Senator	25				
House	21				
(Art.4 , Sec. 47)					
ALASKA			3 years	"	1 year
Senate	25				
House	21				
Art II, Sec. 2)					
ARIZONA					
Senate	25				
House	25				
(Art. 4, Sec. 2)			2 years	"	1 year
ARKANSAS[3]			2 years	"	1 year
Senate	25				
House	21				
(Art. 5, Sec. 4)					
CALIFORNIA					
(Art. 14, Sec. 2)		Elector	3 years	"	1 year
COLORADO					
Senate	25				
House	25				
(Art. V, Sec. 4)				"	12 months
CONN.					
Senate	21	Elector	6 mos.		Qualifications of
House	21	Elector	6 mos.	"	electors to be de-
(Art. 3 - Amendments proposed by HJR No. 160 (1969) would have added residence in district from which elected)					cided at times and in manner prescribed by law.
DELAWARE					
Senate	27				
House	24				
(Art. 3)			3 years	"	last year inhabitant of district
FLORIDA					
Senate	21	Elector	2 years	"	be resident of
House	21	Elector			district
(Art. 3, Sec. 15)					
GEORGIA					
Senate	25		4 years		1 year
House	21		2 years		1 year
(Sec. 2-1701,1801)					
HAWAII					
Both Houses Majority (20)			3 years	BOTH[2]	Qualified voter of
(Art. II, Sec. 7)					district (registered
(Legislature may prescribe further qualifications Art. III, Sec. 9)					in accordance with law
IDAHO					
Both houses	none	Elector	None	"	1 year
(Art III, Sec. 6)					
ILLINOIS[3]					
Senate	25				
House	21		5 years	"	2 years
(Art. 4, Sec. 3, 4)					
INDIANA					
Senate	25				
House	21		2 years	"	1 year
(Art 4 Sec. 7)					

State	Age	Elector Status	State Residence		District Residence
IOWA		Elector	None	BOTH	1 year
Both houses					
(Art. III Sec. 6)					
KANSAS					
Both houses	none		---	---	---
(Art. 2, Sec. 4, 6)					
KENTUCKY					
Senate	30		6 years		last year
House	24		2 years		last year
(Sec. 32)					
LOUISIANA					
Senate	25				
House	none		5 years	BOTH[2]	3 months
(Art. 3, Sec. 9)					
MAINE					
Senate	25				
House	21		1 year	"	3 months
Art. IV, Sec. 6)					
MARYLAND					
Senate	25		3 years	"	last year
House	21				
(Art. III, Sec. 9)					
MASS.					
Senate			5 years		inhabitant of
House					district
(Pt. 2, C.1, Sec. 2, Art. V)					
MICHIGAN					
Both houses	21	Elector	6 years	BOTH[2]	Set by law
(Removal of domicile from district shall be deemed vacation of office.)					
(Art. 4, Sec. 7)					
MINNESOTA					
Both houses		qualified	1 year	"	6 months
(Art. IV)		voters			
MISS.					
Senate	25		4 years	"	2 years actual
House	21				resident
(Art. IV Sec. 41-43)					
MISSOURI					
Senate	30	qualified voter of state 3 years			1 year
House	24	qualified voter of state 2 years			1 year
(Art. III, Sec. 4, 6) - In both cases, district residence of 1 year qualified by provision "if such ...district shall have been so long established, and if not, then of the ... district from which the same shall have been taken)					
MONTANA					
Senate	24	Citizen			12 months
House	21				
NEBRASKA					
(Art. III, Sec. 2		Elector			1 year
NEVADA					
NEW JERSEY					
Senate	30	5	4 years		1 year
House	21		2 years		1 year
(Art. 4, Sec. 1, par. 2)		(as further prescribed by legislature)			
NEW MEXICO					
Senate	25				Maintain residence
House	21				Maintain residence
(Art. IV, Sec. 3)					

State	Age		Elector Status	State Residence		District Residence
NEW YORK						
Both houses (Art. III, Sec. 7)	none			5 years		12 months*

(* subject to exception - "if elected a senator or member of assembly at the first election next ensuing after a readjustment or alteration of the senate or assembly districts becomes effective, a person to be eligible to serve as such, must have been a resident of the county in which the senate or assembly district is contained for the twelve months immediately preceding his or her election.")

NORTH CAR.						
Senate	25		qualified voter	2 years		1 year
House	none		" "	none		1 year
NORTH DAK.						
Senate	25		qualified elector	2 years		
House	21		qualified elector	2 years		
(Sections 28, 34)						
OKLAHOMA						
Senate	25	Both	qualified electors		BOTH[2]	Residence during term
House	21					
(Art. V, Sec. 17)						
OREGON						
Both houses	21			none		1 year inhabitant
(Art. IV, Sec. 8)						
PENNA.						
Senate	25			4 years		Both "inhabitants" of respective districts 1 year and "shall reside in their respective districts during term..."
House	21			4 years		
RHODE ISLAND			Nothing found			
SOUTH CAR.						
Senate	25					elector of district
House	21					elector of district
(Art. III, Sec. 7)						
SOUTH DAK.						
Senate	25		qualified elector	2 years		
House	25		" "	2 years		
TENNESSEE						
Senate	30			3 years	BOTH[2]	1 year
House	21					
(Art. II, Sec. 9, 10)						
TEXAS						
Senate	26		elector	5 years		last year
House	21			2 years		last year
(Art. 3, Sec. 6)						
UTAH						
Both houses	25			3 years		1 year
(Art. VI, Sec. 5)						
VERMONT			nothing found			
VIRGINIA						
Both houses	21			1 year (elector)		county, city or town-6 months precinct-30 days (elector)
(Art. IV, Sec. 44)						
WASH.						
Both houses	none		qualified voter of district in which chosen			
(Art. 2, Sec. 7)						
W. VIRGINIA						
Both houses	none			none		1 year

State	Age	Elector Status	State Residence	District Residence
WISCONSIN				
Both houses (Art. IV, Sec. 6, Art. III, Sec. 1)	21		1 year	as may be prescribed by law, not exceeding 30 days
WYOMING				
Senate	25		none	1 year
House	21		"	"
PUERTO RICO				
Senate	30 years		2 years	1 year
House	25 years (able to read and write in English or Spanish)			

[1] Requirement that person be an elector or voter to be eligible for the legislature found in the legislative article of the indicated states.

[2] Residence requirements identical for Senators and House members.

[3] The new Illinois constitution (effective July 1, 1971, makes the age 21 for both houses, requires U. S. citizenship, and eliminates the 5-year state residency requirement.

Ohio Constitutional Revision Commission
Committee to Study the Legislature
June 15, 1971
Subject: Authority of legislative committees after sine die adjournment.

Section 8 of Article II provides that each house of the General Assembly ". . . shall have all powers, necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers. (Emphasis added) The power to obtain information, through committees or otherwise, was proposed as one of 41 separate amendments submitted by the constitutional convention of 1912 and adopted by the electorate at the special election on September 3, 1912.

In State ex rel. Robertson Realty v. Guilbert, 75 Ohio St. 1 (1906) the Ohio Supreme Court held that the Constitution (prior to this amendment) contained no express grant of power to either branch of the General Assembly to appoint a "select investigating committee" for general legislative purposes and that such power was not necessarily implied from the express grants to each house (to choose its own officers, determine rules of procedure, punish and expel members, and have "all other powers, necessary to provide for its own safety, and the undisturbed transaction of its business)."

Subject of the challenge in Robertson were two Senate Resolutions providing for appointing a committee to investigate charges of corruption existing in the City of Cincinnati and County of Hamilton and to submit a report and recommendations thereon. Finding in the grant of power to each house a limitation, the Court said:

> "The last clause of this section (Sec. 8 Art. II prior to amendment) restricts the phrase 'all other powers' to such powers as are necessary to secure the safety of each house and the peaceable transaction of its business, thereby excluding from the grant all powers which are not included in the class named." 75 Ohio St. 1, 47.

The Court found, moreover, that the framers of the Constitution of 1851 "designedly narrowed the grant of powers to each house of the General Assembly to those which are expressly mentioned." It was further held that if a single branch of the General Assembly had no constitutional power to appoint such a committee, the legislature could not authorize it to do so by general statute or appropriation to such a committee. The alternative argument that upon the face of the Senate resolutions the scope and purpose of the inquiry constituted "an exercise of judicial power," expressly forbidden by Art. II Sec. 32, was expressly not passed upon.

The 1912 amendment of Sec. 8 abrogated the Robertson rule. Each house is specifically empowered to obtain through committees or otherwise information affecting legislative action under consideration or contemplation.

Prior to constitutional amendment, a joint resolution of the General Assembly was adopted conferring upon a committee appointed from each house thereunder power to investigate charges of corruption in Cincinnati and Hamilton County. When challenged this joint resolution was held to be "an exercise of judicial power

not expressly conferred by the Constitution and a gross violation of Sec. 32 of Art. II, prohibiting exercise of the judicial power of the General Assembly," unless justified on the ground of seeking information in aid of intended legislation. State ex rel. Rulison v. Gayman, 11 Ohio Circ. Cts. N.S. 257 (1908). Syllabus 2 declared that "intemperate language in the resolution and the license and revolutionary procedure proposed, together with the declaration that 'all laws are being violated by an organized band which no one dares oppose' make it clear that hope is not based on additional legislation which obviously could not be rendered effective under such circumstances; but these considerations cause it to be evident that the resolution was not adopted in good faith for the purpose of providing remedial laws, and places it beyond the pale of the Constitution."

After holding the resolution an attempt "to exercise judicial power contrary to the Constitution," the Court added in syllabus 3:

> "And were this not true, the fact that the General Assembly has adjourned sine die renders it impossible that information which might be obtained by such an investigation shall be used by the body seeking it for the purpose proposed, or that it will be so used by a body over which the recent General Assembly will have any control, and therefore deprive the investigation of the purpose announced, and leaves the matter in the same situation as though no purpose had been declared by the resolution."

The Ohio Supreme Court affirmed, two justices concurring on the sole ground that the committee appointed under the joint resolution had no power to act after final adjournment of the legislature which could not reconvene on its own motion. 79 Ohio State 444 (1908).

Gayman and several Ohio Attorney General's opinions are cited, in legal encyclopedias, as authority for the proposition that a legislative committee has no power to act after final adjournment of the General Assembly which authorized it.

In 1917 the Attorney General stated that the 1912 amendment did not alter the Gayman case. 1917 O.A.G. 206. In 1935 the Attorney General was called upon to rule on the status of several committees appointed by authority of joint and singular resolutions after sine die adjournment. Citing Robertson Realty and Gayman, he was "to authorize each house of the General Assembly to appoint a committee with powers which formerly might have been granted to joint committees." Concluding that the grant of the power included a limitation thereon, the Attorney General ruled that a legislative body which has adjourned without day cannot thereafter have any legislation "under consideration or in contemplation," and that such committees had no legal existence after sine die nor power to incur expenses. 1935 O.A.G. 1041.

In June, 1937 the Governor called the General Assembly into special session "to make appropriations." Senate Resolution 81, adopted July 12, 1937, authorized appointment of a legislative committee to investigate the civil service commission and other departments upon matters affecting "state finance." The Attorney General viewed the committee as authorized to investigate financial needs for the current biennium and to ascertain facts necessary to determining appropriation amounts, but otherwise "powerless" to conduct any other investigation. After passage of the general appropriation and proroguing of the Session by the Governor until the end of the biennium under Art. III Sec. 9, he ruled, the committee had no power or authority to investigate. 1937 O.A.G. 1709.

Again in 1937 the Attorney General of the state responded that special investigating commissions created under several joint resolutions had no legal existence after date of the sine die adjournment of the legislative body that passed the resolutions. Appropriation made for the use of a committee, he reasoned, could not operate to create a commission nor prolong its life. Again citing Gayman, the Attorney General said of a commission "created under section 8 Article II," that its sole power would be to gather information for the benefit of the session affecting legislation which the session was considering or contemplating. "This grant of power cannot be stretched to include legislation that some future session of the General Assembly might consider or contemplate." 1937 O.A.G. 2600. Here the Attorney General reasoned that the Constitution provides for legislation by "bill" and does not even refer to resolutions, and that, therefore, a mere resolution was without force of law, was not subject to referendum, and could not create a commission with powers that would endure beyond the session in which created.

On the other hand, State ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944) appears to ignore these opinions. The act involved established a "Post-War Commission of the State," the described functions of which consisted of finding facts, assisting in formulation of plans, and making of recommendations "after the convening of the next General Assembly." Although challenged as violation of Section 19, Article II (appointment of members to "civil office"), the Court refused to consider the question of whether authorized appointments were unconstitutional because of certain additional powers that might or might not be exercised (e.g. to lease lands or take options in the name of the state), holding that a commission composed of members of the General Assembly and others to make investigation and recommendation on important matters of legislative concern is within the creative power of the General Assembly under Section 8, Article II (Syl. 5).

Further confusing the issue of authority after sine die, Syllabus 1 of State v. Morgan, 164 Ohio St. 529 (1956), involving the Ohio UnAmerican Activities Commission, states:

> "A commission created by statute, which is authorized to function after sine die adjournment of the General Assembly and which is composed solely of members of the General Assembly, impersonally described, and whose designated function is to investigate subversive activities and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary to the next General Assembly (emphasis added) is within the creating powers of the General Assembly under Sec. 8, Art. II, of the Constitution of Ohio, authorizing that body to obtain through committees or otherwise, information affecting prospective legislation, is within the term "committee" as used in that article, possesses all the attributes of a "select committee" of the General Assembly and is, in fact a "select committee" thereof within the purview of Sec. 12845 G.C. (Sec. 2917. R.C.)."

Citing Herbert v. Ferguson, the Court said:

> "Thus, this court has recognized that Sec. 8, Art. II empowers the General Assembly to create commissions for investigative purposes which shall function after sine die adjournment and make recommendations to the next General Assembly . . . We hereby approve that finding . . ."

In a companion case (State v. Raley, 100 Ohio App. 75, 1954) an Ohio Court of Appeals had said:

> "Section 103.31 et seq. R.C., creating the Ohio Unamerican Activities Commission, confers authority beyond adjournment sine die of the General Assembly; and the life of such commission is limited only by the length of the term for which its members are elected to the General Assembly." (Syl. 1)

Commenting upon denial of appointive power in the General Assembly pursuant to Sec. 27, Art. II) the Court said:

> "One of the exceptions is the power to appoint its own officers, including, of course, committees of its own members, but as already stated, these appointments cannot be for a longer life than that of the appointing power. The qualification to serve on a committee or commission is conditioned upon continued membership in the General Assembly."

And, again, as to whether sine die was the test of the duration of the commission's authority the Court said:

> "We are of the opinion that the commission's life was limited only by the length of the term for which its members were elected to the General Assembly, subject of course to the repeal of the law in the meantime. We are of the opinion also that the law does propose to confer authority beyond the adjournment sine die of the General Assembly but does not assume to confer any authority beyond the term for which the members of the commission were elected."

Convictions under Morgan and Raley were reversed for violation of the due process clause of the 14th Amendment to the U.S. Constitution because the defendants were "entrapped by being convicted for exercising a privilege (against self-incrimination) which the Commission had led them to believe was available to them." 360 U.S. 423 (1959) but the rulings as to duration authority of commissions, apparently appointed pursuant to Section 8 of Article II, still stand. The uncertainty resulting from these holdings should be confronted in considering revision of Section 8 of Article II.

League of Women Voters of Ohio

65 South Fourth Street • Columbus, Ohio 43215

June 22, 1971

Ohio Constitution Revision Commission
20 South Third Street
Columbus, Ohio 43215

RECOMMENDATIONS REGARDING LEGISLATIVE PROVISIONS
IN THE OHIO CONSTITUTION

The League of Women Voters of Ohio believes a state constitution should provide for a structure of government responsive to the needs of the people of Ohio. In order to achieve this a constitution should be flexible and concerned with fundamental principles.. It should be clearly written, logically organized and consistent.

The League believes the Legislative Article of the Ohio Constitution should provide that the General Assembly meet annually and that the provisions dealing with its organization and powers should be broadly stated.

Although in 1968 the Legislature passed a bill which included a provision for the legislature to meet annually, the League feels it would be more consistent to change Section 25 of Article II to state that the General Assembly shall meet annually. This provision would strengthen the power of the legislature and also insure its ability to deal with problems as they arise.

The League of Women Voters feels that Sections 14, 16, 17, and 18 of Article II need not be so detailed. Such provisions might better be handled by statutory law or by the rules of the legislature. These sections deal with specifics of organization and procedures of the legislature and not fundamental law. They would be better stated in terms of broad principles with the specifics left to statutory law. In addition some of these provisions are out of date and could be handled more in keeping with current practices. For instance, Section 16 states "Every bill shall be fully and distinctly read on three different days." Since current practice calls for bills to be read

by title only, it might be advisable to change this wording, or even to omit it entirely, leaving to statutory law or legislative rules the procedures for bill passage. In this regard, the National Municipal League's Model Constitution, Section 4.15, suggests the following wording: "No bill shall become a law unless it has been printed and upon the desks of the members in final form at least three days prior to final passage and the majority of all the members has assented to it." The parts of Section 16 dealing with action by the governor are of fundamental nature but could be more clearly written. Sections 14, 17, and 18 seem unnecessary in our opinion as constitutional provisions. These matters could be covered by statutory law or legislative rules.

Concerning powers given to the General Assembly, the League of Women Voters believes such Sections as 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41 dealing with laws which may be passed are unnecessary. They are not of fundamental nature and could be adequately handled by statutory law. Perhaps a statement such as appears in the Model Constitution under Powers of State (Section 2.01)

> "The enumeration in this constitution of specified powers and functions shall be construed neither as a grant nor as a limitation of powers of state government but the state government shall have all of the powers not denied by this constitution or by or under the Constitution of the United States."

might clarify the right of the Legislature to pass necessary laws for the people of Ohio. Such a statement encourages state government to use its power to the fullest to meet today's problems and assures no delay while the constitution is amended or interpreted.

The League of Women Voters of Ohio would like to encourage the Commission to consider taking out some of these unnecessary sections of the Ohio Constitution. It would make our state constitution clearer, more logical, up to date, and consistent with the idea that a constitution should deal with fundamental principles.

Ohio Constitutional Revision Commission
Committee to Study the Executive
July 27, 1971

Research Paper No. 8

STATE EXECUTIVE REORGANIZATION

The development of the administrative powers of the Governor of Ohio follows the pattern of most American states through the phases establishing a mere figurehead leader in the early post-revolutionary regimes; instituting the Jacksonion reforms of popular election, plural executive and gubernatorial veto; and creating numerous statutory boards and commissions which ushered in the administrative reorganization movement of the 20th century. Nationally, modern reformers of state governmental structures seek unification of the executive branch as a means of achieving their goals of administrative effectiveness and political responsibility. To prevent the further proliferation of uncoordinated executive agencies, constitutional provisions limiting the number of state departments are to be found in many new state documents and amendments. Also a part of this state administrative reform trend are the constitutional provisions allowing the governor to initiate state reorganization by executive orders subject to later approval or disapproval by the state legislature. A survey of adopted, proposed and rejected constitutional and statutory provisions indicates a widespread concern for executive branch reorganization in many states.

Origin of the Reorganization Movement

Evolution of the American state governor's administrative powers does not parallel the growth and development of the federal executive branch. While the federal constitutional convention in 1787 provided the office of President with substantial executive and administrative powers, among the original thirteen state constitutions, only one early state gave its governor veto power and only two states provided that the governor be elected by direct popular vote. The prevailing political theory of the emerging American states sought to protect democracy from any vestige of the single, powerful monarch by vesting constitutional authority in strong legislatures with weak executives.

Responding to the unpopular acts of Governor Arthur St. Clair in dealing with Ohio's territorial legislature, this state's first constitution of 1802 followed the early precedents of a weak governor. Originally under the 1802 Ohio Constitution both the administrative and executive powers of the chief of state were virtually nonexistent or as a later observer put it,"The governor was a name almost without meaning."[1]

Between the American Revolution and the Civil War the office of governor in the states developed increased powers through direct popular election and obtained more independence through the veto established in some states. However, the Jacksonian democracy also negated the governors' administrative powers by structuring plural executives by which top state officials such as secretary of state, attorney general, and treasurer were popularly elected. Legislative supremacy remained the major obstacle to increased gubernatorial influence during the period as succinctly stated in 1831 by De Tocqueville that:

> . . . . The legislative bodies daily encroach upon the authority of the governor and their tendency . . . . is to appropriate it entirely to themselves.[2]

In reaction to the excesses of legislative supremacy,"One of the objectives of the /Ohio/ Constitutional Convention of 1850-51 was the establishment of a balance of authority and responsibility between the governor and legislature."[3] Rather than centralizing the administrative powers of the governor, the 1851 Ohio Constitution made the executive offices of lieutenant governor, secretary of state, attorney general, auditor of state, and treasurer of state elective by the populace instead of

appointed by the legislature. Combined into the executive department to reduce the influence of the legislature, the five additional state offices also have become largely independent of the governor.[4] In addition, Ohio followed the pattern of most state governments in the late 19th century by placing other executive agencies under the governor's supervision by statute. In 1903 the Ohio governor was given veto power over legislative acts.

Attempting to set up additional checks and balances between the executive and legislative branches, the patchwork and accretion methods used to establish boards, commissions, and agencies presented an administrative problem of some magnitude by the early 20th century. New York, for example, had 10 state agencies in 1800, increased to 81 in 1900 and to more than 170 in 1925.[6]

Within the 1912 Ohio Constitutional Convention, delegate Samuel A. Hoskins of Auglaize County, successfully rebutted a proposal for a "short ballot" by giving us this picture of the state government's administration and attitudes toward reform:

> Look at the functions performed by different state departments. Almost every legislature adds some administrative board, or board of some sort, that carries with it a vast number of employees. Now you make all the state offices appointive and you have simply added to the appointing power of the governor of the state. You have added to his power to build up a machine that it will be almost impossible to eliminate.
>
> . . . I would like to call attention to . . . ten heads of departments intimately connected with state government and constituting the governor's cabinet. Under these ten departments there are two hundred and eighty-three employees and in addition to those there are other departments under the control of the governor. . . . and in addition to that you would have him to appoint the secretary of state, auditor of state, treasurer of state, attorney general, and you add about one hundred and ninety more employees, making in all over seven hundred employees under the direct control of the governor. Do you want to make him a monarch? What would we gain by giving the governor any more power than that he already has?[5]

However, this proliferation of boards, commissions and agencies, accompanied by the independent executive officials elected on the "long ballot," created a need for state administrative reform, which according to one scholar could be described as follows:

> It bred chaos, agencies pursued contradictory policies in related fields. It fomented conflict; agencies engaged in bitter bureaucratic warfare to establish their spheres of jurisdiction. It opened gaps in the provision of service or of regulation; clienteles were sometimes denied benefits or escaped supervision because they fell between agencies. It was costly, many agencies maintained overhead organizations that could have been replaced more cheaply and effectively by a common organization, and citizens had to make their own way through bureaucratic labyrinths. And, most important of all, it led to irresponsibility; no one quite knew how the pattern of organization and program came into existence or what could be done to alter it, each segment of the fragmented

governments became a self-directing unit, the impact of elections on the conduct of government was minimized, and special interest groups often succeeded in virtually capturing control of individual agencies. No one seemed to be steering the governmental machinery, though everyone had a hand in it . . . . These were among the forces that persuaded many students of government that chief executives had to be built up to take charge of the machinery.[7]

Principles and Models of State Reorganization

Surveying Ohio's administrative labyrinth beginning in 1919, the General Assembly passed the Reorganization Act of 1921 which is the present basis for Chapter 121 of the Ohio Revised Code. Probably enacted for partisan advantage at the time, Professor Harvey Walker noted: "Administrative organization in Ohio, as in most other states, lacked the benefit of sound principles of organization."[8] The Joint Committee on Administrative Organization as early as 1921 recommended a "reduction in the number of independent departments, offices, boards and commissions" in addition to placing more responsibility in the governor.[9] Additional state studies have advocated more economical consolidation and creation of administrative agencies (Joint Committee on Economy in the Public Service,[10] 1929; Committee on the Ohio Government Survey, 1935;[11] and the Council for Reorganization of Ohio State Government, 1963.[12])

The purpose of the 20th century administrative reform movement has been unification of the state executive branch. The proponents, reorganizing state government toward administrative integration of functions, believe the overzealous pursuit of popular election has created a historical fragmentation of the state executive branch. Bennett M. Rich declares "The greatest single impediment to executive unity lies in the constitutional designation of top officials who obtain office by popular election or by legislative election."[13] Executive unity continues as the central theme for state reorganization with the classic statement of principles in 1938 by A. E. Buck, who enumerated six factors: (1) concentration of authority and responsibility; (2) departmentalization or functional integration; (3) undesirability of boards for purely administrative work; (4) coordination of staff services of administration; (5) provision for an independent audit; and (6) recognition of a governor's cabinet.[14]

Two goals of state reorganization of the governor's powers through executive unification are the achievement of "administrative effectiveness" and "political responsibility" according to the reasoning of the Council of State Governments.[15] Opponents of such principles have developed three basic objections to the principles of administrative integration under the state executive.[16] First, the concern is sometimes voiced that there will be an over-concentration of authority in the governor. Second, there is a questioning of the assumption that single-headed departments with unified power and responsibility with a strong chief executive will insure either continuity of policy or reliable popular control. Third, critics hold there is no evidence to prove actual accomplishment of the espoused goals following reorganization.

The reorganization proposal to create a constitutional ceiling of the number of executive departments and give the governor reorganization power subject to legislative approval are products of the administrative reform movement. If state government reorganization is to become a reality through constitutional changes, such reform must be based on five assumptions and purposes according to advocate Ferrel Heady, who maintains: (1) general objectives of administrative integration are valid for most states; (2) constitutions should be confined to fundamental matters, avoiding unnecessary detail and rigidity so as to not to foreclose different approaches in the future;

(3) policy should be to deal sparingly with the subject or organization of the executive branch in a state constitution; (4) statutory-type specifications for full administrative integration along the lines recommended by most reorganization commissions are not justified in a constitutional provision; (5) The constitutional issue here is "one of eliminating specific constitutional impediments to integration, of facilitating integration at selected crucial points, and of otherwise preserving constitutional neutrality on questions of how state administration is to be organized and conducted."[17]

Within the reorganization movement the origin, purpose and constitutional implementation of limiting the number of executive departments can be viewed apart from the executive initiative in reorganization provisions.

In the July 1968 "Report to National Governor's Conference by the Study Committee on Constitutional Revision and General Government Organization, these suggested reforms are found as separate sections as follows:

The Model Constitutional Article

"Section 10. Executive Departments. All executive and administrative offices, agencies and instrumentalities of the executive branch of the state government and their respective functions, powers and duties shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies established by law may, but need not, be allocated within a principal department. . . .

Section 11. Department Heads. The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The Governor shall appoint and may remove the heads of all administrative departments. All other officers in the administrative service shall be appointed and may be removed as provided by law. Each principal department shall be under the supervision of the Governor and its head shall serve at the pleasure of the Governor.

Section 12. Executive Reorganization. The Governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. Such orders shall be submitted to the legislature, which shall have sixty days of a regular session, or a full session if of shorter duration, to express its disapproval. Unless modified or disapproved by resolution concurred in by a majority of the members of both houses, the orders shall become effective at a date thereafter to be designated by the Governor."[18]

Model State Constitution, Sixth Edition (Revised) 1963

The 1963 edition of the National Municipal League's "Model State Constitution" combines the two reorganization proposals into one section as follows:

Section 5.06. Administrative Departments. All executive and administrative offices, agencies and instrumentalities of the state government, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies established by law may, but need not, be allocated within a principal department. The legislature

shall by law prescribe the functions, powers and duties of the principal departments and of all other agencies of the state and may from time to time reallocate offices, agencies and instrumentalities among the principal departments, may increase, modify, diminish or change their functions, powers and duties and may assign new functions, powers and duties to them; but the governor may make such changes in the allocation of offices, agencies and instrumentalities, and in the allocation of such functions, powers and duties, as he considers necessary for efficient administration. If such changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the legislature while it is in session, and shall become effective, and shall have the force of law, sixty days after submission, or at the close of the session, whichever is sooner, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members.

Bicameral Alternative: Section 5.06. Administration Departments. Change the last phrase to read "majority of all the members of each house."[19]

Constitutional Ceiling on Number of Departments

Early in the administrative reform movement in 1918, Massachusetts adopted a constitutional provision limiting the state's executive departments to 20 in number. The extended reorganization of New York state government in the 1920's also resulted in restricting to 20 the number of civil departments. Following World War II the "Little Hoover Commissions" established after the federal study of post-war reorganization, examined the administrative bureaucracy in many states. Viewing the administrative functions of the state governor, the constitutional ceiling on executive departments limited to 20 in number was incorporated into the 1947 New Jersey constitution. As noted above the National Municipal League's 1963 Model State Constitution also adopted the provision.

Following the immediate post-war reorganization efforts in most states, however, Karl A. Bosworth observed a "rather general resistance on the part of legislatures to full acceptance of the executive management theme." He also found, in analyzing the implementation of reorganization efforts attempted through constitutional revisions, that negative responses prevailed in America's state legislatures.[20] Constitutions in the new states of Alaska (1956) and Hawaii (1950) made specific provisions for a constitutional ceiling of 20 executive departments. Now eleven states have some form of constitutional limitation on the number of executive departments. (See comparison table)

The purpose of the ceiling on the number of executive departments in a constitution is:

> . . . . to thwart what appears to be almost a natural tendency among state legislatures, to create new agencies for carrying into effect new policies . . . such a limitation in the construction would seem not only to prompt the legislature to the exercise of greater care in the establishment of new agencies, but also to force the legislature to consider more seriously where each new function belongs in the state's functions . . .the inclusion of such a limitation in the constitution is proper from the point of view of drafting a good constitution. This is fundamental material dealing with the basic structure of government, establishing the general framework of government within which the representative body will legislate the details."[21]

State constitutional studies for the Hawaii Legislative Reference Bureau provide a summary of arguments favoring a constitutional limitation including:

1. The provision helps insure that the legislature cannot create executive branch departments at will and thus helps protect the power of the governor to administer the state government.

2. The provision protects the legislature from undue pressure to create new departments.

3. The provision helps to insure that the governor has a manageable span of control over departments and helps to limit the number of departments and units reporting directly to him, thereby increasing government efficiency and accountability of officials.

4. A maximum of twenty departments is recommended by the Model State Constitution and also appears to be the trend in other states in their attempts to prevent proliferation of departments of state government and bring sound management principles to the operation of government.[22]

Perhaps the best statement of the purpose of a proposed constitutional amendment requiring a legislature to reduce administrative departments to a set number and authorizing a governor to reorganize the administrative departments, subject to legislative veto, is to be found in the commentary to an amendment later successfully passed by the voters and advocated by the 1968 North Carolina Constitution Study Commission:

The Governor is elected to administer state government. Yet he must do so through an array of 200 state agencies of various titles and descriptions, all of them responsible to him in some way but many subject to little or no effective coordination or direction by him. He does well to recognize on sight the heads of all of these state agencies, much less to be able to have an informed view of the competence with which they perform their jobs. His coordinative function is thwarted because it takes most of his term as Governor /4 years/ to learn what all of these units under his nominal command are supposed to do and how they relate to each other.

One obvious prescription is to reduce to a reasonable number the agencies that the Governor must oversee. Yet each session of the General Assembly sees a net addition of five or ten agencies to the administrative organization chart. The General Assembly has the authority to cut the number of state agencies to manageable proportions through consolidation and elimination, but experience indicates that it is most unlikely to do so in the absence of a clear mandate from the people that it be done. Hence this amendment.

Proposed Article III, section 11, following a precedent found in several states, directs the General Assembly to reduce the number of administrative and agencies to not more than 25, and to do so by July 1, 1975. (Thus it would have three regular sessions in which to accomplish the task.) This would have the effect of reducing the number of department heads whom the Governor must supervise to 25--many, but still only one-eighth of the present number. Not only would the Governor be enabled to manage the business of the State more effectively, but in the course of reorganization, it should be possible to eliminate overlapping and duplication of functions among agencies now independent. The objective is not simply a more efficiently administered government, but one more capable of responding effectively to the needs of the people of the State.[23]

Although the proposed New York constitution of 1967 was rejected, one of its changes to that state's executive article provided for removal of the 1925 amendment limiting the civil departments to 20 in number. A summary of four primary arguments favoring removal of the constitutional limitation include:

> 1. The limit on the number of departments may result in an inefficient grouping of unrelated activities and interfere with efforts to achieve flexibility in administration.
>
> 2. The existence of a limit on departments has contributed to a proliferation of divisions, special agencies, boards, commissions, and offices.
>
> 3. The limitation to twenty departments is wholly arbitrary.
>
> 4. A specific limit should not be in the constitution; the objectives could be achieved by statute which would have the advantage of greater flexibility.[25]

The 1968 model state executive drafted by seven governors and submitted to the National Governors' Conference advocates a constitutional ceiling of 20 departments. However, the proponents admit in discussing the issue that:

> All reviewers favor the principle of executive initiative in administrative reorganization, but they showed considerable disagreement over the limitation on the number of departments to 20. One would place the limitation at 12 . . . . while most of our evaluators preferred the figure of 20 departments, some felt it too restrictive and held the opinion that more might be needed.[26]

A final criticism of a constitutional ceiling on departments involves implementation problems of whether other elected state officers, single directors, boards, commissions, temporary and regulatory agencies are all to be within the magical administrative number. Criticsl of a provision later adopted in the 1968 Florida Constitution limiting state executive departments to 25, three observers argued:

> In summary, the executive article . . . forces reorganization of the state executive branch which now has about 150 state departments. These would have to be reduced to 25, in addition to those headed by elected officials whose duties are specifically provided. But the resulting executive departments could be placed, some under the governor, some under all the cabinet, some under part of the cabinet, and some under an individual cabinet officer. The outcome would be a unique executive system. It would offer possibilities of considerable log rolling between individual executive officers and individual legislators. It would make difficult coordination of the executive branch of state government. It would introduce a number of checks and balances on the governor, should the legislature choose to distribute the executive functions. The result would probably make it difficult for the citizen to determine who would be responsible for particular activities of the executive branch of the state government. Depending upon what the legislature determined, the result could either be more effective state reorganization or continuation and increase of complexity.

A constitutional limitation of state departments without specifying an exact number is in the 1969 proposed Washington constitution. A similar provision of the rejected 1970 Idaho constitution stated simply:

> All executive and administrative offices and agencies of the state and their respective functions, powers, and duties shall be allocated by law among the principal executive departments so as to group them, as far as practicable, according to major functions. (Art. IV, Sec. 5)[28]

Executive Reorganization Initiative Subject to Legislative Veto

As a more recent proposal of the administrative reform movement, the 1963 Model State Constitution of the National Municipal League introduced a provision granting the governor constitutional power to initiate plans for administrative reorganization subject to rejection by the legislature. The purpose is:

> In keeping with the concept of the governor as leader of state administration, however, the chief executive is also granted broad powers which permit him to take the initiative in administrative reorganization. He has broad powers to order changes in the organization of government but, when reorganization desired by the governor requires changes in law, the participation of the legislature is required to effectuate them--the changes may be set forth in executive orders to become effective 60 days after submission to the legislature unless they are specifically modified, or disapproved by resolution concurred in by a majority of all the members.[29]

While the 1956 Alaska constitution adopted a comparable provision, only more recently have Illinois (1970); Michigan 1963); Massachusetts (1966); Maryland (1970); Kansas (1969); and North Carolina (1970) and Virginia (1969); followed in adopting similar constitutional reorganization plans. California in 1966 provided constitutional authority for gubernatorial initiative to reorganize by statute. Rejected constitutions in Arkansas (1970); Idaho (1968); Maryland (1968) and New York (1967) offered provisions for the executive initiative and legislative veto reorganization plan. Proposed constitutions in Oklahoma (1971) and Washington (1969) incorporate the plan. The 1968 model executive article of the National Governors' Conference also contains a suggested provision similar to those recently adopted.

The three basic arguments favoring executive reorganization initiative powers subject to legislative veto have been summarized to include:

> 1. The governor is primarily accountable for and is better equipped than the legislature to oversee administration; therefore, he should have the authority, subject to legislative veto, to reorganize the administrative units under his direction.
>
> 2. The legislature would retain effective power over reorganization since no reorganization could be made without its consent.
>
> 3. The power would assist the executive branch in carrying out efficiently the administrative functions assigned to it.[30]

Again, the North Carolina Constitutional Study Commission describes the purposes and expected benefits of the executive reorganization initiative as later adopted by amendment in that state where:

The structure and powers of state agencies are prescribed in considerable detail by statute. Any significant reorganization of state government now requires legislative action changing the relevant statutes. The responsibility for pursuing in a continuous fashion the reorganization of state government in the interest of attaining a more efficiently designed and responsible structure of government is nowhere fixed in the constitution.

The second feature of this amendment (proposed Art. III, Section 5 /10/ attempts to meet these needs. It vests in the Governor the authority to prepare and submit to General Assembly proposals for state governmental reorganization. The General Assembly will have 60 days or until the end of the session, whichever comes sooner, in which to act upon the plans. If it does not by joint resolution disapprove the proposed plans, they take effect.

The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily. The significant achievement is that the amendment settles on the Governor the responsibility and authority for taking the initiative in state administrative reorganization.[31]

The alternative to consolidation of administrative operations implemented by constitutional provisions is legislative statutory allocation of government departments. In favor of legislative reorganization powers are arguments including:

1. The structure of government is properly a legislative responsibility, so the legislature should have the principal role in framing departmental structure to assure that the policies of government are being executed and accomplishing the desired results.

2. Existing provisions have achieved the objective of preventing proliferation of governmental units.

3. Experience shows that executive and legislative branches can work cooperatively to reorganize when the constitutional power is vested in the legislature.

While legislatures have long established the statutory shape of state administration, only after World War II did the sharing of this role with the executive really begin in the states, although federal presidential-congressional sharing of reorganization powers began as early as 1932. States which have at one time enacted either permanent or temporary reorganization statutes of executive initiative subject to legislative veto include: Georgia, Kentucky, Michigan, New Hampshire, Oregon, Pennsylvania, South Carolina, Missouri, Rhode Island, New Jersey, New York, Vermont and the Commonwealth of Puerto Rico.

Ohio Senate Bill No. 318, introduced on May 18, 1971 offers: "To enact sections 121.23 to 121.33, inclusive, of the Revised Code to provide the governor, as head of the executive branch of state government, with statutory authority to

reorganize agencies within that branch of state government subject to veto by a majority of each house of the general assembly within sixty days of submission." This proposal would give reorganization initiative of creating, abolishing or combining of agencies to the Governor, who would then submit a specific plan to the legislature. The executive-initiated reorganization plan would then take effect" , , , at the end of the first period of sixty calendar days of continuous session of the General Assembly after the date on which the plan is transmitted to it, unless said plan is disapproved within sixty days of its submission to the General Assembly, in regular or special session, by a resolution adopted by a majority vote of the respective elected members of each house of the General Assembly." While no number limitation for state departments is established, S. B. No. 318 sets out that two of its several purposes will be: "To group, consolidate, and coordinate agencies and functions thereof as nearly as possible according to major purposes; to reduce the number of agencies by consolidating those having similar functions under a single head and to abolish such agencies or functions thereof as may not be necessary for the efficient operation of the state government."

Professor Eley in his survey of states' experience with both constitutional and statutory executive reorganization plans summarizes his findings through 1965 by stating that:

> This review indicates that the executive reorganization plan procedure has had only a limited success where it has functioned under legislative authorization alone. Indeed, it may be questioned whether in a majority of the states which have had the statutory plan, the cause of executive reorganization has been helped or hindered. Although no effort has been made at direct comparison, it appears that states without the plan have done as well as those that have it, and some have done a good deal better.
>
> Apparently this disappointing experience resulted from the prevailing legislative suspicion of and resentment toward a procedure that reverses the usual executive and legislative roles. It is also likely that the underlying rural-urban conflict has been a major factor in the creation of suspicion and resentment. Judging by the record, state legislatures are greatly concerned with the manner in which the executive branch is organized. Even when a given legislature has been willing to authorize the executive reorganization procedure, either it has tended to limit the scope or duration of the procedure, or succeeding legislatures have ignored or by-passed enacted provisions. In the face of such hostility, the chief executive as often as not has abandoned both the procedure and the cause of reorganization, at least whenever legislative approval is necessary.[34]

While the merits of the constitutional or statutory methods of executive reorganization provisions remain debatable, the activities of American governors in advocacy of administrative reform is increasing. "Governors have been active in promoting state executive reorganization in the form of messages to the legislatures. Twenty states report their governors made recommendations to the legislature concerning executive reorganization during 1967-69"[35]

For comparative purposes the following table shows alphabetically by states the adopted, proposed and rejected constitutional and statutory provisions and year for ceiling of departments and executive initiative subject to legislative veto plans.

COMPARISON OF LIMITED DEPARTMENTS AND EXECUTIVE INITIATED REORGANIZATION LAWS IN THE UNITED STATES

State	Ceiling on Departments	Executive Initiative with Legislative Veto	Implementation	Year
Alabama	--	--	--	--
Alaska	20	X	Constitution	1956
Arizona	--	--	--	--
Arkansas	20	X	Rejected Constitution	1970
California	--	X*1	Constitutional amendment	1966
Colorado	20	--	Constitutional amendment	1966
Connecticut	--	--	--	--
Delaware	--	--	--	--
Florida	25	--	Constitutional amendment	1968
Georgia	--	X	Statute	1960, 1963
Hawaii	20	--	Constitution	1950
Idaho	*2	X	Rejected constitution	1970
Illinois	--	X	Constitution	1970
Indiana	--	--	--	--
Iowa	--	--	--	--
Kansas	--	X	Constitutional amendment	1969
Kentucky	--	X	Statute	1960, 1962
Louisiana	--	--	--	--
Maine	--	--	--	--
Maryland	2-	X	Rejected constitution	1968
Massachusetts	20*3	--	Const. amend. (Repealed)	1918
	--	X	Constitutional amendment	1966
Michigan	--	X	Statute	1958
	20	X	Constitution	1963
Minnesota	--	--	--	--
Mississippi	--	--	--	--
Missouri	16	X	Constitution	1945
	--	X	Statute	1969
Montana	20	--	Constitutional amendment	1970
Nebraska	*5	--	Constitution	1920
Nevada	--	--	--	--
New Hampshire	--	X	Rejected statute*6	1949
New Jersey	20	--	Constitution	1947
	--	X	Statute	1970
New Mexico	20	--	Rejected constitution	1969
New York	20	--	Constitutional amendment	1925
	*7	X	Rejected constitution	1967
	--	X	Statute	1970
North Carolina	25	X	Constitutional amendment	1970
North Dakota	--	--	--	--
Ohio	--	--	--	--
Oklahoma	20	X	Proposed constitution	1971
Oregon	--	X	Statute	1959
Pennsylvania	--	X	Statute	1955
Rhode Island	--	X	Statute	1969
South Carolina	--	X*8	Statute	1948

State	Ceiling on Departments	Executive Initiative with Legislative Veto	Implementation	Year
South Dakota	--	--	--	--
Tennessee	--	--	--	--
Texas	--	--	--	--
Utah	--	--	--	--
Vermont	--	X	Statute	1969
Virginia	--	X	Constitution	1969
Washington	*9	X	Proposed constitution	1969
West Virginia	--	--	--	--
Wisconsin	--	--	--	--
Wyoming	--	--	--	--
Puerto Rico	--	X	Statute	1949
Nat'l Mun. League	20	X	Model state constitution	1963
Nat'l Gov. Conf	20	X	Model executive article	1968

Notes:

*1 - California: Authorizes statutory reorganization by gubernatorial initiative.

*2 - Idaho: Grouping of principal executive departments by major function; no limit on number.

*3 - Massachusetts: 1918 constitutional amendment (Art. LXVI) effecting a constitutional ceiling of 20 state departments repealed and annulled specifically by 1966 constitutional amendment (Art. LXXXVI).

*4 - Missouri: Constitution names specifically 11 executive officials and states no more than five additional departments may be created by law.

*5 - Nebraska: Constitution provides strict limitation on number of departments by requiring 2/3 vote of legislature in creating a new executive department.

*6 - New Hampshire: In Opinion of the Justices, 83 Atl. 2d 738 (1949) the state's Supreme Court held statutory reorganization plan unconstitutional because the concurrence of both houses of the legislature was not necessary, I.E. the plan would go into effect though one chamber had expressly indicated its disapproval.

*7 - New York: Rejected constitutional provision would have eliminated constitutional ceiling of 20 civil departments and provided executive initiative power with legislative veto.

*8 - South Carolina: "Mixed" legislative-executive reorganizational procedure with Governor consulting a state reorganization commission and transmitting all commission proposals to legislature.

*9 - Washington: Grouping of principal executive departments by major purposes; no limit on number.

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2. Alex De Tocqueville, Democracy in America, (New York, Century Co., 1898).

3. Harvey Walker, "The Executive Department in Ohio," An Analysis and Appraisal of the Ohio State Constitution 1851-1951: a report by the Social Science Section of the Ohio College Association, (Cincinnati, Stephen H. Wilder Foundation, 1951), p. 36.

4. Frederick Woodbridge, "A History of Separation of Powers in Ohio: A Study in Administrative Law, Cincinnati Law Review, Vol. 13 (1938) p. 191.

5. Ohio Constitutional Convention 1912. Proceedings and Debates (Columbus, F. J. Heer Printing Co., 1912-1913) PP. 1694, 1696.

6. Leslie Lipson, The American Governor from Figurehead to Leader, (Chicago, University of Chicago Press, 1936) p. 29.

7. Herbert Kaufman, "Emerging Conflicts in the Doctrines of Public Administration," American Political Science Review, Vol. 50 (1956) pp. 1057, 1063

8. Francis Auman and Harvey Walker, The Government and Administration of Ohio, (New York, Thomas Y. Crowell Co., 1953) p. 102.

9. Joint Committee on Administrative Reorganization, Report to the Ohio General Assembly (Columbus: F. J. Heer Printing Co., 1921) pp. 6-7.

10. Joint Committee on Economy in the Public Service, Report (Columbus, F. J. Heer Co., 1929).

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13. Bennett M. Rich, State Constitutions: The Governor, (New York, National Municipal League, 1960) p. 13.

14. A. E. Buck, The Reorganization of State Governments in the United States, (New York, National Municipal League, 1938) pp. 14-15.

15. Council of State Governments, Reorganizing State Governments, (Chicago, 1950) p. 3.

16. Ferrel Heady, Stat e Constitutions: The Structure of Administration, (New York, National Municipal League, 1961) pp. 4-5.

17. Ibid., pp. 6-7

18. National Governors' Conference. Report to National Governors' Conference by the Study Committee on Constitutional Revision and Governmental Reorganization, Supplement. (Chicago, 1968) p. 12.

19. National Municipal League, Model State Constitution, 6th edition (New York, 1963) pp. 10-11.

20. Karl A. Bosworth, The Politics of Management Improvement in the States, American Political Science Review, Vol. 47 (March, 1953) pp. 92-93, 98.

21. Byron R. Abernathy, Some Persisting Questions Concerning the Constitutional State Executive, Government Research Series 23 (Lawrence, University of Kansas, Governmental Research Center, 1960) p. 75.

22. Hawaii University. Legislative Reference Bureau. Hawaii Constitutional Convention Studies, (Honolulu, 1968), Vol. 1, p. 88.

23. North Carolina. State Constitution Study Commission. Report . . . to North Carolina State Bar and North Carolina Bar Association, (Raleigh, 1968), pp. 51-52.

24. New York. Temporary State Commission on the Constitution Convention. Reports: State Government, Vol. 14, (New York, 1967).

25. Hawaii University, op. cit., p. 89.

26. North Carolina op. cit., pp. 51-52

27. Florida. University. Public Administration Clearing House. Should Florida Adopt the Proposed 1968 Constitution? An analysis by Manning J. Daner, Clement H. Donovan, and Gladys M. Kammerer. (Gainesville, 1968), p. 12.

28. Idaho. Secretary of State. Proposed Revision of the Idaho Constitution. (Boise, 1970), p. 21.

29. National Municipal League. op. cit., pp. 71-72.

30. Hawaii University op.cit., p. 90.

31. North Carolina op. cit., p. 52.

32. Hawaii University op. cit., p. 89.

33. Barry Dean Karl, Executive Reorganization and Reform in New Deal--The Genesis of Administrative Management, 1900-1939 (Cambridge, Harvard University Press, 1963) p. 190 ff.

34. Lynn W. Eley, The Executive Reorganization Plan: A Survey of State Experience, Institute of Governmental Studies, (University of California, Berkeley, 1967) pp. 26-27.

35. Council of State Governments, State Executive Reorganization, (Lexington, Kentucky, 1969), p. 2.

Constitutional Revision Commission
August 13, 1971

To: Committee to Study the Legislature
From: Sara Hunter
Subject: Legislative procedure in the Constitution - Art. II, Sec. 16

Most writers on the subject of legislative articles in modern constitutions deplore the extent of regulation that they place upon the process of legislating. A few requirements are almost unanimously accepted as desirable--those having to do with qualifications for members, officers, vacancies, basic organization, quorum requirements, majority action, veto procedures, and provisions clearly authorizing each house to establish its own rules of procedure, but others have been subjected to a variety of criticism.

Ernest Freund, for one. condemned the inclusion of procedural requirements in the constitution on grounds that they have generated litigation, caused drafting problems, and served as technical loopholes of escape from beneficial laws. His advice to constitution makers was to impose constitutional procedural requirements only if they met the following tests: "(1) that they serve an object of vital importance; (2) that they can be complied with without unduly impeding business; (3) that they are not susceptible of evasion by purely formal compliance or by false journal entries; (4) they do not raise difficult questions of construction; (5) that the fact of compliance or noncompliance can be readily ascertained by an inspection of the journal." Ernest Freund, Standards of American Legislation, 1917, p. 154

Article II, Section 16 contains several such procedural requitements. An alternative for the much condemned "three reading rule" is the subject of an accompanying draft and commentary. This memorandum will address itself to the wisdom of retaining the "one subject" and "title" rules contained in Section 16.

The requirement that no bill shall contain more than one subject, or equivalent language, can be found in most state constitutions. The New Englend states are an exception to the general rule. Purposes of the rule, according to one commentator[1] are threefold: (1) to prevent logrolling, a practice in which unrelated matters are combined in one bill for the sole purpose of gaining the necessary support to secure their passage; (2) preventing the attachment of "riders" to popular measures; and (3) to facilitate legislative procedure. If only the third purpose were involved, suggests its author, the matter could clearly be relegated to legislative rule.

1 Rudd, Millard H. "No Law Shall Embrace More Than One Subject," 42 Minn. Law Review (Jan. 1958).

The commentary cited above points out that while such provisions have been invoked in hundreds of lawsuits across the country and over the years, only rarely has legislation been invalidated under either rule. Courts have broadly construed "subject," finding that if an act has "unity," the purpose of the one subject rule is satisfied. Some courts have insulated laws from attack on this score by invoking the "enrolled bill" theory, refusing to impeach a legislative act by extrinsic evidence. Ohio courts in many instances over the years have termed the one subject and title provisions "directory" and not mandatory and have in this manner repudiated challenges to legislation based upon the requirements of Section 16. Pim v. Nicholson, 6 Ohio St. 176, 179 (1856); State ex rel. Attorney General v. Covington, 29 Ohio St. 102 (1876).

Conceding that the one subject rule is indirect and partial in its effect upon logrolling (by not affecting the practice where two or more bills are used) the Minnesota commentary concludes that: (1) the rule must still be considered a significant deterrent to successful logrolling because by forcing a coalition to use more than one bill the rule increases the probability that the coalition will not attain all its objectives; (2) there is greater strength to the rule when it is in the Constitution and not merely the subject of rule; and (3) although involved in much litigation, the one subject rule has rarely been the sole issue and has succeeded in invalidating an insignificant amount of legislation.

The rules should be retained for these reasons.

Some states and the Model State Constitution except appropriation bills and bills for codification, revision or rearrangement of existing laws from the one subject rule. Such a proposal is not regarded as desirable for Ohio. Ohio is one of the many states with one subject provisions having no special ones applicable to appropriations. The rationale is more convincing for retaining a procedural provision in the Constitution than for inserting it. Specific exclusion of code revision bills would invite problems of definition and could mean that if an act is a revision there is no limit on what may be included. The Ohio Supreme Court in an early ruling upheld revision legislation that was challenged under the one subject rule. Oshe v. State 31 Ohio St. 494 (1882).

The present language should be retained.

Constitutional Revision Commission
August 13, 1971

To: Committee to Study the Legislature
From; Sara Hunter
Subject: State legislatures as "continuing" or "continuous" bodies

Research Study No. 7, prepared for an earlier meeting of this Committee but distributed with materials for this one, summarizes the law in Ohio dealing with the authority of legislative committees after sine die adjournment of the general assembly. Cases and attorney general opinions there discussed raise questions as to the interim authority of a legislative committee created other than by statute.

The purpose of this memorandum is to explore other judicial interpretations of the interim authority of state legislatures, and committees or commissions thereof, and to discuss the use of such terms as "continuous" and "continuing" to describe legislative bodies, to ensure interim authority by committee or otherwise.

In 1877, in an action involving a contested election before the Ohio Senate, one question before the Ohio Supreme Court was whether proceedings to contest were commenced prematurely. The statute authorizing contest called for the filing of notice "between the sixth and tenth days after the commencement of the first general assembly after the election . . ." The election in this case had been held in October, 1876. Notice was filed with the Senate between days called for after commencement of an "adjourned session" on January 2, 1877, meeting pursuant to joint resolution passed April 11, 1876 and setting January 2, 1877 as a reassembly date. Regular sessions commenced in the even numbered years at this time, and the argument was made that the underlined portion of the statute meant commencement of the first regular session of the general assembly after the election - i.e. the first Monday of January, 1878.

The court's reasoning in rejecting such an interpretation is interesting. Citing an 1853 act of the Ohio General Assembly providing for "regular, adjourned and called sessions" the Court said:

> "The general assembly, in legal contemplation, is a continuing body, as enduring as the constitution; but when not in session it has merely a potential existence. Its members are at all times liable to be called together to act as an organized body; and it is only when they are thus convened that the general assembly can be said to be in session, or competent for the transaction of business.
>
> As respects the power or capacity of the general assembly, it is a matter of indifference whether it is convened in pursuance of the express injunction of the constitution, at the time prescribed for the regular session, or under the call of the governor, or at a time fixed by itself. Its authority is as ample at one session as at another." State v. Harmon, 31 Ohio St. 250, 262 (1877)

This early characterization of the Ohio General Assembly as a "continuing body" is inconsistent with cases summarized in Research Study No. 7, holding that a legislative committee in Ohio is without power to act after sine die adjournment of the General Assembly which authorized it. Legislative committees and commissions created by resolution as opposed to statute have been regarded as having no legal existence after date of the sine die adjournment of the legislative body that passed the resolutions. Although the decision in State ex rel. Rulison v. Gayman, 11 Ohio Circ. Cts. N.S. 257 (1908) was based upon a finding that the committee duties there challenged constituted an unconstitutional exercise of judicial power, the opinion contains

language to the effect that in any event sine die adjournment "renders it impossible that information which might be obtained . . . shall be used by the body seeking it . . ."

The "continuing" nature of the General Assembly and its "potential existence" are ignored. Later cases summarized in Research Study No. 7 involve legislative commissions created by statute and thus leave uncertain the judicial response to questions involving authority of the General Assembly, through committees or otherwise to act after a sine die adjournment.

That modern times demand "continuous" legislative assessment of a State's problems is a frequently reiteratad proposition. The Model State Constitution consequently provides in Section 4.08: "The legislature shall be a continuous body during the term for which members of the assembly (one house in bicameral body) are elected." Virginia and Illinois have constitutionally designated the respective legislatures of each a "continuous body" during the term for which members of the House of Representatives are elected. By a 1967 constitutional amendment the Pennsylvania General Assembly is a "continuing body" for the same period. The Pennsylvania Supreme Court had held, in 1936, that there was no implied power in the exercise of which the House could sit after adjournment nor to create a committee to do what the House could not do. The power of each house to "determine the rules of its proceedings" had nothing to do with the question, said the Court in Brown v. Brancato, 184 Atl. 89, 321 Pa. 54 (1936).

In so ruling the Pennsylvania court adopted the majority view. Without specific authority therefor courts have been reluctant to find powers in the legislature or branch thereof as to assembly and length of session. Annot. 56 A.L.R. 721. Similarly, universal has been the rule that a legislative committee authorized to function after adjournment of the legislature cannot be created by a resolution of one body of the legislature. Annot. 2[illegible] A.L.R. 1154. The reason for the rule, as set forth by the California Supreme Court in 1939, is that when the power to legislate ceases, then the power to investigate for the purpose of aiding the legislature in exercising this power ceases. Upon adjournment sine die the legislative powers of both houses of the legislature cease, stated the opinion, and thereafter the members of the legislature have no legislative powers unless a special session is called, which can only be done at the call of the governor and at which only those matters set forth in the call may be considered. In re. Southard, 90 P. 2d 304 (Calif. 1939).

In a federal case to the contrary the United States Supreme Court held that the U. S. Senate lawfully by resolution could create a legislative committee with power to sit after the adjournment of Congress because the Senate "is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress . . ." McGrain v. Daugherty, 273 U. S. 135 (1927). The majority opinion in the California case cited rejected McGrain as authority, holding that "the legislature is not a continuing body -- each session is composed of a new body, separate from its predecessor, all of the members of the assembly and one-half of the members of the senate being newly elected for each regular session.

The dissent, arguing that a state legislature has all powers necessary to enable it to exercise its appropriate functions, except as limited by express restraints in the Constitution, reasoned that "the power to legislate is ever present and continues to exist even after adjournment sine die." The incidental investigatory function likewise continues, thus insuring a more effective exercise of the principal legislative function.

The Missouri Supreme Court several years later adopted the Southard rule in denying to the Missouri Senate the authority, acting independently, to create committees to sit after adjournment sine die. The opinion rejected the argument that the state senate, with one half of the members elected every two years, was a continuing body because "the number of hold-over senators is not a quorum and is less than a constitutional majority." State ex rel. Jones v. Atterbury, 300 S.W. 2d 806 (1957). However, this case upheld the authority of an interim committee established by concurrent resolution to operate after sine die. The court said, "The dormant body with its prospect of reactivation is sufficient to sustain the vitality of the incidental and auxiliary investigative function." Examining the term, "sine die," applied when a legislative body adjourns without appointing a day on which to reassemble, the Missouri Court distinguished sine die adjournment of a body such as a constitutional convention because when the latter adjourns sine die it is "functus officio" in that it has fulfilled the purpose of its creation and therefore of no further virtue or effect. The General Assembly, on the other hand, "always exists as the depositary of the legislative power of state government . . . its right to function in a legislative way is limited to the time when it is in regular or special session." The concurrent resolution in question was viewed as "administrative or procedural in character," without the force of law, and not requiring submission to the governor.

Recent cases from other states with comparable legislative articles in their constitutions have rejected the rule that the legislature ceases to exist upon adjournment sine die. Such holdings contradict the basis for the rule that committees created by concurrent or joint action cannot function after sine die. Modern opinions, recognizing the principle that state constitutions are limitations and not grants of power, have noted that the functions of state government have expanded greatly since statehood. The notion that members of the legislature function only during formal session has been rejected. Verry v. Tranbeath, 148 N.W. 2d 567 (N. Dak. 1967).

One of the changes effected by state constitutional revision of the mid 19th century was the shift from annual to biennial sessions. By 1900 43 states, including Ohio, had abandoned annual sessions, most by constitutional directive. Currently the pendulum is swinging the other way. Commentators and students of legislative reform now call for enabling state legislatures to meet as often and for as long as, in the judgment of its leaders, its responsibilities require. Jefferson B. Fordham, for example, in a lecture on the Legislative Process - Of Men and Method,[1] deplores the fact that standing committees go out of business when the legislature adjourns sine die, having no legal status until the legislature reconvenes. Of the "continuing" or "continuous" nature of the legislative body he says:

> "With respect to continuity, it should be made clear in the constitutional framework of a particular state that a legislative house is competent to have standing committees continue their work in the interim between sessions. The general but not universal judicial view at present is that a legislative body becomes functus officio upon sine die adjournment, as a consequence of which no part of the body, such as a committee, is competent to go on with its business. We should have done with this legalistic restriction upon legislative continuity of action . . ."

1 Fordham, The State Legislative Institution (Edward G. Donlay Memorial Lectures presented College of Law, W. Va. Univ. April 29 and 30, 1957).

The overwhelming weight of authority in reported cases is to the effect that neither house of a state legislature may lawfully appoint a committee by single house resolution with power to sit after adjournment sine die. The majority rule from reported cases (most of them at least 40 years old) is that if an interim committee appointed by the legislature is to function lawfully after adjournment of the legislature, it can be created only by statute. Swing v. Riley, 90 P. 2d 313 (1939). Furthermore, the California Supreme Court held in the cited case that a senate interim committee when it reports back to the senate is not reporting back to a "continuing body since 50 per cent of the senators are elected anew each two years, so that there is not present a majority of the membership of the body originally appointing the committee. The rationale was twofold: (1) upon adjournment sine die all legislative power of both houses terminates, including the auxiliary power of functioning through legislative committees; and (2) McGrain v. Daugherty, holding the federal senate a continuing body, is distinguishable because of the return of two-thirds of the members of the senate rather than fifty per cent.

An argument in opposition to these holdings is that the power to legislate continues and exists after adjournment sine die as fully and completely as during a recess, and inasmuch as either house may lawfully create a committee to investigate during a recess when technically not engaged in legislating, there is no reason to deny either house the right to create interim committees.

In an apparent attempt to overcome or forestall such unfavorable decisions and to insure that a legislature be vested with all the powers necessary and incidental to the unobstructed exercise of its functions, constitutional revisors have called for designating the legislature as a "continuous" or "continuing" body. Developments in Pennsylvania, Virginia, and Illinois have been cited as has the Sixth Edition (Revised) of the National Municipal League's Model State Constitution.

Search for a helpful definition of the term (other than an ever present power to legislate) has been unfruitful. Definitions of the two terms from Black's Law Dictionary[2] indicate that as between the two, "continuing" is the more appropriate adjective. As there defined it means: "enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurences." "Continuous," on the other hand, is defined as: "uninterrupted; unbroken; not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series."

Many states have simply provided for annual sessions. Some, such as California, Alaska and Florida, have given interim committees constitutional authority to function. Although such a solution has the disadvantage of incorporating essentially statutory material in the constitution and possibly by implication of denying the exercise of other interim powers, an alternative - the use of such a term as continuous or continuing -- raises the question of what is meant by the term.

Moreover, the possibility of a legislature in constant session is unacceptable to some. The authority given the presiding officers of the general assembly to call it into special session (see proposed section) gives the legislature the necessary flexibility to deal with particular conditions that may arise after an adjournment sine die. Consequently, the draft presented provides for annual sessions and an amendment to Section 8 (rules) gives interim powers to committees of either house.

The New Jersey Constitution is more specific on the question of continuity. It provides specifically that the first annual session shall begin on the second Tuesday in January in each even numbered year and terminate on the second Tuesday in January following, at which time the second annual session commences, terminating one year later, but subject to the provision that "either session may be sooner terminated by adjournment sine die." Also included in the specific provision for business before either house or committee thereof at the end of the first annual session to be resumed in the second annual session.

The federal rule for adjournment of Congress, by statute, is as follows:

(a) Unless otherwise provided by the Congress, the two Houses shall -
(1) adjourn sine die not later than July 31 of each year; or
(2) in the case of an odd-numbered year, provide, not later than July 31 of such year, by concurrent resolution adopted in each House by rollcall vote, for the adjournment of the two Houses from that Friday in August which occurs at least thirty days before the first Monday in September (Labor Day) of such year to the second day after Labor Day.
(b) This section shall not be applicable in any year if on July 31 of such year a state of war exists pursuant to a declaration of war by the Congress
2 U. S. C. 198.

Constitutional Revision Commission
August 13, 1971

To: Committee to Study the Legislature
From: Sara Hunter
Subject: Three reading rule - Art. II, Sec. 16

Section 16.

~~Every bill shall be fully and distinctly read on three different days; unless in case of urgency three fourths of the house in which it shall be pending, shall dispense with the rule.~~ EVERY BILL SHALL BE READ BY TITLE ON THREE DIFFERENT DAYS UNLESS TWO-THIRDS OF THE MEMBERS ELECTED TO THE HOUSE IN WHICH IT IS PENDING DISPENSE WITH THE RULE. NO BILL SHALL PASS THIRD OR FINAL READING IN EITHER HOUSE UNLESS A COPY OF THE BILL, IN THE FORM TO BE PASSED OR ACCOMPANIED BY A COPY OF EACH AMENDMENT THERETO, HAS BEEN MADE AVAILABLE TO EACH MEMBER OF THAT HOUSE FOR AT LEAST 24 HOURS, UNLESS TWO-THIRDS OF THE MEMBERS ELECTED TO THE HOUSE IN WHICH IT IS PENDING DISPENSE WITH THE RULE. No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed.

Comment: Patricia Shumate Wirt in Salient Issues of Constitutional Revision writes: "Probably the most archaic and most widely condemned procedure is that requiring that a bill be read in full on three separate days. This requirement antedates the development of rapid printing devices and has been slavishly copied as something fundamental ever since."

The present requirement that bills be "fully and distinctly read" on three different days is virtually never observed in Ohio. Constitutional provisions governing bill reading are standard. Although they appear in varying forms in the constitution of the 50 states, a 1970 report by the Council of State Governments (American State Legislatures: Their Structures and Procedures) reveals that the practice of reading bills in full is extremely rare. To conform fundamental law with practice a number of states have revised the requirement by specifying that the readings shall be "by title" only. Another approach is to require that a copy of the bill as amended to date be made available to members of each house for a specific amount of time prior to final passage in that house. By including both types of provision in the draft submitted, the committee intends to discourage undue haste in legislative consideration and to entitle members to prior possession of a bill as it is to be voted upon on third reading.

The draft reduces the majority needed to dispense with the rules from "three-fourths of the house" to "two-thirds of the members elected," in accord with consensus reached at the meeting of June 17, 1971, to reduce the necessary vote and make uniform the language of provisions calling for extraordinary majorities.

The committee recommends further that form and structure will be improved by the removal to another section of the remainder of Section 16, dealing with veto power and passage over veto.

The requirement that the one subject of a bill "be clearly expressed in its title" is generally included with the one subject rule. Reportedly having its origin in a 1795 act of the Georgia legislature, deceptively titled and allowing substantial grants of public property to private persons. the title rule has been said to serve two purposes: (1) to prevent surprise and fraud; and (2) to invalidate all or portions of legislation misleadingly titled.

Constitutional Revision Commission
August 18, 1971

To: Committee to Study the Legislature
From: Sara Hunter
Subject: Section 32, Divorces and judicial powers - proposal to eliminate

Section 32 provides: "The General Assembly shall grant no divorce, nor, exercise any judicial power, not herein expressly conferred."

The Debates of the Constitutional Convention of 1851 devoted little consideration to the subject of Section 32. Proponents of prohibiting divorce in Ohio generally were very vocal, but their proposals for broadening the provision were rejected with little reported commentary.

Acts granting divorces tended to beget legislative corruption and encourage logrolling, with the result that little consideration was given to the merits of passage. However, such limitations originated in unfortunate experiences in the past and are dated. Unnecessary and obsolete language detracts from the stature of the Constitution in general and the legislative article in particular.

Prohibition against such special legislation today is unnecessary. The retaining of superfluous and dated material is not necessarily troublesome, but accuracy and consistency call for removal. Limitations could raise questions and invite litigation, and where they serve no useful counterbalancing purpose, they should be eliminated.

Constitutional Revision Commission
August 19, 1971

To: Committee to Study the Legislature
From: Sara Hunter
Subject: Statutory material in the Constitution - Sections 33, 34, 35, 36, 37, 39, 40, and 41 of Article II, as adopted in 1912

Sections 33 through 41 were proposed as additions to Article II of the Ohio Constitution by the delegates of the Convention of 1912, in the face of arguments that they were statutory in nature and were not constitutional material.

Lauren A. Glosser, Executive Secretary of the Ohio Program Commission in 1950 and author of"Ohio's Constitution in the Making" wrote:

> "The work of the convention was influenced by some sweeping trends of public opinion which were taking place in the state and nation at that time. The national progressive movement which resulted in the Bull Moose party expressed itself in the constitution in favor of direct legislation and greater public participation in the law-making functions. The growth of industrial power in the latter half of the nineteenth century and the complete dependence of the working man on an economy over which he had no control ultimately gave rise to the belief that the government could and should intervene to protect the interest of the laborer in this new economic system."

To encourage social welfare legislation the delegates in 1912 authorized mechanics liens laws (Sec. 33), the regulation of hours, wages and general welfare of employees (Sec. 34) and the adoption of workmen's compensation (Sec. 35). The eight hour day was established on public works (Sec. 37) and the prison labor contract system was declared abolished (Sec. 41). Laws for the encouragement of forestry and conservation of natural resources were authorized (Sec. 36) as were laws regulating expert testimony in criminal cases (Sec. 39) and providing for the registration of land titles (Sec. 40).

All of these provisions represent the inclusion of statutory material in the Constitution. None of these matters is of a fundamental nature. Most are not timeless but are dated and obsolete, having been adopted to meet specific problems, as is illustrated by Convention debates concerning their inclusion.

Presence in the Constitution of statutory material is undesirable because of the rigidity it affixes to the public policy of a past period in history. Nearly all of the above govern relations between private persons and private interests, and this violates the principle that the function of a constitution is to govern government. They invade the rightful province of the legislature by so doing.

Sometimes the retention of such provisions must be reluctantly accepted because of unfavorable judicial construction placed upon other portions of the Constitution. However, in the case of the instant provisions, no such justification is now valid, as a summary of each and its history disclose.

(1) Section 33 authorizes the passage of laws to provide creation of a mechanic's lien, early defined as a "claim createdby law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure." Van Stone v. Stillwell, 142 U.S. 128, 136 (1891) Its necessity was predicated upon a holding by the Ohio Supreme Court in 1896 that mechanics' lien legislation earlier adopted was unconstitutional as an unreasonable and oppressive restraint upon liberty of contract

and prohibited by the bill of rights, declaring inalienable rights of enjoying and defending property. Palmer v. Tingle, 55 Ohio St. 423 (1896).

The Circuit Court of Appeals and the United States Supreme Court exercising independent judgment as to constitutionality of the Ohio law in another case found the statute did not deprive the owner of his property without due process of law nor interfere with his liberty to contract. The Circuit Court, noting that such statutes had met with the approval of most legislatures and had survived assault or not been questioned, reasoned:

> "That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its enactment. Neither upon reason nor authority are we able to come to an agreement with the Ohio court."

The Supreme Court sustained and adopted the opinion of the Circuit Court. Great So. Fire Proof Hotel Co. v. Jones, 193 U. S. 532 (1904).

In the Debates of the 1912 Convention the view was expressed that the Ohio court would reverse itself if the question were before it again. The Palmer case did not turn upon constitutional principles peculiar to this state but upon the rights deemed fundamental with all forms of popular and constitutional government.

Labor influence upon the 1912 convention is most evident in colloquy included in its debates concerning adoption of Section 34, permitting passage of "laws fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees . . ."

Spokesmen for it were asked what provision of the Constitution forbids the legislature from passing such laws and specifically if consideration had been given to whether that portion of the Constitution relating to the passage of laws violating obligation of contract had any bearing on the proposal. Responses acknowledged general belief that the legislature could act without specific authority but favored incorporation of certain subjects in the fundamental law to "give notice to the Legislature" of the wishes of the people. Whether it partakes of the legislative character or not, we must have certain regulations relative to labor inserted in our new constitution, was the expression of one delegate.

The substance of Section 35, authorizing a compulsory workmen's compensation system, was proposed at the constitutional convention of 1912 for the purpose of "making secure" the voluntary system that had passed the legislature and had just been upheld by the Ohio Supreme Court in Yaple v. Creamer, 85 Ohio St. 349 (1912). The "voluntary" system had been challenged because it deprived nonparticipating employers of five or more of certain defenses in personal injury actions.

The legislation had been passed after comprehensive study and report upon industrial conditions in many countries, laws passed to improve them, and findings that a personal injury action no longer furnishes a real and practical remedy nor meets the economic and social problems resulting from modern industrialism. Thus the Court in this case acknowledged conclusions of the study commission "that the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound, that there is an intelligent and widespread public sentiment which calls for its modification and improvement, and that the general welfare requires it."

The rationale of the Yaple court suggests that constitutional amendment was not necessayr for the purpose of upholding the law, although some weight is given its voluntary nature.

Several opinions after adoption of Section 35 have strongly implied that the adoption of the constitutional amendment did not through specific grant of power alter the fundamental source of authority and that validity of compensation legislation rests upon authorization of the police power as well as the specific grant. Sometimes the constitutional grant has been referred to as "implementation" of the general power. See Porter v. Hopkins, 91 Ohio St. 74 (1914); Fassig v. State, 95 Ohio St. 232 (1917); Detorio v. Tnd. Com. 135 Ohio St. 214 (1939).

The Fassig Court in 1917 concluded: "Since, under the general police power of the state, the statute here in question could have been enacted without the aid of a constitutional grant, and since the general police power was not exhausted by such constitutional grant, we are unable to find Section 1465-44a, General Code, in conflict with the general purpose of the Workmen's Compensation Law as authorized by the Constitution. (The section of the law here challenged permitted an injured employee whose employer failed to comply with the law to file an application for compensation in accord with the act or to proceed in court, at his option.)

The Detorio litigation challenged a statute creating four boards of claims with power to investigate, hear and determine compensation claims referrec to them by the Industrial Commission. It was urged that Section 35 permits establishment of but one board to execute and administer purposes of the Workmen's Compensation Fund, and that this was executed in establishment of the Industrial Commission. The Court in rejecting this position, noted the existence of such laws in practically all states, with constitutional authority in only 7 and cited the Fassig opinion.

State ex rel. Michaels v. Morse, 165 Ohio St. 599 ( ) questioned the constitutionality of an act establishing the Bureau of Workmen's Compensation and Administrator as violative of Section 35. Rejecting this limitation, the court elaborated:

> "It should be borne in mind that, in contrast to the federal constitution, which is a delegation of powers, the Ohio Constitution is a limitation of powers. An act of Congress is invalid unless the Constitution authorizes it, but the General Assembly may enact any law which is not prohibited by the Constitution . . . A legislative act is presumed in law to be within the constitutional power of the body making it . . . It has been repeatedly held in Ohio that a clear incompatibility betwen a law and the Constitution must exist before the judiciary is justified in holding the law unconstitutional."

Section 35, being statutory in nature and no longer regarded as essential to the enactment of such legislation by the General Assembly, should also be eliminated from the Constitution.

Section 36 authorizes the passage of laws to encourage forestry and allows areas devoted exclusively to forestry to be exempted in whole or in part from taxation. Power of the General Assembly to pass laws to encourage forestry can hardly be doubted, and that portion dealing with tax exemption should be transferred to Article XII, dealing with finance and taxation. This must was acknowledged in the debates of the Convention of 1912. The remainder of Section 36 provides:

> Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also, to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, weighing, measuring, marketing coal, oil, gas and all other minerals.

A large portion of the discussion of this provision at the Convention of 1912 had to do with the necessity of authorizing laws to provide for weighing coal before it was screened. Miners had long sough legislation guaranteeing payment on the basis of mine run, not screened coal. An 1898 law to this effect was declared unconstitutional for the reason that it constituted an unwarranted invasion of the right of contract and placed a premium on incompetency. It was persuasively argued in debates that the state legislature has the right to regulate conduct of citizens toward each other and the manner in which they shall use their property when regulation is necessary for the public good.

The conservation section was adopted in Convention without elaborate debate.

Subsequent coal weighing legislation was upheld (Rail Coal v. Yaple, 236 U. S. 338 (1915) with little consideration given to the necessity of the amendment as a source of the power to so legislate. A Common Pleas Court in 1955 declares that Section 36 is not a limitation on the general conferral of legislative power under Section 1 of Article II. East Fairfield Coal v. Miller,71 Ohio L. Abs. 49 (C. P. 1955). That conservation of natural resources is within the police power of the state has been accepted by Ohio courts. State v. Martin, 105 Ohio App. 469 ( ); Miami County v. Dayton, 92 Ohio St. 215 (1915).

Section 36 is unnecessary in its purported grant of powers, and its usefulness relative to statutes governing the regulation of mining is outdated.

Section 37 declares: "Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political sub-division thereof, whether done by contract, or otherwise."

The alleged necessity for Section 37 was a decision of the Ohio Supreme Court in City of Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197 (1902) that had held unconstitutional a state law providing for an eight hour day on public works and an eight hour day on all contracts and subcontracts for the state and its political subdivisions. The act was held to be "in conflict with sections 1 and 19 of Article I of the constitution of Ohio; because it violates and abridges the right of parties to contract as to the number of hours labor that shall constitute a day's work and invades and violates the right, both of liberty and property, in that it denies to municipalities and to contractors and subcontractors the right to agree with their employes upon the terms and conditions of their contracts."

The court had rejected an argument by the City of Cleveland that the statute should be regarded as a mere direction by the sovereign authority, State of Ohio, to one of its agents, the City, that contracts made by the city be made in a certain way. Not only is the authority of the State over municipal corporations not so

absolute, said the court, but the legislature is also not competent to deprive private individuals who contract with a city of their right to contract with workmen as to means of performance or rate of wages.

The Clements Bros. decision was much criticized in the 1912 Convention in which cases were cited from other jurisdictions upholding the power of a state under its police powers to regulate hours of labor of workmen upon public works.

Section 38 provides: "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cuase provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

This section was one of the 33 approved by the voters in 1912. It was proposed by the convention primarily because of dissatisfaction with the two existing methods for removing incompetent judges--by impeachment pursuant to Sections 23 and 24 of Article II and by concurrent resolution of both Houses of the General Assembly, pursuant to Section 17 of Article IV. The section generated a great amount of debate in convention, with various recall proposals being offered as substitutes.

Impeachment powers are logically located in Art. II, dealing with the legislative branch of government. Section 38, however, would be more appropriately placed in another article, dealing with public officers, or reconsidered by the Committee on the Judiciary in their deliberations upon Section 17 of Article IV.

Like other provisions essentially statutory in nature, Section 38 invites dispute. An Ohio Court of Appeals held in 1966 that it does not prohibit the Legislature from enacting laws to provide for the removal without formal hearing of subordinate officers who serve at the discretionary pleasure of the appointing authority. State ex rel. Wickline v. Jenkinson, 9 Ohio App. 2d 39 (1966).

Section 39 provides: "Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings."

Its chief spokesman at the 1912 convention deplored the "scandal" surrounding criminal trials involving large expenditures for expert medical testimony. To vigorous opposition to including such a provision in the Constitution and arguments that not only had the Legislature such power already but courts, too, have inherent power to limit expert witnesses, proponents persevered. A Michigan law permitting the use of a court appointed "board of experts" had been declared unconstitutional, they asserted in justification, intending that the laws which could be passed would take such a form.

The necessity of including such a provision in the Constitution on any grounds was not established in the debate on the issue. The section is clearly statutory, not prgamatically justified and should be deleted as unnecessary.

Section 40 authorizes the passage of laws providing for a system of registering, transferring, insuring and guaranteeing land titles by the state or by the counties thereof, and for settling and determining adverse or other claims to and interests in, lands the titles to which are so registered.

In 1897 the Ohio Supreme Court had invalidated the "Torrens Law," authorizing registration of land titles on a voluntary basis. State v. Guilbert, 56 Ohio St.

575 (1897). The legislation was declared unconstitutional for a number of reasons but primarily because the county recorder was given judicial powers. Debates from the Convention of 1912 reveal extended commentary as to the desirability of allowing such a system to operate. The Ohio Court adopted the view that the provisions of the law were for limited benefit of persons who registered their titles. The Torrens system has and has been upheld in other jurisdictions where "public benefit" was found, in that everybody is indirectly interested in having real estate in such shape that titles would be absolutely good and readily transferrable.

Section 41, the purpose of which was to abolish prison contract labor, went through several drafts reported in Debates of the Convention as delegates struggled with the problem of prohibiting the contracting of prison labor by private industry without restricting use of prison labor on public projects. On the question of whether the General Assembly could prevent competition between prison made goods and goods not prison made or could prohibit the exploitation of prisoners for private profit without constitutional amendment, most participants in debates agreed that specific empowering authority was not a constitutional necessity. Legislation had been adopted abolishing contract prison labor several years earlier, but according to spokesmen for the proposal, lobbying of contractors and interests back of them had prevented the necessary appropriation to put the law into effect. Some argued that there is no possible way to employ inmates at the penitentiary at anything useful or productive without putting them in competition with free labor. Others urged that the Constitution was an improper place for the provision and that the language employed was unduly detailed, creating difficult problems of construction. Thus the proponent of an amendment to provide simply that "The contracting or sale of prison labor is hereby prohibited" argued that his proposal was "fair and fundamental" and that anything beyond was statutory.

On behalf of constitutional inclusion, one delegate asserted that the "true test of the merits of any proposal to amend the Constitution is not whether or not the thing sought to be done can be done if the amendment is not passed. There is nothing I know of that we now do that we could not do by an act of the legislature if the Constitution was silent on the subject. The constitution, however, does attempt to define policy." Others agreed with him that the policy that free labor should not be put in competition with convict labor and that peonage should be abolished was appropriate for constitutional inclusion.

A response was to question whether it is "fair at all for us in the present state of the sociological problems and the penal problems to put in the fundamental law of the land such a prohibition which cannot be changed for 20 years." Debates, p. 1397.

Section 41 has created constitutional roadblocks for penologists who favor work release programs for the maximum rehabilitation of persons in penal institutions. Under such programs, convicts are paroled by the day to work for private employers (at going wages) or for job training. The benefits to convict, his family, and society, both during incarceration and afterwards, are obvious, yet the detailed statutory language of Section 41 has discouraged widespread use of such programs. Contracting of prison labor is prohibited by statute, and the authority of the General Assembly to enact such legislation has not been questioned. The cementing of detailed statutory language in the Constitution upon this subject has deterred progressive penology.

Objections to the constitutionality of the several pieces of social legislation discussed above were that they impaired the obligation of contracts (contrary to Art. II, Sec. 28) or that they violated sections 1 and 19 of Article I by abridging the right and liberty of parties to acquire and possess property and declaring its inviolability. Yet, where the statute had no retroactive effect upon the obligations of parties to a contract, the court in other instances adhered to the proposition that: "The obligation of a contract depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party and the right acquired by the other." So said the Ohio Supreme Court in 1889, upholding laws regulating conditional and installment sales, in response to the constitutional challenge made to it on the same grounds. Weil v. State, 46 Ohio St. 450.

In Palmer v. Tingle the Ohio Supreme Court refused to uphold the constitutionality of mechanics' lien legislation, stating that "restraint of the right and liberty of contract is for the common public welfare and equal protection and benefit of the people must appear not only to the General Assembly by force of popular clamor or the pressure of the lobby, but also to the Courts. And it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection, and benefit of the people... "

Distinguishing an opposite result with respect to a statutory regulation of interest on money lent and its imposition on the freedom to contract, the Court reasoned that a statute in restraint of liberty to contract as to interest is valid "for the reason that all can see that it is in the public welfare."

All have since seen that minimum wage laws, legislation regulating a variety of the condictions of employment, protections for organized labor, and other social welfare legislation serve the public welfare. They undoubtedly operate as a deprivation of liberty and property as do all exercises of the police power.

But a public purpose in such legislation has been subsequently recognized, and the position has been judicially accepted that the legislature must possess a wide discretio not only to determine the public interests requiring protection but the best means for consummating this protection. The state's power to regulate hazardous occupations and to specify time, manner and method of payment has been upheld in a large variety of instances since 1912. The fundamental basis for sustaining social legislation is that it is within the scope of reasonable legislative action.

Constitutional Revision Commission
August 19, 1971

To: Committee to Study the Legislature
From: Sara Hunter
Subject: Elimination of procedural matters from the Constitution

Much has been written in recent years on the subject of the residual nature of the legislative power of the states. State constitutional reformers, while recognizing the importance of restraints and limitations to keep government responsible, have emphasized the importance of equipping state government to meet its responsibilities effectively within the distribution of powers fixed by the United States Constitution.

The 10th Amendment to the federal constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people thereof."

This provision has buttressed many a statement concerning the "delegated nature of the powers of the federal government. Limitations on its power are said to be inherent in the nature of the power itself.

Authority of a state, on the other hand, is regarded as "residual" not a delegated authority. One early commentator described the state's position as follows:

> "It has all the powers which any independent government can have, except such as it can be affirmatively shown to have stripped itself of, while the Federal Government has only such powers as it can be affirmatively shown to have received. To use the legal expression, the presumption is always for a State, and the burden of proof lies upon anyone who denies its authority in a particular matter. James Bryce, The American Commonwealth, Vol. 1, New Ed. (1922) p. 421

Thus the assertion is repeatedly made that states possess reserved powers--those not granted to the national government nor denied by the U. S. Constitution to the states--and therefore, constitutional delegation of specific legislative powers in state constitutions is unnecessary and superfluous. Moreover, courts have held that constitutional grants of power by implication prohibit a legislature from acting in a manner different from that specified in the Constitution.

A second matter of concern to revisors of the legislative article of state constitutions is the "mass of detail in the constitution /which/ removes from legislative competence problems that are transitory and should be handled by the state legislature as the agency best equipped for that purpose." Abernethy, Byron R., Constitutional Limitations on the Legislature, (University of Kansas Publication 1959) p. 19.

Obsolescence characterizes overly detailed constitutions, also. The cited monograph by Dr. Byron Abernethy states another objection to inclusion of statutory material in a constitution in that vested interests become entrenched. He points out:

> "It seems quite obvious that one of the principal reasons behind the embodying in state constitutions of much statutory material, as well many prohibitions on the exercise of legislative power, is the determination of special interests to secure permanently in the constitution the protection of their privileges and interests, free from interference by future legislatures. Conservationists

> seek to fix for all time the conservation policies they can sell at a given moment. Labor unions seek to secure various 'rights' of working men against destruction by some unfriendly legislature in the future. Possessors of wealth want constitutional restraints on the power of some unfriendly legislature in the future to levy 'oppressive' taxes. Every person who fears the possibility of adverse legislative action, would like to write into the state constitution securities against that possibility. Long, detailed and statutory constitutions inescapably result in the almost permanent entrenchment of vested interests. Such constitutions provide the home in which they can set up shop on a permanent basis, defying efforts to overcome them as the public interest changes." Ibid, p. 21.

Furthermore, the inclusion of statutory detail in a document intended to state fundamental law, say critics, affects the flexibility and timeless quality of the document by necessitating frequent amendment; encourages litigation and judicial interference with the legislative branch; overburdens the voters with proposals for amendments, resulting in minority rule because of the poor representation of electors voting upon constitutional amendments; adversely affects the stature of the legislature; and lowers respect for the constitution.

If there is any one item upon which constitutional authorities are agreed, it is that a constitution should deal only with the fundamental principles of government. Its major functions, as described by the director of the National Municipal League's State Constitutional Studies Project are to: (1) protect the exercise of civil liberties; (2) establish the more permanent institutions of government, such as the executive, judicial and legislative branch; and, perhaps, (3) provide a method for changing the fundamental law.

Ideally a constitution, being fundamental law, should govern government only. It is the function of the legislature, not that of the constitution, writes David Abernethy, to regulate the relations of private persons and groups of persons vis-a-vis another. Ibid, p. 33.

Ohio Constitutional Revision Commission
Committee to Study the Executive
September 2, 1971

Research Study No. 8 -A

Implementing Constitutional State Executive Reorganization

"As a general rule there are no restrictions upon the power of the legislature to assign new functions to an administrative agency."[1] This current description of American state governmental systems is still generally true. However, limiting the number of administrative departments has gained in popularity among constitutional draftsmen accompanied by proposals for executive initiative for reorganizing of state government.

Proposals for administrative integration using either or both of these reorganization methods met resistance from state legislatures in the early post-World War II era. One observer explained that legislative reluctance to reorganize state government with executive cooperation resulted from nine "pressures for separatism" which he described as (1) a "normal" drive for agency autonomy; (2) a historical background of separate responsibility to the electorate; (3) "reform" movements for special functions; (4) clientele and interest group attitudes; (5) professionalism; (6) functional links to the national government; (7) a desire to insulate special types of programs; (8) a political division between legislature and governor; and (9) dissatisfaction with central political processes. This comparative state reorganization survey concluded that: ". . . desirability of systematic administration depends upon the existence of systematic politics. If the major portion of the population does not use the state political process to secure consequential governmental programs, the ground is removed from the arguments for a rationally organized administration."[2]

A growing trend in the late 1960's and early 1970's toward executive reorganization by constitutional methods still finds "pressures for separatism" at odds with "systematic politics" in the American states.

However, today, among all American state constitutions, nine provide a specific number ceiling on executive departments (Alaska, Colorado, Florida, Hawaii, Michigan, Montana, New Jersey, New York, and North Carolina); eight provide for gubernatorial initiative to reorganize subject to legislative veto (Alaska, Illinois, Kansas, Maryland, Massachusetts, Michigan, North Carolina and Virginia); and three provide for both (Alaska, Michigan, North Carolina). One state's provision (California) is simply an authorization for statutory reorganization by executive initiative. The following brief summaries of the emplementation experience in each of these states emphasizes achievement of administrative integration as the goal shared by all such reorganization attempts. Reliance on the published reports of progress toward administrative reform in each state does not consider the opinion of officials and scholars presently close to each state's situation. Keeping this in mind, however, the basic administrative problems and mechanics of implementing constitutional provisions for state government reorganization should become apparent. Using the functional categories similar to Professor Eley's study of 1967,[3] the comparative state constitution analysis following the individual state summaries illustrates (A) State Adoptions and Coverage of Plans; (B) Executive Procedure; and (C) Legislative Procedure.

ALASKA

As the first state to constitutionally provide for executive initiated reorganization, the Alaskan government administration is considered to be very flexible.

The Governor is allowed to make changes in the organization of the executive "which he considers necessary for efficient administration" according to Section 23 of Article III. The executive orders to reorganize became effective after 60 days unless jointly vetoed by a majority of both houses of the legislature. The most recent reorganization developments in Alaska reveal that: "The legislature created a Department of Highways (1963), advancing that function from its previous divisional status in the Department of Public Works. The Commissioner of Highways is appointed by the Governor, and is one of 14 commissioners who comprise the Governor's cabinet."[4]

CALIFORNIA

Fearing a court decision would hold a statutory, executive initiated reorganization unconstitutional, the California legislature proposed a revised executive article submitted by the California Revision Commission by adding a provision authorizing the legislature to allow the governor to reorganize the executive branch. Adopted by California voters in 1966, the purpose of this authorization provision in the words of the Commission Chairman was to: " . . . with proper safeguards, permit the Governor more direct control over his own area of responsibility. . ."[5] The new provision of Article V, Section 6 is the single sentence: "Authority may be provided by statute for the Governor to assign and reorganize functions among executive officers and agencies and their employees, other than elective officers and agencies administered by elective officers."

The California legislature trimmed the wording and scope of the original reorganization provision which had been submitted to the legislature as a minority report of nine Constitutional Revision Commission members. The provision as originally proposed read:

> Authority may be vested in the Governor by statute to reallocate existing functions among and within state executive and administrative agencies and offices. If any reallocation affects existing law, it shall be set forth in an executive order submitted to the legislature within 30 days of the opening of a general session and, subject to referendum, shall become law on the 91st day after adjournment unless disapproved by resolution of either house.[6]

In the years immediately following the adoption of the more general California provision, the greater detail of the rejected provision began to emerge by the statutory process when in 1969 the Council of State Government reported:

> 1967 - In an executive order, Governor Reagan established an interim communications plan whereby each agency was assigned a person through whom they could communicate with the Governor. The agencies were divided among three persons who would be meeting personally with the Governor at least three times a week to discuss executive affairs. Two additional men were added later to this cabinet staff.
>
> In 1967 an interim committee of the assembly presented a report recommending the enactment of an enabling statute to allow the Governor to initiate reorganizations of the executive branch effective unless vetoed by majority vote of either house of the legislature. The committee also recommended a two-year limitation in the enabling statute.
>
> This proposal was enacted by the legislature with the two-year limitation which will terminate the Governor's authority on December 31, 1969. Reorganization plans must first be submitted to the Commission on California State Government Organization which then reports

to the legislature. Reorganization plans are effective on the first day after adjournment of the session unless vetoed by majority of either house.

1968 - Pursuant to his newly designated authority, Governor Reagan submitted Reorganization Plan No. 1 of 1968 to the legislature. It was enacted and signed into law in May. It created four large agencies within the executive, each to be headed by a Governor-appointed Secretary, and which would contain the various boards and departments that belonged within the functional group. The four agencies and their departments are:

(1) Business and Transportation
- (a) Aeronautics
- (b) California Highway Patrol
- (c) Motor Vehicles
- (d) Public Works
- (e) Real Estate
- (f) Saving and Loan
- (g) State Banking
- (h) Housing and Community Development
- (i) Corporations
- (j) Insurance

(2) Human Relations Agency
- (a) Social Welfare
- (b) Mental Hygiene
- (c) Rehabilitation
- (d) Public Health
- (e) Human Resources Dept.
- (f) The Youth Authority
- (g) Corrections
- (h) Health Care Services
- (i) Industrial Relations

(3) Agriculture & Services Agency
- (a) Agriculture
- (b) Commerce
- (c) General Services
- (d) Veterans Affairs
- (e) Profession & Vocational Stan.
- (f) Franchise Tax Board
- (g) P.E.R.S.
- (h) State Fire Marshal
- (i) Office of Consumer Counsel
- (j) State Teachers' Retirement System

(4) Resources Agency
- (a) Conservation
- (b) Fish and Game
- (c) Harbors and Watercraft
- (d) Parks and Recreation
- (e) Water Resources
- (f) State Air Resources Board
- (g) Office of Nuclear Energy
- (h) Colorado River Board
- (i) Water Resources Control Board

1969 - Governor Reagan delivered a special reorganization message to the legislature outlining some of the proposals to be included in his proposals to be included in his 1969 reorganization plans. Three plans were submitted to the legislature.[7]

It is important to note, however, in regard to the four large "agencies" created in California that:

> No change was made in the functions or organization of the existing departments, and the method of selecting department heads remained unchanged. The agency Secretaries, under whom are placed groupings of homogenous agencies, are expected to serve as policy-makers, communicators, and the Governor's advisors and representatives.[8]

COLORADO

A 1966 constitutional amendment required allocation of Colorado executive and administrative offices within not more than 20 departments. Implementation of this major executive reorganization, according to Dr. George A Bell:

> . . . consolidated a large number of formerly independent agencies

into seventeen departments. The Governor's direct authority over these agencies, however, was only slightly enhanced from the previous situation; he is empowered to appoint the heads of three of these departments. Nine departments are headed by officials selected through Civil Service system procedures; three of these were to have been appointees of the Governor, but the State Supreme Court ruled that constitutional civil service provisions required civil service procedures be used. The five other departments are headed by elective officials. As usual in such massive reorganizations, many agencies newly placed in a major department are subject to only limited control by the department head.[9]

The specific reorganization problems of the Colorado Department of Regulatory Agencies were instructive to the Kansas Commission on Executive Reorganization which structured a similar department in 1971. The personal account of the Executive Director of the new Colorado department relates:

> When the regulatory department was established, it consisted of a few relatively large agencies which became divisions in the new department. These agencies included the Public Utilities Commission, the Insurance Department, Civil Rights Commission, Savings & Loan Department, Banking Commission, Securities Department, and Racing Events Commission. There were also some 27 smaller agencies such as the Real Estate Commission, Architects, Accountants, Collection Agencies, Medical Board, Engineer, Cosmetology Board, Athletic Commission, Electrical Board, and the many others familiar to you. A central agency--the Secretary of State-- already was doing daily bookkeeping for many of these agencies. We continued and expanded this activity.
>
> The Legislature directed that the department head confine his activities to management functions not related to the technical aspects of the work of the boards and commissions. They also directed the department head to move the functions to the State Capitol buildings if possible.
>
> With this backing of the Legislature, we gradually but firmly began to form a workable federation of agencies. We had agencies located in 17 different and widely scattered locations. We moved one agency almost immediately from outside rented space, and saved them more than $6,000 a year. We also moved others as rapidly as possible when such move was mutually agreeable.
>
> We removed several part and full-time workers from their secretarial jobs, transferred the files to our central office of the department, and assigned a secretary to work with two, three, or four of the smaller boards. We saved money for some boards and commissions. We did not save money for others, but began to give better service to the trades and professions and to the public.
>
> Unfortunately, we were not able to move all of the agencies into one building because of space problems.
>
> We began to schedule as many board meetings as possible in the central office or in nearby conference rooms, and attended all of them that we could. We, of course, started the first budgeting period soon after the Department was formed, and immediately used that as an entree into work with the separate agencies. We kept in mind that our functions stopped short of the technical aspects of the functions of the agencies, but were able to create what we thought were better images through tactful suggestions, after we had developed sufficient rapport.
>
> I wish I could say that we had 100 percent success. We did not. But progress was made, and attitudes began to change. We were particularly

proud of the fact that more and more regulatory agencies adopted the theory that their first obligation was to the public, not to members of their profession or trade. And many board members expressed their gratitude for the changes that were made.[10]

FLORIDA

After adopting a 1966 constitutional amendment permitting partial or complete revision of the constitution by legislative referendum, a Florida Constitutional Revision Commission recommended a new document to the Florida legislature in 1967. After revision by the 1968 session of the legislature, the new constitution was submitted to the people as three amendments and approved in 1968.

One commentary to Florida executive reorganization provisions of 1968 constitution discussing Article 4, Section 6 states:

> This section which is entirely new, was taken from the Constitutional Revision Commission recommended draft. It requires that all functions of the executive branch be grouped within not more than twenty-five departments. The Revision Commission draft recommended thirty or less. Article XII, Section 16 provides that the requirements of Article IV, Section 6 'shall not apply' until July 1, 1969.
>
> The designation in this section of those who may head departments is exclusive. The cabinet board system which has a long tradition in Florida was never previously authorized in any constitution except by specific provision such as that creating the Board of Education, Article XII, Section 3 of the Constitution of 1885, which consisted of four members of the cabinet and the Governor. This is the first time that there has been specific authorization in a Florida Constitution for the creation by law of ex-officio cabinet boards. The absence of such a provision in the 1885 document, however, did not prevent the legislature from creating many ex-officio boards.
>
> The provision in this new section that the officer or board appointed by the Governor serve at his pleasure is modified by subsection (a) of this section which provides that cabinet approval or Senate confirmation may be required for removal from or appointment to any designated statutory office (not excluding the officers or boards serving as heads of departments). The Legislature, in the Reorganization Act of 1969, interpreted this section to mean that officers or boards appointed by the Governor could be created for terms of years with the Governor empowered only to remove an officer or member for cause and to fill vacancies by appointment. This is clearly a limitation on appointments to serve at his pleasure.
>
> Excluded from organization into the twenty-five (or less) departments are those functions or those departments specifically provided for or authorized in the Constitution. The question as to whether it is 'functions' or 'departments' which are excluded may be of some importance. The structure of the first sentence of this section technically excludes 'functions', as the subject of the sentence, from the requirements of the section. Since there are many 'functions' provided in the Constitution and not departments (unless the Game and Fresh Water Fish Commission and the Board of Administration, for example are to be considered 'departments'), it can be reasoned that the Constitution was intended to allow exclusion from organization into departments only those 'functions' specifically provided or authorized in the new Constitution. This is unclear and the

Governmental Organization Act of 1969 did not resolve the question.

> The Public Service Commission was held not to be an executive department within the meaning of the reorganization requirement. Advisory Opinion to the Governor, 223, So. 2d 35 (Fla. 1969). . . .
>
> The Revision Commission had proposed for a method of reorganization through executive order but this section was deleted in the legislative draft. The section still remains in the executive article, however, and there may be some executive power to reorganize by order.[11]

The management consultant firm which was hired by the Florida House of Representatives stated in a reorganization report to aid in the drafting of the reorganizing legislation that:

> Placement of executive authority in a single chief executive is the most suitable system for providing leadership to the new state government. The governor performs the executive function and is responsible to the public for the policies, programs, and achievements of his administration. . .
>
> The concept is comprehensible to the public and may already exist in the public mind. Responsibility for policy developments, programs, and management is clearly fixed. Responsibility is commensurate with authority . . .
>
> The consolidation of substantial authority in a single office may be resisted because of the potential arbitrary use of that authority. Adequate safeguards are available to the legislature to protect against this possibility. Legislative approval is required for proposed policy, legislation, etc. Legislative approval of proposed funding is necessary. The availability of the legislative audit staff provides a resource for objective evaluation of the performance of the administration. New budgetary systems such as PPBS are making executive budgets more comprehensible to the legislature and permit a review of proposed expenditures on the basis of their policy and program implications . . . .
>
> In summary the multiple executive system in Florida is neither retained nor abolished by the new constitution. Evaluation of the retention of the Florida cabinet system or other alternative supports the conclusions that the cabinet system should not be retained and that strengthening the office of governor provides the most promising system for providing effective executive leadership to state government.[12]

The Florida legislature did not abandon the cabinet system, however, as the Council of State Governments reports:

"The Governmental Reorganization Act of 1969' was enacted on June 3 (Florida Statutes, Chapter 69-106). This reorganizes the executive branch into twenty departments and provides for their administration and supervision. It also provides for transfer of most existing executive functions to these departments and sub-agencies, and for abolishment of others.

> The twenty departments created are: (1) General Services (2) Revenue (3) Community Affairs (4) Highway Safety and Motor Vehicles (5) Law Enforcement (6) Transportation (7) Natural Resources (8) Air and Water Pollution Control (9) State (10) Education (11) Agriculture and Consumer Services (12) Business Regulation (13) Commerce (14) Insurance (15) Administration (16) Citrus (17) Health and Rehabilitative Services (18) Legal Affairs (19) Professional and Occupational Regulation (20) Banking and Finance.
>
> The heads of six of these deparrments are individuals appointed by the Governor and three departments are headed by boards whose members are gubernatorially appointed. Six departments are headed by the

Governor and Cabinet consisting of six elected officials, and for one of these,Department of Education, the Superintendent of Public Instr uction, a Cabinet member, is the chief executive officer.[13]

HAWAII

Adopting a constitutional ceiling of 20 principal departments in the 1950 constitution, Hawaii has retained legislative allocation of governmental units. The historically strong executive[14] in the newest state still allows legislative authorization for the establishment of temporary nonallocated agencies. The governor under the constitution supervises over the principal departments, headed in most instances by a single executive but with provision for multimember department heads of some principal departments.

It was reported in 1968 that:

The Soecial Commission on State Government Operations was created by Concurrent Resolution. The Constitution of Hawaii authorizes only twenty departments to be created for the executive branch. The State Legislature has already authorized the establishment of seventeen departments. The Governor is not empowered to establish the remaining three departments without authorization by the Legislature; but he may reorganize without legislative approval the existing departments and functions as he feels is needed to carry out program goals effectively and efficiently.[15]

ILLINOIS

The new 1970 Illinois Constitution provides for executive initiation of reorganization subject to veto by either Legislative chamber within sixty days of submission of executive orders by the Governor. The inclusion of such a provision as adopted by the Constitutional Convention followed the view before ratification of the new document that:

The inclusion of such a provision as adopted by the Constitutional Convention

The Illinois Constitution, unlike those others presents no barriers to administrative integration except the long ballot. In fact, the first extensive reorganization achieved was that of Illinois: the Civil Administrative Code of 1917 consolidated more than 100 independent agencies into nine code departments, each headed by a single administrator responsible to the governor, and substantially reduced number of boards. The code also set out the framework of an executive budget.

Since 1917, the legislature (often with the encouragement of the governor or of special interest groups) has reverted to establishing new departments or commissions whenever there is a new problem or part of an old problem that needs special attention. In 1967 the Illinois Commission on State Government counted 110 state agencies including eighteen code departments (three have been added since and two noncode departments. Even when the newly created agencies are made responsible to the governor (the code departments are, but many are not), his control is diluted because he can effectively supervise only a limited number of subordinates reporting directly to him . . . .

If the structure of the administrative end of government is not to be fixed in the constitution, should it be entrusted to the legislature, to the governor, or to both? In Illinois, as is most states, the creation

of executive agencies and the assignment of their functions have been accomplished by the legislature. However, as head of the executive branch, the governor probably is in a better position to know the needs of administration and to initiate the decisions . . . .

If the governor is to be given reorganization power, provision for it should be made in the constitution. The Illinois Commission on State Government so recommended in 1967. While the governor of Illinois could realign some functions under the present constitution, the results are too limited unless he can affect existing statutory provisions; and that is probably not possible without constitutional authority.[16]

KANSAS

The 1969 amendment to the Kansas constitution was designed by the Citizen's Committee on Constitutional Revision so that:

> New section 6 provides that the governor may submit an executive order to the legislature providing for transfer, abolition or consolidation of the whole or any part of any state agency within the executive branch of the government except constitutionally designated functions. The purpose of this recommendation is to authorize the governor to provide the initiative in organizing most efficiently that branch of the state government which he heads. The authority of the legislature to originate legislation in this field is not impaired. This proposed section, if adopted, provides that the executive reorganization order will have the force and effect of law unless disapproved by at least one branch of the legislature within sixty days after the governor submits the order, and before adjournment of the session to which it is submitted. The legislature could not let such an order die in action, but only by voting against it. It is further provided, that such an order once in effect, could be amended by statute as any other law, although the legislature would not be permitted to amend the order when it is submitted to it by the governor in the first instance.[17]

To implement the constitutional provision, House Bill 2031 of the 1970 Kansas legislative session formed a Commission on Executive Reorganization composed of state Senators and Representatives and nonlegislative members appointed by the Governor, President pro tem of the Senate and Speaker of the House of Representatives. In January, 1971, the Commission recommended the establishment of the following eight state departments: Administration; Agriculture and Natural Resources; Economic Development; Labor and Employment; Health and Social Services; Public Safety; Regulatory Agencies; Revenue; and Transportation. In the discussion of its recommendations the Commission asked:

> What more could be accomplished by reorganizing the executive branch than by leaving it alone? Soon after its initial meeting, the Commission answered that question by embracing the idea of a cabinet system--that is, a grouping of all agencies into a few departments, each directed by a secretary chosen by and responsible to the governor. By this means, it was contended, the governor could fulfill his constitutional obligations to 'see that the laws are faithfully executed.' As long as structural fragmentation exists and as long as total agency independence obtains, no governor could hope to live up to this expectation. While is is the governor to whom the electorate generally looks for responsibility in what happens in government in Kansas, the governor has no real authority to govern. Kansas has nearly 200 agencies, boards and commissions,

committees, councils and other groups for whose actions the governor is at least theoretically responsible. It is obviously impossible for anyone to properly govern the state as long as this inadequately structured organization exists . . . .

While believing that it may be possible for state agencies to provide more service at less cost, some members of the Commission have warned against the expectation that great dollar savings would be achieved almost immediately as a result of reorganization. The Commission would expect it to be true in the long run, but reorganization ought not be judged a failure if in the short run it does not produce a savings. There are other values besides dollar savings by which to measure the good achieved by restructuring the executive branch. Of major importance is better service to Kansas citizens.

The Commission understands that by restructuring the executive branch into a cabinet system, the governor's authority and, if used skillfully, his power, would be augmented. But it does not believe the role of the legislature would be correspondingly diminished. To deprive certain executive branch agencies of their virtual autonomy takes nothing away from the legislature. Quite the contrary, the legislature's working relationship with the operations of the executive branch would be simplified.

Accountability, process, clientele, visibility and flexibility all were standards applied at one time or another. But the primary basis for decisions throughout was purpose or function. Certain activities should be joined together because of a similarity of goal or purpose. By working in close proximity to each other and under a single leader, it was anticipated that certain agencies would perform their functions more effectively. The stimuli afforded to individuals through working with people who share a goal but whose perspectives and experiences differ is in itself a justification for reorganizing the executive branch. In general terms, this is the logic of reorganization.[18]

MARYLAND

Although included in the rejected 1968 constitution, executive initiative to reorganize subject to legislative veto was adopted by a 1970 amendment to the 1867 Maryland constitution. A ceiling of 20 principal departments also was included in the 1967 constitutional convention's draft upon a research finding that Maryland had over 240 boards, departments and commissions created at the average rate of 1 every 4 months for the past half century.[19] This departmental ceiling and an executive initiated reorganization provision, while rejected as proposed by the 1967 convention, remain relevant since:

The convention moved to bring greater order to the executive branch and to expand significantly the capacity of the governor to function as chief executive. First, all functions, powers and duties of the executive branch were to be assigned according to major purpose to no more than 20 principal departments. Regulatory, quasi-judicial and temporary agencies established by law were exempt from this requirement. The General Assembly could increase the maximum number of principal departments only by a vote of three-fifths of the members of each house.

Second, the governor was empowered to take the initiative in executive reorganization. Following the federal pattern and that set in a few states, the governor was given the power to frame reorganization plans which would become effective unless vetoed by either house of the General Assembly.

The General Assembly was made responsible for the initial allocation of functions within the 20 departments, and it retained its traditional authority to initiate reorganization plans. New powers allowed the governor to 'make changes in the organization of the executive branch, including the establishment or abolition of offices, agencies, instrumentalities and principal departments of the executive branch' (Section 4.27). If proposed changes required the force of law, the governor was to submit his plan in the form of a statute to the General Assembly within the first 10 days of a regular session. It went into effect after 50 days unless killed by either house by a majority vote of all its members.

The third major reform related to heads of departments and their selection. The convention in principle generally opposed multi-headed departments but refused to mandate the single executive plan for all of them. The convention's draft provided that every principal department would be headed by a single executive unless some other form was decreed by law or executive reorganization plan, and a chief administrative officer was required for any department headed by a board or commission. Department heads were to be appointed by the governor with senatorial approval, and chief administrators by the governor alone, Such officials would serve at the pleasure of the governor. Members of boards and commissions would have terms as prescribed by law, structured in such a way that the governor could appoint half of the members on assuming office. Educational interest, however, asked for and received specific exemption from this provision. The state public school system would be headed by a governing board; this pattern was also prescribed for the University of Maryland, the state colleges and the other institutions of higher learning.[20]

After studies in 1968-69 by the Commission for the Modernization of the Executive Branch of Maryland State Government and the Governor's Executive Reorganization Committee, a 1970 constitutional amendment now permits the Governor to reorganize by executive order subject to disapproval of either house of the Legislature within 50 days of submission.

MASSACHUSETTS

After adoption of a 1920 constitutional amendment limiting principal departments to 20 in number, a 1966 amendment to the 1780 Massachusetts Constitution repealed the number limitation and provided for executive initiative to reorganize subject to legislative approval.

The result of this recent reorganization is that:

A cabinet form of government was also put into effect in Massachusetts through the establishment of nine executive offices, each of which is headed by a Secretary. These offices are Administration and Finance, Communities and development, Consumer Affairs, Educational Affairs, Environmental Affair , Human Services, Manpower Affairs, Public Safety, and Transportation and Construction. All existing agencies of state government are to be placed within these executive offices, but at present there will be no structural reorganization within those departments. The Secretary is given authority to review, approve or amend budget requests of the agencies within his office, to conduct studies of their operation, and to conduct comprehensive planning in the functional areas for which his office is responsible. The new plan is to go into effect April 1971.[21]

MICHIGAN

Problems in implementing the 20 principal department provision are best documented by analyses of the experience under the 1963 Michigan Constitution. Grouping agencies by "major purpose" did not provide classification as regulatory or revenue-raising and left out of consideration "the self-imagery, jealousies of prerogative, and fear of being 'swallowed' by larger departments, which nearly every agency could be expected to exhibit." The problem of numbers was ascertaining that the state statutes and budget identified between 120 to 140 agencies which then had to be grouped by function and"deciding how many of the maximum of twenty departments would be used immediately, and the number to be retained as 'spares,' both to provide bargaining flexibility and to accommodate the growth of state services."[22]

At the outset of the governor's proposal for reorganization in Michigan:

> Five departments appeared to have constitutional status. These included the three under state elective officers expressly directed, and the state highway commission and the state board of education by inference. In addition, the civil rights commission and the civil service commission had broad powers and jurisdiction affecting every department of the executive branch. . . . Departments were to be headed by single executives unless otherwise provided in the constitution or by law. This left considerable leeway if the legislature favored plural-headed agencies. Michigan law had relied heavily on commissions, the members of which often had long and staggered terms, to take a favored agency 'out of politics'--and out of the reach of the governors. Interest groups surrounding such an agency would probably be expected to support the commission form.[23]

The final goals of reorganization had to be established at the beginning since:

> . . . the role of a department head would vary with the degree of autonomy granted to the component units within his department. If the powers, duties, and functions of agencies were transferred to the department, its executive head could be held more accountable for its internal organization and operation than if the agencies were transferred with their authority intact. Should reorganization be based on the concept of a 'cabinet', whose members would participate in policy formulation, or creation of a series of 'holding companies,' with departmental heads serving merely as managers? Obviously, executive reorganization could result in the addition of another level of administration superimposed on existing and independent agencies, or it could seek to achieve a thorough functional regrouping of all state agencies.[24]

The actual implementation of executive reorganization under the Michigan constitutional provision extended through the legislative sessions of 1963, 1964, and 1965 when delayed by the legislature's change from the governor's party to the opposing party. However, a report observed at the time:

Somewhat to the mild surprise of everyone, including perhaps themselves, legislators passed the 'Executive Organization Act of 1965' before recessing until Fall. The reorganization of the executive branch 'among and within not more than

20 principal departments' had to be done by legislative action before the end of this year; if not, the governor had one year more in which to do the job. A product that compromised two conflicting attitudes toward the subject, the bill now appears headed for executive approval. Thus, a matter conceded by all observers to be a contentious if not impossible legislative issue, was resolved in conference committee and accepted by both chambers with almost effortless ease. Credit for this rests with both the executive and legislative branches. Few more controversial subjects have had such scrupulous attention and so little real controversy.

The essence of the opposing viewpoints on organization involve two different philosophies of government: In one view, executive organization is primarily the governor's responsibility, and its aim and purpose are organizational efficiency achieved mainly through the governor's direct at-pleasure appointment of individual department heads (by and with the advice and consent of the senate, says the constitution). The executive office, naturally, upheld this view most strongly, and the Constitutional Convention debates of the meaning and intend tend to support this interpretation. In the other view, executive organization is to be subject to continuing legislative control--which essentially, of course, must be true of all major policy activities of government, including itself was sought by some followers of this theory--the right to dictate divisional and 'organization chart' lay-out of the agency. But the principal weapon that would be employed was the commission-- over-lapping terms, plural responsibility, senatorial oversight of each appointment. If not a 'divide and conquer' of government this is a 'diffuse and disperse' responsibility for departmental operations, of direct gubernatorial control (and accountability at the polls).

The legislative provisions establish 19 principal departments. The general breakdown is as follows--

1) Single-headed departments (12)
   a) Constitutionally elected (2) secretary of state and attorney general
   b) Constitutionally appointed (1) state treasurer
   c) By bill provisions (9)--administration, state police, military affairs, commerce licensing and regulation, labor, mental health, public health and social services
2) Commission-headed departments (7)
   a) Constitutionally elected (1) board of education
   b) Constitutionally appointed (3) civil service, state highways, and civil rights.
   c) By bill provisions (3) -- agriculture, conservation and corrections.[25]

Following the joint process of executive and legislative reorganization in Michigan, one conclusion was that:

> Continuing legislative control exists through the powers to reject executive appointments, to set salaries for unclassified positions, to appropriate operating funds, and to act on organization changes proposed by the governor . . . The 1963 constitution and implementing legislation have provided the frame work for more effective administrative management. Both the governor and department heads have two strong means of control through their budgetary and appointing powers. If properly employed, they could result in a fully integrated executive organization; if not so used at the top level, numerous power centers could develop with

> divisive effects on the executive branch . . . . Following initial reorganization the Romney administration moved to strengthen the governor's budgetary controls by transferring the budget office from the department of administration to the governor's office. Before executive reorganization, many administrative agencies negotiated directly with the legislature for their appropriations, sometimes contrary to the wishes of the governor or to their original budget requests. Past practices die hard, and some executives appointed to department, bureau and division headships may present continuing problems. On balance, however, executive reorganization involving reduction of 140-plus agencies, boards and commissions to nineteen principal departments has gone a long way toward providing the ar more effective gubernatorial leadership in both policy development and execution in the executive of Michigan government.[26]

MONTANA

Described in 1961 ". . . as representative of a state which presents the most average situation in regard to administrative integration, "Montana ranked "lowest in the number of administrative agencies created or recognized in the constitution" and "about average under the factors of constitutionally elected officers and tools of management and, under the provisions concerning the governor's term, appointment powers, and removal powers, somewhat above average.[27]

Although a student of Montana politics and government advocated a wholesale reorganization into 11 executive departments in 1958, the serious difficulty that he feared in amending the constitution[28] was overcome by a 1970 amendment allocating all nonelective executive offices into not more than 20 principal departments.

NEW JERSEY

The constitutional revision of the mid-1940's in New Jersey has resulted in a high degree of administrative integration by means of a structure closely paralleling the 1963 Model State Constitution.[29] While efforts at administrative reorganization failed during the 1920's and 1930's, in 1942, a constitutional commission recommended a proposed constitution with all executive functions to be specifically allocated within nine departments. This effort resulted in the lesson that: "In their anxiety to reduce the number of agencies, the commission attempted to freeze not only the number of departments to be created but also the specific names of those departments. The commission sought a flexible constitution, yet its recommendations with respect to some phases of administrative organization were the exact opposite."[30] Later in the 1944 proposed constitution of the New Jersey legislature, the number of departments was limited to 20 with the governor authorized to allocate existing agencies into these departments by executive order "according to major purpose" while the executive orders were subject to disapproval by a resolution of each chamber of the legislature. However, this constitutional amendment was defeated by the state's referendum process.

The adopted 1947 New Jersey constitution provided for departmental reorganization among not more than 20 principal departments from the 70 administrative agencies existing prior to constitutional approval. After the 1944 legislative effort at constitutional revision failed, from 1944 to 1947, a Commission on State Administrative reorganization was appointed with representatives of each house of the legislature and the governor w hich led to recommendations to consolidate 24 agencies within five major departments. After the 1947 constitution took effect, 13 of the 14 reorganization bills based on the Commission's report were enacted into law.

NEW YORK

The long experience of New York in amending its 1925 constitutional provision limiting civil departments to 20 in number resulted in the recent attempt by the unsuccessful 1967 constitutional convention to eliminate the ceiling altogether and replace it with a provision of executive initiative to reorganize subject to legislative veto.

The reform purpose of the 1925 amendment was to somehow integrate the labyrinth of 170 administrative units of New York state government. Under the leadership of Governor Alfred E. Smith and former Governor Charles Evans Hughes, the reorganization coalition succeeded in obtaining the original 1925 amendment which restricted the number of civil departments, but named the specific departments in the constitution.[31] By 1930, ". . . more than 75 separate departments and agencies had been brought together in 18 major departments and the governor, by constitutional amendment in 1927, was provided with potentially the strongest budgetary control of any chief executive in the Union."[32]

While a strong office of governor was to emerge in New York as a result of other reforms, the long history Article V, Section 2 in limiting civil departments to 20 in number was one of continued amendment:

> As revised in 1938, the section listed eighteen departments as follows: executive, audit and control; taxation and finance; law; state; public works; conservation; agriculture and markets; labor; education; health; mental hygiene; social welfare; correction; public service; banking; insurance; civil service. The 1943 amendment added the commerce department as the nineteenth civil department. In 1959, the motor vehicle department was added as the twentieth civil department. The 1961 amendment deleted the actual listing of the twenty departments but provided that there shall not be more than twenty departments including those referred to in the constitution. At the same time it was also provided that the legislature could change the names of the departments.[33]

The New York constitutional ceiling on departments has evoked continued analysis, with Ferrel Heady noting in 1961:

> New York was able at an early date to integrate its administration, making the necessary constitutional changes to accomplish this. Although the constitution is more detailed and specific than is the case with the Model State Constitution and with some more recent constitutions in other states, New York has not developed any serious constitutional problems with respect to its administrative pattern. There has been some difficulty in confining governmental functions within the constitutionally recognized departments, which is likely to happen with the passage of time in any state which has imposed a constitutional ceiling on the number of agencies.[34]

The latest attempt at revising the New York document's administrative sections failed as part of the executive article of the rejected 1967 constitution. In the comments explaining this proposed revision, the reasoning of the New York constitutional convention indicated:

> The draft replaces and makes a number of significant changes in present sections 2 and 3 of Article V of the present Constitution.

> It eliminates the present requirement that there shall be not more than twenty civil departments in the state government on the ground that despite the numerical limitation there are currently some one hundred and fifty state administrative units reporting to the Governor. Since experience has shown that a constitutionally mandated maximum can be successfully ignored; it seems wiser to allow for flexibility and provide the Governor with adequate power to reform the executive branch, subject to legislative veto. This conclusion was reached both by the Hoover Commission studying federal administrative reform and by the draftsmen of the model constitution. The proposed revision is modeled on section 2 or article V of Michigan's Constitution of 1963.[35]

NORTH CAROLINA

Perhaps the state where executive reorganization should accomplish the most is North Carolina. As recently as 1961, one authority on state government administration pointed to the Tar Heel state as exemplifying " . . . the situation in which a constitution directly hinders the goal or aim of administrative integration." Although "in 1962, North Carolina voters approved an amendment enabling the legislature to undertake large-scale reorganization of the judiciary," it was only in 1970 that a departmental ceiling and executive initiated reorganization provisions were approved by the electorate as a constitutional mandate. A decade earlier the chronic need for reform became evident since:

> The present constitution in relation to administrative structure is much the same as the document of 1868. The long ballot, if anything, has been increased in recent years. North Carolina has more constitutional elective officials than any other state. Ten administrative officers are elected by the voters while 107 others are elected by the state legislature as provided in constitutional provisions. The large number of elective constitutional officers creates a situation where many officials may feel an independence of the governor's authority as head of the executive branch of government. Any serious attempt to shorten the ballot is faced with the difficult process of amending the state constitution.
>
> The constitution also hinders any attempt at reorganization of North Carolina's administrative structure by establishing some thirteen officers and agencies, five of which are multi-headed boards and commissions.
>
> The governor is particularly weakened by the lack of administrative authority provided for in the constitution.[36]

The new 1970 constitutional provisions limiting administrative departments to 25 in number were adopted so that:

> Not only would the Governor be enabled to manage the business of the State more effectively, but in the course of reorganization, it should be possible to eliminate overlapping and duplication of functions among agencies now independent. The objective is not simply a more efficiently administered government, but one more capable of responding effectively to the needs of the people of the State.[37]

Requiring disapproval by both houses of the Legislature, the executive orders provision allowing the Governor to initiate reorganization follows the Alaskan model with the goal "that the amendment settles on the Governor the responsibility and authority for taking the initiative in state administrative reorganization."[38] According to a recent periodical:

A report detailing the method of the reorganization has been submitted to the governor by a 50-member bipartisan committee. It proposes reforming the more than 300 administrative boards, agencies, commissions and departments into 19 major departments, eight headed by presently elected state officials and the remainder directed by cabinet secretaries, appointed by the governor and responsible to him.

'Regulatory, quasi-judicial and temporary agencies may, but need not be allocated within a principal department,' according to the amendment. Under this provision the committee elected to leave 31 licensing boards out of the plan and permit the quasi-judicial and regulatory bodies to retain their independent powers, excluding budget making.

The Raleigh News and Observer notes that, while on the surface there is no major opposition to the plan, various aspects of it are strongly opposed by special interest groups which want to see the present structure retained so that certain agencies do not lose their autonomy.[39]

VIRGINIA

After an 11-member Commission on Constitutional Revision reported in January, 1969, the draft of the proposed constitution was amended and also approved in 1969 by a special legislative session. The document was then approved by Virginia voters as five packages in the November, 1970 election. A commentary on executive reorganization prior to ratification explained that:

Another proposal advanced by the Commission to enhance the Governor's ability to act as an efficient administrator is a new section (proposed Section 9) for executive initiation of administrative reorganization. The proposal would allow the Governor to put into effect practices which a good business executive would want to adopt in his business. Section 9 authorizes the Governor to initiate reorganization of the executive which, if not disapproved by the General Assembly, becomes effective and has the force of law. The proposal does not strengthen the office of the Governor at the expense of the Legislature. Both have their place in the proposed arrangement: The Governor can take the initiative, but the General Assembly can have the final say, if it wishes it.[40]

One progress report now indicates that:

Virginia's revised constitution which was approved by voters in November, is being implemented by the 1971 session /of the Legislature/. Much of the implementing legislation has been drafted by a Code Revision Commission. Regular legislative committee structure is also being utilized for the task.[41]

COMPARISON OF REORGANIZATION PROVISIONS OF AMERICAN STATE CONSTITUTIONS

A. State Adoptions and Coverage of Plans
B. Executive Procedure
C. Legislative Procedure

A. State Adoptions and Coverage of Plans

State Constitution Provision	Scope of Authority

Alaska

Constitution of 1956, Article III:

Section 22: Functional allocation of all executive and administrative offices, departments and agencies into not more than 20 principal departments. Regulatory, quasi-judicial, temporary agencies excluded.

Section 23: Statutory organization of executive branch assignment of functions.

California

Constitutional Amendment of 1966, Article V:

Section 6: Authorizes legislature to allow governor to reorganize the executive branch subject to statute. Excludes elective officers and agencies administered by elective officers.

Colorado

Constitutional Amendment of 1966, Article IV:

Section 22: Functional allocation of all executive and administrative offices, agencies and instrumentalities into not more than 20 principal departments. Offices of governor, lieutenant governor and temporary commissions excluded.

FLORIDA

Constitution of 1968, Article IV:

Section 6: Functional allocation of all executive and administrative into not more than 25 departments placed by statute under supervision of governor, lieutenant governor, governor and cabinet, or an officer or board appointed by governor. Constitutionally delegated offices excluded.

Hawaii

Constitution of 1950, Article IV:

Section 6: Functional allocation of all executive and administrative offices, departments, and instrumentalities into not more than 20 principal departments. Temporary or special agencies or commissions excluded.

Illinois

Constitution of 1970, Article V:

Section 11: Statutory organization of executive branch assignment of functions. Includes all executive agencies directly responsible to governor.

Kansas

Constitutional Amendment of 1969, Article I:

Section 6: Statutory organization of executive branch assignment of functions. Agencies and functions of legislative, judicial and constitutionally delegated state officers and boards excluded.

Maryland

Constitutional Amendment of 1970, Article II:

Section 24: Statutory organization of executive branch assignment of functions. Constitutionally delegated officers or departments excluded.

Massachusetts

Constitutional Amendment of 1966, Article LXXXVI:

Sections 1, 2, 3: Statutory organization of executive branch assignment of functions. Compliance with civil service, seniority, retirement and other statutory employee rights.

Michigan

Constitution of 1963, Article V:

Section 2: Functional allocation of all executive and administrative offices, agencies and instrumentalities into not more than 20 principal departments. Offices of governor, lieutenant governor, constitutionally delegated bodies of institutions of higher education, temporary and special commissions excluded. Statutory organization of executive branch assignment of functions.

Montana

Constitutional Amendment of 1970, Article VII:

Section 20: Functional allocation of all executive and administrative offices, boards, bureaus, commissions, agencies and instrumentalities into not more than 20 departments. Offices of governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, superintendent of public instruction, and temporary commissions excluded.

New Jersey

Constitution of 1947, Aaticle V:

Section 4: Functional allocation of all executive and administrative offices, departments, and instrumentalities, including offices of Secretary of State and Attorney General, into not more than 20 principal departments. Temporary commissions excluded.

New York

Constitutional Amendment of 1925, Article V:

Section 2: Prohibits more than 20 civil departments. Legislature authorized to change names of the departments referred to in constitution.

North Carolina

Constitutional Amendment of 1970, Article III:

Section 5 (10): Statutory organization of executive branch assignment of functions.

Section 11: Functional allocation of all administrative departments, agencies, and offices into not more than 25 principal administrative departments. Regulatory, quasi-judicial and temporary agencies excluded.

Virginia

Constitution of 1970, Article V:

Section 9: Statutory organization of executive branch assignment of functions.

B. Executive Procedure

State Constitutions	Provision for Advice and Assistance	Prepare for Legislative Submission
Alaska	none	Executive orders, by governor
California	none	Authorizes statutory provision
Colorado	none	Statutory by law
Florida	Approval by three cabinet members for statutory changes	Confirmation by senate for statutory changes.
Hawaii	none	Statutory by law.
Illinois	none	Executive orders, by governor on or before April 1 or first day of an annual session.
Kansas	Governor's message required to detail affected records, property, personnel, balance of funds and appropriations.	Executive orders, by governor within 30 days of regular session.
Maryland	none	Executive orders, by governor within 10 days of regular session.
Massachusetts	Requires legislative committees to hold public hearings within 30 days and to give committee report within 10 days of hearings	Reorganization plan by governor submitted to House and Senate Clerks who refer to committee with approval of President and Speaker.
Michigan	none	Executive orders, by governor.
Montana	none	Statutory by law.
New Jersey	none	Statutory by law.
New York	none	Statutory by law.
North Carolina	none	Executive orders, by governor
Virginia	none	Executive orders, by governor at least 45 days prior to regular or special session.

C. Legislative Procedure

State Constitution	Method of Disapproval	Period for Action
Alaska	Disapproval resolution in joint session.	Within 60 days of regulat session, full session if shorter duration.
California	Authorizes statutory provision	none
Colorado	Statutory by law	No later than June 30, 1968 (2½ years)
Florida	Statutory by law, with confirmation by senate or approval of three members of the cabinet for appointment or removal from statutory office.	none
Hawaii	Statutory by law	none
Illinois	Disapproval resolution by record vote of majority of either house or senate	Within 60 calendar days after delivery to the session.
Kansas	Disapproval resolution by majority vote of either house or senate	Within 60 calendar days of transmittal and before adjournment of regular session.
Maryland	Disapproval resolution by majority vote of either house or senate.	Within 50 days of regular session.
Massachusetts	Disapproval resolution by majority vote of either house or senate	Within 60 calendar days after presentation to the session. No amendments to governor's plan before 60 days expire.
Michigan	Disapproval concurrent resolution of majority of both houses.	Within 60 days of regular session, full session if shorter duration.
Montana	Statutory by law	No later than July 1, 1973 (2½ years)
New Jersey	Statutory by law	none
New York	Statutory by law	none
North Carolina	Disapproval joint resolution of both houses	Within 60 days after submission, or upon adjournment sine die, whichever is sooner.
Virginia	Disapproval resolution by majority vote of either house or senate	Effective on a date designated by Governor following adjournment of General Assembly.

FOOTNOTES

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5. Bruce W. Sumner, "Constitutional Revision in California," State Government, Vol. 40, Autumn, 1967) p. 228.

6. California. Constitution Revision Commission. Proposed Revision of the California Constitution, (San Francisco, 1966), pp. 201-202.

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21. Bell, op. cit., p. 136.

22. Albert L. Sturm and Margaret Whitaker, Implementing a New Constitution: The Michigan Experience (Ann Arbor, University of Michigan, Institute of Public Administration, 1968) p. 109.

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24. Ibid.

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29. Heady, op. cit., p. 21

30. Bennett M. Rich, The Government and Administration of New Jersey (New York Thomas Y. Crowell, 1957) Chapter 8, "Administrative Reorganization," p. 106.

31. Heady, op. cit., p. 33

32. Lynton V. Caldwell, The Government and Administration of New York, (New York Thomas Y. Crowell, 1954), Chapter 10 "Organization and Management," p. 194.

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35. Jack B. Weinstein, A New York Constitution Meeting Today; Needs and Tomorrow's Challenges, (New York, National Municipal League, 1967) pp. 94-95.

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39. National Civic Review, "North Carolina Studies Plan for Executive Reorganization" March, 1971 p. 150.

40. The Constitution of Virginia, Report of the Commission on Constitutional Revision, (Michie Co., Charlottesville, 1969) p. 158.

41. State Government News, Council of State Governments April, 1971, p. 8.

Constitutional Revision Commission
Committee to Study the Legislature
September 8, 1971

Secret Sessions - Article II, Section 13

Article II, Sec. 13 provides as follows:

Section 13. The proceedings of both Houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy.

The origin of this section is Article I, Sec. 15 of the Constitution of 1802, which provided in part: "The doors of each house, and of committees of the whole, shall be kept open, except in such cases as, in the opinion of the house, require secrecy . . ." The Constitution of 1851 added the requirement of a two-thirds vote for secret sessions, removed language about committees of the whole, and reworded the language of the provisions.

Little is said about this provision in the published Debates of the Constitutional Convention of 1851. In discussing the question of its retention, one delegate pointed out that in 1812 it became necessary for the Legislature to sit in secret session in order to take steps for the prosecution of the war. The supposed object of the committee in reporting this section, he concluded, was to make provision for such an emergency. An amendment to limit secret sessions to war time emergencies was defeated, a delegate observing that they should "let the good sense of the Legislature do as it thought best in regard to this matter." 1 Debates 232.

Senate Rule 122 of the 108th General Assembly and House Rule 112 of the 109th General Assembly adopted the exact phraseology of Section 13 except that the terms "Senate," and "House," respectively, are substituted for the words "both Houses."

Whether standing committee hearings are open to the public was one matter reported upon in the Book of the States for 1970-71. Twenty-nine of the 50 states and 2 territories (Puerto Rico and Virgin Islands) reported that open hearings were "discretionary". Two others replied that committee hearings were open except for executive sessions. In Tennessee the matter was reported as discretionary in the House with open hearings in the Senate. Twenty states, including Ohio, are shown as having open hearings, unqualified as to House or subject.

The application of Section 13 to committee hearings has not been the subject of reported judicial ruling. A frequent criticism of state constitutions today is that they are filled with provisions designed solely to meet problems current when drafted, which naturally, in many instances, were subsequently replaced by new and unanticipated situations calling for legislative solution. The propositions that a Constitution should deal with fundamentals only and that it should be a timeless document argue against expansion of this section to cover committees under defined circumstances. The assumption that the provision extends to committee action has not been challenged. Committee procedures are better the subject of rule than Constitutional provision because they must be flexible, timely, and facilitate, not restrict, freedom of action.

Note: The Committee decided at its meeting on August 26, 1971 to invite further comment on this provision.

Ohio Constitutional Revision Commission
Committee to Study the Legislature
September 16, 1971

The Committee to Study the Legislature makes partial recommendations to the Ohio Constitutional Revision Commission for the revision of Article II of the Ohio Constitution, as follows:

(1) Repeal of Sections 5 and 10 of Article II, for reasons explained in attachments hereto;

(2) Amendment of Sections 7, 11, 14, 25, 8, 17, 3, and 4 of Article II, with changes noted and reasons explained in attachments hereto.

The Committee makes the further recommendation that Sections 15 and 22 of Article IV of the Ohio Constitution, affecting the operations of the Legislative Branch, be repealed for reasons explained in attachments hereto.

Respectfully submitted by the Committee to Study the Legislature

John A. Skipton, Chairman

Douglas Applegate, Member

William W. Taft, Member

William L. Mallory, Member

Barney Quilter, Member

Frank W. King, Member

Oliver Schroeder, Jr., Member

Don W. Montgomery, Member

Constitutional Revision Commission
September 16, 1971

Remarks of Chairman John Skipton preceding submission of Legislative Committee's Report to the Commission on September 16, 1971.

Now, I trust that we all realize somewhat of what we hope to accomplish with this report: This is a partial report, and the Committee will continue in existence, and it will act on some of the more significant changes that have been proposed relating to the legislative branch of government. Obviously, some of these are controversial propositions such as this question of unicameral versus bicameral legislature. We don't have an amendment to suggest today on compensation of legislators. Some others that you are familiar with will be considered.

In approaching its work this Committee has felt that there were many amendments of the legislative article that probably could be accomplished without a great deal of controversy and in so doing, we would enable this Committee to answer some of the objections I have heard here today--that we don't get enough exposure, the public doesn't know what we're doing--it doesn't know what we're about to do--. interest isn't very great. Well, I suspect the reason interest isn't great is that there has been no specific amendment of any kind proposed in which public attention is focused. Perhaps with this report today we will enable you and others to focus a little bit better on this Commission and its work and how it intends to operate. If we are guinea pigs in a way for the procedures of this Commission, it is quite all right with this Committee. We are also aware that in being guinea pigs, we might not survive the operation, but that will be all right with us. I hope through this exercise we will learn how to be a better Commission.

The Committee also approached its task with the feeling that the General Assembly should be one capable of independent judgment on proposals of public policy. We thought the General Assembly should operate under powers and authorities that would enable it to conduct its business in an orderly and efficient manner. We wanted to make it possible for the General Assembly to employ modern rules and procedures, and to be a strong, independent General Assembly, the Committee felt that the General Assembly should have authority that is commensurate with responsibilities of state government, particularly if Ohio is to meet the challenges of this century. It is this Committee's belief that there are no well-founded arguments to support artificial restrictions on it in its abilities to meet and consider the problems of the people of this State. So in presenting some of these amendments we are aware that we may have opened the door wider than some people may have preferred, and we may have removed some restrictions which others would like to see retained. But hopefully, we're at least making it possible for our Legislature to do a better job. We believe that some of the restrictions which have existed on the Legislature date from a time when the reputations of individual members of the Legislature might not be as good as they are today. Maybe people were right in permitting restrictions on them. We also are aware that just removing restrictions, per se, isn't going to guarantee great improvements. The Legislature may be free to act, but how it acts is its own problem. The Committee in approaching its job is also aware that the legislative article has been examined by many others. I'll mention one, a recent one. The Wilder Foundation in Cincinnati has prepared a report on Ohio's Constitution, which most of you have read, I am sure. That report found the Ohio Constitution fundamentally good. It did say that it was in need of some substantial changes. But significant in its conclusions, numbering 14--there were none for changes in the legislative article.

The Committee felt that in approaching its job, it didn't have a really significant amount of work to do. It may seem as I go through the actual report of this Committee that we found a lot wrong. But really, it's mostly getting rid of some obsolete provisions. It's perhaps getting rid of what we thought were superfluous provisions, some unnecessary. Some of these provisions have served their purpose. Some of them are obsolete because whatever functions they provided for have already been accomplished or the action required has been taken. In one or two cases we just believe that other powers are sufficient and it is unnecessary to have a specific revision. The report that deals with sections of Article II and a few other Articles. It has been aptly characterized as a "clean-up operation."

Now, for the body of this report. Perhaps before I start I should state too what we hope to accomplish as a Committee mission today. I'd like to present this report following which I would like the Commission to formally receive the report and then establish a specific hearing date, that is a specific public hearing date, on these recommendations, so that the Commission itself can proceed to a full and deliberate consideration of them, preparatory to making a recommendation of the Commission to the General Assembly. As you well know, these amendments are subject to further revision by this Commission, and once they are forwarded to the Ohio General Assembly they are subject to all the legislative processes before they are submitted to a vote, if and when they are approved.

Constitutional Revision Commission
Committee to Study the Legislatuve
September 8, 1971

WHO SHALL NOT HOLD OFFICE

The Committee proposes the repeal of Section 5 of Article II, which reads as follows:

Section 5. No person hereafter convicted of an embezzlement of public funds, shall hold any office in this State; nor shall any person. holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury.

COMMENT: The portion of the section governing membership in the General Assembly by persons holding public money for disbursement had its origin in Art. I, Sec. 28 of the Constitution of 1802. The prohibition against the holding of any office by persons convicted of embezzlement was adopted by the Convention of 1851.

The provision falls within one category of constitutional restraint which impairs legislative authority and effectiveness--I.E. the inclusion of statutory material in the constitution. Presence in the Constitution of statutory material is undesirable because of the rigidity it affixes to the public policy of a past period in history. The essential framework of state government must be provided in the Constitution, but details are better left to experience and legislation. Basic qualifications for officeholding, it is generally conceded, are appropriate for a constitution, but provisions other than age, residence or elector status have no place there. It is within the province of the legislature to adopt statutory requirements in conformance with changing times and mores and to adopt specific definition of the coverage intended. The inclusion of such statutory material in the fundamental law may, through judicial interpretation of its terms or simply its inclusion, operate to restrict legislative competence to deal with qualifications for officeholding under unforeseen and unpredictable circumstances.

Constitutional Revision Commission
Committee to Study the Legislature
September 8, 1971

RIGHT OF MEMBERS TO PROTEST

The Committee proposes repeal of Section 10 of Article II. The section reads as follows:

Section 10. Any member of either House shall have the right to protest against any act, or resolution thereof; and such protest, and the reasons therefor, shall, without alteration, commitment, or delay, be entered upon the journal.

COMMENT: This provision had its origin in the Constitution of 1802, in Art. I, Sec. 10, thereof, providing: "Any two members of either house shall have liberty to dissent from, and protest against, any act or resolution which they may think injurious to the public or any individual, and have the reasons for their dissent entered on the journals." No rationale for retention of the section appears in the Debates of the Constitutional Convention of 1851, and the section has been the subject of very little reported litigation. The Ohio Court of Appeals in 1967 construed "any act" to mean any act of that House and not to any act of members thereof. Failure of the Senate Rules Committee to order printing of a proposed resolution was held not to be an act of the Senate within this section. Carney v. Brown, 11 Ohio App. 2d 239 (1967).

Most writers on the subject of legislative articles in modern constitutions deplore the extent of regulation that 19th century constitutions place upon the process of legislating. A few requirements are almost unanimously accepted as desirable--those having to do with qualifications for members, officers, vacancies, basic organization, quorum requirements, majority action, veto procedures, and provisions clearly authorizing each house to establish its own rules of procedure, but others have been subjected to a variety of criticism. In his early work Ernest Freund advised constitution makers to impose constitutional procedural requirements only if they met the following tests: "(1) that they serve an object of vital importance; (2) that they can be complied with without unduly impeding business; (3) that they are not susceptible of evasion by purely formal compliance or by false journal entries; (4) they do not raise difficult questions of construction; (5) that the fact of compliance or

noncompliance can be readily ascertained by an inspection of the journal." Ernest Freund, Standards of American Legislation, 1917, p. 154.

Freund's advice, although written some years ago, is frequently reiterated in the literature of constitutional revision. Section 10 does not meet the requisite tests for imposing its procedural requirements in the fundamental law. Rules to facilitate the legislature in fulfilling its responsibilities, while protecting both members and the public from trickery and tactics, are best devised by the legislature itself, to meet its ever changing needs.

Constitutional Revision Commission
Committee to Study the Legislature
September 7, 1971

Elimination from Article IV of Sections 15 and 22

The Committee to Study the Legislature recommends the elimination from Article IV of Sections 15 and 22, both calling for a two-thirds majority vote of the General Assembly for purposes specified therein. Section 15 requires such a vote for the passage of laws to change the number of judges or to establish court other than the Supreme Court and Courts of Common Pleas. Legislation proposing to increase the number of judges of courts of appeals, probate courts, municipal courts, or county courts requires only the concurrence of a majority of all the members elected in each house. 1961 Ohio Atty. Gen. 2168. Section 15 is regarded by this Committee as an outmoded restriction, inconsistent with the power of the General Assembly to adopt enactments affecting other courts and a legislative limitation without current grounds.

Section 22 was adopted in 1876 to provide for a Supreme Court Commission to help dispose of the accumulated business of the Supreme Court. On only two occasions has Ohio had a supreme court commission - one appointed in 1876 for 3 years and one appointed in 1883 for 2 years. The section is obsolete because the problems to which it was addressed no longer persist.

The provision of Section 22 authorizing the General Assembly to provide by law for the appointment of a commission but limiting its term to two years and its creation to no oftener than once in ten years is also regarded as outdated. The specific delegation of the power is superfluous, and the restriction is an unnecessary restraint upon legislation power.

The recommendation to eliminate sections 15 and 22 has the endorsement of the Administrative Director of the Ohio Supreme Court.

Constitutional Revision Commission

Committee to Study the Legislature
September 7, 1971

ORGANIZATION OF EACH HOUSE

Section 7.
The mode of organizing ~~the House of Representatives~~ EACH HOUSE OF THE GENERAL ASSEMBLY, at the commencement of each regular session, shall be prescribed by law.

COMMENT: The sole purpose of the amendment proposed is to add provision for organization of the Senate to the section which now is limited to organization of the House, as prescribed by law. The amendment is one of form not substance. Revised Code sections 101.01 et seq prescribe the mode of organizing the Senate. No apparent reason exists for singling out the House of Representatives in the section as it now stands.

Constitutional Revision Commission
Committee to Study the Legislature
September 7, 1971

VACANCIES

Section 11

A vacancy in the Senate, or ~~a vacancy~~ in the House of Representatives ~~occurring after May 7, 1968~~, for any cause including the failure of a member-elect to qualify for office, shall be filled by ~~appointment~~ ELECTION by the members of the Senate or the members of the House of Representatives, as the case may be, who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant. A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled TEMPORARILY by ~~temporary appointments,~~ ELECTION as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January, next following such election. No person shall be ~~appointed~~ ELECTED to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in this Constitution and the laws of this state for the seat in which the vacancy occurs. An ~~appointment~~ ELECTION to fill a vacancy shall be accomplished, notwithstanding the provisions of section 27, Article II of this Constitution, by the adoption of a resolution, while the Senate or the House of Representatives, as the case may be, is in session, with the taking of the yeas and nays of the members of the Senate or the House of Representatives, as the case may be, affiliated with the same political party as the person last elected to the seat in which the vacancy occurs. The adoption of such resolution shall require the affirmative vote of a majority of the members ~~of~~ ELECTED to the Senate or the House of Representatives, as the case may be, entitled to vote thereon. Such vote shall be spread upon the journal of the Senate or the House of Representatives, as the case may be, and certified to the Secretary of State by the clerk thereof. The Secretary of State shall, upon receipt of such certification, issue a certificate of ~~appointment~~ ELECTION to the person so appointed and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person ~~so appointed~~ ELECTED shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was ~~so appointed~~ ELECTED.

COMMENT: Under the Ohio Constitution various majorities are necessary for legislative action on specific matters. Most such provisions call for a specified vote of the members "elected" to each house. None takes into account the filling of vacancies by "appointment," a term used in Section 11. The "appointment" there provided involves action of the members of the house affiliated with the same political party as the person last elected to the vacant seat. The substitution of "election" for "appointment" makes no substantive change in Section 11, calling for collective action by a vote, and does eliminate possible conflict between the section as it stands and eight other constitutional provisions.

Constitutional Revision Commission
Committee to Study the Legislature
September 8, 1971

POWER OF ADJOURNMENT

Section 14. Neither House shall, without the consent of the other, adjourn for more than ~~two~~ FIVE days, Sundays excluded, nor to any other place than that in which the two Houses shall be in session.

COMMENT: The prohibition against either house from adjourning for more than a certain number of days without consent of the other is a common provision in state constitutions with time periods on adjournment varying. Three days is common. Such restrictions are apparently intended to preclude the leadership of either House from acting in an irresponsible manner with reference to adjournment. Expansion of the time period for which either house may not adjourn without consent was suggested by the Legislative Clerk of the House of Representatives to accord with the practice of having the first formal session of the week on Tuesday. The change would eliminate the need for Monday "skeleton" sessions to satisfy the rule. In supporting revision of the section and choosing a five day period the Committee also noted the pattern of Monday holidays.

Constitutional Revision Commission
Committee to Study the Legislature
September 8, 1971

ANNUAL SESSIONS

Section 25. ~~All regular sessions of the General Assembly shall commence~~ THE GENERAL ASSEMBLY SHALL CONVENE EACH YEAR on the first Monday of January~~; biennially. The first session, under this constitutionk shall commence on the first Monday of January, one thousand eight hundred and fifty two~~ OR ON THE SUCCEEDING DAY IF THE FIRST MONDAY OF JANUARY IS A LEGAL HOLIDAY.

COMMENT: One of the changes effected by state constitutional revision of the 19th century was the shift from annual to biennial sessions. By 1900 43 states, including Ohio, had abandoned annual sessions, most by constitutional directive. In recent years, however, strong opinion has developed in favor of more frequent sessions, and currently the pendulum is swinging in the direction of annual meetings. Over half the state legislatures convene annually.

This Committee agrees with a 1967 report of the Illinois Commission on the Organization of the General Assembly that for the foreseeable future legislative responsibilities will include all of the infinitely complex problems generated by our rapidly changing society: education, health care, human relations, urban decay, transportation, and a host of others. These problems do not arise and end biennially but are permanent problems, deserving sustained attention. Improving the State Legislature, A Report of the Illinois Commission on the Organization of the General Assembly (1967), p. 4.

The inadequacy of biennial sessions has resulted in statutory provision in Ohio for annual meetings, enacted in 1967. However, most authorities feel that a constitutional provision for annual sessions strengthens the legislature and its ability to deal with problems as they arise.

Every seven years New Year's Day, a legal holiday, falls on the first Monday of January, the day set by the Constitution for the commencement of regular sessions. The proposed amendment of Section 25 meets this situation by providing for session commencement on the succeeding day when this occurs. The succeeding day rather than the second Monday was selected to maintain the difference between the commencement of legislative sessions and the commencement of term of the Governor and other members of the executive branch on the second Monday of January.

Constitutional Revision Commission
Committee to Study the Legislature
September 7, 1971

SPECIAL SESSIONS

Section 25

All regular sessions of the General Assembly shall commence on the first Monday of January, ~~biennially~~ OF EACH ODD-NUMBERED YEAR. ~~The first session, under this constitution, shall commence on the first Monday of January, one thousand eight hundred and fifty-two.~~ THE GOVERNOR OR THE PRESIDING OFFICERS OF THE GENERAL ASSEMBLY MAY CONVENE THE GENERAL ASSEMBLY IN SPECIAL SESSION BY A PROCLAMATION AND SHALL STATE IN THE PROCLAMATION THE PURPOSE OF THE SESSION.

COMMENT:The only provision in the Ohio Constitution for the calling of a special session is Section 8 of Article III, empowering the Governor to convene the General Assembly in special session and limiting the business to be transacted to that named in the call or subsequent gubernatorial proclamation. This Committee proposes an amendment to the Legislative Article permitting either the Governor or the presiding officers of the General Assembly to convene a special session.

In making such a change Ohio would join a growing number of states which have in recent years broadened the constitutional power to convene during interim periods to include the legislature. The legislature should have the authority through its leadership to call a session when a valid need is seen. Such a session would not be possible after a sine die adjournment if the Governor refuses to cooperate for political or judgmental reasons. The legislature should be available at all times.

In its recent evaluation of the fifty state legislatures the Citizens Conference of State Legislatures postulated that legislatures must be functional, accountable, informed, independent and representative as necessary conditions of fulfilling their responsibilities. On the criteria of independence Ohio received a rank of 40, putting it among the bottom ten states in terms of the control of its legislature over its own activities and independence of the legislative branch from the executive branch of government. The C.C.S.L. Report points out: "At least 33 of the 50 state legislatures must be faulted on the question of independence because they lack the power to call a special session. "

This Committee concludes that the General Assembly should have the power to meet in special session and to decide what subjects it will consider. This authority should be equal to that of the Governor. Appropriate amendment to Section 8 of Article III will be necessary for this purpose. By stipulating that the calling of a special meeting be by "proclamation" the Committee favors encouraging specificity in the call without constitutionally restricting the subject matter to be transacted.

Constitutional Revision Commission
Committee to Study the Legislature
September 8, 1971

PRESIDING OFFICERS

Section 8. Each house, except as otherwise provided in this constitution, shall choose its own officers, INCLUDING A PRESIDING OFFICER SELECTED FROM ITS MEMBERSHIP, WHO SHALL BE DESIGNATED IN THE SENATE AS PRESIDENT OF THE SENATE AND IN THE HOUSE AS SPEAKER OF THE HOUSE OF REPRESENTATIVES, may determine its own rules of proceeding, punish its members for disorderly conduct; expel a member, but not the second time for the same cause; and shall have all powers, necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers.

COMMENT: This Committee has recommended that Section 25 of Article II be amended so that in addition to the Governor, the presiding officers of the General Assembly should convene it in special session. The meaning of the term "presiding officers" is not without some uncertainty. Section 8 of Article II gives to each house the authority to choose its own officers. However, Section 16 of Article III makes the Lieutenant Governor President of the Senate. The leadership of the Senate selects the President Pro Tempore as a matter of course and not only "in the event of absence, impeachment or exercise of the office of Governor," as prescribed by Article III, Section 16.

The amendment to Section 25 is intended to give legislative power to convene and to place the power in the leadership of each house. Consequently, Section 8 should be amended to provide for definition of the term "presiding officers."

This Committee further recommends to the Committee to Study the Executive Branch that the provision making the Lieutenant Governor president of the senate and giving him a vote when the senate is equally divided not be retained. Section 16, Article III should be repealed. A real legislative role for the lieutenant governor is viewed as detracting from legislative independence from the executive branch. The validity of a parallel between the United State's vice-president's role with respect to the U. S. Senate and a state lieutenant governor with respect to the state senate is a subject that should be explored in collaboration with the Committee to Study the Executive Branch.

Constitutional Revision Commission
Committee to Study the Legislature
September 8, 1971

SIGNING OF BILLS

Section 17. The presiding officer of each House shall sign~~,-publicly-in-the presence-of-the-House-over-which-he-presides,-while-the-same-is-in-session,-and capable-of-transacting-business~~ all bills and joint resolutions passed by the General Assembly WHILE THE HOUSE OVER WHICH HE PRESIDES IS IN SESSION.

COMMENT: The section as proposed eliminates the requirement that the signing of bills and resolutions be done publicly, in the presence of the House or Senate. As written it would require simply that presiding officers sign bills in session. The deletion of the phrase "and capable of transacting business" is to eliminate the necessity of signing of bills in formal session, as opposed to any time prior to adjournment sine die.

The act of signing bills is regarded as essentially administrative in nature and not one that need be witnessed. The restriction upon the signing of bills could impede presentation of a bill to the governor for signature (required before a bill becomes law) and such a result could be significant if the effective date of the legislation is crucial.

The requirement that bills be signed by the presiding officer of each house is basic and fundamental, but the procedure for authentication is more properly a subject of statute. New constitutions require signing or certification of bills but do not stipulate by constitution that the act be done publicly.

Constitutional Revision Commission
Committee to Study the Legislature
September 7, 1971

QUALIFICATIONS (AGE AND RESIDENCE)

Section 3.
Senators and Representatives shall have resided in their respective districts ~~one-year-next-preceding their-election~~ ON THE DAY THAT THEY BECOME CANDIDATES FOR THE GENERAL ASSEMBLY, AS PROVIDED BY LAW, AND SHALL REMAIN RESIDENTS DURING THEIR RESPECTIVE TERMS unless they ~~shall-have-been~~ ARE absent on the public business of the United States or of this State.

COMMENT: The Committee regards the requirement that a member of the General Assembly be one of his own constituents a reasonable one but favors removing the requirement of one year's prior residence for this purpose. Residence is a matter of intent, and if it is established when a person becomes a candidate, no reason exists in the Committee's view to impose the additional waiting period. Residence within the district is related to proper representation, and therefore maintenance of residence during term is more appropriate than residence prior to election.

Residence requirements vary among the states, with one year's state residence a common one. Several newer constitutions do not specify a period of time for district residence, and leave this question to legislative discretion. Some state constitutions set a district residency requirement but make special provision for reapportionment by allowing residence in a district containing part of a new district for a specific period or setting district residences of a specific period, provided the district has been so long established.

Under Article XV Section 4 legislators (as persons elected to any office in this state) must possess the qualifications of an elector - i.e. reside in the state six months and be 21 years of age. The Committee does not wish to place specific minimum age limits on eligibility for election to the General Assembly. Lowering of the age of an elector from 21 to 18 does not affect its position that no age restriction be inserted and that 18 year olds be permitted to seek office if they are permitted to vote, if that interpretation is given to the federal constitutional amendment as applied in Ohio.

Constitutional Revision Commission
Committee to Study the Legislature
September 7, 1971

ELIGIBILITY (COMPATIBILITY)

Article II, Section 4, determining "eligibility" to the General Assembly, provides as follows:

Section 4. No person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to, or have a seat in the General Assembly, but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia.

The following revision is proposed:

SECTION 4. NO MEMBER OF THE GENERAL ASSEMBLY SHALL, DURING THE TERM FOR WHICH HE IS ELECTED, HOLD ANY PUBLIC OFFICE UNDER THE UNITED STATES OR THIS STATE OR A POLITICAL SUBDIVISION THEREOF.

COMMENT: Section 4 of Article II has been the subject of many Ohio Attorney General Opinions and several reported court cases dealing with the question of compatibility of dual public positions. The number and variety of questions of interpretation that have been raised indicate a need for clarifying the language of this provision. Basically three questions have arisen under present Section 4: (1) whether the situation involves "holding office under the authority of the United States; (2) whether the position in question constitutes an "office" under authority of the United States or this State; and (3) whether the office held under authority of this State, if so determined, is a "lucrative"one.

The new section proposed would eliminate the ambiguous phrases pertaining to office "under the authority of" the United States or State and thus significantly reduce the need for interpretation of the section to determine its appoication to specific cases. Public employment would not be constitutional disqualification for membership in the General Assembly. Compensation attaching to office would not be a criterion.

Prohibiting basic conflict between public offices is appropriate for the Constitution. Specific factors having to do with disqualification for membership are more appropriately left to statute. Moreover, the reference to justices of the peace should be removed as obsolete, the office having been abolished.

This document (s) that follows was not published with the original volume. It was inserted into this volume held by the LSC Library. It is related to the topic of this volume, but it is unknown why it was not published with the original volume.

Ohio Constitutional Revision Commission
Committee to Study the Legislature
October 6, 1971

Summary of Public Testimony

The Committee to Study the Legislature held a hearing at 1:30 p.m. on October 6, 1971, in Room 11 of the House of Representatives in the State House, for the purpose of receiving public testimony on a series of recommendations presented in a partial committee report on September 16, 1971, pursuant to Commission rule E-4. The committee report will be formally presented to the Commission for action by the Commission on October 19.

The following members of the Commission were present at the public hearing: Senator Taft, Representatives Thorpe, Russo, White and Fry, Mrs. Orfirer, and Messrs. Carter, Cunningham, Skipton (chairman of the Legislative Study Committee), Montgomery, Schroeder, Ostrum, and Carson.

Commission chairman Carter opened the meeting, stating that its purpose was to receive testimony from any persons present, and to offer commission members present an opportunity to question those who offered testimony and to discuss the committee proposals. The Chairman then asked Mr. John Skipton to preside. Mr. Skipton stated that the purpose of the meeting was to receive public testimony on recommendations of the Legislative Committee which were distributed at the September 16 meeting of the Commission, have been made available to the public since that time, and copies of which were available in the hearing room. He stated that the report under consideration is not the complete report of the Legislative Study Committee, but that the hearing is for the purpose of receiving testimony only on those matters contained in this report. He further stated that, after the Commission considers the Committee recommendations on October 19, those proposals adopted by the Commission will be presented to the General Assembly for action pursuant to procedures followed for any proposed constitutional amendment.

The first person to testify was Mrs. Richard Brownell, on behalf of the League of Women Voters. Mrs. Brownell's statement is attached hereto.

In connection with the proposal for annual sessions, Mrs. Brownell raised a question about the starting date of the session, which, at the present time under the annual session provision in section 101.01 of the Revised Code, can be as late as March 15 in the second year. With respect to the provision allowing the presiding officers of the House and Senate to call a special session, Mrs. Brownell questioned whether the language was clear enough to require the concurrence of both presiding officers for this purpose, and she also noted that the two proposals respecting section 25 (annual sessions and special sessions) need reconciliation.

Mr. Skipton asked if there were questions of Mrs. Brownell. Dr. Cunningham asked whether Mrs. Brownell or the League had a position on age eligibility for members of the General Assembly since the lowering of the voting age may make 18-year-old persons eligible in Ohio. Mrs. Brownell stated that the League had no position on this question and that her personal opinion is that any person eligible to vote should also be eligible to hold office.

Representative Russo questioned the effect of the annual session language, and whether this means that each year is a new session for the purpose of introduction of bills, or whether the General Assembly, at the end of the first year, would continue the practice of only holding over specific bills for consideration in the second year. Mrs. Brownell stated that the League has no position on this question,

and, in response to a question from Mr. White, that the League has no position on the question of limiting the number of days in a legislative session. Mrs. Brownell stated that the League's position is that there should be assurance that the General Assembly will meet every year, so that it can deal with current problems as they arise, and that the requirement for meeting annually should be in the Constitution.

Mr. Skipton pointed out that the annual session provision requires the General Assembly to convene each year, and this will have to be combined with the provision for special sessions, which states that the "regular" session of the General Assembly begins at a particular time, and that there is a possibility of making the General Assembly a continuing body for a two-year period.

Mr. Skipton asked whether there was anyone else present with a statement or who wished to testify on the committee proposals. He then stated that the committee would receive questions or proposals for further consideration and discussion.

Mrs. Molly Hood, a member of the Constitution Study committee of the Columbus League of Women Voters, pointed out an error in the committee report, in section 11 of Article II (vacancies). In the fifth line from the end of the section as it appears in the committee rport, the word "appointed" should be stricken and the word "ELECTED" inserted in order to maintain consistency with the purpose of the proposed amendment. Mr. Skipton agreed that this was an error and would be corrected. Mrs. Hood also pointed out, in conjunction with the proposal to add to section 8 of Article II a provision that the presiding officer of the Senate should be designated the "president" of the Senate and chosen from among the Senate membership, that the traditional term for the presiding officer of the Senate was "speaker" before the change in the Constitution which added the Lieutenant Governor as an elective state officer and designated him as the presiding officer of the Senate. The speaker of the Senate was the most important elective office after the governor. Mrs. Hood asked that the committee consider using the traditional term "speaker" instead of "president" of the Senate, and Mr. Skipton accepted her recommendation for committee consideration.

Lt. Governor John Brown offered comments on several items in the committee report. With respect to the proposal to repeal section 10 of Article II (right to protest) he pointed out the lack of anything in Ohio like the Congressional Record, in which any member of Congress may have recorded any item or matter he wishes; in Ohio the right to have a protest entered in the Journal is a very limited right. He believes this right to protest should be preserved in the Constitution, especially as it is now limited to a formal enactment or resolution of the House or Senate, and a member of the General Assembly has no other official way to bring before the public a matter he believes to be wrong or with which he strongly disagrees. Mr. Skipton asked whether the right should be limited in some way, such as requiring the concurrence of two members or limiting the amount of material that could be inserted in the Journal, but the Lt. Governor stated that he felt it was already sufficiently limited by the court decision. He feels the right should be in the Constitution, since legislative rules are subject to change, and may differ between the two houses. Mr. Thorpe pointed out that the right to protest is seldom used in the House.

The Lt. Governor proposed, for committee consideration, limiting the subject matter in the second year of the General Assembly if annual sessions are required by the Constitution. He proposed that the second year session be limited to fiscal matters, matters proposed by the Governor, and matters agreed to by 2/3 of the members.

Otherwise, in his opinion, much legislation will be reintroduced in the second year that has already been considered in the first year. He feels that if 2/3 of the members agree to the introduction of the matter, it is of sufficient importance that it should be considered, or if it is included in a message from the Governor. Budgetary matters, he feels, should be considered on an annual basis.

The Lt. Governor and several committee members discussed the effect of a sine die adjournment on pending legislative business and the carryover of bills from one year to the next. He stated that his proposal to require 2/3 approval for introduction of bills in the second year applied to new legislation, not carryovers. Mr. White pointed out that requiring 2/3 for introduction of new bills might shut out controversial legislation but legislation which was, nevertheless, important for the General Assembly to consider. Mr. Fry pointed out that the legislature would still have the prerogative to carry over bills considered important from the first year to the second. Mr. Carter asked whether the Lt. Governor considered it important to include these items--restricting the subject matter of the second year--in the constitution. The Lt. Governor replied that, because of the changeability of the rules, he thought these matters should be included in the Constitution. Mrs. Orfirer questioned whether the suggested restrictions did not impair rights and should not, therefore, be excluded from the Constitution, and whether the 2/3 agreement necessary would not keep out consideration of important new matters which the General Assembly should consider in the second year. Mr. Russo again stated he thought the second year might be construed as a completely new session, and that legislation from the first year could not be carried over.

Mr. White said that he felt there was implied in the annual sessions proposal that the job of being a legislator is now a full-time job, and that professional legislators would result.

There was further discussion about whether the annual session proposal would require a sine die adjournment at the end of the first year and entirely new beginning the second year, or whether the present system of considering that a "session" of one General Assembly is the term of representatives--two years. Mr. Skipton stated that the committee wanted to leave the provisions open so that the legislature had leeway to interpret them itself.

With respect to the special session provision, the Lt. Governor pointed out that there were practical problems involved if the intention was to require both presiding officers to concur in the special session call, since they might be of different parties or different opinions about the need for the session. Mr. Skipton replied that the committee recognizes these problems, but did intend that both presiding officers concur in the special session call.

The Lt. Governor then turned his attention to the proposal to have the presiding officer of the Senate chosen by the members from among their membership. He is opposed to this proposal. He reviewed the position of the Lt. Governor in other states, pointing out that most states designate the Lt. Governor as the Senate presiding officers and that several states have recently changed from having the secretary of state succeed to the governorship in the event of vacancy to having the Lt. Governor, also the president of the Senate, succeed. He mentioned the work of the National Conference of Lieutenant Governors in elevating the office of Lt. Governor. He reviewed the various functions assigned to the Lt. Governor in various states, pointing out the great variety in the types of functions performed other than as the presiding officer of the senate. He feels that the office of Lt. Governor should be enhanced, and that removing the function of presiding over the senate would be to the contrary.

Mr. Skipton stated that the committee was not trying to down grade the position of Lt. Governor.

Mr. White asked whether the Lt. Governor felt that there was merit in the idea that the Governor and Lt. Governor be elected as a team. Mr. Brown said that he was in favor of this idea and, further, that he favored preprimary selection of the Governor and Lt. Governor as a team by having them file joint candidacy petitions.

Mr. Carter stated that there was no effort to downgrade the position of Lt. Governor but that this proposal was based solely on the idea that it may not be appropriate to have a separately-elected official preside over the senate. Mr. Skipton stated that this proposal arises from the concern over the nature of the office of Lt. Governor, who succeeds to the Governorship, and who should be given additional administrative and executive responsibilities to prepare him for that position, as well as the concern of maintaining the independence of the legislative from the executive branch, especially should a vacancy occur in the office of Governor.

Mr. Fry pointed out that, in Oklahoma, the Lt. Governor was recently named head of Development and Mr. Brown pointed out the great variety of jobs which have been given to the Lt. Governor in other states.

Mr. Carter stated he felt that the Lt. Governor was asserting that his office should be a more effective one in state government, and perhaps increased effectiveness could be achieved in the executive branch only if the Lt. Governor's time were not consumed with the legislature. Mr. Brown stated that the duties were not too heavy, and that he felt the Lt. Governor made an effective presiding officer because he did not represent a district, but was elected by all the people. He feels the Lt. Governor could be of great assistance to the Governor in conducting state matters if the two have agreed to run as a team and so filed for the primary.

With respect to the provision for signing bills, the Lt. Governor stated that he felt a majority of the members of the Senate must be present for the signature under present provision, and he is in favor of changing that provision. He questioned whether the proposed language is clear enough that "session" would not be interpreted to include the language being deleted "capable of doing business" so that the situation which presently exists would continue. Mr. Skipton pointed out that this, again, is a problem of the definition of the word "session" which has two meanings--anytime before sine die adjournment, or the daily assembly of the body.

Mr. Thorpe asked why bills have to be signed at all. He suggests removing that requirement altogether.

Mr. Brown proceeded to several other matters, not part of the committee report. He suggests consideration of section 16 of Article II, pointing out the necessity of the motion to dispense with the complete reading of a bill. He suggests requiring reading by title only. Mr. Thorpe noted that the motion to dispense with the reading is made only on second reading anyway, and that the Supreme Court has ruled that this provision is not mandatory.

The Lt. Governor urged consideration of section 31 of Art. II, dealing with legislative compensation.

Mr. Skipton read a statement prepared by Sam J. McAdow of the Senate Clerk's office for Senator Taft. Mr. Taft was absent. The statment urges elimination of certain provisions in section 16 of Art. II (three readings on separate days, one subject and repeal of amended sections) and insertion of reading "by title only"

rather than reading the entire bill. The statement indicated concurrence with the change in section 17 (eliminating the signing of the bills in the presence of the house) and pointed out, as noted before, the dual meaning of the word "session." The statement further noted the new provisions requiring that a legislator remain a resident of his district during his term, and pointed out that this would cause a hardship in the case of reapportionment since he could not remain a resident of his district if he had to move into another district because his original district was changed. Further, the statement noted that the day a person becomes a candidate is open to varying interpretations.

Mr. White noted that the provision requiring that a bill have only one subject prevents the attachment of riders to bills in Ohio, as happens in Congress.

Mr. Skipton noted that part of the reason for the committee's proposals regarding legislator residence was because reapportionment will make it difficult for a member to have been a resident of his district for one year prior to election in a reapportionment year. He further stated that the proposal to require residency on the day a person becomes a candidate was intended to be as broad as possible, so that as conditions change or as election laws change, the Constitution will not have to be changed.

The chairman invited other comments. Mr. Carter referred to Art. II, Sec. 4, dealing with compatibility of public offices. He suggested that the phrase "except as expressly provided by law" be added to the end of the proposed section in order to give the General Assembly flexibility to define the types of public office which are inappropriate for a member of the General Assembly to hold.

Mr. Skipton noted that there was additional research on the question of compatibility, and the committee would possibly wish to consider this section further. Mr. Carter noted that there are two sides to this question, whether the General Assembly should be given the power to determine incompatible offices since they are ultimately responsible for this decision to the voters, or whether this is a matter which should be strictly regulated by the Constitution.

Mr. Russo noted the proposal to remove section 5 and expressed his opinion that its removal might enable the General Assembly to enact even more restrictive measures for eligibility for the General Assembly than this section. He believes that, presently, the General Assembly cannot enact more restrictive requirements for eligibility than provided in the Constitution. Several others noted that this is subject to other interpretations. Mr. White stated that it was possible the legislative body might establish other qualifications. It was noted that the Constitution presently permits the General Assembly to deny the franchise to certain types of people, and that you must be an elector to qualify for public office. Mrs. Orfirer questioned whether the omission of an item from the Constitution denies the legislature the power to enact. Considerable discussion ensued.

Mr. Skipton asked for further comments, section by section. There being no further comments, the meeting was adjourned.

League of Women Voters of Ohio
65 S. Fourth St. Columbus, Ohio 43215

STATEMENT TO THE COMMITTEE TO STUDY THE LEGISLATURE
OF THE OHIO CONSTITUTIONAL REVISION COMMISSION
Regarding Committee Recommendations
by Mrs. Richard M. Brownell, Chairman
LWV Constitution Committee
on October 6, 1971

The League of Women Voters of Ohio believes a state constitution should provide for a structure of government responsive to the needs of the people of Ohio. In order to achieve this a constitution should be flexible and concerned with fundamental principles. It should be clearly written, logically organized and consistent.

Members in all 74 local Leagues studied the Legislative Provisions of the Ohio Constitution in 1969-70. At that time our members agreed that the Legislative Article should provide that the General Assembly meet annually and that the provisions dealing with its organization and power should be broadly stated. Under those broad principles the League supports the following recommendations of the Committee to Study the Legislature: 1) The repeal of Section 5 of Article II and the repeal of Sections 15 and 22 of Article IV. 2) The proposed changes to Section 7, 11, 14, and 17 of Article II and one of the proposed changes to Section 25 dealing with annual sessions. We have no position for or against the other proposed changes.

The League of Women Voters of Ohio agrees that Section 25 of Article II should read: "The General Assembly shall convene each year . . ." Although in 1968 the Legislature passed a bill which included a provision for the legislature to meet annually, the League feels it would be more consistent to change Section 25 to state that the General Assembly meet each year. This provision would strengthen the power of the Legislature and also insure its ability to deal with problems as they arise.

The League agrees that Section 5 of Article II should be repealed. This provision deals with a specific prohibition of who shall hold office, which is not necessary to the constitution. It could be adequately handled by statutory law or by a rule of the legislature.

Sections 15 and 22 of Article IV are both outmoded provisions which no longer need to be in the constitution. A constitution should be brought up to date and remain flexible for changing times. Detailed and short term items are better left to statutory law.

The League questions the repeal of Section 10 of Article II. This section provides for the right of members to protest and to have this protest entered in the Journal. It does not seem to be a completely procedural matter, but rather a protection of the minority party or a minority group within the legislature. This provision gives them a chance to make public in the Journal their objections to some action taken in the General Assembly. This provision was most recently used in late May or early June of this year during the budget vote in the House. The wording of the amendments offered by the Democrats was not included in the Journal of May 28. The following week the Democrats, under this right to protest, had recorded in the Journal their proposed amendments. This sort of procedural matter would most likely be written in the rules of the legislature and the rules are written by the majority party. Therefore, it might be necessary to keep Section 10 of Article II to guarantee the rights of the minority party to protest.

The recommendations by the Legislative Committee to change the wording in Sections 7, 11, and 14 of Article II to bring them in line with current practice and to make the constitution more consistent conform with the League criteria of a good constitution. A constitution should be clearly written, kept up to date, logically organized, and consistent. Section 7 recognizes the fact that each house of the General Assembly should organize itself. These details should be in the statutes or in the rules of the Senate and the House and not in the constitution. Section 11 changes the word 'appointed' to 'elected' to make this section consistent with other sections of the constitution which state 'elected' members of the General Assembly. Section 14 increases the length of time either house may adjourn without the consent of the other house from two to five days, which is more consistent with current practice.

The suggested change in Section 17 of Article II falls into a similar position of bringing a provision up to date and more consistent with current practice. Signing of bills is more properly a matter for statute or rules of the legislature and this amendment adds desired flexibility and allows for the possibility of change in procedure as the legislative business becomes more computerized.

The League does not have any stand for or against the other proposals of the Legislative Committee. We would point out that both the proposal to allow the presiding officers to call a special session and the proposal to allow both the House of Representatives and the Senate to choose their presiding officers in effect strengthen the power of the legislature. This may very well be what the people of Ohio want in the future. The League believes it is important that both the executive and legislative branches of government be responsive to the needs of the people of Ohio. We hope that any changes in the balance of power between these two branches of government will continue to provide the kind of effective government Ohio needs.

The final proposed changes deal with eligibility and qualification for members of the General Assembly. The League again has no position for or against these proposals. We would only urge that any proposals for change in this or other areas of the constitution be carefully considered to allow for maximum flexibility for the provision to be applicable not only for today but for the future as well.

The League of Women Voters is impressed by the dedication of a number of the Commission members to the time-consuming work of constitutional revision. Carefully considered recommendations for constitutional revision can be of tremendous benefit in easing many of the governmental problems of the state of Ohio. We commend the Legislative Study Committee of the Ohio Constitutional Revision Commission for moving ahead with this important task.

Ohio Constitutional Revision Commission
Legislative-Executive Study Committee
November 15, 1971

Summary of Meeting November 10, 1971

The Legislative-Executive Study Committee met on November 10, 1971 in the Commission offices. Present were Chairman Skipton, and Messrs. Taft and Montgomery.

Chairman Skipton opened the meeting by announcing that its primary purpose was to reconsider matters referred back to the committee by the Commission at its meeting of October 19, 1971, restudied and revised, some with major revamping, with a view to resubmission to the Commission on November 18, 1971.

The following is a summary of the items considered and the discussion of each at that meeting.

1. Proposal for Annual Sessions and Special Sessions

The proposal to amend Art. II, Sec. 25, providing for annual sessions and authorizing the convening of special sessions by presiding officers of each house, was reconsidered by the Committee, in the same form as submitted to the Commission. The annual sessions portion was favored by all but one member of the full Commission present at its meeting of October 19, 1971. Consideration of the special session provisions had raised two questions to which the committee gave its attention: (1) whether a percentage of the membership of each house should request the call for a special session, as four members had favored at the Commission meeting; and (2) the matter of assuring that if presiding officers are to be given such authority, that they should be elected from the membership of both houses. Section 25 was re-referred for the specific purpose of making certain that the presiding officer of the Senate for this purpose would be elected, and staff indicated that this matter is taken care of in a package amendment, governing the election and duties of the Lieutenant Governor.

The committee members expressed themselves as still in favor of having presiding officers make the special session determination and call and asked that the position developed at the public hearing in favor of this alternative be added to the Commentary for resubmission.

2. Lieutenant Governor: election; substitution of executive for legislative duties

Chairman Skipton explained that the composite revision of sections in Articles II, III, and V is to provide for team election of Governor and Lieutenant Governor and to set out the duties of Lieutenant Governor, in addition to providing that the President of the Senate be elected from its membership. In other words, the original provision, amending only Art. II, Sec. 8 has been greatly expanded.

In the discussion of Article II amendments, Mr. Montgomery pointed out that Section 8 is cumbersome and could be improved by a division of its provisions into separate paragraphs. Question was raised as to whether the provision of Art. III, Sec. 16 that the Lieutenant Governor perform duties delegated by the governor and prescribed by law would require that exercise of duties and powers would require the appropriate authorization of both branches of government. Staff indicated that this is an "and/or" situation. And can be used in a cumulative sense and its use does not necessarily mean that both conditions be met. As proposed, the section means that the Legislature or the Governor can prescribe duties, according to the interpretation of staff. Chairman Skipton agreed that courts would normally construe "and"

to mean "and/or" in such usage.

Dissatisfaction was expressed over the term "delegated" to describe those duties of the Lieutenant Governor emanating from the Governor. Chairman Skipton suggested "assigned" as a more appropriate term, and the committee agreed. The committee also agreed on a proposal by Mrs. Hunter to re-write the new matter of Art. III, Sec. 16, for clarity, to read as follows:

"PERFORM SUCH DUTIES IN THE EXECUTIVE DEPARTMENT AS ARE ASSIGNED TO HIM BY THE GOVERNOR AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY LAW."

Next the original revision of Art. II, Sec. 8 was discussed, Mr. Montgomery noting that the sentence was awkward and could be divided because of the differing subject matter of the two clauses. In the ensuing discussion it was pointed out that the section contained mandatory and permissive provisions, and that the two could be separated. As originally proposed Section 8 contained one clause requiring each house to choose its own officers and another giving it all powers necessary for stated purposes. Other sections in Article II detail powers of the General Assembly, said Mr. Skipton, and some rearrangement would be logical. It was finally decided that Section 6 (subject matter of which is powers of each house, including power to compel attendance of absent members) is the logical place to put power to punish members for disorderly conduct, now a part of Section 8. Moreover, Section 7, having to do with the organization of each house, is a better place for inclusion of the provision governing choice of officers. Staff was instructed to make this division for cohesion and coherence and to provide the Commission with a clearer choice of alternatives.

3. Constitutional Procedural Requirements for Passage of Legislation--A Consolidation of Sections 15, 16, 17, and 18 of Article II.

Chairman Skipton described the consolidation of provisions submitted under the above title a "radical revision of Section 16." He pointed out that it represents an effort to put in one section of the Constitution all procedural requirements for passage of a bill. These include requirement for majority concurrence, the style of laws in Ohio, multiple "readings" of a bill and all steps leading up to presentation of an enactment to the Governor for his consideration.

Mrs. Hunter told the Committee that the package lacked a section dealing with passage over veto, which had been removed from present Section 16 and not yet incorporated into another section. Some discussion followed as to whether the procedure for consideration over veto should be changed.

Mrs. Hunter asked whether or not there should be provision for the Legislature to convene to consider vetoes made after adjournment--i.e. whether special veto sessions should be provided for. Chairman Skipton responded that the adjournment resolution currently provides for recess for the purpose of considering vetoes. It was agreed that the problem of veto after adjournment was insignificant. Mr. Skipton noted that only if measures were passed on December 31, then vetoed early in January would the question arise under present provisions because the General Assembly recesses until after opportunity to veto has passed. Mrs. Eriksson pointed out that even in the event of an adjournment sine die, the General Assembly could convene in special session if necessary under the proposed amendment to Art. II, Sec. 25. It was agreed that no special provision is necessary.

Whether the 3/5 majority necessary to repass should be changed was the next matter to be considered. Comment pointed out the reluctance of the committee to raise special majorities. An increase (e.g. to 2/3 majority) could create problems in a state as evenly divided as Ohio.

A third topic discussed on the question of passage over veto was whether the Governor should have power to reduce items in addition to the power to make item vetoes. Committee members agreed that if the Governor is to be given additional control over the spending of public moneys, such control should be related to the budgetary process--over spending--and not over the appropriation process. Item reduction was rejected.

Mrs. Hunter then explained the derivation of each paragraph of the consolidated procedure section. She noted that another gap in the package before the Committee was the revision of Section 9, requiring the keeping of journals, from which was taken the requirement for at least a majority concurrence in the passage of bills. The latter portion of Section 9 is a logical part of the new section, and Section 9 should be amended to show that the passage portion has been deleted for the purpose of incorporation here. She indicated that the revised Section 9 would be ready for submission to the Commission for its meeting on November 18, 1971.

The committee discussed the proposal of paragraph (C) in the procedural section that bill reading be replaced by a provision for "consideration" of a bill on three different days. The committee agreed that provision for "reading" of a bill, even by title is archaic. The section as proposed would still carry the protection that three days must elapse between introduction and passage.

Chairman Skipton pointed out that a radical departure from present practices is the requirement that the bill and amendments be distributed to all members prior to passage. Question was raised as to whether this would apply to so-called "clerks' amendments"--generally regarded as nonsubstantive in nature. The committee agreed that it would apply to such amendments, even changes in punctuation, offered for the purpose of compliance with the rules of code revision. Mr. Montgomery expressed the consensus of the committee on this point when he stated that reproduction of bills and amendments is no longer a problem and that every member should know exactly what he is voting upon. Question was raised about the practice in New York of requiring that copies of the bill <u>in final form</u> be available three days before passage. Mrs. Hunter pointed out that the constitutional provision in New York specifically prohibits floor amendments. The Model State Constitution adopts the three day availability provision but is silent as to floor amendments. Because of the tradition of floor amendments in this state, the Committee members did not favor adopting the three day rule. It was assumed that if such a proposal were adopted, there would have to be provision for recommitting bills to committee.

Paragraph (D) contains the prohibition against bills containing more than one subject and the additional provision that "no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed." Considerable discussion ensued on the meaning of the quoted provision which was removed without change from present Art. II, Sec. 16. Mrs. Eriksson explained that its purpose is to prevent the passing of an act by referring to a prior act that has either been repealed or has been declared unconstitutional Passage of acts "by reference" is the evil at which this provision is apparently aimed, she explained. Mr. Skipton added that it prohibits

revitalizing a lapsed appropriation. If authority to make expenditures is to be reinstituted, it must be spelled out again and not by reference to an earlier appropriation.

As a sideline to this issue Mrs. Eriksson stated that there has been some interest in allowing introduction of the "short form bill." However, even if such a procedure were favored, she added, a bill could be introduced in incomplete bill form, but it would still come out of committee in a form meeting constitutional requirements. The present section would probably not prevent such a practice. The committee declined to take a position on the practice and favored retaining the present requirements. Mr. Skipton pointed out that computer written bills have eliminated much of the irritation that the present provision causes.

The quoted portion of Paragraph (D) uses the terms "act" and "law" and question was raised as to whether the terminology is consistent. Mr. Taft asked, "Does this really mean 'No act shall be revived and no law amended unless the new act contains the entire act revived or the section or sections of the law amended?'" Mrs. Eriksson questioned whether if by changing the provision to read that an act cannot be revived, the prohibition would continue to apply to the carrying forward of a particular appropriation item, prior to the lapsing of the appropriation act. She reiterated that the importance of the present language (unchanged in the proposal) is that it prevents incorporating by reference, a practice that keeps the reader of the act from knowing what the law contains.

Mr. Taft asked about the meaning of "section or sections" being amended and specifically whether this refers to Revised Code sections only. Replying that the provision is not so limited, Mrs. Eriksson stated that the Legislative Service Commission has advised that in amendment to an appropriation act the entire section must be repeated. The same rule applies to many special acts--i.e. acts without Revised Code sectional designations. Pursuing this same line of questioning, Mr. Taft asked why if Section 1 of an act is the enacting section for 10 Revised Code sections, one of which is changed a year later, Section 1 of the original act does not have to be repeated. Why, in other words, can the change be made by including only the one Revised Code section and not the section of the original act. In such a case, Mrs. Eriksson explained, the entire act is not being amended, only the law, which happens to be a Revised Code section. Thus, the entire section of any Revised Code section being amended must be repeated in full. The prohibition against the revival of laws has been applied so as to prevent enactments by reference. The revival portion of the section applies to appropriations as well as to cases where a law has been declared unconstitutional, she continued, and if the legislature wants to correct the unconstitutionality, it must do so by enacting the whole law over again. Moreover, an act that is a special act is law just as much a law as an act that contains Revised Code sections. It is for this reason that the prohibition on revival and amendment is written in terms of "no law."

The committee concluded discussion on this matter by deciding to leave the provision as is because apparently there have been no problems with its interpretation and it would be difficult to make the prohibition any clearer than it is at present. Similar sections from the constitutions of other states, including constitutions recently revised were examined; a style amendment was adopted by substituting 2 sentences for the compound sentence in (D).

Another matter discussed by the committee was a point raised by Jefferson B. Fordham in an article from the May 22, 1950 Ohio Bar Association Report--that Section 1c of Article II does not appear to have been clearly coordinated with the legislative

procedure provisions of Section 16 of that article. Section 16 declares that a bill becomes law when signed by the governor. Section 1c makes most bills take effect at the expiration of 90 days after filing in the office of the Secretary of State, and subject to further delay should a referendum petition be filed. It is silent as to effective date of a measure enacted over veto.

Mrs. Eriksson suggested that the language in 1(c) should be reconsidered, but added that this is a part of the subject of initiative and referendum, to be considered at a later date, along with other proposals affecting emergency measures. There was general discussion about the meaning of the provision in present Section 16 that a bill becomes "law" when it does not take effect for 90 days or longer under Section 1(c). Mr. Taft commented that this tags the point at which action of the legislature comes to an end but asked what is meant by saying that something is law if it is not yet in effect. Mr. Skipton was troubled by the fact that a reading of Section 16 by an ordinary citizen would lead him to believe that it is at this point that a "law" must be complied with. He stated that a constitution, being a citizens document, should be easily understood. If one has to look elsewhere for the "operative" effect of legislation, it becomes complicated.

Mr. Taft asked when an emergency bill becomes effective--when signed by the Governor or when filed with the Secretary of State. Mrs. Eriksson responded that such a bill apparently goes into effect when filed, simply because he puts an effective date on it. As a legal matter the answer is uncertain; the question can only be answered from the standpoint of what happens in practice.

Mr. Skipton pointed out that the effective date of a measure is subject to two delays--the 90 day provision and referendum. He would like some cross reference from Section 16 to sections 1(c) and 1(d).

A conflict was acknowledged between the provision in Section 16 that a bill "shall become a law" upon signature of the Governor and other sections referring to filing. The committee decided to retain the language of Section 16 (as revised) to avoid the result that nonfiling would prevent a measure from becoming law. Cross referencing at this point was not adopted because of the possibility of revision and renumbering of sections 1(a) through 1(g).

The question was raised as to whether an effective date can be postponed beyond 90 days. Mrs. Eriksson responded that the Secretary of State has interpreted the constitution to mean that the effective date of an entire act cannot be postponed and that for this reason extended effective date language has been written in recent years to apply only to portions of a bill--e.g. to Section 1.

Another matter discussed involving Section 16 is the situation of conflict where two bills affect the same Revised Code section and the bills have different effective dates. Mr. Skipton stated that the most recent expression of the General Assembly should prevail in such a conflict situation. The point was made that the Legislative Service Commission tries to catch such conflicts and submits amendments to avoid them. Mrs. Eriksson pointed out, however, that there are situations when nothing can be done about such a conflict when, for example, the legislature does not want to include changes made by the bill first passed in the bill passed later because it is not desired that the changes from the first bill take effect immediately. It is the requirement that amended sections must be set forth in full that causes the problem but the committee decided that it could do little but acknowledge the problem because it could not, by constitutional language, attempt to settle all conflict problems that result;

Section (E) of the new section contains the provision of present Section 17, requiring presiding officers to sign bills. Mr. Skipton pointed out that it has been re-written to state that such signatures serve the purpose of certifying that procedural requirements for passage have been met. The new language also contains specific provision for transferral to the Governor. The committee decided to take note of Mr. Fordham's criticism referred to above and to include in the veto provisions (1) a requirement that a bill passed over veto must be filed with the secretary of state and (2) a provision as to when it "becomes law." It was agreed that a new provision on veto be included in the package for submission to the full Commission on November 18 and that the section should be retained in Article II even though it affects executive powers as well.

It was agreed that one section, probably designated as Section 15 in Article II, would include all material relative to bill passage, through presentation to the Governor for approval. A second section, probably 16, would include provisions for veto, passage over veto, and the new matters referred to in the preceding paragraph.

The proposal before the committee provided that signed bills be presented to the Governor "within three days of passage." There was comment to the effect that this time limitation is impractical. The only time limit in the present Constitution, it was noted, is that bills must be signed while the General Assembly is in session. There was some discussion as to whether a time limit on signing should be inserted and a decision that Ohio has had no problem with presiding officers holding bills and the committee does not want to put in an arbitrary provision that could be ignored.

In its re-review of paragraph (C) the committee decided that although the present Constitution allows 2/3 of members to "dispense with the rule" on 3 readings (proposed to be changed to considerations) a more accurate phraseology is "suspend the requirement" and the change was adopted.

The final item to be considered was a proposal for combining Sections 4 and 19 of Article II, having to do with compatibility and eligibility, along with a new provision covering conflict between private interests and public duties. Mr. Montgomery was of the opinion that the compatibility section should exclude reserve officers in addition to officers of the state militia. Mr. Taft questioned the retention of the term "emoluments" in the portion of the Section that was derived from Section 19. What is meant by this term, he asked. Mr. Skipton read a dictionary definition that uses the term "profit arising from" office. It was agreed that reimbursement for expense would not be included. Perquisites (including the providing of an office or secretary) could be included. It was agreed that the term "compensation" would probably be adequate, and Mrs. Hunter was asked to give this matter further study.

The Committee then discussed the proposal for mandating laws governing conflicts of interest. Mr. Skipton questioned the singling out of the General Assembly for this purpose. There was discussion as to whether the proposal, calling for laws "regulating" conflicts would go beyond a statute requiring financial disclosures. Mrs. Hunter was directed to give this matter further study in the hope that language can be developed that would clearly cover disclosure statutes, if the Committee decides to go along with the idea of such a provision generally.

Ohio Constitutional Revision Commission
Committee to Study the Legislature
June 9, 1971

Research Study No. 5

Qualifications of Legislators

Under Art. II, Sec. 3, Ohio Constitution, senators and representatives "shall have resided in their respective districts one year next preceding their election; unless they shall have been absent on the public business of the United States or of this State."

They are also subject to Art. XV, Sec. 4, providing that "(n)o person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. Under obviously archaic provisions of section 5 of the same Article XV, ~~due~~ lists are ineligible for office.

From the requirement of Article XV, Sec. 4 that persons elected or appointed to office be "possessed of the qualifications of an elector" one must look to Article V, Sec. 1 for definition of "elector." This section provides in part:

> "Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

Section 6 of Article V denies the privileges of an elector to an "idiot, or insane person."

Section 4 of Article V provides: The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime."

Finally, Section 5 of Article II provides the further restriction that:

> "No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this State; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury."

Pursuant to Section 4 of Article V the Ohio General Assembly has disenfranchised felons and made them ineligible to hold office under Revised Code sections 2961.01 and 2961.02 as follows:

> "Sec. 2961.01. A person convicted of a felony in this state, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust or profit. The pardon of a convict restores the rights and privileges so forfeited, but a pardon shall not release a convict from the costs of his conviction, unless so specified."
>
> Sec. 2961.02. A person who has been imprisoned in the penitentiary of any other state of the United States, under sentence for the commission of a crime punishable under the laws of this state by imprisonment in the penitentiary, is incompetent to be an elector or juror, or to hold an office of honor, trust or profit within this state unless he has

received a pardon from the governor of the state in which he was imprisoned."

The question of "eligibility" to a seat in the General Assembly, determinable under Art. II, Sec. 4 and involving the holding of office "under the authority of the United States, or any lucrative office under the authority of this State" will be examined in an accompanying memorandum, reporting the interpretations of this section under the broad heading of "eligibility."

The purpose of this memorandum is to report upon qualifications regarding age, residence, and elector status under the constitutions of the 50 states. Elements of the category of elector status are not always noted. The memorandum concerns itself chiefly with the legislative article in each case. In addition, a criminal conviction disqualifies a person from being a legislator in Arkansas (Art. 5, Sec. 9), Kansas, Mississippi, Nevada, Oklahoma, South Dakota, Virginia, West Virginia, and Wisconsin. United States citizenship is specifically required in Main (5 years), New Jersey, New York, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Washington, and Wyoming.

State	Age	Elector Status[1]	State Residence (next preceding election)		District Residence (next preceding election)
Ala.			3 years	BOTH[2]	1 yr. and reside in dist. during term.
Senator	25				
House	21				
(Art. 4, Sec. 47)					
ALASKA			3 years	"	1 year
Senate	25				
House	21				
(Art II, Sec. 2)					
ARIZONA					
Senate	25				
House	25				
(Art, 4, Sec. 2)			2 years	"	1 year
ARKANSAS[3]			2 years	"	1 year
Senate	25				
House	21				
(Art. 5, Sec. 4)					
CALIFORNIA					
(Art. 14, Sec. 2)		Elector	3 years	"	1 year
COLORADO					
Senate	25				
House	25				
(Art. V, Sec.4)				"	12 months
CONN.					
Senate	21	Elector	6 mos.		Qualifications of electors to be decided at times and in manner prescribed by law.
House	21	Elector	6 mos.	"	
(Art. 3 - Amendments proposed by HJR No. 160 (1969) would have added residence in district from which elected)					
DELAWARE					
Senate	27				
House	24				
(Art. 3)			3 years	"	last year inhabitant of district
FLORIDA					
Senate	21	Elector	2 years	"	be resident of district
House	21	Elector			
(Art. 3, Sec. 15)					
GEORGIA					
Senate	25		4 years		1 year
House	21		2 years		1 year
(Sec. 2-1701,1801)					
HAWAII					
Both Houses Majority (20)			3 years	BOTH[2]	Qualified voter of district (registered in accordance with law
(Art. II, Sec. 7)					
(Legislature may prescribe further qualifications Art. III, Sec. 9)					
IDAHO					
Both houses	none	Elector	None	"	1 year
(Art III, Sec. 6)					
ILLINOIS[3]					
Senate	25				
House	21		5 years	"	2 years
(Art. 4, Sec. 3, 4)					
INDIANA					
Senate	25				
House	21		2 years	"	1 year
(Amendment proposed by SJR 26, Acts 1969 Ch. 464, p. 1858 changes "inhabitant to resident and reduces residency in district to 6 months)					

State	Age	Elector Status	State Residence		District Residence
IOWA		Elector	None	BOTH	1 year
Both houses					
(Art. III Sec. 6)					
KANSAS					
Both houses	none		---	---	---
(Art. 2, Sec. 4, 6)					
KENTUCKY					
Senate	30		6 years		last year
House 24			2 years		last year
(Sec. 32)					
LOUISIANA					
Senate	25				
House	none		5 years	BOTH[2]	3 months
(Art. 3, Sec. 9)					
MAINE					
Senate	25				
House	21		1 year	"	3 months
(Art. IV, Sec. 6)					
MARYLAND					
Senate	25		3 years	"	last year
House	21				
(Art. III, Sec. 9)					
MASS.					
Senate			5 years		inhabitant of
House					district
(Pt. 2, C.1, Sec. 2, Art. V)					
MICHIGAN					
Botn houses	21	Elector	6 years	BOTH[2]	Set by law
(Removal of domicile from district shall be deemed vacation of office.)					
(Art. 4, Sec. 7)					
MINNESOTA					
Both houses		qualified	1 year	"	6 months
(Art. IV)					
MISS.					
Senate	25		4 years	"	2 years actual
House	21				resident
(Art. IV Sec. 41-43)					
MISSOURI					
Senate	30	qualified voter of state 3 years			1 year
House	24	qualified voter of state 2 years			1 year
(Art. III, Sec. 4, 6) - In both cases, district residence of 1 year qualified by provision "if such ...district shall have been so long established, and if not, then of the ... district from which the same shall have been taken)					
MONTANA					
Senate	24	Citizen			12 months
House	21				
NEBRASKA					
(Art. III, Sec. 2)	Elector				1 year
NEVADA					
NEW JERSEY					
Senate	30		4 years		1 year
House	21		2 years		1 year
(Art. 4, Sec. 1, par. 2)		(as further prescribed by legislature)			
NEW MEXICO					
Senate	25				Maintain residence
House	21				Maintain residence
(Art. IV, Sec. 3)					

State	Age	Elector Status	State Residence		District Residence
NEW YORK					
Both houses (Art. III, Sec. 7)	none		5 years		12 months* (*subject to exception - "if elected a senator or member of assembly at the first election next ensuing after a readjustment or alteration of the senate or assembly districts becomes effective, a person to be eligible to serve as such, must have been a resident of the county in which the senate or assembly district is contained for the twelve months immediately preceding his or her election.")
NORTH CAR.					
Senate	25	qualified voter	2 years		1 year
House	none	" "	none		1 year
NORTH DAK.					
Senate	25	qualified elector	2 years		
House (Sections 28, 34)	21	qualified elector	2 years		
OKLAHOMA					
Senate	25	Both qualified electors		BOTH[2]	Residence during term
House (Art. V, Sec. 17)	21				
OREGON					
Both houses (Art. IV, Sec. 8)	21		none		1 year inhabitant
PENNA.					
Senate	25		4 years		Both "inhabitants" of respective districts 1 year and "shall reside in their respective districts during term..."
House	21		4 years		
RHODE ISLAND		Nothing found			
SOUTH CAR.					
Senate	25				elector of district
House (Art. III, Sec. 7)	21				elector of district
SOUTH DAK.					
Senate	25	qualified elector	2 years		
House	25	" "	2 years		
TENNESSEE					
Senate (Art. II, Sec. 9, 10)	30		3 years	BOTH[2]	1 year
TEXAS					
Senate	26	elector	5 years		last year
House (Art. 3, Sec. 6)	21		2 years		last year
UTAH					
Both houses (Art. VI, Sec. 5)	25		3 years		1 year
VERMONT		nothing found			
VIRGINIA					
Both houses (Art. IV, Sec. 44)	21		1 year (elector)		county, city or town-6 months precinct-30 days (elector)
WASH.					
Both houses (Art. 2, Sec. 7)	none	qualified voter of district in which chosen			
W. VIRGINIA					
Both houses (Art. VI, Sec. 13)	none		none		1 year

State	Age	Elector Status	State Residence	District Residence
WISCONSIN				
Both houses (Art. IV, Sec. 6, Art. III, Sec. 1)	21		1 year	as may be prescribed by law, not exceeding 30 days
WYOMING				
Senate	25		none	1 year
House	21		"	"
PUERTO RICO				
Senate	30 years		2 years	1 year
House	25 years (able to read and write in English or Spanish)			

[1] Requirement that person be an elector or voter to be eligible for the legislature found in the legislative article of the indicated states.

[2] Residence requirements identical for Senators and House members.

[3] The new Illinois constitution (effective July 1, 1971, makes the age 21 for both houses, requires U.S. citizenship, and eliminates the 5-year state residency requirement.