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Ohio Constitutional Revision Commission
Elections and Suffrage Committee
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Summary

The Elections and Suffrage Committee met on July 23 at 9:30 a.m. in the Commission offices in the Neil House. Present were committee chairman Katie Sowle, Richard Carter and Senator Robert Corts. Roy Nichols attended, representing the Secretary of State's office, and Edith Hilliker represented the League of Women Voters. Staff members present were Ann Eriksson, Director, and Brenda Avey.

Mrs. Eriksson explained the recent Ohio Supreme Court decision regarding the use of voting machines in general elections, and the need, in the view of the Secretary of State, to attempt to move the committee's proposed language for ballot rotation through the legislature quickly.

Mrs. Eriksson: The Secretary of State's office would like to have the Constitutional Revision Commission's support in this effort. Roy Nichols is coming to try to present their position. A problem with that is that the Commission did not react favorably to making a special effort on the bedsheet ballot proposal. So it depends upon whether you are convinced of the necessity to convince the commission of the necessity to give this section priority. Putting it on the ballot even in November isn't going to solve the problem, because the November ballot is still going to be controlled by the court decision. The Secretary hopes that having the General Assembly act on it will assure boards of elections that there is relief coming, and that they only need to make special effort for this November election and that they don't have to buy a lot of new machines. Now, they may do it by combining precincts temporarily - that's one possibility. Where you have two precincts, each with one machine, you could conceivably combine those two precincts. You're still going to have a lot of problems, but you could do this. So, for this November, there may be temporary solutions, if the boards of elections can see that ultimately the voters are going to be asked to vote on a constitutional amendment which will enable different kinds of legislation. The Secretary of State originally wanted rotation by precincts, but this committee rejected that as having inherently unfair aspects, and that of course is what the court was recognizing. In addition, you wanted to avoid being that specific. But there could be other ways of doing it without this rigid rule of at least an even number of machines. And, of course, it's inherently unfair this way if you have an odd number of candidates for any position, having an even number of machines doesn't solve that problem.

Mr. Carter: The thing that scares me most about this Supreme Court decision is the question of each succeeding elector must be directed to a machine different from the machine utilized by the preceding voter. I wonder if they have any concept of what that's going to do. Because, you have some people taking 15 minutes at a machine. And that means that you can't by-pass him. In my precinct there are two machines, and if you have this situation, the line will just back up out to the street.

Mrs. Eriksson: And voters would not understand why they had to stand in a long line when there was a short line.

Mr. Carter: Or when there was a machine empty. There would be chaos.

Mrs. Eriksson: But the real problem is that there are not the machines available now in any event.

Mr. Carter: We must remember that the Commission is an arm of the legislature, an advisory group to the legislature, and if the legislative members would feel that we should push this matter, then I think it would be very appropriate to have the Commission take it up as a special item. Senator Corts, would you be in favor of that?

Sen. Corts: Absolutely.

Mr. Carter: Okay, do you think you could be of some help in talking to the other legislative members as you get a chance on this?

Sen. Corts: I could do that.

Mr. Carter: With that backing, it's proper for the chair to take the position that the matter is of such importance to the legislature that they would like to have us give this item special treatment.

Mr. Nichols: Some of the boards of elections are in a state of near panic on this thing. We're getting calls from all over the state. Some boards are talking about asking the Supreme Court to stay the execution of its judgment, but I don't know if that's a practical suggestion to make. I don't know if there is any way that they can suspend the operation of a section of the constitution, but they're grasping at straws - anything to avoid having to purchase such a tremendous quantity of machines. Automatic machines run over $2000 per machine. So, if you have a county that has to buy 300 additional machines, such as Franklin County, or 1100 as in Cuyahoga County, you can see why they're in a state of panic. Right after the suit was filed in 1972, we began work on a proposed constitutional amendment to anticipate the fact that the suit might be successful because the language of the constitution did tend to favor the plaintiff. We anticipated that the Supreme Court might even say that the use of machines is unconstitutional. In February of 1973, Mr. Brown asked the General Assembly to consider this amendment, and on several occasions he asked that the matter be pursued. As he is fond of saying, sometimes the dam has to break before anyone really realizes that there is a problem, and that came with the court decision. He felt that perhaps the court was waiting to see what action would take place before rendering the decision, hoping that an amendment would come about that would make the decision unnecessary. The boards are faced with a major problem. If they don't want to buy the machines, then they have to convert some of their precincts to paper ballots, which will involve some expenditure but not as much as the purchase of additional machines. The decision applies to a general election, but not a primary. The problem will be with us this November no matter what we do - even if we get the issue on the November ballot, that would still not eliminate the fact that we're stuck with the decision for this election and we will have to make some kind of adjustment to meet it. Right now, Mr. Brown is contemplating asking the General Assembly to possibly reimburse the counties for some of the costs. He does feel that, if possible, the matter should be put on the ballot this November. And if it's not...

Mr. Carter: Next June would still do the job. That would have the same practical effect as passing it in November. The only thing is that you'd have more assurance if the people knew it was in the works.

Mr. Nichols: Yes. The decision doesn't apply to the primary. The only difference is that if a resolution were passed this summer, a lot of boards might decide to hold off on purchasing all of the extra machines, and wait to see what the voters decide, and will have a temporary solution. If they don't have any hopes that there

is going to be a solution, they might decide that the thing is going to be permanent and they might as well go ahead and buy the machines. And then if you have a reversal later, you've bought a lot of equipment that you don't need.

Mr. Carter asked Mr. Nichols to attend the Commission meeting in the afternoon to answer questions.

Mr. Carter: Let's see what we can do to move expeditiously on this matter. I reviewed this last night, the language, the Supreme Court decision, the write-up and so forth. Really the reason for this is to prevent an abuse of the elective process, such as, like in California always having the incumbents' names first. Any election has elements of chance in it. So I think really what the objective of this is, as far as I'm concerned, is to prevent a priori rigging of the election process to favor a candidate. I don't think that it's feasible to have perfect rotation. And furthermore, I don't think it's all that important to try and make it that perfect. Where you run for office, you've got many more things that are a lot more chancy then where your name might be ending up on the ballot, provided that it couldn't be decided in advance that someone was going to have an advantage. This is just one of the many elements of chance that are involved in running for office.

Mr. Nichols: One of the ironies, I think, is that the constitution requires the near perfect rotation in a general election but not in a primary. A primary is far more likely to have a multiplicity of candidates. For example, at the last primary, the Democratic Party had 11 candidates for lieutenant governor and I would think that rotation would make a far more difference in that kind of a race than it would in a general election.

Mr. Carter: Why is it limited to a general election?

Mr. Nichols: I have no idea.

Sen. Corts: My guess would be that people who vote in a primary ordinarily go to the primary to vote for a particular candidate or they're party people who know what's involved, whereas, people who vote in a general election want to vote for president, or they may want to vote for senator, but the rest of the things on the ballot they don't know much about. I think the placement of the name on the ballot, under those circumstances, means a lot. We had this come up in the Senate last year, where one of the Senators had his name first on the ballot almost 100% in one county, and the Supreme Court took evidence on that and they had experts who apparently know something about it who testified that indeed it does make a difference whose name appears, at least when there are two names. Maybe when there are 9 or 10 or 100 names, it may not make such a difference, but where there are two names, it does make quite a difference.

Mr. Carter: Why shouldn't it apply to a special election, or a primary election?

Mrs. Eriksson: I don't know why the section applies only to a general election except that the constitution does not and traditionally has not, dealt with primary elections very much. Primary elections were a newcomer to the scene and only section 7, the bedsheet ballot section, dealt with primary elections.

Sen. Corts: It used to be done by caucus until about 10 years ago, and I think there are some places that still nominate by caucus.

Mrs. Eriksson: There are some elections for which there is no primary, such as township trustees and small municipalities.

Mr. Nichols: The portion of the decision that's really mind-boggling is that if you have three or more candidates, then your rotation would not only have to take place within the precinct, but from one precinct to another. And that's going to make it almost impossible to use the solution of machines in one precinct and paper ballots in the next, because in paper ballot precincts, you rotate by ballot. How can you possibly have rotation from one precinct to another unless you were to use mechanical devices in every precinct?

Mr. Carter: Are we going to reconsider section 2a before we resubmit it to the Commission this afternoon?

Mrs. Eriksson: You might consider changing the word "possible" to "practical".

Mr. Carter: First, I want to consider whether we should not drop "general". Make it apply to any election. Is there any reason to limit that to a general election particularly since the constitution is liberalizing the things that can be put on at a special election, like the referendum?

Mr. Nichols: In a primary, you have such a large number of candidates in some contests. In order to arrive at the lowest common denominator for ballot variations, you're coming up with a much larger variety of printing. For example, in a general election you would have to have two candidacies or three, in which case six would be your lowest common denominator and you would need six different ballot formats in order to arrive at your perfect rotation.

Mr. Carter: But if we eliminate perfect rotation that's no longer a problem, if we were to take the position, which I think we are, that what you have to do is do the best you can, practically, to avoid giving any candidate a preferential treatment. And why should we limit it just to general elections?

Mr. Nichols: I think that even with language that would suggest that you have to do the best you can that a court that is presented with a case would still be prone to say that if the rotation was less than it could have been that it's defective.

Mr. Carter: Then let's drop this question until we've discussed the rest of it and then come back to it after we see what we're going to do with the rest of it. I really have a question whether we should limit it to general elections.

Mr. Nichols: Any election on issues is a special election even if it's held on the same day as the general election.

Sen. Corts: If you put this on next June's ballot, that would be a special election, too, because many areas do not have primaries.

Mr. Nichols: The primary itself is not the special election. The primary is the election at which candidates are nominated and a special election may be held at the same time.

Mr. Carter: The committee has already agreed as I understand to drop these changes in the parenthetical phrase. I agree with that.

Mrs. Eriksson: Especially if the section is going to go on ahead of the rest of the Commission's recommendations, since those changes relate to other proposals.

Mr. Carter: I was very concerned in reading the Supreme Court decision, in context with our phrase "wherever possible". I felt that they might go back and use the same kind of tortured reasoning to come up with their legislating as to how elections are going to be held, and I think it's a terrible mistake for a court to try and do that. There's no opportunity for the public to be heard and once it's done it's bad. So I think "wherever possible" is too strong, since that is the word in the present constitution. I suggest, and I seem to recall we discussed this before, the phrase "to the extent practical" rather than "wherever possible".

Mrs. Eriksson: Or you could just use the word "if". Maybe "to the extent" is a little stronger.

Mr. Carter: I want to weaken it as much as I can. And the other thought that occurred to me, can we drop that phrase entirely, or does that make it even stronger?

Mrs. Eriksson: That depends upon the construction of "reasonably equal treatment" and I have a feeling that that might strengthen it rather than weaken it if you drop the phrase altogether.

Mrs. Sowle: The important part of that sentence is "appropriate to the voting method used". As long as the court is reading that part of the sentence as conditioning the rest of it I think it's alright. In fact, I wondered if "wherever possible" is a problem in light of the words "appropriate to the voting method used".

Mr. Carter and Mr. Nichols both expressed concern.

Mrs. Eriksson: That's the language of the present constitution - "possible".

Mrs. Sowle: What's the difference between the word "practical" and "practicable"?

Mrs. Eriksson: I prefer practical to practicable, because if they both mean the same thing I prefer to use the simpler word.

Mrs. Sowle: Then "if practical".

Sen. Corts: Something seems to me to further confuse the matter. It seems to me that "wherever possible" is in the wrong place.

Mr. Carter: Yes, I was just coming to that same point.

Sen. Corts: You're talking about where the rotation is possible, not where equal treatment is possible. We should always give reasonably equal treatment but maybe it doesn't have to be done by rotation. "shall give each candidate reasonably equal treatment by rotation, wherever possible..."something like that.

Mr. Carter: Here's what I was going to suggest very similar to that. "...reasonably equal treatment by rotation or other comparable techniques practical and appropriate to the voting method used."

Mr. Nichols: I would just take out the "wherever possible" altogether, I think: Give each candidate reasonably equal treatment by rotation or other comparable techniques appropriate.

Mr. Carter: I'm afraid that taking out "wherever possible" might strengthen it.

Mr. Nichols: If you say, "by rotation or other comparable techniques" you're presenting the possibility of an option other than rotation, and that's what you're seeking to achieve.

Mr. Carter: But on the other hand, the court might argue that reasonably equal means that the same kind of reasoning that they applied in this thing. How about "reasonably equal and practical"?

Sen. Corts: It should be equal in every case, not just where it's practical. The treatment has to be equal. Now where you get that equal treatment is another matter. You may get it by rotation, you may get it by some other method, but it's the treatment that has to be equal, and I would think that's what the Supreme Court held.

Mrs. Sowle: Yes, it certainly was.

Mrs. Eriksson: Well, in that case, maybe this could say, "by rotation or other comparable techniques practical and appropriate to the voting method used".

Mrs. Sowle: "If practical" makes it very clear that you can give a higher rank of priority to practicality than to absolute equality.

Mrs. Eriksson: Where would you put "practical" - after "rotation"?

Mr. Carter: I still like "to the extent practical". "If" means to me that if it's not practical, you don't have to have any rotation, and that I don't think is what we want to do. "...rotation or other comparable techniques to the extent practical..." or "appropriate and to the extent practical..."

Mrs. Avey: Why isn't practical contained in "reasonably equal"? When you talk about reasonably equal treatment, doesn't that imply practical? If it's not practical, then it's not reasonable, and vice versa, I think.

Mr. Nichols: Why not "the names of all candidates shall be alternated on the ballot in the manner provided by law"? Just leave it wide open and handle it by statute.

Mr. Carter: Then you're faced with the California situation.

Mr. Nichols: I don't think you can put the same candidate's name at the top in every instance as long as they have to provide for some kind of alternation of names.

Mrs. Eriksson: But on a voting machine you can't have alternation of names so what you're doing is alternating by machine or by precinct or however.

Mr. Nichols: We'd like to see the general assembly have the flexibility to decide by statute whether to permit rotation by precinct, rotation by machines, rotation by ballot, or combinations.

Mr. Carter: But this mandates that they are required to give reasonably equal treatment.

Sen. Corts: What does your present resolution provide?

Mr. Nichols: We provided the Commission with two variations, and variation 'a' was the one provided to the General Assembly.

Mrs. Eriksson: And that provided in the constitution for rotation by precinct, and this committee rejected that because they felt that that was too confining.

Mr. Nichols: The other would have removed the reference to rotation from the constitution and delegated the authority completely to the General Assembly to provide by law for the method of alternating candidates' names on the ballot. We prefer variation 'b'.

Mrs. Sowle: I still like "to the extent practical".

Mr. Carter: Replacing "wherever possible".

Mrs. Sowle: Yes, and how about its insertion after "reasonably equal treatment". "reasonably equal treatment, to the extent practical, by rotation or other comparable techniques appropriate to the voting method used."

Mrs. Eriksson: But then you're back to Senator Corts' point that you do want to provide reasonably equal treatment for everybody. The only question is whether it's practical to do it by rotation or some other method.

Sen. Corts: I'd put that phrase after "techniques".

Mrs. Sowle: I see. Well then, how about "other comparable techniques to the extent practical and appropriate to the voting method used"?

Sen. Corts: That sounds good.

It was so agreed.

Mrs. Eriksson: Then it will read, "The general assembly shall provide by law the means by which ballots shall give each candidate reasonably equal treatment by rotation or other comparable techniques to the extent practical and appropriate to the voting method used."

Mr. Nichols agreed.

Mrs. Eriksson: If we pull this out and make it a special report to the General Assembly then it will stay as section 2a. We can't change it to section 3 because it won't be tied in with the repeal of section 3.

Mr. Carter: Now we are coming back to my question of general elections.

Mrs. Sowle: I was going to raise the question on that. Is there some fundamental reason why the laws have not addressed themselves to the primary? Is it that the parties control the primaries, and not the state?

Mr. Nichols: As a practical matter, rotation does occur in the primary. The only difference is that we've always advised the boards, don't be overly concerned if your rotation doesn't balance out as perfectly as you try to get it in a general election. Rotation still occurs. You don't go to the expense of making sure that you have really arrived at the lowest common denominator and have all of the possible varia-

ties of printing.

Mr. Carter: This is a big change, though. We're leaving it up to the legislature. They no longer have to be concerned about the attempt for perfect rotation. Is it not also true, we're talking about three types of elections: primary, general and special elections.

Sen. Corts: You don't ordinarily have candidates at a special election.

Mr. Nichols: Except in a congressional vacancy. You have a special election for candidates in that case.

Mr. Carter: Again, I go back to my example of the charter commission.

Sen. Corts: Well, this deals only with candidates.

Mr. Carter: The typical thing is that you have the candidates on the ballot the same time the question is on the ballot. As I recall, you have 15. And if you have 27 candidates there ought to be some reasonable opportunity rather than listing them in alphabetical order.

Mr. Nichols: If you want to strike the word "general" I don't think that we would have any objection because it's not really inserting a new provision in the constitution but it's giving the general assembly greater latitude on what they will be permitted to do by statute. If the general assembly chooses to establish the same requirement for general elections and for primaries and special elections, or if they choose to handle them differently, they will have the latitude to make that determination.

Mrs. Sowle: If we strike "general" then what does it cover?

Mr. Carter: All elections.

Mrs. Eriksson: There are three kinds of elections: general, special and primary.

Mrs. Sowle: Are they all statewide?

Mrs. Eriksson: No. A local election is basically a special election.

Mr. Carter: I'd like to see you strike that word unless anyone has a reason to keep it.

Mr. Nichols: The Code does use several different terms, and does define several different kinds of elections: regular state election; regular municipal election. And for some reason there is not uniformity of language in all of the Code sections, and so the Code does define what is meant by each one. But when you cross-reference them it comes down to primary, general and special.

Mrs. Sowle: Is "election" by itself too broad?

Mrs. Eriksson: No, not if you know what it means. It would include the charter elections and elections of charter candidates.

Mr. Nichols: Yes, it's talking about the election of candidates because that's the

subject matter of the sentence.

Mrs. Eriksson: And except for the charters and the special elections to fill a congressional vacancy, most candidates are nominated at primaries and elected at general elections.

Mr. Nichols: The question you raised about why primaries were treated differently, one other thought occurs to me as to why they are not included in this provision. In a presidential primary when you are selecting convention delegates you have the possibility of a large number of candidates running at-large and within each district, and if you have a half a dozen different presidential candidates on the ballot, as we had in the democratic ballot in 1972, it gives you a fantastic number of varieties of the ballot that you have to come up with, if you had to have perfect rotation in a primary.

Mr. Carter: We're talking that out. Really what we're mandating is reasonably equal treatment in the constitution.

Mr. Nichols: If we had needed that kind of rotation in the 1972 primary, it would have been impossible to live with.

Mrs. Sowle: But you did have some rotation.

Mr. Nichols: There was some rotation. I'm not sure to what extent it occurred on the delegate listing.

(Mr. Carter looked up "feasible" in the dictionary as an alternative to "practical" but decided to keep "practical".)

Mrs. Sowle: What is the heading of this article? One reason I worry about "election" without a modifier is, for example, would there be any possibility of that being interpreted to apply to corporations, or something outside of governmental elections?

Mr. Nichols: The heading of the section is not part of the constitution, that's just something put on by the printer. But I can't imagine a court construing that to be something other than a governmental election.

Mr. Carter: You can straighten it out if there is any question by saying"the names of any candidate for <u>public</u> office..."

Mrs. Sowle: Do you think it would be a good idea to put the word "public" in that first sentence?

Mrs. Eriksson: If you say that that's a possible interpretation of this section, then how about section 2?

Mrs. Sowle: "All elections shall be by ballot."

Mrs. Eriksson: I think you have to assume that the constitutional article deals only with public office.

Mr. Carter: It does. It says "Article V. Elective Franchise" and it's all talking about public elections. So I don't think there would be any problem on it.

Mr. Nichols: Have you decided to strike the word "general"?

Mrs. Sowle: Yes. One thing that occurs to me is that we might create an issue about whether it ought to apply to these other elections that would divert attention from the basic point.

Mr. Carter: Let's submit it to the Commission and see what reactions we get.

Mr. Nichols: We don't advocate dropping the word "general" but we were more concerned with the later changes than that one, and would not oppose that decision.

Section 2a was agreed to.

Mrs. Sowle: Let us look at the other matters. We agreed that the bill of rights approach might be very difficult and it might actually restrict the franchise.

Mr. Carter: I agree.

Mrs. Sowle: There are two language changes we have to look at in the initiative and referendum report. "Every petition shall contain a statement to the effect that any falsification is subject to penalties as prescribed by law". And this just puts in the constitution what is presently prescribed by statute. It makes it clear that we intended no repeal of that statute.

Mr. Nichols: This is just a general requirement.

Mr. Carter: Could I come back to section 7 of Article V? We had a vote, Bob, before you came on the Commission, of 17 in favor, and 3 opposing change in section 7. My question is whether or not we should resubmit the committee recommendation as part of Article V. I think we had rather overwhelming support for the thing, but we just didn't get enough people voting on it. Section 7 concerned the bedsheet ballot - election of delegates to national political party conventions.

The committee agreed that since there was no possibility of getting it on the ballot in November, it could be resubmitted after the Democratic mini-convention this December.

Mrs. Sowle: When we vote on recommendations to the general assembly we need 2/3. When we vote on amendments to the committee proposals, it's just those present at the meeting who vote on the amendment. Perhaps when the proposal goes out to the whole commission by mail, maybe we could present alternatives. It seems to me rather unfortunate that a bare quorum can change a committee recommendation that has been worked on for quite a while and perhaps that should be voted on by the full membership.

Mr. Carter: That's a good thought.

Mrs. Sowle: We're back to initiative and referendum and the new language.

Mr. Nichols: This new language, I think, was in response to the objections I raised at the last Commission meeting to the word "conclusively".

It was so agreed.

Mrs. Sowle: The second initiative and referendum thing we have to discuss is this:

"The secfetary of state shall cause to be placed on the ballot the caption and the ballot language prepared by the ballot board for each proposal contained in a properly certified petition filed with not less than the required number of signatures. The petition and signatures shall be presumed to be in all respects sufficient, unless not later than seventy-five days before the election, the petition is proved to be invalid or the signatures insufficient or an action challenging the validity of the petition or one or more signatures is pending, which action was begun not later than one hundred days before the election. No proposal voted on by the electors shall be held unconstitutional or void after the election because of an insufficiency of valid signatures or an invalid petition."

Mr. Nichols: We were worried that the word "conclusively" might do two things: one, invalidate the checking process; and, two, prevent a judicial challenge, and this accounts for both of those and we think the change in wording overcomes the objection entirely.

Mrs. Sowle: I don't think that could be any clearer.

Mr. Nichols: And it does specify a deadline for bringing a challenge which is consistent with the kind of change we made on a challenge to the ballot language on issue #3.

Sen. Corts: I'm inclined to find some objection to the last phrase "or an invalid petition". If you're talking about an invalid petition which is invalid merely because of an insufficiency of valid signatures, that's one thing. But if you're going to take in the whole realm of possibly invalid petitions... Suppose you don't have all of the required language in there - maybe you have a referendum petition when you mean an initiative petition.

Mr. Nichols: I think the point here is that the challenge would have to be brought within the specified time period and that if you don't bring the challenge until after the election, you're too late..

Sen. Corts: With respect to the validity of signatures, I go along with that, but with respect to all possible defects, I'm not so sure.

Mrs. Sowle: I think the theory that we have discussed before on the timing of a challenge for any reason is that, once the voters of the state have voted and approved it, it cannot be challenged after the election for some reason which could have been discovered before the election. Because the voters of the state have expressed themselves.

Sen. Corts: I would agree with the procedural aspects, and maybe to include the validity of signatures, which may not be procedural, but substantive defects in the petition I think should always be challenged both before or after elections. If you would strike "or invalid petition", I wouldn't see that that would defeat what we are trying to do.

Mr. Nichols: You mean, stop after "signatures".

Mr. Carter: Does the petition have any relevance once the matter is on the ballot and approved by the voters? What's on the petition doesn't mean anything at that point. The purpose of the petition is to get something on the ballot. So that once

it is on the ballot and approved by the voters, the fact that the petition was invalid is no longer relevant.

Mr. Nichols: Senator Corts raised the possibility that something might be identified as a referendum when an initiative is intended. I have difficulty imagining that if someone drafted it that improperly, it would ever get to the ballot.

Mr. Carter: The reason for that is that the voters aren't voting on the petition matter. They're voting on what was on the ballot.

Mrs. Sowle: They're voting on the substance of the issue at that point.

Sen. Corts: I'm not sure that my point is well taken. Suppose it may have gotten on the ballot improperly?

Mr. Carter: Even if that's so, that doesn't bother me because the voters are voting on what they see on the ballot.

Mr. Nichols: What about the situation they had in 1973 where an issue was scheduled for the May ballot as one issue and the court said that the question had to be divided because the question really dealt with two separate issues, and so they were separated into questions 5 and 5a. But supposing the election already took place, and then a voter said he didn't realize until he showed up to vote that there were really two questions there and he didn't have the opportunity to voice his support on one and his opposition to the other and he wants to challenge it saying this should have been submitted as two questions.

Mr. Carter: That doesn't have anything to do with the petition.

Sen. Corts: Yes it does, it should have been two petitions instead of one. It seems to me you're getting at the question only of signatures in this proposed amendment and if that's all you want then you don't need that last phrase.

Mr. Carter: The ballot board would have the right to split it up and put it on the ballot anyway they wanted to, within reason, would they not?

Mr. Nichols: They would have the right to draft a summary. I don't think they would have the latitude to split the question on their own.

Mrs. Sowle: How would that question be resolved under the current provision?

Mr. Nichols: I could not cite you a precedent for whatever happening, but it seems to me that a person could file a suit to have the election set aside on the grounds that the question had been improperly submitted as one question when there were two issues, and I don't think that there is ever an instance where that has happened, but I see no reason why it couldn't happen under the present constitution. If the petition was invalid in some other respect, such as submitting two or more questions instead of one, that you would not want to preclude setting the election aside on something that basic.

Mrs. Sowle: Take the petition that proposes an amendment to the constitution that has two questions. The petition is circulated; it comes to the secretary of state's office, you are figuring out how to put it on the ballot. Even if the petition didn't have it

in two parts, don't you just divide it into two parts for the ballot?

Mr. Nichols: We don't divide it into two separate ballot questions, no.

Mrs. Sowle: You put it on the ballot just as it appeared on the petition?

Mr. Nichols: Yes. We don't divide the resolution into two questions unless the resolution says that the question shall be submitted in such a way.....This happened for example with one of the issues that was on the ballot last fall or this past spring, but one of the resolutions passed by the general assembly said that the question had to be presented in a manner that the voters could vote separately on the amendment to section 20a and the question on section 31. And the resolution specifically provided that they could vote separately on the two questions. But the resolution provided specifically that they had to be submitted as two questions and that's why we did it that way.

Mr. Carter: What is the present language?

Mrs. Avey: It says in Article II, section 1g, "No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency."

Mr. Nichols: Is it your objective to prevent a challenge after the election for any cause whatsoever?

Mrs. Sowle: That was our intention, as was my understanding.

Mr. Carter: Why don't we pick up the same language that we have now, and say after the election because of an insufficiency of the petition.

Mrs. Avey: Craig Aalyson said that he was bothered by the present language.

Mr. Nichols: I think the present language is vague. This new wording makes it clear that you have two things you're talking about - the signatures and the petition itself. The present language is a little fuzzy. You don't know, when it says "insufficiency of the petition" you don't know whether that means insufficiency of signatures or some defect in the petition itself and how it's presented. So your new language is certainly more explicit than that of the present constitution.

Mr. Carter: I guess the question that we're talking about is after the voters have approved something, do you want the court to have the right to say that the election is void?

Mr. Nichols: If it was presented in a way that made it impossible for the voters to express their will separately on each of the questions presented, it would seem to me that there is a valid reason why the court ought to set the election aside and require that if it is to be submitted to the voters, it be submitted as separate questions.

Mr. Carter: I think I disagree with that. I think I would take the position that the question should be raised before it gets on the ballot.

Mr. Nichols: I wouldn't want to be construed as speaking for the office because I

certainly don't know whether this makes any difference to Mr. Brown or not and I suspect that this would not be a point on which he would decide to support or oppose a Commission recommendation. I think this would be a matter that he would say was in the discretion of the Commission and I don't think he would have any particular objection either way.

Mr. Carter: We faced the same problem when we were talking about legislatively initiated amendments, and at that time we faced the question and said in essence that once the voters have spoken it ought to be closed at that point.

Mr. Nichols: That was dealing with the ballot question. We're not talking about a defect in the wording of the ballot question, explanation, or arguments.

It was agreed to accept the language as drafted, since any question of two amendments can be raised before the election.

Mrs. Sowle: We can start on the corporation memo now. Shall we start with section 1? The memorandum seems to me to be fairly persuasive that it is an important provision.

Mr. Carter: I'm not sure it deserves a separate section though, because it seems to me it's covered in section 2.

Mrs. Sowle: "No special act conferring corporate powers..."

Mr. Carter: If you look at section 2, "Corporations may be formed only under general laws". We've done the same thing.

Mrs. Sowle: Are they two different things? Section 2 says corporations may be <u>formed</u> under general laws...

Mr. Carter: And I would add the word "only".

Mrs. Sowle: And section 1 says conferring corporate powers, so section 1 has been interpreted to apply to other than just the formation of the corporation.

Mr. Carter: Yes, good point.

Mrs. Sowle: Alteration of the corporate powers is under section 1 as well, and formation is a little narrower. The judicial interpretation of section 1 talks about interpretation of changes in corporate powers, even the changes in the city limits in Cincinnati have been covered as well.

Mr. Carter: I don't know as it's important enough. I think it will depend a little bit on what we have in the way of discussion of some of the other provisions in this. But it almost seems to me that we could put all of the things we wanted in just a couple of sentences of the whole darn article, and if so, it would seem to me that one section could do the whole thing. One of the things I thought of is that there's quite a bit of confusion in my mind, and I see the courts have wrestled with this a little bit, as to what is a corporation? You know, does it apply to private or public corporations, and municipal corporations, and that sort of thing.

Mrs. Sowle: It has been interpreted to apply to both.

Mr. Carter: I don't know how much you're familiar with corporations, but it's one of the greatest inventions of mankind. It's relatively recent, because before 1800 I

don't think there were any corporations. About that time, the very early 1800's, the concept of an inanimate entity that has substance to itself and yet isn't associated with any people was a marvelous concept.

Mrs. Sowle: I did work on the American Bar Foundation Study of the Model Corporation Act, and it's a very interesting area. There is background in this memorandum that I thought was interesting. The great debates about whether corporations were too much of a threat. I was interested in the discussion in the memorandum of the general provisions prohibiting the enactment of special legislation aside from corporations the more general provision. The Ohio law is not very broad.

Mr. Carter: Yes, that's in this discussion under section 1.

Mrs. Sowle: If that were changed, section 1 of the corporation provision would not matter as much. What committee had Article II?

Mrs. Avey: I think it was the Legislative - Executive Committee.

Mrs. Sowle: Did they look at Article II, section 26? I imagine that that's something where we just ought to leave well enough alone. There's probably a long history of interpretation of that section, but apparently that was not considered to take care of the special acts for corporations. Let's go on to section 2. It provides for the alteration or repeal of corporation laws and apparently there was a need to do that, a need to make that provision because of the Dartmouth College case. Is there any particular difficulty with that section?

Mr. Carter: I don't think so. It seems to me that the plenary powers of the legislature would have all of that right if it were not so stated. I'm not really sure why it was stated.

Mrs. Sowle: It was to meet specific problems of the time.

Mrs. Avey: It says in the memorandum that they were added to enable the legislature to enact laws regulating corporate and commercial transactions because at the 1912 convention some doubt existed as to whether the legislature had this authority.

Mr. Carter: I have no objection to it.

Mrs. Sowle: Section 3 concerns the liability of stockholders and that does not seem to present problems. And then the banking provision.

Mr. Carter: Again, I don't think it's necessary.

Mrs. Sowle: Do you think it's legislative material?

Mr. Carter: Yes. The only thing that is not legislative material is that there is a prohibition against any liability other than unpaid stock. That's a limitation on what the legislature can do. I don't have much of a problem with section 3. Again, I'm not sure if you were starting from scratch whether you would put it in. Section 4 is clearly unnecessary but, again...

Mrs. Sowle: To make the property of corporations subject to taxation.

Mr. Carter: I don't think that's at all necessary, but on the other hand, I can just

see the problems if you try to put it on the ballot to take it out.

Mrs. Sowle: It's to prevent corporate exemptions, which would not be a current issue but was at one time.

Mr. Carter: It's obsolete. There's a lot of superfluous material. Is it worth it to try and shorten the constitution? I don't see any problems with these provisions. So it's kind of a clean-up matter, and is it worth the effort? Section 5 - there's no reason why that can't be left in. Again, I think that's statutory material.

Mrs. Sowle: These are all outgrowths of particular abuses or problems, 19th century problems that are not getting in anybody's way.

Mr. Carter: Section 7, I think, is a limitation. Basically, the discussion says, the purpose of that is to eliminate state banks from issuing money. It's been interpreted that way and it's not relevant today.

Mrs. Sowle: Because of the tax clause?

Mr. Carter: Back in the 1800's, before we had the federal currency and the federal reserve system and all of those things, and before we had national currency, you may recall, banks used to issue their own paper money, it was in circulation all over, and banks promised to pay - it became legal tender, that is, it became accepted tender. But can you imagine a bank trying to issue currency today? It's just not conceivable. And so that one I feel is completely obsolete.

Mrs. Sowle: Is this causing anybody any trouble?

Mr. Carter: The only way that I can see that it might is by putting some restriction on the legislation, so that we're relying on court interpretation of what it meant.

Mrs. Sowle: Of the words "banking powers" as just meaning issuance of money.

Mr. Carter: Yes, and it seems to me it might present some cloud over the acts of the general assembly with respect to banking matters generally and to me this is something the general assembly should have the power to do.

Mrs. Sowle: Oh yes.

Mr. Carter: And to have a constitutional question to submit acts of the general assembly authorizing associations of banking powers to the people is ridiculous.

Mrs. Sowle: Only two other states have a requirement, and the Illinois one was deleted in its new constitution.

Mr. Carter: So that would be my first preference for taking that out, that is clearly obsolete. Look at that section 4, it probably shouldn't be in the constitution. "The property of corporations now existing and hereafter created, shall be forever subject to taxation the same as property of individuals." That's completely moot. But if you were to put that on the ballot to repeal it, they would think that then that means that corporations wouldn't have to be taxed. So that it presents a practical problem, whereas if you're doing a whole new constitution by a convention, then you can get by with dropping it.

Mrs. Sowle: There are two other provisions of the constitution that accomplish this anyway, it says in the memorandum. So section 4 looks like a good candidate for repeal and section 7. Section 1 probably should remain.

Mr. Carter: The substance of it should remain.

Mrs. Sowle: I'm not so sure about section 2.

Mr. Carter: This is a highly technical area. What I'd like to do is ask some outstanding corporate law firms in the state, such as Jones, Day, Cockley & Reaves. They have offered on many occasions to work with us in any areas that they can be of help. Why don't I take the opportunity of submitting this to them and see of there are any problems or suggestions they would have in this area.

Mrs Sowle: Another possibility, in addition to that, would be to ask the Ohio State Bar Association's Corporations Committee to look at it and invite their recommendations. Some rewriting of sections 1 and 2 might be desirable, with repeal of the rest of it as the memorandum suggests.

Mr. Carter: I'd simply like to have one section that essentially states what we're considering, and repeal the rest of it on the basis that it's obsolete material.

Mrs. Sowle: I will take a look at the report that the American Bar Foundation issued on Model Corporation Acts and see if it says anything about constitutional provisions.

Mr. Carter: I think it's a good idea not to give the legislature the authority for special acts. You're not only talking about private corporations, that gets into the local government area. One of the things you've done if you didn't have that in there is that the legislature could change municipal and school districts and that sort of thing in Columbus, by by-passing the local interests, and I don't think that's a good idea. I was interested in the definition of "special act" in here, which is defined as "laws which are temporary and local in operation". And then there are a couple of decisions that indicate that it has to be both. You could have a temporary act that's not special, like the Ohio Turnpike Commission.

Mrs. Sowle: And then it doesn't come under the prohibition.

Mr. Carter: Okay, let's see if we can't get any more information on this one for the next meeting. I wouldn't be unhappy with just leaving it the way it is.

Mrs. Sowle: It doesn't seem to be getting in anybody's way.

Mr. Carter: Unless there are problems that we're not aware of.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
September 19, 1974

Summary

The Elections and Suffrage Committee met on September 19 at 12:30 p.m. in the Commission offices in the Neil House. Present were Committee chairman, Katie Sowle, members Carter and Wilson, and Ann Eriksson and Brenda Avey attended from the staff. Peg Rosenfield of the League of Women Voters and Dale Bring of the Ohio Chamber of Commerce were also present.

Mrs. Sowle opened the meeting with a request that Mrs. Eriksson summarize the material contained in Research Study No. 38 on Corporations.

Mrs. Eriksson explained the staff point of view expressed in the memo that the prohibition against incorporation by special act should be retained, and that some provision should enable the legislature to amend corporate laws, and the present provision on that should be retained. She explained that she had sent a copy of the memorandum to several groups, asking for their comments: The Secretary of State, the Division of Banks of the Department of Commerce, the Ohio State Bar Association Corporations Committee, the Ohio Bankers Association, and two law firms known to handle large amounts of corporate work. Mrs. Eriksson summarized the comments that these groups had to offer and distributed letters of reply from some to all those present at the committee meeting. The Secretary of State said there were no objections to the memorandum. The Division of Banks says that one of the provisions not suggested for retention in the memo (Section 3) prohibits double liability of shareholders. The Superintendent said that banking laws do permit assessment of shareholders. The Ohio State Bar Association wants to retain "no liability of shareholders" provision in the Constitution. The Superintendent of Banks opened the question that the banking statutes might be unconstitutional.

Mrs. Sowle asked whether it would be helpful to get an opinion from the Attorney General on the matter. Mrs. Eriksson said that, in her opinion, the Commission should not attempt to resolve the question of constitutionality of present laws, but rather let the banks do it if the situation arises.

Mr. Carter: When was the statute passed?

Mr. Wilson: Section 3 was amended in 1936 to its present form (but superadded liability provision was removed by amendment in 1903).

Mrs. Sowle: If we remove the provision do we remove a protection?

Mrs. Eriksson: I don't know, if we remove the constitutional provision, where it's going to leave the committee.

Mr. Carter: Let's start with section 1 and go through it.

Mrs. Sowle: Section 1. "The general assembly shall pass no act conferring corporate powers."

Mr. Carter: Does it refer to municipal corporations as well as private corporations?

Mrs. Friksson: Yes, but it is redundant (since municipal corporations are covered in Article XVIII).

Mr. Carter: Should we make that clear in the language? That's a substantive question whether we want to address municipal and private corporations. Are non-profit corporations formed under the general corporation laws? Are public corporations?

Mrs. Eriksson: The Turnpike Commission is public and non-profit. It is created by law and has corporate powers conferred on it.

Mr. Carter: Is that a special act?

Mrs. Eriksson: No, it is interpreted as general law.

Mr. Carter: Is there any way to phrase it to exclude municipal corporations? I don't think it belongs in this section.

Mrs. Sowle: If it is ambiguous, does it make any difference?

Mr. Carter: If a valid public purpose is involved, the general assembly should be enabled to allow it to incorporate. (Used COMSAT as an example).

Mr. Wilson felt that the general assembly could get around this when it was necessary to form COMSAT-type groups.

Mr. Carter: But that would be relying on a court interpretation of this provision. There is the difficult question of modifying "special".

Mrs. Eriksson: The state lending credit for a public purpose would take care of the concept of the public corporation.

Mr. Carter: I'd like to remove the reference to municipalities, and, Ann, you're saying that since municipalities are covered in Article XVIII, this doesn't hurt them. A concept I'd like is something having the effect of "no special act for private enterprise" but maybe that's opening Pandora's box.

Mrs. Rosenfield: You mean "non-governmental" vs. "governmental".

Mr. Carter: Yes, organized for non-governmental purposes.

There was further discussion on this question.

Mrs. Sowle read Section 2. "Corporations may be formed under general law; but all such laws may, from time to time, be altered or repealed. Corporations may be classified, and there may be conferred upon proper boards, commissions or officers such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual."

Mr. Wilson: Why is the last sentence in there? We have laws regulating the sale and conveyance of personal property, so why is there a constitutional provision for it?

Mrs. Eriksson: There are many unrelated things in here. I don't think there's any question of the General Assembly's power to do this, and that's argument in favor of repeal. The first part should be retained.

Mr. Carter: It doesn't hurt anything.

Mr. Wilson: Yes.

Mrs. Eriksson: It is misplaced, however.

Mr. Carter: What are joint stock companies? It says corporations, joint stock companies, and individuals. How about a change to corporation, partnership, or individual?

Mrs. Sowle: Maybe it belongs in Section 19 of Article 1 which says private property shall forever be held inviolate but subservient to the public welfare. If we cut it loose from this section, we have to look at the word "other" which I guess is there because of stocks and securities.

Mr. Carter: "Corporations may be regulated by general law" is my suggestion for the first sentence. I withdraw my comment on attempting to change section 1.

Mrs. Sowle: Section 3. "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank", "banker", or "banking", or words of similar meaning in any foreign language as a designation or name under which such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state." The Ohio State Bar Association's Corporation Committee wanted to retain the first sentence of Section 3.

Mr. Carter: I agree.

Mr. Wilson: "Dues" bothers me.

Mrs. Sowle: What does "dues from private corporations" mean?

Mr. Carter: We can take it out and say we don't know what it means and it is not relevant today. (All agreed to take it out.) Also, cross out "otherwise".

Mr. Wilson: There are better wording available. For instance, under this language, if I pledge $5000 to a company, and put down $500, and the company goes bankrupt, I am liable for $4500 but not for the $500, so I could ask for the $500 back.

Mrs. Sowle felt that a liability represented something owing and since the $500 was already paid, he couldn't owe it.

All present wanted to retain the concept of no stockholders liability, and repeal the rest of the section.

Suggested possible language - "In no case shall any stockholder be individually held liable other than for the unpaid stock subscribed to by him or her."

Mrs. Sowle read section 4. "The property of corporations, now existing or hereafter created, shall be forever subject to taxation, the same as the property of individuals." Could section 4 be repealed?

Mr. Carter: It would be very difficult because the question is too political. The section has no effect but the people would think we were trying to exempt corporations from taxation.

Mrs. Eriksson: The section is redundant.

The committee agreed to leave section 4 alone.

Mrs. Sowle: Section 5. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first paid in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record as shall be prescribed by law." Is section 5 covered by the bill of rights?

Mrs. Eriksson: No private corporation can exercise the right of eminent domain unless authorized by the general assembly to do so. Corporations do not derive power from this section. Section 19 of Article I says: "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Mrs. Sowle: Section 5 requires the court to make the determination, so a commission could not be so empowered.

Mr. Carter: Article I, Section 19 calls for a jury, too.

Mrs. Eriksson: Section 19 talks about public use, section 5 talks about corporate use. There is the question of whether you think the general assembly is going to confer greater eminent domain powers on corporations than public bodies have. The reason for removing it is it depends upon action of the general assembly. You are removing a restriction on the general assembly.

Mrs. Sowle: In Section 5 you know they can't. If you took it out, would there be any grey area where you didn't know what the rights of corporations are?

Mrs. Eriksson: You would be giving authority to the general assembly so there are no grey areas.

Mrs. Sowle: Might you run into trouble getting rid of this provision?

Mr. Wilson: I don't see it as a problem.

Mrs. Eriksson: Section 5 really applies to public utilities. If section 5 were dropped, the general assembly is still restricted as to who gets eminent domain. There are two methods: quick take - (highways) is one of them. The general assembly might tell utilities that therefore you can appropriate right-of-way and pay for it later.

Mrs. Sowle: Then possibly you think that section 19 limits quick take to particular purposes whether or not section 5 exists.

Mrs. Eriksson agreed with this.

Mr. Carter noted that it was approaching time for recommencement of the Commission meeting, and the meeting adjourned until Tuesday, September 24 at 10:00 a.m. at the Commission offices, at which time the matter of corporations will be continued.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
September 24, 1974

Summary

The Elections and Suffrage Committee met on September 24 at 10 a.m. in the Commission offices in the Neil House. Present were committee chairman Katie Sowle, Jack Wilson, and staff members Ann Eriksson, Director, and Brenda Avey.

Mrs. Sowle: Let's consider first the remaining sections in the April 22 committee report. Sections 3 and 4 of Article III were the two sections that were originally recommended for repeal. They really have to be considered together. First of all, how are the official results of elections presently determined by statute - that's one of the things that we ought to look at since this provision of Article III is antiquated. Actually, how are the official results determined prior to this ceremonial thing happening?

Mrs. Eriksson: They're determined by the secretary of state.

Mrs. Sowle: And is that by statute?

Mrs. Eriksson: Yes. Each board of elections submits to the secretary of state a certified result of the canvassing of the elections in that county and it takes about a month before the secretary of state issues the final results of the election.

Mr. Wilson: I would imagine that there is a prescribed form that each county board of elections fills in and returns to the general assembly.

Mrs. Sowle: Then the second question, since the official way of declaring election results is defined by statute and is very different from this first sentence here - is it desirable or necessary to have the method of official declaration of election results in the constitution?

Mr. Wilson: If you didn't have some provision in the constitution, wouldn't you have the possibility of tinkering with the statutes to the point where it might become absurd?

Mrs. Sowle: I guess the question is: should it be in the constitution or should it be left to the General Assembly? I think that was what was bothering Commission members, that if this isn't up to date, should it be updated, and should something be in this section of the constitution? Maybe the constitution ought to reflect the statutory method now, or maybe the constitution should say: let's leave it to the General Assembly, or maybe it's alright if the constitution says nothing which would leave it under the implied powers of the General Assembly.

Mrs. Eriksson: The statutes carry forward this present constitutional method of the actual canvass being presented to the president of the senate. Sec. 3505.32 provides that the board of elections of each county, not later than the fifth day after a general or special election, shall canvass the election results of the precincts. In other words, what they actually do is sit down and recount because often there are changes in the total as a result of some error in the precinct count. The statute tells the exact procedure which the board follows in opening the tally sheets and making its count. And then the board of elections completes its count of the election results and submits an abstract to the secretary of state

in a special order and on a special form. And then, when the secretary of state has received the abstracts from the county boards of elections, he promptly fixes a time and place for canvass of such abstracts. Then he notifies the governor and some other people, and then he declares the results of all elections in which electors of the entire state voted. Now what they have done in the statutes is provide that the county board of elections submit several different abstracts. One abstract contains all of the state offices: governor, lt. governor, secretary of state, auditor of state, attorney general, treasurer of the state, chief justice of the supreme court, members of congress, senators. That's one abstract, and that is the one opened by the secretary of state in the presence of the governor and other persons to declare the results of the elections. Then the boards of elections also submit a separate abstract just containing the results of elections for governor, lieutenant governor, secretary of state, treasurer of state auditor of state, attorney general, and that is the abstract presented during the first week of a regular session of the General Assembly, in order to comply with this constitutional provision. So, the results are declared twice for all of those offices: they're declared by the secretary of state as soon as the abstracts are received from all of the counties, but then they also submit them so they can declare the results to the General Assembly. This only applies to the six elective state offices. And as a result, the county boards of elections have to submit the results of those six elections twice.

Mrs. Sowle: I think the question for us, then, is should we simply leave it alone because it's not bothering anybody? Should we take it out because it's really not a necessity of modern times? If we take it out, should we put something else in? And if so, what? Reflect the **statutes** or simply say that it's up to the General Assembly? Or assume that it is part of the implied powers of the General Assembly to do in any event? It did seem to bother some members of the Commission that we were just taking it out.

Mrs. Eriksson: I think there was also feeling on the part of some that they liked this ceremony.

Mrs. Sowle: Yes, but others said that you could have the ceremony by statute - you don't have to have it in the constitution.

Mr. Wilson: It's related to the electoral college bit in that respect, being outdated, but it hasn't been removed from the constitution. It isn't hurting anything, to specify a little ceremony.

Mrs. Sowle: It isn't hurting anything. I really think that's the question. Is it worth trying to take it out?

Mr. Wilson spoke of the difficulty of getting a repeal through the legislature and also said he thought the constitution should contain some provision for determining when someone is actually elected.

Mrs. Avey: The last sentence about the tie vote means that the results are declared in November, and in the unlikely event that there is a tie, for two months the people won't know who won. There just doesn't seem to be any good reason for going two months with a tie and then sending it to the General Assembly to resolve it.

Mrs. Sowle: That's a very good point. The question occurs to me, do they have to wait until the time specified in the first sentence.

Mr. Wilson: If they are not in session, how are they going to conduct their business? Unless they come back for a special session.

Mrs. Eriksson: In any event, this says that it has to take place during the first week of the session, so unless it were a special session called to being after the election, it couldn't be done by the General Assembly until January. You wouldn't have two months, because it probably would be about three or four weeks anyway before the official results were declared. But you would have a month to six weeks.

Mrs. Avey: It just doesn't seem to make sense to wait and keep those two candidates who were tied not knowing who won.

Mrs. Sowle: Maybe what needs to be changed is that term "the first week of the session", then it would just be determined by the General Assembly, or the president of the senate when this should take place.

Mr. Wilson: You might have a house controlled by one party before the election, and then the house controlled by another party after the election, so it would make a difference when the tie was broken in terms of who is selected, because this is probably done by a party line vote.

Mrs. Eriksson: That's right. That would be a very important consideration in whether you had a special session or not.

Mr. Wilson: But you couldn't really do it though, because you couldn't declare the results which can't be officially opened until the first week.

Mrs. Eriksson: Couldn't it be the first week of a special session?

Mr. Wilson: If you knew that your party was going to lose if you wait till the first week of the regular session, you could call a special session.

Mrs. Eriksson: The real thing that's bothersome about it, is that the chance of a tie vote is so astronomically remote.

Mr. Wilson: We're worrying about something that probably will never happen, although mathematically it could. You have to give the drafters of this provision credit for trying to foresee the possibility of a tie.

Mrs. Sowle: Our recommendation had been simply to repeal, and to leave this all to the determination of the General Assembly.

Mrs. Eriksson: There are three elements. One is the ceremonial function of opening the returns, and declaring the results. The second is the statement that the person having the highest number of votes is elected, and the third has to do with the breaking of tie votes.

Mrs. Sowle: It really does seem to me from the attitude of the Commission at the meeting that they would like to leave this alone because of a feeling of insecurity about what would happen without it.

Mr. Wilson: I didn't hear any of the legislative members express anything contrary to your statement.

Mrs. Sowle: Some Commission members said they would be willing to get rid of the first part of the section but they would like to keep the last part. Some were concerned about runoff elections. But as you pointed out, I think, Ann, there is no constitutional provision in the primary situation about runoffs.

Mrs. Eriksson: No, that's right. I think that is unlikely to happen in Ohio. These runoff elections are almost always associated with states where one party is predominant. But, there is that possibility.

Mr. Wilson: Lester Maddox would have won in this state under our interpretation. He got a plurality in the primary, but lost in the runoff.

Mrs. Sowle: Now, shall we transmit this to the other committee members, Jack? It's my impression that we might as well leave this section 3, and I'm not referring to section 4, that we might as well leave well enough alone. It's not causing any trouble.

Mr. Wilson: I would go along with that.

Mrs. Sowle: Let's see how the other committee members react to it.

Mr. Wilson: I don't know how we could put any wording in here that would eliminate the possibility of a special session.

Mrs. Eriksson: That might happen, but, after all, it's only going to be when the tie vote comes up. Otherwise, there is nothing to it but ceremony.

Mrs. Sowle: Is there a constitutional provision that gives meaning to the words "the first week of the session"? Because, when you look at section 4, it says "should there be no session in January next after an election". Now, why does it say "the first week of the session" in section 3 and "the January next after an election" in section 4?

Mrs. Eriksson: Because what they meant in section 3 was the session of the general assembly which convened in January. This election is always in the even-numbered year, and the general assembly always convenes in the odd-numbered years.

Mrs. Sowle: Is that by the constitution, or by statute?

Mrs. Eriksson: That's by the constitution. Originally, the general assembly met every year. In the early 1900's the tradition of meeting every year just stopped and they started meeting every other year with the session beginning in the odd-numbered year, and that's the way it has been until we just recently proposed an amendment to the constitution which now provides for a session every year. This section is intended to mean the session that began in January after the election because that's when the members of the General Assembly came into office. And this question of the first week of the session, although we're speculating that it could be a special session, and technically I think it could be, it could certainly be challenged on the basis that what they really meant was the first week of the January session after the election.

Mrs. Sowle: And that's why section 4 says "should there be no session in January next after an election".

Mr. Wilson: There have been general assemblies that worked only 4 or 5 months out of that whole term of office.

Mrs. Sowle: Where in the constitution are the sessions?

Mrs. Eriksson: It's section 8 of Article II, and it reads now, this is the new amendment: "Each general assembly shall convene in first regular session on the first Monday of January in the odd-numbered year, or on the succeeding day if the first Monday of January is a legal holiday, and in second regular session on the same date of the following year."

Mrs. Sowle: So we have what is called 'first and second regular sessions'. Is there any reason why there are first and second regular sessions?

Mrs. Eriksson: We stipulated that so that it would not be read to interfere with special session powers. The legislative leadership can call special sessions, so we wanted to distinguish between regular and special sessions.

Mrs. Sowle: But why isn't each regular session just a regular session? Why are they number one and number two?

Mrs. Eriksson: Simply because they're seen as parts of the same general assembly. There is one general assebmly every two years because the elections occur every two years. The members of the senate serve four year terms, but nevertheless, a general assembly is a two-year body. It's not a continuing body.

Mrs. Sowle: I don't know on what basis of the policy question would be resolved, but one way to make sections 3 and 4 consistent, indeed if there is any need for section 4, or at least what you could say in section 3 is "the first week of a regular session" if you wanted to tie that down.

Mrs. Eriksson: If you wanted to tie that down and preclude the possibility of a special session in the event of a tie vote.

Mrs. Sowle: Well, this is an issue that maybe the Commission would want to take up. Is there any reason why it should be tied to a regular session, this breaking of a tie?

Mrs. Eriksson: The reason would be that that was certainly the intention of the original drafters.

Mrs. Sowle: Is there a good reason to back up their intention?

Mrs. Eriksson: The reason would be that when this was written, they wouldn't have had the results of the votes before January, because it takes several weeks just to do the counting, and so that means that back in those days it took them that much longer to transmit the results, and so they probably didn't have them till then. Besides which, the possibility of the General Assembly being in session following an election was probably never even thought of. Because, as Jack says, in the early years they never were in session two years in a row.

Mrs. Sowle: Okay, that was then a practical reason. Now, is there any other reason? A reason of policy. For example, the officers involved in a possible tie would be elected at the same election at which the members of the General Assembly who would take office would be elected.

Mrs. Eriksson: Yes.

Mrs. Sowle: In other words, is there any reason of democracy, or any reason of consistency?

Mr. Wilson: Getting back to Brenda's point, if you tie it down to a regular session, you're going to have this 7 or 8 weeks without knowing who the winner is. Maybe we can think of another basis to settle a tie vote.

Mrs. Sowle: Now, if we should simply eliminate section 4 and the words "the first week of the seesion" that probably would permit a special session.

Mrs. Eriksson: You see, I think that at the time this was written the Governor had no power to call a special session. The special session provision was not a part of the constitution.

Mrs. Sowle: Well, it might be desirable to make this clear. To say something like "during the first week of the regular session" or "during the first week of a regular or special session".

Mr. Wilson: Then you are calling attention to the fact that there can be a special session called.

Mrs. Eriksson: Maybe you should consider the possibility of simply having another method of resolving tie votes, rather than trying to remove the possibility or particularly permit the possibility of a special session.

Mr. Wilson: About the only way you can do it is to provide for a special election.

Mrs. Avey: Would the legislature be willing to give up the power to determine tie votes?

Mr. Wilson: It's probably not saleable in the first step.

Mrs. Sowle: What we're left with is simply the problem of when this should be done and should we leave that alone or should we try to clear up what might be viewed as an ambiguity.

Mr. Wilson: Since the part about annual sessions is in the constitution now, you really don't need section 4.

Mrs. Sowle: No.

Mrs. Eriksson: I think the question is should anything be done about the expression "the first week of the session"?

Mrs. Sowle: What does it mean, if we eliminate section 4, what does it mean "the first week of the session"? We know what they meant it to mean, but if we cut it loose, what does it mean? The first week of whatever session follows the election?

Mrs. Eriksson: Yes.

Mrs. Sowle: What if they are in session?

Mrs. Eriksson: It can't be a first week. At that election, people are electing six state officers and also members of the general assembly. If you are going to resolve

a tie vote that way it probably is better to permit the tie vote to be solved by the members of the General Assembly who were elected at that same election. To reflect the wishes of the people.

Mrs. Sowle: That's the thing I was talking about.

Mrs. Eriksson: I don't think that was the policy of the drafters.

Mr. Wilson: If there was no such thing as a special session, then it couldn't come up. Morally, the newly elected officials should decide who the elected officers are.

Mrs. Sowle: As a matter of sound political approach, it probably is desirable to have it done by the people elected. Now that seems to me as maybe a good enough reason for us to recommend that it be the first week of the regular session.

Mrs. Eriksson: Of a regular session. I would say "of a regular session" in case there should be a special session. In order to eliminate section 4.

Mrs. Sowle: Does that right right, "who, during the first week of a regular session"? "The next ensuing regular session"?

Mr. Wilson: They could wait maybe a year and a half or two years to do it. It doesn't say which regular session.

Mrs. Eriksson: "The first week of the next regular session" might be better.

That language was agreed to.

Mrs. Eriksson: That would preclude, I think, a special session. Now that means that again we're back to the problem that you might not know the winner for a while, but I think then you're making a policy decision.

Mrs. Sowle: That's right. Those would be the arguments on the two sides. One, that there is some sound basis for, perhaps, requiring it to be at the next regular session, but there is another argument on the other side that you have left it unresolved for a period of time, and is that desirable? Is this something that we should perhaps present to the Commission, give the reasons on both sides, and say we thought it ought to be considered?

Mrs. Eriksson: You think you would like to present it with this proposed amendment inserting "next regular" in there.

Mrs. Sowle: If we repeal section 4, it seems to me that we are kind of turning our backs on an obvious flaw in section 3, if we just leave it "the first week of the session". I just don't feel that we can take out section 4 and leave that wording.

Mr. Wilson: By amending the language, you are pinning it down.

Mrs. Eriksson: Right. Anyone who thinks to the contrary, either that a special session should be permitted, or that it is not conscionable to permit the question to be open that long could argue for a special election, sometime in November or whenever it's possible.

Mrs. Sowle: What would be good language if one were to want to permit a special ses-

sion? How would that be done?

Mrs. Eriksson: I think you just leave it alone. Just leave the question open.

Mrs. Sowle: But if you leave in the language "the first week of the session"?

Mrs. Eriksson: Yes, or change "the" to "a".

Mrs. Sowle: Then what about the question I raised earlier, what if they are in session?

Mrs. Eriksson: I don't think it could be the first week then.

Mrs. Sowle: But do we need "the first week"? In other words, should we permit it if they're already in session?

Mrs. Eriksson: Oh. If you want to do that then I would just leave out "directed to the president of the senate who shall open and publish it". Take out the whole expression about the first week of the session. Then it would really be required that the secretary of state transmit the results as soon as he has them. That would leave the possibility that they were in session, or a special session could be called.

Mrs. Sowle: If that were done, wouldn't we need something like "transmitted by the returning officers...forthwith"?

Mrs. Eriksson: I don't know what kind of a term requirement you would write in the constitution. You could say "as soon as possible" or "forthwith". Anything you write in there is going to, by implication, incorporate statutory provisions.

Mrs. Sowle: It does seem to me to be logical to say that the tie should be broken by the General Assembly elected at that election.

Mrs. Eriksson: Are you agreed to putting the words "next regular session" in there, and then the alternate would be just to eliminate that expression "during the first week of the session"? Which would open up the possibility that the General Assembly would still be in session or that a special session would be called.

Mrs. Sowle: I don't feel if we are taking section 4 out, that we're really doing justice to it by leaving the language in section 3 as is.

Mrs. Eriksson: I think if you take section 4 out and don't do anything to section 3 you are just leaving the question open. You're not resolving anything.

Mrs. Sowle: That's right.

Mrs. Eriksson: If you want to resolve the question one way or another, then you've got to do something to section 3. The options are: one, leave it as is; two, put "next regular" in there; three, take out "first week of the session". Four, I suppose, would be to present the three alternatives to the Commission and let them decide.

Mrs. Sowle: I suppose we could do that. I think it would be easier parliamentary procedure if we did present a recommendation for discussion. And we could even say we are presenting this motion for purposes of discussion. We feel it has to be resolved one way or the other. It's not very important, but to leave it this way doesn't

seem too neat. On Article II, Section 21 the Commission agreed with us so we can skip over that and go to Article XVII, Section 1 and Section 2, and Article III, Section 18. And those are the ones that are kind of difficult to juggle. Article XVII, Section 1 really causes us no problem. The way that we have recommended it be changed is simply to move something from section 2 to section 1 when elections shall be held, and then we moved the term of office provision. So really the crux of our problem is Section 2.

Mrs. Eriksson: The only question that came up in section 1, was a question raised by Nolan, and whether "so prescribed" shouldn't be "prescribed by law". The language is taken verbatim from section 2, so if you wanted to say "so prescribed by law" that's what it means.

Mrs. Avey: The two sentences before that in section 2 say "as may be prescribed by the general assembly".

Mrs. Sowle: That sounds good "as may be prescribed by the general assembly". Shall we take section 2, line by line, sentence by sentence. First of all, what it does is address itself to the term of office of the executive branch, This is an exact duplication of Article III, Section 2 except for one thing that looks to me like an error in Article XVII, Section 2. Let's turn to Article III, Section 2 and if you follow along with the first sentence of Article XVII, Section 2, they both have about the term of office of the governor, that's the same. Attorney general - that's the same, it's just in a different order. Secretary of state is the same. Treasurer of state is the same, but Article XVII includes Auditor of State.

Mrs. Eriksson: So does Article III, Section 2 except that it's a different sentence.

Mrs. Sowle: It's a different sentence but it's also a separate sentence in Article XVII because the next sentence goes on to say in both articles "The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963, and thereafter for 4 years." It seems to me that the intent is that they're both to operate exactly the same way. Althought Article XVII seems to contradict itself. It says the auditor of state shall be four years, commencing on the second Monday of January, 1959 in the first sentence and then it goes on to say that the Auditor shall hold his office for a term of two years from the second Monday of January, 1961. It looks to me as if there was a mistake there. To include the auditor in the first sentence.

Mrs. Eriksson: Yes.

Mrs. Sowle: It's of no moment anyway, since Article III is clear. We have recommended a repeal of those 2 sentences of section 2 of Article XVII because it is an exact duplication. Then we get to the term of office of judges. If we refer to the first part of it, judges of the Supreme Court and Courts of Appeals, that's an exact duplication of Article IV, Section 6, subsections 1 and 2 and they both say not less than six years. So so far there is complete justification for repealing this. There is no point in having it two places. If we look at common pleas, there is a variation. Article IV, Section 6 (A)(3) says not less than six years. Article XVII says six years. First of all, Article IV was enacted later and as it would probably prevail, although Nolan wasn't exactly sure that he was going to agree.

Mrs. Eriksson: Article IV was enacted in 1967. Section 2 of Article XVII has been amended later than that, but not for the purpose of defining judicial terms. And, as a technical matter, section 6 of Article IV was amended in 1973 so that that's the latest

amendment, although, again, it did not deal with judicial terms.

Mrs. Sowle: That's the issue of interpretation of what it means. Now it seems to me thatif you look at both of them, right down the line, they all say not less than six years, so it does seem a little absurd to end up with only judges of the common pleas court serving six years. There doesn't seem to be much reason why all of a sudden you say just for that one court six years.

Mrs. Eriksson: Those interested in judicial politics might argue that trial judges should have shorter terms than appellate judges.

Mrs. Sowle: Then the third consideration is that that's not a consideration for our committee, anyway, what the terms should be. What we're concerned about is the proper organization of Article XVII and cleaning it up so we don't have discrepencies. It seems to me that what we're recommending is that it is better organization to have the terms treated in Article IV and they should be taken out of here anyway. So the recommendation for the Commission as to terms of office should be made by the Judiciary Committee. So we can simply recommend repeal from Article XVII, Section 2, of this provision because it shouldn't be treated in Article XVII, it should be treated in Article IV and not duplicated.

Mr. Wilson: One sentence that shouldn't be marked off is, the General Assembly shall have the power to extend existing terms of office, which is not in Article IV, Section 6.

Mrs. Eriksson: No, but we transferred that to Article XVII, Section 1. You see that sentence was moved, as well as the sentence which says "the term of office of all county, township, municipal and school officers..."

Mr. Wilson: This power of the General Assembly to extend existing terms of office is for all state and county offices?

Mrs. Eriksson: Yes, in my opinion, because it says that it is to effect the purpose of this section which says that elections shall be held on the first Tuesday after the first Monday in November, and, in other words, this defines when elections are. And I think what this sentence is intended to do is to say that if the General Assembly changes the term of office of any of those persons whose office it can change, that it can then extend terms in order to comply with when elections shall be held.

Mr. Wilson: Okay, as long as that's still in there.

Mrs. Sowle: Then we go from Common Pleas to Probate court, and it was pointed out that this should go because that is no longer a separate court. Then the question was raised in the Commission meeting about the language "that of other judges" and whether that ought to stay. It seems to me, our conclusion probably is that all of this sentence concerning the terms of office of judges ought to be in Article IV. This sentence should be repealed from Article XVII for purposes of organization but it's provisions referred to the judicial committee to consider any substative considerations. If there were any, they would be very minor, about the language "that of other judges" and "not less than six years". So do you think that would be the proper way for us to go back to the Commission. We'd still recommend it's repeal. Any substantive changes should be made by the judiciary committee.

Mrs. Eriksson: Then make a specific statement that the judiciary committee take this question up.

Mrs. Sowle: Yes.

Mr. Wilson: It looks like when they talk about other judges they are talking about other judges in Article IV, Section 6.

Mrs. Eriksson: It seems that the time to debate other courts is when the judiciary committee makes its recommendation, and not here.

Mrs. Sowle: So then we recommend that these be taken up by that committee. That seems to be easy enough. That takes us down, then, to the end of that first paragraph. Then we get to the term of office of elective county, township, municipal and school officers and that's what we have put into section 1. Now, I want to raise a question about that. I feel that we ought not do anything different from what we've done before, but the question did occur to me; why should the term of office of elective county, township, municipal and school officers be in Article XVII. I looked back through the constitution just for organizational purposes, and I couldn't find any other place where they are mentioned.

Mrs. Eriksson: There isn't any other place. That's why this is the only place for it. Because Article XVIII deals specifically with municipal corporations. Article X deals with counties and townships. Article VI deals with schools. So there is one place for this sentence and that's probably why it's here.

Mrs. Sowle: Yes, Section XVII is entitled elections. The only other place I found was Article XV, which is miscellaneous. I don't see any other good place for it. And then the power to extend we've moved to section 1. And then the filling of vacancies by the governor, election of successor and when elections take place is the last paragraph. I had a question about that. If I may refer back to our report of April 22. The question that I had was a purely organizational question. Article III provides for the filling of vacancies in the executive branch. What we have recommended is the elimination of Article III, Section 18. Also, though, Article IV has an exact duplication of this about the filling of vacancies for judges. Now, my question is, should the filling of vacancies be provided for in Article III and IV rather than Article XVII?

Mrs. Eriksson: The reason that I think we should keep it here is that this says "any elective state officer other than members of the general assembly or governor".

Mrs. Sowle: Yes. I remember that we had discussed this. My question is, what does any elective state office mean? Are there any other elective state offices other than those provided for in Article III and IV?

Mrs. Eriksson: And, of course, the General Assembly in Article II. Judges are provided for in Article IV but the judges are the duplicate of this so it doesn't matter because this doesn't exclude judges. The only other elective state office that I have been able to come up with at the present time is the state board of education. Now, however, it does not preclude the possibility that the General Assembly might create other elective state offices in the future. The state board of education is not constitutionally provided for. It's provided for by the General Assembly. The constitution says that there shall be one but it doesn't say that they shall be elected, and they are elected by congressional districts according to statute. There is no reason why the General Assembly cannot provide for other elected state officials.

Mrs. Sowle: But if they provide for them, can't they also provide for filling vacancies?

Mrs. Eriksson: If they provided for them, this section would then cover the filling of vacancies.

Mr. Wilson: This would be operable now, though, for filling vacancies in the state board of education.

Mrs. Eriksson: The statute which provides for the state board of education doesn't exactly follow these terms but it's effect is the same as far as filling a vacancy is concerned. It is stated differently but has the same meaning, so that it does comply with this section.

Mrs. Sowle: It seems to me that just in terms of making the constitution easy to understand and putting things in what appears to be logical places, perhaps the filling of vacancies ought to be provided for for judges in Article IV, for the executive officers in Article III and members of the General Assembly in Article II, if there is no necessity for a catch-all.

Mr. Wilson: Either it should be in every place, or it should be in a catch-all. But not both. But the problem is if you don't provide a catch-all, and then they come up with something like the board of education, and they forget to provide for the filling of vacancies, then it's a bit of a mess.

Mrs. Sowle: Then I guess my question would be, should the constitution have to provide for the filling of vacancies for any but constitutionally created offices?

Mr. Wilson: It probably shouldn't, but it's to take care of an oversight by the legislature. I don't think they ever would forget, but they might, and then this section would be operative.

Mrs. Sowle: If we leave this in, then don't we have to recommend the repeal of Article III, Section 18, and we should also recommend the repeal of the provision in Article IV about the filling of vacancies for judges.

Mrs. Eriksson: Or add judges in here as an exception.

Mr. Wilson: Or put something in to the effect that if the filling of vacancies for a particular office is provided elsewhere in the constitution then this section is null and void.

Mrs. Eriksson: In that case you could say "except as otherwise provided in this constitution, a vacancy which may occur in any elective state office shall be filled by appointment by the governor..."

Mrs. Sowle: And retain the other provisions, Section 18 of Article III.

Mrs. Eriksson: You still would have to consider the question of lieutenant governor.

Mrs. Sowle: I'm looking to see what the last sentence means. "All vacancies in other elective state offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law." The first sentence really just refers to the executive branch, doesn't it?

Mrs. Eriksson: No, <u>all</u> elective state officers, and the last sentence refers to everybody else: county, municipal, township, etc.

Mrs. Avey: Why don't we move this paragraph to section 1?

Mrs. Sowle: That's what I'm thinking.

Mrs. Eriksson: That could very well be moved if you wanted to, if you were still thinking in terms of elective state officers.

Mrs. Sowle: Perhaps we ought to have it as a catch-all. But it just appeals to me to have Article III, Section 18 where it is. It makes much more sense to have it in Article III than in Article XVII.

Mrs. Eriksson: And then not have the catch-all?

Mrs. Sowle: Well, if we need a catch-all, then let's put it here as you were just suggesting.

Mrs. Eriksson: Well, if you are going to have a catch-all, in view of the recommendations on the lieutenant governor and the succession to the governorship, I really would hate to see any catch-all cover the lieutenant governor, because I really don't think we want to have that vacancy filled, the way the Commission has recommended.

Mrs. Sowle: Yes, but can't we word a catch-all so that it will not apply to Article III? It seems to me if we cover the filling of vacancies at the end of section 1 for counties, townships, municipal and school officers, I still wonder if we need a catch-all beyond that. As long as we've provided for everything the constitution provides for, we've covered all of the offices the constitution treats, couldn't we simply leave it to the General Assembly to take care of other offices that it creates?

Mrs. Eriksson: If you're talking about new elective state offices created by the General Assembly then you don't need a catch-all. If you're going to eliminate a catch-all, you really don't need that last sentence either because that's the authority the General Assembly would have absent any constitutional provision.

Mrs. Sowle: Any elective state office, then, does cover Articles III and IV. Would it cover Article II?

Mrs. Eriksson: No, because the General Assembly is excepted and provided for in Article II.

Mrs. Sowle: So the only thing that this would cover beyond what's in the constitution is the schools.

Mrs. Eriksson: At the present time.

Mrs. Sowle: I just wonder if the constitution has to cover anything else. Couldn't we leave it to the General Assembly?

Mr. Wilson: This might never be used, but there is nothing in here that tells you how vacancies shall be filled, unless this is in here or unless the legislature provides for it.

Mrs. Sowle: How might this be worded so that we still leave the others in Articles II, III and IV? Can you think of a way to word this so that we leave the filling of vacancies of the executive branch in Article III, and the judicial in Article IV?

Mr. Wilson: How about Ann's suggestion?

Mrs. Eriksson: I said "except as otherwise provided in the constitution", but the problem with that is that Article III does not otherwise provide for the filling of the vacancy of lieutenant governor, and we don't want it to provide for that.

Mrs. Sowle: Then can't we put in something about "except for..."?

Mrs. Eriksson: Except for the judicial and legislative members.

Mrs. Sowle: And the executive branch.

Mrs. Eriksson: Executive branch almost has to be defined as Article III because the executive branch covers anybody not in the legislative or judicial branches.

Mr. Wilson: Where is the section for replacement of a lieutenant governor?

Mrs. Eriksson: There isn't any, and the recommendation of the Commission at this point is that if there is a vacancy in the office of governor, he would be succeeded by the lieutenant governor, then the president of the senate and then the speaker of the house, and so if you've provided for the filling of the vacancy of lieutenant governor you'd be eliminating that succession, except within a very short period of time. And it was the opinion of the Executive Committee that you shouldn't fill that vacancy because under those recommendations, the lieutenant governor would no longer be president of the senate and their recommendation provides for succession but it does not provide for filling that vacancy. Katie's raising the question why should this be in here at all.

Mrs. Sowle: My feeling is that Article XVII is a poor place to provide for the filling of vacancies for the executive and judicial branches. It seems to me just more logical to have it in Articles III and IV, but how we do that, without stumbling on the lieutenant governor, I don't know. That is a problem.

Mrs. Eriksson: The other problem is that the judicial branch is covered in Article IV and the legislative branch is covered in Article II. Article III talks about the executive department. Many officers are state executive officers who are not mentioned in Article III.

Mrs. Sowle: What does Article III, Section 1, say?

Mrs. Eriksson: It says "the executive department shall consist of..."

Mrs. Sowle: Maybe the except phrase or clause in Article XVII could refer to that.

Mr. Wilson: You mean, instead of saying "or of governor or lieutenant governor" say "or of executive department"?

Mrs. Eriksson: Right. Maybe you should say, "any vacancy which may occur in any elective state office, except as provided in Articles II, III, and IV..." or "except as provided in Articles II, III and IV of this constitution, any vacancies which may occur in any elective state office shall be filled by appointment of the governor."

Mrs. Sowle: We may still be tripping on the lieutenant governor.

Mr. Wilson: Article III doesn't provide for the governor to fill the office of lieutenant governor.

Mrs. Eriksson: Then "except with respect to the officers named..."

Mrs. Sowle: Yes, that does it.

Mrs. Eriksson: Or "...the officers provided for in..."

Mrs. Sowle: Perhaps we ought to leave the drafting if we have a sense of the objective .

Mrs. Eriksson: How do you feel about the last sentence? Do we want to transfer that to section 1?

Mrs. Sowle: The end of section 1 concerns the elective officers of county, township, municipal and school. It seems to me that there would be a logical place to put that vacancy clause. And then a catch-all phrase like the last sentence in section 2.

Mr. Wilson: Except that section 1 is time for holding, and section 2 is the filling of vacancies.

Mrs. Eriksson: Right.

Mr. Wilson: You are still going to be talking about vacancies in both of them.

Mrs. Sowle: We will have eliminated all of section 2 if we eliminate this paragraph.

Mrs. Eriksson: I thought you were thinking of retaining the catch-all in section 2.

Mrs. Sowle: Well, we could. That could be section 2, although it seems to me, you might even think about putting up what we have recommended in section 1, and have section 1 concern itself with the time of the election, section 2 may be the term of office of these with the vacancies on county, township, municipal and schools, and have section 3 a catch-all. That separates the subject matter.

Mr. Wilson: Maybe you should keep all comments regarding vacancies in the same section.

Mrs. Sowle: Yes, that's a good idea. What we would be doing is not to eliminate Article III, Section 18, and take out of Article XVII provisions for vacancies of Articles II, III, and IV.

Mrs. Eriksson: Perhaps the better policy is to retain the catch-all because it does express a policy that there shall be an election to replace an elected officer. And if you just leave that to the General Assembly, you might not be expressing that policy. That policy is carried out in judicial vacancies but it's no longer carried in legislative. There could be some feeling that because the legislature no longer holds elections for their own vacancies, they might eliminate them for the other vacancies. Someone might feel that this is a protection that the people should have an opportunity to replace an elected officer by an election.

Mr. Wilson: How did the legislature get to change how they filled their vacancies?

Mrs. Sowle: By constitutional amendment.

Mrs. Eriksson: I'll see what I can do about constructing a catch-all so that we clearly don't catch the governor and lieutenant governor in it.

Mrs. Sowle: Okay. Then we still are going back to the Commission with the recommendation that the office of lieutenant governor not be filled. So we simply explain that by taking this out we are simply being consistent with the policy the Commission has already adopted.

Mrs. Eriksson: Yes, by making this section consistent with Section 18 of Article III.

Mrs. Sowle: I think that takes care of, then, everything in that April 22 report. And this means that if the committee members go along with the few recommendations, the report can be submitted to the Commission. Should we leave a final resolution of it to the luncheon session of the first day?

Mrs. Eriksson: If we are going to vote on it, it would be well to get a committee consensus before them. We can do it by mail.

Mrs. Sowle: Why don't we suggest having a luncheon and dinner meeting on the first day of the Commission meeting, and if we have enough able, we'll have both. I suspect that we can get agreement on Article XVII by mail, so we can discuss corporations at the next meeting.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
October 23, 1974

Summary

The Elections and Suffrage Committee held a dinner meeting on October 23 at 6:00 p.m. in the Commission offices in the Neil House. Present were committee chairman Katie Sowle, and committee members Craig Aalyson, Dick Carter, and Jack Wilson. Ann Eriksson, Director and Brenda Avey were present from the staff.

Before addressing the topic of discussion for the meeting which was the constitutional provisions on corporations in Article XIII, Mrs. Sowle highlighted a few of the more difficult features of the committee's report on the initiative and referendum, scheduled to be presented to the full Commission on the following morning, October 24. No substantive changes were made during the discussion.

Mrs. Sowle: Maybe what we ought to do, since our discussion last time on corporations was very preliminary, is that we ought to go section by section through this report. I would like to make a preliminary comment for purposes of discussion. The memorandum recommends a lot of repeal. However, it doesn't point out, really, that any of these sections is causing any trouble. I get the feeling that we might run into opposition in trying to do very much with this - that it might be nice to make it neat and clean it up on the one hand but on the other hand we might stir up more than we really want to stir up by recommending repeal.

Mr. Carter: You're saying that there are political implications as well as logical implications on what we are talking about.

Mrs. Sowle: Yes, and it might make people just nervous to think, 'well, if it were repealed, might something unexpected happen?' Let's start with section 1. The memorandum does not recommend repeal of section 1. It points out it may be desirable to retain two provisions found in sections 1 and 2. Number 1 is to prohibit the general assembly from passing a special act conferring corporate powers.

Mr. Carter: I think all the people agree that we should leave that in. The only question that came up on that in our last discussion is whether we want to make any attempt to try to limit corporate powers to business corporations rather than municipal, and I just don't feel very strongly about that. Although, if it's a question that we could do it easily, we might give it some thought.

Mrs. Eriksson: At first we were going to try to draft something and then at the end you said you really didn't think it was worthwhile. I gave some thought to it and the more I thought about it the more I became convinced that it was better to leave it the way it was. It doesn't create any conflict with any other section of the constitution.

Mr. Carter: Yes, yes. Because you can't do it on municipal corporations, they must be subject to general laws.

Mrs. Eriksson: When you try to write an exception, it sounds almost as if you are trying to do something different with respect to municipal corporations.

Mrs. Sowle: Many of the cases seem to concern the question, 'what are corporate powers', but again, there doesn't seem to be any difficulty with those court decisions and there is a backlog to be referred to of cases. I think the term was used today

with respect to home rule that there was 'stable interpretation', and I think that applies here.

Mr. Carter: This article is dealing with corporations, but really all of it except this one thing is really dealing with business corporations. So it offends my sense of logic and order to have something in there like that. Could we change the title of the article?

Mr. Wilson: To what?

Mr. Carter: Well that's the nasty question.

Mr. Aalyson: Instead of just corporations, to a designated type of corporations?

Mr. Carter: Yes, but then that gets difficult.

Mr. Wilson: Well I'm not a major stockholder of of director in banks or banking institutions. But I wonder why they were singled out? Should they be now, in view of the FDIC and such?

Mrs. Sowle: Then, I assume that the committee is agreed that we will not recommend any change in section 1 of Article XIII. Section 2, again, the memorandum does not recommend repeal. At least the concept that the general assembly has the power to alter and repeal general laws, pursuant to which corporations are formed. "Corporations may be formed under general laws but all such laws may from time to time be altered or repealed." Now, that portion of it was obviously very important and necessary and there appears to be no reason to bother with that. "Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their oganizations, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law." Now, the memorandum at the bottom of page 5 says the second and third sentences were the work product of the 1912 convention. These provisions were added to the constitution to enable the legislature to enact laws regulating corporate and commercial transactions. In 1912, some doubt existed as to whether or not the legislature had authority under the 1850 constitution. These cases have held that prior restrictions were unwarranted restrictions on trade which violated the first article of the constitution by restricting a person's right to hold property. That's all kind of ancient legal history but it stimulated the inclusion of this. Does anyone see any reason to take that out?

Mr. Carter: I have a suggestion on this. I agree with your general comment. I have a heck of a time saying that that whole second paragraph should be in the constitution. I've read the memorandum on this. But it just seems to me that we could do all that by simply saying in the first sentence, "Corporations may be formed and their activities regulated under general law, but all such laws may, from time to time, be altered or repealed." And just leave that whole second paragraph out. It's a type of clean-up thing. I don't think it's a substantive change as far as I can determine, at all. If we were to decide that we were going to make some other changes in the section, I think it might be worthwhile to go back and pick it up. But if we decide that we're going to leave the rest of it alone, then I don't think it's worth going back and picking it up.

Mrs. Sowle: It seems to me that the constitutional law has changed in such a way that the basis for these decisions in 1904 and 1911 no longer exist. Would you agree?

Mrs. Eriksson: Yes, I think that is correct. That's happened in a number of areas. The whole idea of the right to own property and do with it whatever you want is subject to the police powers of the state or the federal government, as the case may be. And it would be my thought that no court would decide anymore that the general assembly could not pass a law regulating the sale and conveyance of personal property. To my mind the whole last two sentences are not necessary. However, if it would open a question if you removed them, that I don't know.

Mr. Wilson: I think you would have trouble selling the removal of them. Someone might feel you were opening the door wide for corporations to do whatever they want without proper governmental control. I agree that it is superfluous.

Mrs. Eriksson: The problem is that the last sentence clearly doesn't belong here and yet if you simply took that out then that would raise the question as to whether or not you were trying to make a substantive change. I don't really think that that ought to be taken out unless you take out the second sentence too. Because, I think if you take the whole thing out then you could simply say, 'we're cleaning up the constitution and we feel this language is no longer necessary'. But if you only take out the last sentence, then I think you would raise a serious question as to why you didn't take out this other sentence which would be even more unnecessary, I think, than the last sentence. If you removed the last sentence and tried to put it someplace else, I don't know where you would put it, except you would put it in Article II, dealing with the powers of the general assembly, or in Article XII.

Mr. Carter: I'm in favor of leaving it out because clearly, in my view, the plenary powers of the legislature enable them to do that. I would like to make a motion, if you will, that we give consideration to eliminating the second and third sentences, and replacing them by this phrase. Again, I'm not ready to say that it should be a committee recommendation at this point. But I'd like to record what we're talking about.

Mrs. Sowle: Would you repeal that language?

Mr. Carter: I would add, after 'corporations may be formed"...'and their activities regulated' and then striking out everything else.

Mr. Aalyson: I'm in favor of Dick's suggestion. I don't think we need to spell out what activities precisely can be regulated if we say that their activities can be regulated.

Mr. Carter: I happen to think that their activities can be regulated even if we didn't say that. But there is some question and for those few words I'm willing to put it in. I'm going to go back again to the question of business corporations. If we limit our thinking to that, we might get trapped somewhere. Are we interfering with home rule powers by making this kind of an amendment after the home rule powers were adopted? There are all kinds of sneak paths that are involved. Once again, I wonder if we change the title of Article XIII to "Corporations (other than municipal)".

Mrs. Eriksson: The problem is that we don't have anything to do with the titles, unfortunately.

Mr. Carter: That's not part of the constitution?

Mrs. Eriksson: No.

Mr. Carter: I see.

Mr. Wilson: Who attributes these titles to the constitution?

Mr. Aalyson: It's an editorial function, I suppose.

Mrs. Eriksson: Yes, it's an editorial function of the secretary of state. Titles to statutes are now written by statute by the Legislative Service Commission, but they are written after the general assembly adopts it.

Mr. Carter: In other words, the constitution itself is simply Article XIII.

Mrs. Eriksson: It may originally have had a title to it, but as the general assembly adopts new constitutional amendments, it does not include titles in them.

Mr. Carter: There is no reason why it couldn't be done though.

Mrs. Eriksson: I don't know whether it would go through or not. Titles to sections are never put in. And I would know of no way to amend the title to an article, which is really what you are talking about.

Mr. Carter: If it's in the constitution you surely can amend it, and if it is not in the constitution, you can add it, I would think. I get concerned about this business where we think in terms of one kind of corporation; but what's happening on the other prong?

Mrs. Sowle: Yes, are we doing something to the other...

Mr. Carter: Because clearly, I think that the activities of municipal corporations should not be covered in this article. They are covered elsewhere and we don't want conflicts and duplications.

Mr. Aalyson: Yes, the municipal corporations are treated as a special subject, aren't they, by courts attempting to interpret this section?

Mr. Carter: No, you see that's the problem. The courts have interpreted some of these as applicable to municipal.

Mr. Aalyson: But how recently?

Mrs. Eriksson: Most of the cases are before the adoption of Article XVIII, because in 1851 they had this problem of the special and the general laws and it was at that point that they adopted this provision and the uniform rule. And those are the sections that were interpreted to prohibit any special legislation for municipal corporations. And then in 1912 it was specially written in and at that time.

Mr. Carter: Ann, you may not like my terminology, but let me take a crack back at this section 1. Let's suppose you were to say in section 1, "With respect to corporations other than municipal..." I know this isn't satisfactory for a number of reasons but I'm just trying to get, "the General Assembly shall pass no special acts conferring corporate powers." No, that's bad, too. That's the same trap you were talking about, Ann.

Mr. Aalyson: What is the municipal corporpation article?

Mrs. Eriksson: Article XVIII.

Mr. Aalyson: "Except as provided in Article XVIII..."?

Mrs. Eriksson: No, but then that sounds as if the general assembly can pass special laws for municipal corporations, as if it isn't provided in Article XVIII.

Mr. Aalyson: Doesn't Article XVIII provide it cannot?

Mrs. Eriksson: Yes.

Mr. Carter: But if this were passed later, you see, you get a mess.

Mrs. Sowle: This is just like the filling of vacancy problem.

Mrs. Eriksson: It is the same.

Mr. Carter: The problem is that 'corporation' has two entirely...What we need is a word of definition of a corporation for the purposes of this section.

Mrs. Eriksson: Maybe the simplest thing to do is to define corporations.

Mrs. Sowle: What does 'business corporation' mean? Are non-profit corporations under the business corporation act?

Mr. Carter: That's a problem of definition.

Mrs. Eriksson: There are two statues; one is a corporations statute and another is a non-profit corporations statute and I think if you use the term "business corporation," it wouldn't be clear that you included both.

Mr. Wilson: The terminology 'municipal corporations' actually describes the activities of municipal organizations is wrong - it's not a corporation as such - it would be better described as a municipal entity. And then you could go ahead with corporations.

Mrs. Eriksson: But we can't change that now.

Mr. Wilson: But now that we've got this municipal corporations to align with our thinking, you're going to have to come up with something else to define 'other than'.

Mr. Carter: Could we add a new section of essentially definitions? Start out with a new section - one that says this article is concerned with corporations other than municipal and putting in a definition?

Mrs. Sowle: The word "corporations" as used in this section means...

Mrs. Eriksson: Constitutional purists will say that definitions should not be put into the constitution, although it is done.

Mr. Wilson and Mr. Carter agreed.

Mr. Wilson: Normally you rely upon its current usage and that's one of our problems.

Mr. Carter: You see, that's not really a definition, what I was talking about, Ann. It's really saying that this is what we're talking about in this section.

Mr. Wilson: I like the idea of "except as concerning municipal corporations" or "except as concerning section such and so, this section shall apply..." Now, how you get that in the proper phraseology is something else.

Mr. Carter: Suppose you were to say something like "for municipal things... see section XVIII". You see, you'd have to change this whole language here, "shall pass no special acts". You really need a statement in here of what you are talking about.

Mr. Wilson: "The general assembly shall pass no special act conferring non-municipal corporate powers". That's about as short and succinct as I can figure out to get where you want to go.

Mr. Aalyson: That still implies that in the case of corporations they might be able to do it.

(All agreed).

Mr. Wilson: I dislike the use of the word "non" anyhow - I wish the word had never been invented.

Mrs. Eriksson: The entire corporation provision of the Illinois Constitution reads as follows: "Corporate charters shall be granted, amended, dissolved, or extended only pursuant to general laws." That's it.

Mr. Wilson: Do they have a provision regarding municipal corporations in their constitution?

Mrs. Eriksson: They refer only to municipalities. They define "municipalities" - means cities, villages, and incorporated towns.

Mr. Carter: The Model Constitution simply assumes that it's within the plenary powers of the legislature.

Mrs. Sowle: That is certainly a road that we could take. Highly defensible. And then we would have a selling job to do to say, "look, the rest of this isn't necessary". Then, they're going to come back and say, "but the general assembly would then have the power to do various things, which the general assembly doesn't have the power to do now". I'm just wondering whether they will buy it. I think it would be great to have a provision like that and throw out the rest of it.

Mrs. Eriksson: Well, this only permits by general laws, so the general assembly would still not have the power to confer corporate charters specially.

Mrs. Sowle: No, but they could increase the liability of shareholders, for example. They could make other changes that they cannot make now.

Mr. Carter: If you take such an approach as that, we might be able to delete some of these obsolete things, like section 4, which, if you tackle by themselves, there is no way. I'm speaking from a political standpoint.

Mr. Aalyson: How about "subject to the provisions of Article XVIII which shall control (or govern) the formation and regulation of municipal corporations, the general assembly shall..."

Mr. Carter: Or just "govern municipal corporations".

Mr. Aalyson: "The general assembly shall pass no law or special act conferring corporate powers..."

Mr. Carter: "...other corporate powers"? No, that's the same dilemna.

Mr. Aalyson: I think "corporate powers" is enough. It seems to me that gets rid of the problem that you are implying that you can do it in corporate cases and it gets rid of the idea that the last enacted might take preference because you are referring municipal corporations to its own article. And at the same time it seems to limit the thing to corporations other than municipal corporations.

Mrs. Sowle: Now, if we went to a provision such as Illinois', we really wouldn't even have to worry about that now, would we? I think that's a very good way to accomplish it.

Mr. Carter: Yes, how about this use of the phrase "corporate charters"? Does that help us at all? Is a municipal corporation a charter? That's an interesting distinction.

Mr. Aalyson: Do we have corporate charters when we form a corporation?

Mr. Carter: Yes, very definitely.

Mrs. Sowle: Articles of incorporation.

Mr. Aalyson: Is it called a charter?

Mr. Carter: Yes.

Mrs. Sowle: And a city does not have articles of incorporation or a charter.

Mrs. Eriksson: Yes, Mr. Wilson says a city does have a charter.

Mr. Wilson: I found the local historian who has ours and it belongs to the city and I'm trying to get it back. There is an actual piece of paper incorporating the city of Piqua, Ohio.

Mrs. Eriksson: Issued by the secretary of state?

Mr. Wilson: In 1823.

Mr. Carter: But this says "corporate charters", you see. I think the use of the word 'corporate' is a distinction between municipal corporation....

Mr. Aalyson: If that's so, then there is no need to change it.

Mrs. Eriksson: No, because this probably says that the city of Piqua...

Mr. Wilson: Piqua was incorporated, and has a corporate charter as a city in the state of Ohio.

Mrs. Eriksson: And it was a special act then by the legislature.

Mrs. Sowle: But, of course, if we take the constitution simply out of the whole business of corporations, except for one limited provision, we don't have to worry about it. I don't know if you want to do that.

Mr. Aalyson: You mean make section 2 the single section? "Corporations may be formed and their activities regulated under general laws"?

Mrs. Sowle: Well, we might have to combine the ideas of sections 1 and 2.

Mr. Aalyson: Only under general laws. Yes. "Corporations may be formed and their activities regulated only under general laws"?

Mrs. Sowle: Yes. Does the Illinois Constitution say any more than that?

Mr. Carter: No, it says less than that. It just talks about corporate charters. Granted, amended, dissolved, or extended. It doesn't talk about any more than that.

Mr. Wilson: Does it talk about taxation of corporations?

Mrs. Eriksson: It doesn't talk about regulating their activities, which is why the question would come up if this applied to municipal corporations.

Mr. Aalyson: Do we have to get the general assembly in there?

Mr. Carter: No.

Mrs. Sowle: Looking at the Illinois provisions, several words correspond: 'granted' that would be 'formed'; 'amended' - 'altered'; 'dissolved'- 'repealed'; 'extended' - well, that's altering it, isn't it?

Mr. Carter: They're talking about charters, you see. Everything is qualified by charters in that one.

Mrs. Sowle: I'm not sure the meaning is any different, though.

Mr. Carter: Yes, I think it is. Corporate charters are a little different.

Mrs. Sowle: Corporate charter is a rule of law. It's the grant of power that makes it an entity. I think that the meaning of this is the same.

Mr. Carter: I was looking to section 2 which goes a little further than the formation. That's the present intention of section 2. It talks about certain regulations of their activities: classification, regulatory powers, and that sort of thing.

Mrs. Sowle: Yes, and your words would cover that "and their activities..."

Mr. Carter: Yes, except for this problem of applying it to municipal corporations, which bugs me.

Mr. Aalyson: Why not a combination of section 1 and 2 with that proviso - "subject to the provisions of Article XVIII which shall govern municipal corporations, corporations may be formed and their activities regulated only under general laws".

Mrs. Eriksson: And then eliminate section 1?

Mr. Aalyson: Yes. I don't know whether you need the word 'only'.

Mrs. Eriksson: Yes, if you are going to eliminate section 1, I think you do.

Mrs. Sowle: But if that's all it says, the same thing is true in the article on municipal corporations. So would it make any difference whether it was distinguished or not?

Mrs. Eriksson: Municipal corporations' activities are not necessarily regulated only

under general law if the municipal corporation is exercising the power of local self-government.

Mr. Aalyson: We don't want municipal corporations to be formed by special acts and the implication might be here that since this is later enacted, and it says 'corporations' it may apply to municipal corporations.

Mrs. Sowle: I was thinking that you could say the same thing of a business corporation in the sense that you have a board of directors, and there is a process of self-government and their activities are regulated. Maybe we ought to go with the Illinois concept...

Mr. Carter: Maybe we don't need that phrase, and in essence, say that corporations may be...

Mr. Aalyson: ...may be formed and regulated...

Mr. Carter: ...only under general laws.

Mrs. Sowle: Also, we may not have to say anything about the regulation of activities in the constitution. There isn't any longer any constitutional question about that kind of thing. Constitutional law has changed since these early decisions.

Mr. Aalyson: Well, would there be if we repealed it, though? In view of the old supreme court decisions.

Mrs. Sowle: You're right, that's a problem.

Mr. Carter: How about a disclaimer stating what we want to do, in the Illinois style or however we modify it, and then say that this provision shall not apply to municipal corporations covered elsewhere in this constitution, or under Article XVIII or whatever.

Mr. Aalyson: ...subject to...

Mr. Carter: I'm a little uneasy about subject to, which gives us this problem about are we excepting municipal corporations from this, which we are not trying to say. What we are really trying to say is that that's governed elsewhere. So if we can make a statement for what we are talking about for business corporations, and then have a disclaimer that this shall not apply to municipal corporations, covered under Article XVIII. Now, let's see if we can struggle with a little bit of language then. How does the Illinois provision start out?

Mrs. Eriksson: That starts out with the words "corporate charters".

Mr. Carter: And what we are trying to say is that corporate powers... No. "The formation of corporations, their powers, and the regulation thereof,shall be in accordance only with general laws, (something like that)in accordance.

Mr. Aalyson: I was using really the expression there that "corporations may be formed and regulated only under general laws".

Mr. Carter: No, does that cover the power? Corporations may be formed...

Mr. Aalyson: "...empowered and regulated".

Mr. Carter: Yes. I think there is some concern about their powers not being special acts. That was a burning issue at one time - with that canal business and all that sort of thing.

Mr. Aalyson: "...may be formed, granted powers, and regulated..."

Mr. Carter: "Corporations may be formed, empowered, and regulated only under general laws"? (All liked that). Then "the provisions of this section are not applicable to municipal corporations which are covered under **Article** XVIII (or governed by)."

Mrs. Eriksson: I still would like to find a word to describe, rather than saying that this does not apply to something, I think we would be much better off if we could find a word to describe what it applies to.

Mr. Carter: If you could do it "See Article XVIII for municipal corporations" it would be nice.

Mr. Wilson: I told you that the best you could get is 'non-municipal', and stop right there. It won't work either. I'd like to back up a few thoughts.

Mr. Carter: That's not so bad in context with this now. If we say that non-municipal corporations can be formed, empowered, and regulated only under general laws, because there are some exceptions in Article XVIII, home-rule and that sort of thing, that are applicable to municipal corporations.

Mrs. Eriksson: There could still be a problem with respect to formation, because municipal corporations are still subject to general laws as far as incorporation is concerned.

Mr. Carter: But we are specifically saying non-municipal corporations.

Mrs. Eriksson: ...may be formed only under general laws, therefore municipal corporations may be formed under special laws.

Mr. Carter: Except that that's covered elsewhere.

Mrs. Eriksson: But I don't think that your language here is going to be referring to that, would it.

Mr. Carter: No, but it is covered elsewhere.

Mr. Aalyson: But in the article dealing with municipal corporations, it says they must be under general laws. Do we still have the problem of this later enacted section conflicting?

Mr. Carter: We are simply saying that we're talking about non-municipal corporations.

Mr. Aalyson: I'll try another stab. "Corporations other than municipal corporations, which are governed by the provisions of Article XVIII, may be formed..."

Mr. Carter: Yes, how about that?

Mrs. Eriksson: How about using the words in the code, saying "profit and non-profit corporations?

Mr. Aalyson: What is a municipal corporation?

Mrs. Eriksson: A third category of corporations.

Mr. Carter: That's an interesting approach.

Mrs. Eriksson: There are two kinds of corporations - profit and non-profit.

Mr. Wilson: Currently, yes.

Mrs. Eriksson: Currently. Now that would be the immediate problem.

Mr. Wilson: It seems there could conceivably be some other type of corporation.

Mrs. Eriksson: I don't know what other type there could be.

Mr. Wilson: The Ohio Turnpike Commission is not necessarily a corporation for profit or for non-profit. They are supposed to break even and pay for the road.

Mrs. Sowle: But hasn't the court said that that is not a corpporation?

Mr. Wilson: I don't know whether they have or not but it is a corporation.

Mrs. Eriksson: It's a public corporation.

Mr. Wilson: That's what I'm gettingat. There may be other classifications other than profit and non-profit.

Mr. Aalyson: How about "private corporations"?

Mr. Carter: Well, we talked about that, and then we got into this question of public and then you get into the securities aspect. So that again, you get into the problem of the definition of what words mean when they're used in a variety of contexts.

Mrs. Eriksson: Yes, This is part of the provision - the turnpike commission also came under the uniform law, and even if you took public corporations out here, I suspect they would still be governed by section 26 of Article II, which would prohibit passing a special act for something that was of general application. But that's worded a little bit differently.

Mr. Aalyson: Well, "other than municipal corporations" would satisfy that.

Mr. Carter: But then that gives into the inference again. Corporations other than these cannot...The inference is that municipals can.

Mr. Wilson: I was going to back up to the start of this discussion and say, why are we recommending changes in these as they stand now anyway?

Mr. Carter: Alright, it is kind of a circular argument.

Mr. Aalyson: One other suggestion. "Corporations not governed by Article XVIII" without saying municipal corporations.

Mr. Carter: How about that?

Mr. Wilson: Article XVIII says "municipal corporations" period. If we don't change the title on it, which we have no control over, alright.

Mr. Carter: Let's try that. I kind of like that. "Corporations not governed (or not covered)...

Mrs. Eriksson: Even if you could change the title, though, how would you change it?

Mr. Wilson: Article XVIII, or this one?

Mrs. Eriksson: This one. If we could decide on that, we would solve our problems.

Mr. Carter: How about "corporations not governed under Article XVIII"? Not as a title.

Mr. Aalyson: I don't know why we need to change the title.

Mr. Wilson: If we could write the title, we could say Article XIII - Corporations, Article XVIII - Municipal corporations.

Mrs. Sowle: What if we just went to the language of the Illinois Constitution. Would we be running into problems of home rule charters there?

Mrs. Eriksson: Well, we might because they don't use the expression "municipal corporations" and I don't think they have the same home rule provisions that we do.

Mr. Wilson: Do they have a provision for municipal corporations anywhere in their constitution?

Mrs. Eriksson: They just call them municipalities, not municipal corporations.

Mr. Carter: I think this comes out pretty good. "Corporations not governed under Article XVIII mat be formed, empowered, and regulated only under general laws."

Mrs. Eriksson: Well, that might be better. I like that better than saying "other than municipal corporations".

Mr. Carter: This is pretty good I think. "Corporations not governed under Article XVIII..." which, in essence says we are excluding them from this. Now, what I'm suggesting is the reason I think this has some relevance is that we might very well say that we could eliminate practically all of this Article and replace it just by this one sentence.

Mrs. Sowle: Would you repeat that?

Mr. Carter: I have here in Craig's words (I'm piggy-backing), "Corporations not governed under Article XVIII" or "not covered under Article XVIII..."

Mr. Aalyson: "...of this constitution" I suppose we have to say.

Mr. Carter: "Not covered"? Would that be better?

Mrs. Eriksson: "Not covered by Article XVIII".

Mr. Carter: "...not covered by Article XVIII of this constitution, may be formed, empowered and regulated, only under general laws."

Mrs. Eriksson: I think it would be well to continue with the rest of that sentence "but all such laws may from time to time be altered or repealed". So that you don't

go back to the Dartmouth College case.

Mr. Carter: We might even eliminate the whole article, and just make it a miscellaneous provision. It really doesn't deserve an article.

Mr. Wilson: There is no more reason for treating corporations separately than there is partnerships or joint ventures, or anything else.

Mr. Aalyson: Ann, I recall your penchant for keeping as much as you can of anything in the same language, but it seems to me that that should read "under general laws which may from time to time be altered or repealed."

Mrs. Eriksson: Yes.

Mrs. Sowle: Well, that takes care, at least for the time being, of sections 1 and 2, doesn't it?

All agreed.

Mrs. Sowle: Ann, is it your feeling that that last sentence of section 2 then can be eliminated without any complications?

Mrs. Eriksson: That's my opinion.

Mrs. Sowle: Because it's simply antiquated - we don't need it. Section 3. I don't even know what this first part means.

Mrs. Eriksson: Well, we looked into that because the question was raised at the last meeting.

Mr. Carter: What are dues from private corporations?

Mrs. Eriksson: Apparently they mean "debts."

Mr. Wilson: Debts of private corporations, or amounts owed to?

Mrs. Eriksson: No, debts from private corporations. Because what it's saying is that if a private corporation gets into debt, it cannot assess its stockholders, and that's what it is prohibiting.

Mr. Carter: In other words, if we were to use "moneys owed by".

Mrs. Eriksson: The debts from private corporations may be secured by such means as may be prescribed by law. In other words, they can mortgage their property, they can sell bonds. But the stockholder will not be individually liable for the debts of the corporation. That's what it was really intended to say. And why they used the word "dues" rather than "debts" apparently wasn't clear.

Mr. Carter: It probably was the word used at the time.

Mrs. Eriksson: But it definitely was used in that sense.

Mrs. Sowle: Well, that makes sense. I gather that we are agreed that there is no problem with doing away with this requirement. The statutes so provide.

Mrs. Eriksson: Except that this is the one that the Bar Association said that they

really wanted to keep that prohibition against stockholder liability in the constitution.

Mr. Aalyson: I think it would be a good idea to keep it in there for the implication that at least you can go to the shareholder for his subscribed but unpaid for stock.

Mr. Carter: I might read from this letter from the representative of the Ohio Bar. "Although the matter of stockholder liability might be dealt with either in the constitution or the statutes, the matter is too fundamental to be left to implied statutory construction if it is not covered in the constitution." One of the things that concerns me, if you take it out of the constitution after it has been in, it's kind of an implied approval of a double indemnity sort of thing.

Mr. Wilson: How did this get tied in with banks? I know that they had double liability. But the first part, amounts due from or by a private corporation shall be secured up to the amount of the unpaid stock - that could be any corporation. It could apply to the Fostoria Wigget Company, and if the company goes bankrupt, the stockholder is going to have to pay up part of what he subscribed to. But the banks, I don't think, are deserving of any special treatment.

Mr. Carter: They're not getting it, I don't think.

Mr. Wilson: No, but they are given specific mention in here.

Mr. Carter: Well, that's to prohibit the use of the word "bank".

Mr. Wilson: Yes, well, why put that in there?

Mrs. Eriksson: I think the banking language today is unnecessary.

Mr. Wilson: These are two different things to me. A stockholder owes money he's subscribed to for stock.

Mr. Carter: We can handle that just by leaving in that phrase "In no case shall any shareholder be individually liable otherwise than for unpaid stock owned by him or her".

Mr. Wilson: Yes, and I have no objection to that.

Mr. Carter: And this is one of those cases where, if it weren't already in there, you'd never put it in. But the fact that it's in introduces some complications. All we have left, if we omit "dues from private corporations, etc..." is "in no case, shall any stockholder be individually liable for unpaid stock owned by him or her."

Mrs. Sowle: From him.

Mrs. Avey: At the last meeting when we discussed this, you said, "In no case shall any stockholder be individually held liable other than for the unpaid stock subscribed to by him or her." Do you still prefer that?

Mr. Carter: Oh, yes.

Mr. Wilson: The reason I brought that up is that technically, it's not owned by you until you've paid for it. Subscription doesn't necessarily give you voting rights or anything else. The question is: when is it owned by you? Normally, it is not

owned by you until you've paid for it.

Mr. Aalyson: Subscribed to or subscribed for?

Mr. Carter: I think technically, it should be subscribed for. Would you read that again?

Mrs. Avey: In no case shall any stockholder be individually held liable other than for the unpaid stock subscribed to by him or her."

Mr. Aalyson: Individually held liable?

Mrs. Eriksson: I wonder why we want the word "held".

Mr. Aalyson: Yes, what does that add?

It was agreed to omit the word "held".

Mr. Carter: Other than for unpaid stocks subscribed for.

Mrs. Eriksson: You don't need the "by him or her".

Mrs. Sowle: You don't want to end the sentence with a preposition.

Mr. Carter: Yes, I agree.

Mr. Aalyson: "In no case shall any stockholder be liable to secure the debts of a corporations"?

Mrs. Sowle: Right.

Mr. Carter: Well, suppose the corporation is sued for something. The point is that the shareholders don't have any responsibility other than their investment.

Mrs. Sowle: In no case shall be individually liable for corporate debts.

Mr. Carter: Maybe we can just cut out that "in no case".

Mrs. Sowle: I don't think that answers Craig's objection.

Mr. Aalyson: I don't either. We want to limit the stockholders liability to his subscription, in cases where the corporation becomes indebted and he might have to stand good. That's what we want to do.

Mrs. Sowle: You want to define what he is liable for.

Mr. Aalyson: Yes, in no case shall he be individually liable - in what kind of a case? It means in case of a debt involving a corporation to whose stock he subscribed. I think we should say that. Otherwise, it's kind of a raw, bare thing.

Mrs. Sowle: He's worried about the ridiculous construction that I go out and buy stock and from thereon I can't be liable for anything.

Mr. Carter: Incidentally, it's interesting to me, this is the first time I caught this, they used the term "private corporations".

Mr. Aalyson: Yes. As opposed to public or municipal...or?

Mrs. Sowle: "Private corporation" is a term used this way, I think, in corporation law. It means a non-municipal.

Mr. Carter: Privately held, that is.

Mrs. Sowle: No, it can be a non-profit and it can be publicly or privately held. You can have a private corporation publicly held. It simply means, as I understand it's use in corporate law it means non-municipal corporation.

Mr. Carter: Well, that goes back to what we had started with. Maybe we can just use "private corporations".

Mrs. Sowle: And private corporation means a non-public corporation. It has nothing to do with who owns the stock. Wouldn't you agree with that, Ann?

Mrs. Eriksson: I think that maybe that was a good expression, but I don't think that would explain the turnpike commis sion.

Mrs. Sowle: But I don't think that's a corporation.

Mrs. Eriksson: Yes, I think it is. It has corporate powers. A lot of public bodies are specifically given corporate powers.

Mrs. Sowle: Okay.

Mr. Carter: The context of what we are talking about here is strictly a private corproation as you have described it.

Mr. Aalyson: A development corporation might be owned by the state, and it could be a public corporation in the sense that the state owns it.

Mrs. Eriksson: That's what the Turnpike Commission is.

Mr. Carter: That's what the Port Authority is in New York. So I think that's right.

Mrs. Eriksson: Some institutions have corporate powers, like Ohio State University. That's why I don't think you want to use that expression.

Mr. Wilson: Just to throw another slight monkey-wrench in the works, this sentence as it now stands is in conflict with one portion of federal law. Corporate officers are personally liable for debts owed to the federal government for withheld taxes.

Mr. Carter: Yes, that's in their capacity as management.

Mr. Wilson: As individuals, not necessarily in their capacity as stockholders; they may be stockholders.

Mr. Aalyson: How about "for the payment of corporate debts, in no case shall any stockholder be individually liable..."?

Mrs. Sowle: Other than for the unpaid stock subscribed to. I think that's good.

Mr. A lyson: "In the discharge of corporate obligation, or, for the payment of corporate obligations, in no case shall any stockholder be individually liable other than for the

unpaid stock subscribed for by..."

Mrs. Sowle: I see no problems with that. Does anybody?

Mr. Wilson: That basically is what we are trying to say. Whether that is the exact phraseology or not is another question.

Mr. Carter: I have essentially a little different language here which is, I kind of like, the same thing: "Stockholders in a private corporation shall not be held liable for corporate obligations in excess of the amount for which he has subscribed."

Mr. Aalyson: And not paid.

Mr. Carter: That's right. "...in excess of the amount subscribed for but not paid."

Mrs. Avey: How about "unpaid subscriptions".

Mr. Carter: That's a thought. In excess of any unpaid subscription.

Mr. Aalyson: That's fine. I guess you don't have to say his unpaid subscription. I guess that is implied, of course. In excess of his unpaid subscription?

Mr. Wilson: I like "unpaid stock subscription".

Mrs. Sowle: I like keeping the word "stock" in there too.

Mr. Carter: "...in excess of any unpaid stock subscription". Let me read you what I've got as I listen to this. "A stockholder in a private corporation shall not be held liable for corporate obligations in excess of any unpaid stock subscription."

Mr. Aalyson: You've got to say whose.

Mr. Carter: His unpaid stock subscription. Actually, a stockholder doesn't have to be a person, either.

Mr. Wilson: It could be a corporation owning stock.

Mr. Carter: In excess of that stockholder's unpaid stock subscription. That will do it. I'll try it again. "A stockholder in a private corporation shall not be held liable for corporate obligations in excess of that stockholder's unpaid stock subscription."

Mr. Aalyson: I don't like "held".

Mr. Carter: That's right. Shall not be liable. "A stockholder in a private corporation shall not be liable for corporate obligations in excess of any unpaid stock subscription by that stockholder."

Mr. Wilson: Wouldn't you want to keep the word "individually"?

Mr. Carter: No, I don't think so.

Mr. Aalyson: What do we have so far?

Mr. Carter: "A stockholder in a private corporation shall not be liable for corporate obligations in excess of that stockholder's unpaid stock subscription." So it doesn't

sound like a magazine subscription.

Mrs. Sowle: I have Jack's question, too. The term "individually liable" is often used. If we don't use 'individually' are we alright. What does that mean? How can you be liable other than individually?

Mr. Carter: Collectively.

Mr. Aalyson: Jointly.

Mrs. Sowle: Do we need the word or are we alright without it?

Mr. Aalyson: If you say "individually" you imply that collectively, you might be, I think.

Mrs. Eriksson: Collectively, as a corporation, he is liable, as a corporation. So maybe you should keep that word 'individually' in there.

Mr. Aalyson: You think you do?

Mrs. Eriksson: Yes. So that you can say that he shall not be individually liable. But as the collective of the corporation the corporation is liable.

All agreed.

Mrs. Eriksson: And I think if you take that word out, there might be a question about it.

Mr. Carter: Now, I have, "A stockholder in a private corporation shall not be individually liable for corporate obligations in excess of that stockholder's unpaid stock subscriptions." That certainly is something that's understandable.

Mr. Wilson: It's much more explicit than what we have got in here now.

Mr. Aalyson: What are we going to do with that last sentence? I think it ought not be in this section myself.

Mrs. Sowle: Should it be anywhere?

Mr. Carter: I don't think you need it. The Division of Banks said that repeal of section 3, which is what we're talking about, would leave the statute intact, which is sufficient.

Mrs. Eriksson: Historically, this goes back to a time when private banks were possible, and they aren't any more.

Mr. Carter: Yes. It used to be that I could set up the Carter Bank, and write my own currency. A lot of people did that. All you had to have was a reputation in the community. A lot of people lost a lot of money that way.

Mr. Wilson: That's probably why banks and banking got into this section.

Mrs. Sowle: The reasons for deleting that last sentence are that it's covered by statute and it's not properly constitutional material.

Mr. Aalyson: And you cannot form a private bank now anyway.

Mrs. Sowle: Right. So that takes care of section 3. We're on section 4: "The property of corporations now existing or hereafter created shall be forever subject to taxation the same as the property of individuals."

Mrs. Eriksson: The discussion about that section was that it was unnecessary but that it would be politically unwise to take it out.

Mr. Carter: Unless it's a part of a whole thing. In other words, one of the things I'd kind of like about what we are doing is that we can say we are going to eliminate Article XIII and have one section. We can put this stockholder thing into the section we already have written. And if that's all we end up with, we can then propose the abolition of Article XIII. and just put it in the miscellaneous section.

Mr. Wilson: We could also go back to that first sentence we wrote to take care of section 1 and 2, talking about corporations may be formed, and the powers regulated, and taxed.

Mr. Carter: Yes, that's an interesting political gambit, though.

Mr. Wilson: It's already in there. All you would be doing would be including it in this cumulative sentence you've come up with to replace a lot of sections.

Mrs. Sowle: Section 2 of Article XIII covers existing and future corporations and double-property taxation. So this is merely a duplication of something else in the constitution, and (I'm reading from page 10 of the memo) if double property taxation is already covered there. can we recommend the elimination of this on that basis?

Mr. Aalyson: If it is so covered, I would think there would be ample reason to eliminate it.

Mr. Wilson: I could think that we would not necessarily eliminate it, but we could cover it with my suggested insertion of the word "taxed" in that first cumulative sentence.

Mr. Carter: Clearly it is a political strategy. It doesn't mean anything.

Mrs. Sowle: Yes, it doesn't mean the same thing that this does, if you just add taxation to that section. That talks about special as opposed to general laws.

Mr. Aalyson: This is being sure that the general assembly can tax corporations.

Mr. Carter: Well, I think that it would take the sting out of repealing it.

Mr. Wilson: I don't think that you could come up with the repeal of this without coming up with something...

Mr. Aalyson: If we say it's in Article XII, and if it is, and I accept the analysis of the author of this memo.

Mrs. Eriksson: Of course, it's not specific. It's just that section 2 of Article XII clearly covers property taxation, but it doesn't specifically talk about corporations.

Mr. Carter: But if we were to use Jack's term in context with Article XII.

Mr. Aalyson: The section presently provides against excluding a corporation from tax-

ation in any different form than an individual's tax.

Mrs. Sowle: It's the special privilege problem, I think, that section 4 is addressed to.

Mr. Aalyson: Right, they are trying to avoid giving a corporation a special privilege.

Mrs. Sowle: Because of the abuse of a special grant of privilege where you tax individuals but you exempted corporations. Now, to add taxation to that earlier article would simply mean you have to tax by general law but you could still exempt corporations from a generally applied tax.

Mrs. Eriksson: But section 2 has to do with property taxation generally.

Mr. Aalyson: This does too, with the property of corporations.

Mrs. Eriksson: Right, and you see, land and improvements thereon can be taxed by uniform rule according to value. You can't classify and say we're not going to tax corporations' property. That's another method of classification of property and any classification of property taxation has to meet the requirements of reasonableness under equal protection, anyway. So that's what this means when it says that under section 2 of Article XII you couldn't say we're not going to tax corporate property. Unless you made an exception in section 2 of Article XII.

Mr. Carter: As we have for homesteads and that sort of thing.

Mrs. Sowle: That's property taxation. What about income taxation?

Mrs. Eriksson: This is only talking about property taxation. That's why we reached the conclusion that section 2 of Article XII covers it.

Mrs. Sowle: Then I have no objection to adding taxation to the earlier section, as long as this special exemption is taken care of also.

Mr. Carter: Let's go back and pick up what language we have. I want to make sure we've got this what we're talking about now. I have "Corporations not governed under Article XVIII may be formed, empowered, taxed, and regulated" or "regulated and taxed", "only under general laws, but all...." that phraseology that we have on that. Is that right, Ann?

Mrs. Eriksson: Yes.

Mrs. Sowle: Section 5. "No right of way shall be appropriated..."

Mrs. Eriksson: At the last meeting we discussed this, and our original recommendation in here is that this can be repealed. Then, as we talked about it at the last meeting, the question came up whether if this section were repealed it would permit the general assembly to confer upon corporations greater powers of eminent domain than under section 19 of Article II, the state itself can exercise. Because the state and anybody who derives its power from section 19 of Article II, all political subdivisions, can only use quick-take procedures in particular instances, otherwise compensation must be paid before you take the property. And it was my original opinion that even if you repealed this, no corporate power could ever rise higher than the public power from which it is derived. And that is still my opinion. But I find, in getting into it, that I want to have somebody really look into the eminent domain section and make sure that's a correct opinion before we would recommend repealing it. Because there are many other ramifications to the whole question of eminent domain. I think it is very

clear that the general assembly could not confer upon anybody eminent domain power except as it would be for a public purpose. But whether there could be any quick-take given to a private utility that the public itself could not use, I want to make sure before this section would be repealed. So I would be happy if you would postpone any decision on this section until after I have a proper paper prepared on that.

Mr. Carter: In other words, this prevents quick-take. Because it says "until full compensation therefore..."

Mrs. Eriksson: Right. And essentially that's the only difference between this section and section 19 of Article I.

Mr. Carter: I remember the rather involved discussion we had on this the last time.

Mrs. Sowle: Okay. Then we will postpone any further discussion of the eminent domain question until that's done.

Mr. Aalyson: When you are working on it, Ann, I wonder why was this restricted to a right-of-way?

Mrs. Eriksson: It's interesting that, under the cases, it's not restricted to right-of-way. And that's why I think that there can be no greater power than that conferred under the other section anyway, Because one of the leading cases under this section had to do with a railroad, and they were trying to appropriate property for a depot. And somebody said that this section only talks about right-of-way and the courts said no, because the general assembly has conferred power on the railroad to appropriate property for its purposes under section 19 of Article I. Therefore, it can acquire a depot, and it doesn't have to be a right-of-way. In other words, this section doesn't confer power in itself. It only restricts it that compensation be paid ahead of time.

Mr. Carter: And jury protection.

Mr. Wilson: Actually, that belongs in the eminent domain section, anyhow.

Mr. Aalyson: I'd like to change "no right of way" to another term, anyhow. It would sound better.

Mr. Carter: Has anyone tackled section 19 of Article I?

Mrs. Eriksson: That is really part of the bill of rights, and I do have a memo on that section. It hasn't been sent to anybody yet because after I started reading it and started reading this and started reading the cases myself, I decided we really needed to put it all together.

Mr. Carter: Alright, so at any event, section 5 should be considered in context with Article I, Section 19. Maybe we could dispose of it, take it out of here and refer it to the Bill of Rights Committee as a part of Article I, Section 19. It doesn't belong here.

Mr. Wilson: It doesn't necessarily have to be a corporation that goes someplace with a right-of-way. It's all under eminent domain, rather than specifically corporations.

Mrs. Sowle: So in effect, do you think it would be appropriate for this committee simply to take the action of recommending its removal from Article XIII and that further consideration be given by the Bill of Rights Committee.

Mrs. Eriksson: I don't see any particular reason to have it here. As you say, if the legislature determined that it's a proper public purpose for a partnership to be given the power of eminent domain that would be appropriate. There is no magic about a corporation exercising that power.

Mr. Wilson: People didn't trust corporations earlier - big business.

Mrs. Eriksson: But it was only corporations generally that were the utilities and that's really what this is talking about, of course.

Mrs. Sowle: So this committee recommends deletion of section 5 from Article XIII and consideration of the provisions of section 5 by the Bill of Rights Committee.

Mrs. Eriksson: I would just recommend section 5 to the Bill of Rights Committee rather than making a recommendation to delete it, because I really don't know what we're going to find out.

Mr. Carter: We can make a recommendation to transfer the subject.

Mrs. Sowle: Okay. Now, that takes us to section 7. Where is section 6?

Mrs. Eriksson: Section 6 has to do with the municipal corporations and it clearly belongs in conjunction with that. It was part of the Local Government Committee report.

Mr. Wilson: This is the only attempt I can see in this article to delineate between so-called business corporations and municipalities.

Mrs. Sowle: Section 7 looks fairly simple. "No act of the General Assembly, authorizing associations with banking powers shall take effect, until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of all the electors, voting at such election." This is limited to laws involving banks of issue and that's controlled by federal law, anyway, in effect, so this section, the memorandum says, is not necessary.

Mr. Carter: I couldn't agree more.

Mrs. Sowle: Do you all feel that it's obsolete and should be repealed?

Mr. Wilson: If we are going to eliminate reference to "banks, bankers and banking" in Section 3, I'm in favor of eliminating this section by repealing it.

Mr. Carter: I'd like to bring up the question again; since we're left with so little whether we shouldn't eliminate Article XIII.

Mrs. Sowle: Yes. We are back to where we put what we are left with.

Mr. Aalyson: And make it just a section in a miscellaneous? The only objection I have to that is that it does deal with corporations, and if you are looking for something, trying to find something in the constitution, I always like to be pointed to an area where I feel that I can find most of what I'm looking for. I don't know whether anyone would even think to look under miscellaneous for corporations.

Mr. Wilson: That's where it is in the index.

Mr. Carter: It doesn't deserve an article.

Mr. Aalyson: Well, probably you're right.

Mr. Carter: And there is a strong argument, there shouldn't be anything in here about corporations. It just doesn't deserve the status of an article.

Mr. Wilson: It would be interesting to hear some of the arguments when this was first put into the constitution.

Mr. Carter: Corporations were a bitterly controversial idea back in 1851. There was a tremendous argument as to whether that should be a permissible form of organization. I would like to suggest that we eliminate Article XIII and put it in Article XV, the miscellaneous article.

Mrs. Eriksson: There are other instances where we're going to be left with very little in an article, and one of those was voted on today which is Article XVII which is going to be left with two rather short sections in it. It only has two sections in it now.

Mr. Carter: What is the article?

Mrs. Eriksson: That is the elections.

Mr. Carter: I feel that that's an appropriate subject for a constitution, and corporations is not.

Mrs. Sowle: There is one other question, just in the matter of research, suppose, on the history of the liability of shareholders. Now you go to a volume and you find the provision under section 3 and its under Article XIII and all the annotations are there. Now if we move this to miscellaneous, these annotations are still going to be in what used to be Article XIII?

Mr. Aalyson: But it makes a difficult job for someone who is doing research or writing.

Mrs. Eriksson: It's a difficult job for the publishers and they're the ones that complain about this sort of thing, but you've just transferred all of initiative and referendum from Article II to Article XIV. We're making a lot of changes like that. We're shifting all those sections in Article XVIII around and changing the numbering and it's going to be the same problem. I don't think that that should be a major consideration.

Mr. Carter: I see that Article XIV on jurisprudence doesn't have anything in it anymore.

Mrs. Eriksson: That's where we are putting the initiative and referendum.

Mr. Carter: Yes. That's right. I remember that now. This is more than just a technical point in my mind. I just don't feel that corporations, business corporations, have much of a place in any constitution. Modern day constitutions - you don't need anything in it because it is a legislative matter. And it just seems to me the sooner we can get them back in the background, a better constitution we are going to have and hopefully sometime the next step will be to drop the whole thing.

Mr. Wilson: I don't have the legalistic background some of you have, but from an accounting standpoint, a corporation is simply a business entity, like a partnership or a sole proprietorship. And in our mind, it doesn't merit a full article or special treatment, so I can see your point. Although, obviously, at the time it was put in there, people felt that it deserved special treatment.

Mr. Carter: At that time.

Mrs. Sowle: The reasons are mostly historical now. Well, I have no objection to putting it in miscellaneous.

Mr. Carter: There are only ten items in miscellaneous, and a couple of those have been repealed, so it's not a big deal. Another thing, I think, is that you are going to have an easier time getting this thing by if you take this approach, too.

All agreed.

Mr. Carter: The next step is to make a draft of a report of the committee, and send it out to our missing members and give them a chance to reflect on some of these questions. I really feel this has been a good change. One of our functions is to clean up the constitution of archaic and non-applicable matter, and that's what this is.

It was announced that Mr. Aalyson would assume chairmanship of the committee.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
November 26, 1974

Summary

The Elections and Suffrage Committee met on November 26 at 9:30 a.m. in the Commission offices of the Neil House. Present were committee chairman Craig Aalyson, committee members Katie Sowle, Dick Carter, Jack Wilson, and Robert Huston; Russ **Herrold,** an attorney with Vorys, Sater, Seymour and Pease and legal representative of the Ohio Manufacturers Association; Miriam Hilliker of the Ohio League of Women Voters; Brenda Avey was present from the staff.

Mr. Herrold stated that his firm represents the Ohio Manufacturers Association and has an interest in workmen's compensation.

Mr. Carter welcomed Bob Huston, a new member, to the Commission.

Mr. Aalyson: The meeting this morning is for the purpose of discussing whether there should be any change in the constitutional provision which deals with workmen's compensation. I wrote a letter addressed to a number of people, most of whom I felt were more aligned with the employers' position in workmen's compensation, since I am primarily aligned with the claimants' position. I addressed the letter to Russ, John Cantlon and Associates, Inc., who are actuaries in this field, Mr. William Hartman, member of Squire, Sanders & Dempsey in Cleveland, who represents employers, Robin Obetz, who I've already described as having been a past chairman of the Columbus Regional Board of Review and also affiliated with a firm that handles employer clients in this field and Mr. James L. Young who is presently director of the Ohio Legal Center Institute but who formerly was the chief of the workmen's compensation section in the attorney general's office and also administrator of the Bureau of Workmen's Compensation at one time who has written a book dealing with workmen's compensation in Ohio, all of whom I felt might be able to give us the advantage of their thoughts. I've had some response. John Cantlon is intending to send a representative, Robin Obetz hopes to appear, and of course, Russ told me he would be here and is here. I have had no response by way of written comments on proposals for changes except from the Ohio Academy of Trial Lawyers which has a workmen's compensation committee on it and they have submitted to me some proposed changes which I will pass out in a few minutes. I had asked Russ and the other members to whom I have written if they wished to make written responses, and I have received none from any of those persons. So, Russ, if you have anything you would like to say before we start, we would be most happy to hear from you. This is our first discussion of workmen's compensation.

Mr. **Herrold:** May I ask, you are expecting to have another day for people with the labor organizations coming in and saying what they have to say?

Mr. Aalyson: Brenda wrote to the labor people and none of them responded. We had hoped they would be here today. I had hoped that perhaps we could dispose of this in one meeting. There is no plan presently to have a meeting where labor would appear as opposed to employers.

Mr. Carter: May I comment on that? All of the meetings of the committee are public so that anyone can attend any session of a committee or of the commission and we have invited. We then have to have a public hearing if the matter passes the committee and goes to the full Commission, then it is again open for public hearing. So there are opportunities for any member of the public to appear at any committee meeting or at the commission meeting. I'm surprised we haven't had any response

Mr. Aalyson: I didn't write because, to my knowledge, Brenda was writing, and they've had an opportunity, as I understand it, to know that we are having a meeting and to appear if they wished. This draft that I have just passed out is a draft proposing changes from the Ohio Academy of Trial Lawyers' Workmen's Compensation Committee. I have had the opportunity to see it last evening, and I think I understand everything that they want to do, and we will comment upon it during the course of the meeting. Russ, if you care to read it and make comments, fine, or if you have anything independent of this suggestion that you want to propose, we would be glad to listen to that. The Ohio Academy of Trial Lawyers is on the side of the injured employees.

Mr. **Herrold:** This makes an enormous number of changes in the Ohio law.

Mr. Aalyson: I believe that before we proceed to discussion of this particular item that we should give Russ the opportunity to be heard on anything that you might have wanted to speak to independent of this particular thing. I heard from Steve Tedrick with John Cantlon's firm, and he had the impression that someone was going to submit a proposal that the self-insuring provisions of the Ohio statutes be restricted constitutionally. Now, I have heard nothing beyond what I heard in that conversation. I have seen nothing in writing from anyone. I just thought I would mention it.

Mr. **Herrold:** I have previously been furnished with a research memorandum on the subject, and I will respond to that in a moment. First, let me say that I am an attorney for the Ohio Manufacturers Association which represents most of the manufacturers in Ohio and as such, their orientation is toward manufacturers rather than employers generally. Over the years, the Ohio Manufacturers Association, more than any other group of employers has spoken for employers generally in the field of workmen's compensation. For three reasons. Their interests are more homogeneous than perhaps employers generally because they are all engaged in the process of manufacturing. And as manufacturers, as opposed to retail personnel or some other categories of employers, generally they have a higher payroll which in turn subjects them more to greater costs of injuries than some other lower paid categories of employment. And thirdly, manufacturing is probably a more hazardous type of employment than some others which also contributes to their being more directly affected by the costs of compensation and the effects of workmen's compensation. My own orientation and background might be of some interest to you, also. A good bit of my practice in law is representing employers in workmen's compensation matters. I have done it for about 23 years, and a good bit of that has been in friendly opposition to Mr. Aalyson in court cases. I have served as the chairman of the Ohio Bar Association's workmen's compensation committee for two years in succession and I served as an employer member on the workmen's compensation advisory council. And I now serve as vice-chairman of the American Bar Association's workmen's compensation committee. But I'm here today as a representative of the Ohio Manufacturers' Association. I came to react to the research memorandum which was distributed earlier. I think employers generally would be opposed to amendment in the present constitution and I had two basic reasons. The memorandum suggests that the one percent limitation now in the constitution should perhaps be removed. That language is as follows, "such board shall set aside as a separate fund such portion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, in so far as possible, the burden thereof to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases." So, in effect our constitution contains a provision permitting the assessment against employers generally of one percent of payroll for the purpose of investigation and prevention of industrial accidents. This, of course, goes back to the enactment of the constitution. And before that constitutional provision was enacted, there was no workmen's compensation. The injured claimant entirely depended on his rights at common law to which the common law defense applied. And when the constitution

gave the claimant the statutory right he now has, this one percent limitation was put in.

Mr. Wilson: That's of the contribution, not of the payroll, isn't it?

Mr. **Herrold:** Yes, it would be of the contribution. You are very right. And, of course, the higher the risk the more you contribute therefor. The riskiest employment we have is coal miners and it varies down to the office personnel at the bottom. Now, this limitation of one percent was part of the compromise which was arrived at when employers gave up their common law defenses which they, before that time, were permitted to have in defending against these cases. So, in effect, if you were to change it, you would be changing the quid pro quo given by employers when they gave up their defenses. This is no little matter because in workmen's compensation now there are very few defenses except that the incident didn't happen. None of the common law defenses which you'd have in a suit of common law are now available to the employer. The only defenses which are available are: it didn't happen, the disability is not related to the event of injury. Everybody in the state is interested in the prevention of accidents. And yet, this one percent premium tax is levied against the employer. It would seem to me that if any change, any increase, in that amount is to be made, everybody in the state should bear it, and not just the employer. This seems to be what the research memorandum overlooked.

Mr. Carter: As I read the memorandum, it doesn't recommend a change in the one percent, but rather it raises the question as to whether this is a matter for the legislature rather than a matter for the constitution.

Mr. **Herrold:** I would say "no". The reason it is here was part of the agreement arrived at when employers gave up their defenses, and by putting it in the constitution it was meant to make it a thing that wasn't to be subject to the whims of political change. I would like to make the point that this was the bargain struck at the time and that it should be a thing not easy to be changed, therefore it should be in the constitution.

Mr. Aalyson: A couple of questions please Russ. Frankly, I don't know how this one percent is handled, but is it one percent in addition to the premium or one percent of the premium or contribution made?

Mr. **Herrold:** It's in addition.

Mr. Aalyson: The way the language is written it seems as though the industrial commission would set aside one percent of the contributions paid.

Mr. **Herrold:** I had thought it was extra but someone from the industrial commission would be able to say.

Mr. Huston: Is there any limitation on the amounts of the contributions? You mean the one percent is figured in after they establish the contribution to be made. Is there any limitation on the amount of the contribution? There isn't any in here. So really, you don't have a limitation on the one percent, technically.

Mr. **Herrold:** The one percent really is a configuration of the amount that is assessed against the employer.

Mr. Aalyson: Russ, would your attitude be different if the one percent were in addition as opposed to being one percent of the contribution that is already made?

Mr. **Herrold:** My concern is that it be limited to one percent and that it should be a

constitutional thing, not a legislative thing.

Mr. Huston: Any additional cost is something the employers don't need.

Mr. Aalyson: I assume that employers customarily, in computing costs take workmen's compensation premiums into account. Am I correct in that or would you know?

Mr. **Herrold:** I would assume that they take all costs into account, but I guess there are as many variances as there are employers.

Mr. Aalyson: When you suggest that perhaps if there is an increase in this cost for safety investigations that it should be shared by perhaps everyone in the state - wouldn't it be fair to say that in most instances, at least, the employer would have a method of passing along this cost, and therefor couldn't recover it.

Mr. **Herrold:** That assumes, I think, that the employer can just keep raising prices without end, which I wish were true, I suppose, whereas taxes can be raised without the limitations of the constitution.

Mr. Aalyson: Are you proposing that if there is to be an increase, it should be somewhat in the nature of a tax that would be imposed on all the residents of the state?

Mr. **Herrold:** I'm not proposing any changes.

Mr. Aalyson: I see. But if there were to be a change you would think that a tax of some sort - a general tax - might be more appropriate.

Mr. **Herrold:** It seems to me that the matter of health and safety concerns everbody, not just employers.

Mr. Aalyson: I agree with you on that. I'm just wondering what your idea is as to how the cost should be distributed.

Mr. **Herrold:** I'm just proposing that it should be left the way it is. I'm objecting that there should be any elimination of the limitation.

Mr. Huston: Russ, I had a question. What do you think is the impact of the Occupational Safety and Health Act laws in connection with this type of activity? Hasn't that somewhat put the responsibility for safety in another area?

Mr. **Herrold:** That is a very excellent question because of what happened in the last year in Ohio. Sheldon Samuels, the head of the AFL-CIO Industrial Division out of Washington, has been quoted as pointing out that during the Gilligan administration, labor was very pleased in that they had been able to put a lot of things together in favor of their members. One of those things has been, and it is not generally realized, a tapping of this one percent fund for purposes, the legality of which is very questionable. Ohio did not enter into agreement with the OSHA people by which the OSHA people would have taken over administration of the Ohio safety and health programs. Instead, it elected to develop its own, and it entered into a contract with the federal government by which certain functions of the federal government would be performed by state people. It's my understanding that Ohio employees are enforcing federal laws with funds paid from this one percent. I have grave legal problems concerning this. To me, Ohio tax dollars should enforce Ohio programs, not federal programs, and yet that's not what is happening now. I don't think the fund should be increased or limitations should be removed from the one percent that is established in the constitution to permit this sort of thing to

happen. I do not like the use of these fund dollars to enforce federal programs. Whether the programs are good or bad is irrelevant, it seems to me, for purposes of constitutional discussion. And I suspect the validity of what has been done will be disposed of at a later date.

Mr. Aalyson: Would that be changed by what's in the constitution? That seems to be something that happens independent, whether this was a one percent figure or a ten percent figure.

Mr. **Herrold:** I think my point is whatever was done was limited to one percent. Taking off that limitation would mean the sky is the limit.

Mr. Huston: It just seems to me to a degree that circumstances have changed since the constitution was written and this provision was put in there. Inasmuch as the federal government, to a certain extent, has preempted this field, even though they have left to the state some of the rights they have that a state has the election to go one way or the other.

Mr. **Herrold:** I would have to say a couple of things. First of all, the federal government has not preempted in Ohio.

Mr. Huston: No, that's what I say. They have not.

Mr. **Herrold:** In some states, they did. Labor here favors state control rather than federal. We had the OSHA bill come along, I think in 1970, and in the last session of congress, there was the so-called Javitz bill which didn't pass but about which a great deal of concern and activity was happening. All of the states, in their workmen's compensation programs, were very concerned about federal preemption, wondering whether it was on the way or can we keep state control by upgrading our systems. Ohio has done that so they now meet so-called federal minimum standards. One of the few states which had. All state administrators seek to avoid federal control and are urging upgrading of their own systems to get this. So I have to say that this is the battleground right now as to which way it will go. I would hope that a state commission such as yourselves would lean toward state control and not take any action which would lean toward federal pre-emption.

Mr. Carter: If you were a member of this committee would you recommend no change in the present provision?

Mr. **Herrold:** I would. Now, unless there are further questions on the one percent, I would like to shift to another portion of the research memo.

Mr. Aalyson: If the committee were to consider changing the one percent limitation, you would still favor a limitation in the constitution? For example, if it would go from one to two percent, you would favor that as opposed to removal entirely.

Mr. **Herrold:** Yes, I certainly would, and let me say the reason. It comes from many years working in the legislative field of workmen's compensation, and it is a battleground in which labor and industry are pitted head on. In the past, Democrats have generally lined up behind the interest of labor and the Republicans the sides of industry. When the Republicans win, legislation favorable to employers generally gets adopted. When the Democrats control by a substantial majority, legislation favorable to the views of labor is adopted. It seems to me it's not a good thing to have the pendulum in a field such as this swing back and forth. It ought to be moderated in the middle by legislative mandate rather than subject to wide changes.

Mr. Carter: I think you could say that about almost any legislative program.

Mr. Aalyson: But I don't think you see it as clearly as you do in this field. I agree with what Russ is saying.

Mr. **Herrold:** It seems to me that it is desirable, at least in workmen's compensation, to have a steady course charted in the legislation rather than one marked by wide swings favoring one side or the other. I think it is bad when it happens. And so I would like to see a balance wheel such as the constitutional one we have preserved to the good of the overall system. I'm delighted to hear Mr. Aalyson say he concurs.

Mr. Aalyson: I might say, for the benefit of the other members, that I have always felt that if labor and management's representatives could get together and draft something that was agreeable to both it would be better than having this wide pendulum-like swing that we do have every few years in Ohio. It seems that we go from one extreme to the other, and I agree with Russ, in principle, that if we could chart a middle course, we would be much better for both labor and management.

Mr. Wilson: I'd like to raise a question that to me is basically in back of this. I may be wrong, but I had information at one time that indicated that Ohio was one of seven states which has a state monopoly on industrial accident insurance. Other states, I understand, provide requirements that in effect this type of insurance be carried, and so states have a choice between the state fund and commercial insurance. I object to state monopolies in any field. I am wondering whether there would be any worthwhile merit in considering liberalizing this to the point of where we could provide some competition for the state fund if that is the way you want to look at it.

Mr. Carter: You mean, not prohibit it.

Mr. Wilson: Yes, to me, social security can be pointed at as a stupid arrangement as far as retirement forms are concerned. It was sold to the public on account of its having retirement benefits which are not there. It may not be bankrupt but it's close to it. I'm not saying this fund is in bad shape but I'm saying that a governmental monopoly, which is what this is, does not necessarily lend itself to the most efficient method of operation. I'm not an insurance agent and I don't represent insurance companies, but I feel that perhaps we are overlooking something by not considering whether we want to do something about this Ohio monopoly on industrial insurance. I don't know how the rest of you feel or whether you have given it any thought or not, but when we agreed to study workmen's compensation, this was one of the things in the back of my mind, whether we shouldn't consider opening this up to allow private enterprise to compete with governmental enterprise.

Mr. Aalyson: I'm sure Russ might have some comments to make about that, Jack. Periodically there is such a movement in Ohio.

Mr. **Herrold:** The last one in 1967.

Mr. Aalyson: To permit insurance carriers to come into Ohio and enter into the workmen's compensation field, and I have never heard that there is a constitutional objection to that. Either the thing fails in the legislature or from lack of support. Now, I might say this as a claimants representative that when we hear about insurance carriers coming into the state that this is a fearsome idea. And yet, when we as claimants representatives talk to people in other states which have insurance carriers they say, "We wouldn't think of having a state fund", and so I guess our fear is of the unknown. I don't think, however, that anyone has ever raised the point that it might be unconstitutional to have private carriers in the state so I don't know that it is necessary that we do

anything with the constitution. I'm not prepared to argue one side or the other except that the legislature seems to take the attitude that it would be constitutional if they could pass it.

Mr. Wilson: Workmen's compensation is now required on your baby-sitter and your dishwasher and your housecleaner. I carry liability insurance on my home and everything in there for people who are there for any reason whatsoever, and if I have a housecleaner in and she gets hurt, my personal insurance will no longer cover it, and I am now required to pay into this. If I'm already covered by private insurance, why should I have to put into this fund too? We could allow anybody to insure anybody in the state of Ohio as long as their benefits are comparable to what the state would provide.

Mr. Carter: Jack, as far as the constitution is concerned, what we are concerned with, it says "laws may be passed". Now, that indicates to me that if the legislature "in its wisdom" determined that private enterprise could do this job that there is no constitutional prohibition. So I would be inclined to go along with what Craig says that it is a legislative matter rather than...

Mr. Wilson: It may well be, but I think you've got this roadblock in here now, it's a firmly entrenched governmental operation, and it's difficult to get it switched around. I'm not saying absolutely that it should be, but I think we're paying a penalty through inefficient governmental administration.

Mr. Carter: The thrust of this constitution as I understood the memorandum was to remove any doubt, from a legal standpoint, that such laws were, if passed by the legislature, in fact valid laws under the constitution, and I think that's the thrust of this. Now, if the legislature decided that it wanted to terminate the state compensation operation, I see no reason why they couldn't do so.

Mr. Wilson: Could they also allow competition?

Mr. Carter: I think so, because it only says "laws may be passed".

Mr. Aalyson: Russ is nodding his head yes, and I agree. I think it has always been the idea that the legislature could do this if the votes were there.

Mr. **Herrold:** I was involved in the last time or the last two times that this went through the legislature and if the legislature saw fit, I think they could allow private insurance. Labor and industry are both opposed to allowing private insurance and there are two reasons: in the first place there is no way for private enterprise to compete with for the simple reason - the state fund is roughly two billion dollars at the moment. This generates 8% on that, or $150 million a year. And so for every premium dollar paid, $1.08 gets paid out in benefits. There is no way anybody in private industry could compete with that because he has his taxes, his payroll, his profits, his cost of operation.

Mr. Carter: So does the state.

Mr. **Herrold:** Right, but nobody else is ever going to get up above the premiums that are paid out. So you won't have that reserve, the income from which is allocated toward benefits.

Mr. Carter: I understand what you are saying. It is a start-up problem.

Mr. Wilson: That may well be a current financial status. It's just the concept that here I am paying private insurance for coverage and now I'm going to have to pay the state for the same thing.

Mr. **Herrold:** I agree with you. I think it's ridiculous and the reason that it happened is that it was mandated by the feds. The feds said "Thou shalt have coverage to be an acceptable system which covers one or more employees." Everyone agrees that this is a terrible result. The second reason on the insurance question why industry and labor are opposed to it is that if private firms came in they would want the good risks which have low losses. If you had a state fund left, you'd end up with all the bad ones, which has obvious disasterous results for the state fund.

Mr. Wilson: It can't be doing that badly if it has that kind of reserve.

Mr. **Herrold:** Well, it's been there sixty years.

Mr. Wilson: I'd say they've overtaxed the employers is what they've done.

Mr. **Herrold:** That may very well be.

Mr. Huston: Getting back to this one percent, Russ, do you have any reason to know why they put a one percent factor in here to be used for investigation or prevention of industrial accidents?

Mr. **Herrold:** No, I can't claim to know about that, it was before my time, but it's worked out alright. I think it's not an excessive one and in the most recent years I've known about they haven't been using the full one percent for the program so the figure can't be too far off as far as need goes.

Mr. Huston: Do you think that, perhaps, the fact that the employees waived any right to sue the employer and there is a limitation on the amount an employee can recover I believe, even if the employer has violated the state standard, that it was to provide an equalization so that the state could go to the employer and establish criteria or safety standards that the employers had to meet in order to **counterbalance the fact that the** employee was waiving his general common law rights in the case of negligence?

Mr. **Herrold:** That sounds reasonable. You mentioned the penalties against employers. The memorandum suggests removing the fifty percent penalty, and obviously, this is a thing which the employers feel is a protection and it should be borne in mind that this is purely a simply a penalty and the courts have so indicated. To take any maximum off would again leave the degree of penalty or the percentage of penalty being assessed subject to the wide swings which you get when you have changes of administration in various political administrations as they come and go. This 50% penalty, as it exists now, can be disasterous to a small employer because it comes 100% out of his pocket. Let's say that under present law you have death claims of an 18 year-old leaving an 18 year-old widow. She could receive $112 from age 18 until she died at age 80 which would make a big risk to an employer, if she doesn't remarry. If she remarries, it will terminate. And an employer would have to pay 50% of whatever that cost is, under present law. Taking the roof off would bankrupt any small employer to whom this happens, which is bad. I deplore the concentration of large employers. I hate to see it happen but it is happening, and I don't want to contribute to anything that is going to squeeze out the small employer.

Mr. Aalyson: I think that as the claimants' representative, I'm in general agreement with what Russ says in that regard. I think that the threat of the penalty in these cases has worked wonders in cleaning up industry so far as safety hazards is concerned. I know it has had a marked financial impact, especially upon the small employers. I suppose there are some small employers who totally disregard safety, who ought to be run out of business, but the removal of the limitations would cause me some concern.

I suppose getting back to the federal income tax where there was no limit imposed and now we have to live with whatever we have to pay. It makes me very skeptical about removing limitations in the constitution.

Mr. Carter: What it seems to me is that all I've heard here is to say "Don't monkey with it - leave things alone."

Mr. Aalyson: There is on the table for discussion a fairly major change as Russ has indicated.

Mr. Carter: Well, from a constitutional writing standpoint, it does seem to me that this is statutory material. And on the other hand I am persuaded by the arguments that have been presented that this is one of these things that trying to monkey with is going to cause a lot of problems.

Mr. Aalyson: I think that if no one has anything more to say about what has already been proposed that I should go through the written proposal that is on the table because I think I understand what motivated it and I am perhaps in agreement with some of the things that are in it.

Mr. Carter: Before we do that, first of all I would like to say that the staff memorandum did not recommend anything. The function of our staff, and they have done a beautiful job over the years, is to bring up matters which should receive the attention of the committee, so that I don't want you to consider that as a recommendation. The second thing I'd like to say is in the memorandum is discussed the role of these two entities, the Bureau of Workmen's Compensation and the Industrial Commission, and I would be curious to know whether there is any comment on the structure that is provided.

Mr.**Herrold:** Yes. The last paragraph refers to the comments of Mr. Stringer who is no longer administrator of the Bureau of Workmen's Compensation and I interpreted his comments as being more personal than otherwise. Over the years, the problems that he referred to and have been referred to in some degree in the public press haven't been as pressing as they might seem to indicate. I believe, over the years they have worked out satisfactorily.

Mr. Carter: You do not see a problem in this area, then?

Mr. **Herrold:** I don't see why there should be a problem, but if there is one, it's more legislative.

Mr. Aalyson: I agree. I think we can turn to the proposal then. The first thing you see as a proposed change is the addition of the word "disease" to the other types of ailment that might be covered by workmen's compensation. I would be opposed to the committee adopting the addition of the word "disease". I can tell you, as Russ can also, why it came about I'm sure. Presently in Ohio if an individual is a workman in the out of doors and his activities outdoors fall on a day when it is 10° below should lead to pneumonia, he could not be compensated for that condition because the Supreme Court has held that under the present statutes this is a disease which is not contemplated either in the statutes or in the constitution and therefore he is not entitled. Now, I might have some reservations about the Supreme Court's interpretation but I do believe that this would be a legislative matter and if the legislature wants to include diseases, the legislature ought to do it. I don't think its place is in the constitution. Russ, do you have anything to say about that, or the other members might have some questions.

Mr. **Herrold:** I would agree with you and I would further say that distinction is drawn

between disease and occupational disease.

Mr. Aalyson: Yes, disease being a germ-induced problem.

Mr. Carter: This is something that the private insurance carriers are handling very well. It's not for the state at all.

Mr. Wilson: I think you are opening a horribly big Pandora's box if you put that word 'disease' in there.

Mr. Aalyson: Well, as I say, it's motivated by a couple of Supreme Court decisions. My own position is that if one does contract pneumonia as a result of exposure to the elements in his work he probably ought to get compensation, but I don't think it's a constitutional problem.

Mrs. Sowle: Craig, if "disease" were put in here as opposed to occupational disease, aside from pneumonia contracted outdoors, what about something contracted from a fellow employee. Would that also be a disease?

Mr. Aalyson: It's been my experience that the Industrial Commission treats that as a compensable situation, and I don't think anybody objects too strenuously. For example, people who are engaged in lab work, who, by virtue of a scratch from a broken glass or needle or something, or even nurses who are infected as a result of exposure in a hospital ... I'm not sure of a measles case, but a staphylococcus infection, the Industrial Commission and the bureau generally treat as compensable.

Mr. **Herrold:** No problem.

Mr. Aalyson: I think it's legislative. I don't think we need it in the constitution.

Mrs. Avey: Do you think that by using the words "occupational disease" it's so specific as to preclude the kind of thing that you think ought to be covered?

Mr. Aalyson: Well, I think that's the reason the Supreme Court reached the decision it did. When they say occupational diseases, I think, the Supreme Court interprets that as something other than a germ-induced disease and perhaps if the question of, for instance, a staphylococcus infection which can be spread anyplace as opposed to a hospital but more likely in a hospital, should get before the Supreme Court, they might adopt the same rule. I don't know. I would hope that they would find some means of distinguishing, but they might adopt the same rule.

Mr. Carter: In any event it isn't anything that anyone has any sentiment for changing in the constitution.

Mr. Aalyson: No, I don't think so. You don't see enough of these cases to merit constitutional change. I think it is a statutory thing.

Mr. Wilson: It could be that the common cold becomes a disease.

Mr. Aalyson: Yes, it does indeed. As does nearly anything. The Supreme Court has had difficulty with permitting a germ-induced common type of thing such as a cold or pneumonia from being compensated. The word "disease" appears a second time in the draft. "Except for a decision involving the numerical evaluation of the percentage of disability, the claimant or the employer may appeal any adverse decision in any case to the court of

common pleas which shall be prescribed by law where the trial shall be by jury, unless waived, with the appellant having the burden of proof." I'd like to stop right there because it makes for easier discussion. Now, what this says in plain language, I think, is that except for decisions involving the extent if disability, either party is guaranteed a trial by jury in the county which the legislature prescribes, and presently, that's in the county of injury. And, either party may waive the right to jury, but if you go to trial, the person or the party which lost at the Industrial Commission level shall have the burden of proof. Presently there is the right to trial by jury in the county where the injury occurred, or,in some instances where the contract of employment was entered into by either party in cases other than cases involving extent of disability. In the past, there has not been the right of appeal to the jury by the employer. And presently there is. And that has held to be constitutional - the absence of the right by the employer. So that this would guarantee to the employer as well as to the injured employee the right to trial by jury. The big change from the present, as I see it, in this particular sentence, is that the appellant shall have the burden of proof. Presently, the statutes, as interpreted by the courts, provide that the claimant shall have the burden of proof even though he may have won at the Industrial Commission level. In other words, the employer can appeal and then the claimant has to go ahead in court and re-prove his case. Now, my personal opinion is that this is unfair to make the claimant go ahead and re-prove his case once he has won and yet there is a very valid argument that can be made on the other side, or at least it's an argument which is often advanced, that the employer shouldn't have to prove a negative. In other words, this has been said to be difficult, and I'm sure Russ can probably expound on that much better than I have.

Mr. **Herrold:** I don't think why this isn't purely a legislative matter - the procedure that should be followed in appeal or not appeal to court. The technical trial lawyers' procedural burden of proof type matter which to me would be hard enough to explain in the legislature. I don't know how you would ever explain it to the people. Now, to get to the merits of it. To try and do what I just said is hard. The proving of a negative is a pretty tough thing. But it becomes even more unreasonable, it seems to me, when you consider that the burden of proof to do this would be put on the employer, in the language proposed, which is not the party who would be getting the money. It would seem to me that if you want something, i.e. money, you should bear the burden of proving that you are entitled to it. I guess that's the simplest way to say it. Now, there is much more in this sentence than just that - the burden of proof thing. Up in the third line of the capitalized language it talks about "may appeal any adverse decision". That's a change of present law now. And before I explain what's involved in it, let me say that, again, I think it's a legislative matter. Now, under the present statute which has been in effect since 1959, the only thing that can go to court is a decision other than to the extent of disability which is what this language says. Which means you can't appeal to court percentage evaluations, specific violation cases, occupational disease cases, and there may be some others. This would change all that. Now, whether those should or should not be appealable to court, I'm not sure I know the answer to. It depends on what or who I'm representing. But, to me, that again, is a legislative matter, not a constitutional matter, and certainly it's always been a very hotly contested one whenever it comes up, which is every two years.

Mr. Carter: I don't disagree with the thrust of what you are saying but it seems to me that what you are saying is that some things should be in the constitution, and we should not trust the legislature, to avoid this zig-zagging back and forth as it has been described, but some of these other things, it's best to let them zig-zag back and forth. Is that right? It's kind of a judgment question as to which should be?

Mr.**Herrold:** If they are going to zig-zag, I would rather that the legislature was in

charge of that than the general electorate, yes.

Mr. Carter: On this specific thing.

Mr. **Herrold:** Well, I don't know. I just don't want to tinker with the constitution at all for another reason. We've had it for almost fifty years in its present form since there was an amendment in 1924, and over those 50 years the Supreme Court has had to answer all of these questions and we know where we stand. We can live with it. Why start all over again?

Mr. Carter: You lawyers don't want to have a new set of rules to live with.

Mr. **Herrold:** I suppose it makes money, but is the public well served by it and I don't think they are.

Mr. Huston: Isn't this point generally that when the constitution is written or amended, usually the provisions in there attempt to take care of the quid pro quo for various aspects in the constitution. They try to envision everything to protect both sides because they have either reduced the right or increased the right or something of that type, and leave the implementation of that up to the legislature. But if the constitution does not interfere with any rights as such that they need to balance, they leave that to the legislature also. Isn't this generally the principle of the constitutional provision?

Mr. Carter: I think I would put it a little differently. I think that the function of the constitution is one to basically say how far the legislature can go. What things we reserve to the direct vote of the people and what things we entrust to our elected representatives. The theory of plenary powers that the legislature can do all those things that are not prohibited by the constitution. There are cases like this where it is unclear, so that the constitution does get involved saying "Laws may be passed to do thus and so" which makes it clear that the legislature has the power. I don't think that's in conflict with what you are saying, it's just a little different way of looking at it. Who suggested this amendment?

Mr. Aalyson: The Ohio Academy of Trial Lawyers has a workmen's compensation committee.

Mrs. Sowle: And this proposal came from that committee?

Mr. Aalyson: That's correct.

Mrs. Avey: I'm not sure I understand something. The fact that the claimant now has the burden of proof, that doesn't arise directly from the old constitutional language, does it?

Mr. Aalyson: It arises from statutes.

Mrs. Avey: So that by including the appellants' having the burden of proof, you're, in effect, pre-empting what the statutes may provide.

Mr. Aalyson: Yes, that's correct. I'd like to respond now to what Russ says, speaking from a claimant's standpoint. I reiterate - I am claimant oriented in these cases. I believe that there may be something desirable in this language in an attempt to prevent the see-sawing which does go back and forth in the legislature. One thing which I did not cover and I only got this (draft) yesterday and had an opportunity to look at it last night and Russ has caught me on it and it is true. I believe that this provision as it presently stands, would guarantee to an injured employee, and maybe the guarantee

is much more significant to him than it would be to the employer, but also to the employer, the right to appeal to a common pleas court from an adverse decision which involves an occupational disease. As someone who represents claimants before the Industrial Commission, I can see no reason why there should be any differentiation in the right of appeal between an injury and an occupational disease.

Mrs. Sowle: Craig, are you saying that under the present statutes there is that difference?

Mr. Aalyson: There is that difference under current statutes.

Mrs. Sowle: And this would change that.

Mr. Aalyson: A claimant who is injured is entitled to appeal an adverse decision to court as opposed to the claimant who contracts an occupational disease. He cannot appeal. Now, I can see no reason to differentiate between these two. I'm not even sure that... Well, the differentiation comes by way of court decision, primarily, which says that because of the way the constitution is worded there is a distinction between injury and occupational disease.

Mrs. Sowle: They get that from section 35?

Mr. Aalyson: Yes because the constitution mentions both death or injuries and occupational disease, the court has said that this means that there must be a distinction between the two. In my judgment, the drafters of the constitution, and I have no basis for saying this except a personal feeling, meant to enlarge the concept by using occupational disease in the constitution rather than to make it restrictive by making a difference. They wanted to cover both injuries and occupational disease.

Mr. Carter: But this says that the legislature may pass laws.

Mr. Aalyson: Yes, well the legislature has not said, as far as I can see, that occupational diseases may not be appealed.

Mr. Carter: They have not?

Mr. Aalyson: No. The Supreme Court has said that occupational diseases may not be appealed. Am I correct, Russ?

Mr. **Herrold:** That's right. It's based on the statutory interpretation of the 1959 amendments or the 1963 amendments.

Mr. Carter: But the remedy is legislative, though.

Mr. **Herrold:** Completely so. And this argument comes up every time the legislature considers workmen's compensation.

Mr. Aalyson: I disagree just a little bit. I think that the Supreme Court has gone back to the constitution and said that because the constitution differentiates between injury and disease, we must differentiate. And because the statutes allow appeal for injury, and don't allow for disease, we think there is a distinction.

Mrs. Sowle: But the statutes in fact say "injury" when they are discussing appeals.

Mr. Aalyson: Right.

Mrs. Sowle: And the general assembly could add occupational disease?

Mr. Aalyson: Yes, I think so. But I also think that the constitution ought to guarantee the right of jury trial for either injury or disease. I don't think this should be left to the legislature. If there is a jury trial, this should be guaranteed by the constitution and there should be no distinction made between injury and disease.

Mrs. Sowle: At present this says nothing about appeal does it? It does permit doing away with trial by jury, doesn't it?

Mr. Aalyson: The present act does not talk about trial by jury.

Mrs. Sowle: Am I right in saying that section 35 does not require trial by jury in these cases?

Mr. Aalyson: Section 35 does not even mention it.

Mr. **Herrold:** And many states don't have trial by jury.

Mrs. Sowle: Yes, but isn't it because section 35 could be interpreted to permit no trial by jury?

Mr. Aalyson: It could.

Mr. Herrold: I believe it could. In fact, if you go back to your theory of workmen's compensation, it is to have an expert administrative agency which decides these things and their decision is final. Now, we've eroded that in Ohio, and what he proposes would erode it further.

Mr. Aalyson: The idea of workmen's compensation is that you would have an expert administrative body and they would take care of these things. But in Ohio this just hasn't happened. Politics has been the key factor, it seems to me, in the administration of workmen's compensation. You not only get a change in legislature but you get a change in governors and when you get a change in governors you get a change in the makeup of the Industrial Commission and this is something that should not be. I think that we should try as closely as we can to restrict this thing and spell out what can and cannot be done and what rights shall and shall not exist, and I don't think you can leave it to the legislature. Past experience says you cannot.

Mrs. Sowle: I think I have Dick's problem with all of this and that is, so much of it sounds like legislative material and how do you decide which sort of legislative material ought to be in the constitution and which kind shouldn't.

Mr. Aalyson: It's the same thing we had in the elections and suffrage, the initiative and referendum. What are you going to reserve to the people? What are you going to guarantee and what are you not. It's a matter of policy, I guess, and judgment.

Mr. Wilson: How far do you trust the legislature.

Mr. Aalyson: Yes, and in this field, I think we agree that you can't trust the legislature. I wish you could. I wish you could stop this pendulum swing, as Russ does. I think it would be better for both sides, but it hasn't stopped in the entire history of the workmen's compensation act and whether you want to put particular things in the constitution, of course, is going to be a matter of judgment. But I think we ought to

try to stop the pendulum here.

Mrs. Sowle: Has any case ever been brought claiming an equal protection of the law problem with permitting trial by jury in the case of injuries and not in the case of occupational disease?

Mr. Aalyson: To the best of my knowledge, no, and it may well come up some time.

Mrs. Sowle: I'm not sure how good that argument would be.

Mr. Aalyson: You get back then to the Supreme Court interpretation of the constitution. You're talking about the fourteenth amendment to the federal constitution.

Mr. Carter: I would suspect that this classification would not be unreasonable the way the statute is.

Mr. Aalyson: I think that the point we have here and about which we are discussing presently is, should there be a differentiation between the rights of one who is injured, where he falls of a loading dock, as opposed to one who has perhaps as high or higher disability because he has breathed in injurious ducts. In my opinion there should be no distinction.

Mr. Carter: Even if I were to accept that premise, and I'm inclined to think it's a reasonable one, isn't the argument still in front of us as to whether that is statutory or constitutional?

Mr. A lyson: Perhaps, unless you want to look at legislative history. It's political, it's not legislative, it seems to me, right now.

Mr. Herrold: The legislature is a political body.

Mr. Huston: Fundamentally, your constitutional provision in here was merely to eliminate the common law rights of the employer and the employee or to limit them. That was the purpose of it, rather than to spell out the details of what happens after those rights have been waived. If you look at the constitutional provision, this actually gave the legislature the right to enact laws that did provide for these rights, did it not?

Mr. Aalyson: I suppose it did, but the idea, I think, of the constitution was not only to do this but it was to provide that persons who were injured by their employment would receive compensation, and you don't provide that if you leave it up to the legislature to say that the person who has an occupational disease cannot be compensated except under very strict rules. For example, an individual who is 99% disabled because of silicosis, presently, in Ohio, is not entitled to 1 penny of compensation. The person who has one % disability by way of injury is entitled. Now the purpose of the constitution I think was to provide that every person who was disabled by reason of occupational exposure or injury was entitled.

Mr. Carter: I don't agree with that.

Mrs. Sowle: It just says that laws may be passed.

Mr. Aalyson: Yes, but the movement itself was to get away from the idea of employee suing employer and to get it into a situation where, if we believe what they say, industry would assume the burden of the cost of this type of thing.

Mr. Huston: But really, doesn't it go on to say that laws may be passed establishing a board which may be empowered to classify occupations according to hazard, to fix rates, to collect and to determine all rights of claimants thereto.

Mr. Aalyson: I don't question what the constitution says. I'm questioning whether what is happening was what the constitution intended, what the movement intended.

Mr. Wilson: This is a throwback to the argument I had back in the Taxation Committee that we have a devious legislature that they interpret this the best way to suit whatever needs they have. I'm talking now about corporate income tax being called a franchise tax, so that it doesn't meet the requirement that it must go back to the county of origin. Do we establish just general principles in the constitution and leave everything up to the legislature or do we try to spell out a lot more than we should?

Mr. Aalyson: I think that if we look at this historically, we find that employers would have preferred to stay in the situation which they were in. The majority of the populace decided that it was a bad situation and decided that industry should pick up the tab for injury and/or occupational disease.

Mr. Carter: On an insurance basis.

Mr. Aalyson: Yes. And when this constitutional provision was enacted, I think it was the intent that there should be a provision for compensation for injury or occupational disease. As it happened there is a provision for injury but there is almost none for occupational disease. At least the serious occupational diseases.

Mr. **Herrold:** Well, that's overstating it.

Mr. Aalyson: Unless you are totally disabled by reason of the occupational disease.

Mr. Carter: Craig, I still think that the thrust of this constitutional amendment was to say that there is no question that laws can be passed to do these things. I think that was really the thrust of it in 1912. There was a big question whether the laws were valid that were passed.

Mr. Huston: Actually, the courts had held them invalid.

Mr. Aalyson: Yes that was one thing but I think that the basis of the thing was to provide that there would be.

Mr. Carter: No, that's where I part company with you. I think that the constitutional amendment says that the legislature has the right to do these things. I thinks that was the thrust of this constitutional amendment. Now, if we do what you're talking about, we're changing it. I'm not saying it isn't a valid argument. But we're then saying that the constitution shall mandate this which I don't think is what the amendment had in mind.

Mrs. Sowle: Yes I agree with you Dick. I think the historical perspective on it is probably that the movements in favor of workmen's compensation and to change the common law rules was succeeding on a legislative level and then the courts were coming in and saying the legislatures can't do that, and then the changes in the constitution were to change the court interpretation of the legislation. It was the same movement that resulted in the legislation and the constitutional changes, but different things were done in the constitution. I do have trouble with all of this legislative material in it. I understand the problem of the shift from one general assembly to the next.

Mr. **Herrold:** We've been able to avoid those the last two changes by labor and industry agreeing on what the language should be.

Mr. Aalyson: One of the reasons that you were able toagree is that you had a split general assembly, you see, so it behooved everybody to get the best they could. My own feeling is that we ought to try to avoid this shift. Too often we don't have a split, we have one side or the other controlling and when you do, the pendulum takes off.

Mr. **Herrold** Everybody deplores it in the practice and everyone who is on the commission deplores it. If enough people keep doing that maybe we'll be able to slow it down.

Mr. Aalyson: In **fifty** years they **haven't** done it.

Mr. **Herrold:** On the question of jury guarantees, many states have no jury trials in this sort of thing.

Mr. Carter: Do they have the right of appeal, though?

Mr. **Herrold:** On questions of law, only, in many states. Here we have law and fact. But if you are going to do that, this doesn't even go far enough. It goes as far as claimants would want , but not all the way. There are ways you could go further. You could appeal to court on percentage of disability. And I suggest you have utter chaos if you did that, to have the jury decide - is this man, because he has a crooked finger, 3% or 5% disabled. Certainly you don't want that.

Mrs. Sowle: The trial by jury is a trial de novo?

Mr. **Herrold:** Yes. I think we would be much better off if we went to court on a record for the jury to consider rather than letting the facts shift at each of the hearings. We used to do this in Ohio, but in 1955 we went away from it. By legislature, again.

Mr. Carter: This is a very difficult problem and it comes up in many areas of the right of an appeal from an administrative decision. It's a tough one.

Mr. **Herrold:** I submit it's better decided by the legislature than by the electorate, who could have hearings and argue back and forth, and be subject to changes if it doesn't work out. That's one function that the pendulum shifts serve, correcting things that prove not to be good. Whereas you do cast it for 50 years worth of stone in the constitution.

Mrs. Sowle: That's very true. How was it that injury and not occupational disease got into the statute?

Mr. Aalyson: I don't know but I would have to guess that a very strong lobby from the employers kept it out. They don't want appeal to a jury probably as much as the claimants want it. Except in the present day, there **are more** appeals going to the jury by employers right now because of the makeup of the Industrial Commission than there are by claimants. You see, it's one of those things that depends on whose ox is being gored.

Mrs. Sowle: And the two sides do not always have confidence in the objectivity of that board.

Mr. Aalyson: And with good reason.

Mrs. Sowle: I'm not really proposing this, but maybe your objection would be taken care of in the constitution if there were some kind of constitutional provision requiring that

whatever treatment of appeal is made by statute must be done by statute must be done across the board for all of these things that are covered by the constitution.

Mr. Aalyson: I think that's what this does.

Mr. **Herrold:** Well, we have that now.

Mr. Aalyson: Except occupational diseases, she's talking about.

Mr. **Herrold:** Either side can appeal occupational disease in a court.

Mr. Aalyson: But not to a jury. Neither side may appeal occupational disease to a jury right now.

Mr. **Herrold:** Right.

Mr. Aalyson: In a mandamus action which results in 99% of the cases, if there is any evidence to support the lower body's decision, you leave it is at stands because the court doesn't want to get involved. You can appeal anything if you want to, but it's not be a practical method of changing it.

Mrs. Soule: What I'm suggesting is that the constitution not deal with whether or not there should be appeal, trial by jury, but provide that whenever statutory arrangements are made in that respect must cover death, injury, or occupational disease.

Mr. Aalyson: You are getting into an area that I had originally suggested to this committee that's in the Ohio Trial Lawyers Association but which they apparently felt was not sufficient. I suggested that they come up with some language which would provide that there would be no differentiation in the law between the handling of injury and occupational disease claims. Now, whether they had difficulty with the language or what, I don't know. But it seemed to me that if you provide for no discrimination between the two, which I think the constitution intended originally, then I think that would be satisfactory. I think that when they added occupational diseases, they meant to be sure that occupational diseases wouldn't be overlooked and the Supreme Court has seized upon occupational disease being listed as a separate entity to make a distinction between injury and occupational disease in some areas of the right of appeal, for example. So I think that what you are suggesting would probably be a good method of arriving at this if some language could be reached. And I couldn't. I sat down maybe 6 months ago to try to come up with some language and it's difficult.

Mr. Huston: I'm not too familiar with this whole area but, generally speaking, appeals from administrative agencies, generally, are not to a jury. Is that not right?

Mr. Aalyson: I don't know.

Mr. **Herrold:** That's right. This is one of the few exceptions to that.

Mr. Huston: Yes, this is one of the few exceptions. Normally, it's an appeal directly to the court.

Mr. Carter: Because they are generally highly technical.

Mr. Huston: Because the administrative agency has been created by the legislature as an arm of the legislature to deal with the technical areas that they have felt the courts and juries are not really competent to deal with. Do you think that, by, you might say,

eliminating that concept you are really going beyond what the administrative agency has been created for?

Mr. Aalyson: I think that the administrative agency was created to make it easier for a claimant, an injured employee, to get compensation to which he was entitled. Well, it hasn't worked out that way. And, we keep adverting to the idea that the administrative agency becomes a political animal, and it does. Russ can probably cite equal numbers of cases with me where you reach a bad decision, and it seems to become political. If that were the intention of the constitution originally, it hasn't worked out. And I don't know how to change it except by amendment to the constitution to restrict not only what the legislature can do but what the administrative agency can do too.

Mr. Huston: Appeal directly to the court without a trial de novo before a jury. You appeal on the record to the court on questions of law and fact.

Mr. **Herrold:** I don't see how it can be any easier for the claimant to win than it is now if you are going to have any rules. I suppose whenever you have rules, somebody is going to be on the wrong side of them.

Mr. Aalyson: Speaking from the other side, I don't see how it is any easier for the employer to win than it is now. I think that the right to a trial by jury is not something that should be left to the legislature, in workmen's compensation or in anything else. I think that when you are coming down to a very basic right, the right of a man or of a woman to be compensated for an injury which he has received in his work, and I think it is a basic right - there is a constitution that permits it, that you've got to give them along with that the corresponding right of a trial by their peers.

Mr. Huston: Not to put words in your mouth, but do you feel that due to the fact that the constitutional provision eliminated any right that a workman and an employer have under the common law that a right to a trial by jury is something that would have existed by the constitution?

Mr. Aalyson: This constitutional provision came about, I think, because it had been determined from long experience that the right which the claimant had to the employer was, in fact, no right at all. He had the defenses that were imposed against him which cut him out on numerous occasions and he certainly didn't have the financial resources to go in against the employer and so they felt that it wasn't a right. This is an abstract proposition.

Mr. Carter: What I think this was is to give the legislature the right to make that determination.

Mr. Aalyson: Yes, this may be true, Dick. I follow your logic completely, except that I think that had the legislature not done anything, we would have gotten a constitutional provision anyhow. The movement was to provide compensation but to let the legislature say how it is going to be done, as is nearly always the case. But the legislature, I don't think, has responded to what the intent was or the motive for this constitutional amendment which was to make industry bear the burden.

Mr. Carter: What is the thrust of the second sentence?

Mr. Aalyson: "No law may be passed which makes the right to receive compensation dependent upon the interval between injury...."

Mr. Carter: What's the problem?

Mr. Aalyson: The problem there is that, again, we're getting into an occupational disease area. In the occupational disease statutes, there are limitations as to, in some instances not always, and these deal mostly with inhalation of injurious substances, there are some limitations as to how long the employee shall have been exposed before he is entitled to receive compensation for an occupational disease contracted. Now, a lot could be said about the logic of that situation. I think it's fairly well medically accepted that people are different in their responses to exposure to injurious elements. I, for example, can wade through poison ivy, but several of my kids can't even talk about it without getting it. Some people can breathe in some injurious substances and not be affected substantially; some people can breathe them in and be affected right now. Imposing a length of time which they must be exposed before they can recover even if they contract the disease seems to me is illogical. These occupational disease statutes are so involved that it is difficult for me to remember them, maybe Russ can help. I believe that in some instances the disability must assert itself within a certain period of time after exposure, or else there is no recovery. Now, the ghost that claimants' representatives parade in front of people when they talk about this is berylliosis. We have a case in our office right now where an individual was exposed to berylliosis some 18 years ago. He had no after-effects, until I think it was last year when it was discovered that he is suffering from berylliosis and he is going to die within the next year. And yet, because of the wording of the statutes this man cannot recover because there is a limitation from the date he was exposed to the **date he** was diagnosed - something over which he has no control.

Mr. Carter: Like a statute of limitation.

Mr. Aalyson: Yes, but in reverse. It says you've got to show evidence of your disability within a certain period of time after you are exposed or you can't recover. So I think this is what this language is intended to deal with.

Mr. Wilson: This could work in the opposite direction also, for the self-employed lumberjack who quits that business and goes to work in the mines and the next week he is diagnosed as having silicosis or black lung disease or something like that. Are you going to award him damages from his present employer?

Mr. Aalyson: You still have the problem of proof.

Mr. Wilson: This says nothing about it. You are going to remove the requirement of time in here.

Mr. Carter: It seems to me the constitution cannot deal with this kind of material.

Mr. **Herrold:** This is mostly detail. This would rip out of the statute 8 or 10 sections which have been laboriously amended over the years to deal with the matters as they arose. To me it's a legislative matter of the most detailed type. There is much more to it, other elements involved. From the employer's point of view, the statute of limitations is clearly written all over it. The man who worked for you 30 years ago. You destroyed your records after 10 years. He says "you know I got a whiff of something out in the XYZ department 30 years ago when I worked for you." How in the world do you defend yourself in a case like that.

Mr. Aalyson: The answer is, you make him prove his case.

Mr. **Herrold:** Alright. You have no facts to defend with. He just says "Hey, this happened to me", how do you disprove that after thirty years?

Mr. Aalyson: By the same kind of argument you are giving today.

Mr. **Herrold:** And yet he wants to have this submitted to a jury in every unlimited case. He plays the violin to the jury, he waives the bloody shirt. What does the poor employer do?

Mr. Huston: Basically, Ohio had a workmen's compensation statute before the constitutional amendment and it was declared unconstitutional and the amendment really just entitled the legislature to establish what they had established before to a certain extent, and made it constitutional. Wasn't that the actual import of the constitutional amendment in 1912? It was a foregone conclusion that the legislature would enact something because they had a statute on the books. I'm just asking a question.

Mr. Aalyson: Yes, there was a movement afoot to compensate people for an injury suffered in industry. Now, if you could do this by statute, fine. The courts say you couldn't - you do it by constitutional amendment. The fact remains that the constitutional amendment was adopted to provide to compensate people for their injuries.

Mrs. Sowle: To permit.

Mr. Huston: It permits compensation.

Mr. Carter: To permit the legislature.

Mr. Aalyson: Alright, to permit the legislature which was responding to a movement of the people that said "this is what we want".

Mrs. Sowle: You know, this all came about at the same time that things like protective legislation for children and women and all the rest of it, at a time when **the court was** saying these economic changes that are a product of social and economic movements are unconstitutional. A lot of the constitutions were amended to allow for this movement of reform at that time. But it seems to me that there is a real danger in freezing the specifics into a constitution. Just as the womens' movement has been saying, "Look, all of this protective stuff is really standing in the way of women getting all kinds of positions". What is a reform at one time 50 years later isn't. It seems to me it's a political problem, and that the solution may lie in something like Bar Association work where lawyers on both sides get together and decide that these things could get together and say "Look, these swings are very undesirable". Is there any such thing as a Model Workmen's Compensation Law?

Mr. **Herrold:** They have one they call a model but I wouldn't agree it was a model.

Mr. Aalyson: Is that the federal?

Mrs. Sowle: After all, you talk about the swings from one general assembly to another. It seems to me very dangerous if during one of the periods of swing you get it frozen into the constitution.

Mr. **Herrold:** Isn't that the beauty of our federal constitution - it deals not in specifics which are frozen in stone, but in words which can be interpreted as the times require by legislatures. Obviously, this is the basis for all your work here, but to me this (draft) goes as far away from that as you can get, in an area which is not a fundamental right. It's a statutory right to begin with.

Mr. Aalyson: I ask you when you pose that question, what are you freezing? You are freezing the right to a trial by jury, you are freezing the right to be compensated to the extent that you are disabled by a condition which you got at work, either injury or

occupational disease. That's all, so far. There isn't a great change. These are the two things you've frozen so far: the right to a trial by jury, from both sides...

Mr. **Herrold:** Do you want a right to a trial by jury in workmen's compensation?

Mr. Aalyson: The legislature says no.

Mr. **Herrold:** This goes against the principle in most other states that we should have an expert body whose decision is final.

Mrs. Sowle: There are a lot if different kinds of solutions, it seems to me, to the problem. For example, you wouldn't have as much of a need for reliance on trial by jury if you had a board that everybody felt was an expert board that would render an objective decision.

Mr. Aalyson: Oh that would be great. Or a legislature that was an expert legislature.

Mrs. Sowle: I know. But the question isn't just trial by jury, here, it's the nature of the board.

Mr. Aalyson: Yes, that's what it amounts to. You're trying to get rid of the vagaries, perhaps where you go to the constitution instead of the legislature, I don't know.

Mrs. Sowle: On the policy standpoints, I couldn't agree with you more. On where it belongs, in the constitution, or the legislation, I have a lot more trouble with that.

Mrs. Milliken: There isn't any probably perfect workmen's compensation, but I think there is more agreement on what is a model constitution. I think a lot of these things don't fall within that. Also, I'm a little disturbed by everybody's jumping on the legislature. I think it's really the public that is at fault and causes this pendulum swing. The reason that there are these pendulum swings is because when you have a certain composition in the legislature or in the administration, you go to the legislators or administration and say, "I would like to have this sort of thing." Or you lobby for it when it comes up. And it is really the public and not the legislature itself.

Mr. Aalyson: Well, maybe we shouldn't indict the public, maybe we should indict labor and management, because I don't think the public shows any attention to this now.

Mr. Wilson: This is the point I was going to bring up. If labor, or the labor factor which is experiencing the occupational diseases feel they have been put upon, they are free to bring pressure upon the legislature to get the thing changed statutorily, not constitutionally.

Mr. Aalyson: Yes, but that seems to be the problem. If I were able to freeze this thing, I'd almost be willing to freeze it for bad or good rather than let it swing back and forth the way it does. And it does swing. They do bring pressure to bear.

Mr. Wilson: But they never got occupational disease given the same treatment as injury?

Mr. Aalyson: Apparently not.

Mr. **Herrold:** This is a very insignificant number of cases he's speaking of.

Mr. Aalyson: Occupational disease?

Mr. **Herrold:** What are there, 8,000,000 active cases over there? Either of us could dream

up horror cases and any system is going to have somebody on the other side of the line.

Mr. Wilson: Let's go back another step to the Model Constitution, which I've seen in the past but I don't have a copy with me. Does it encompass anything on workmen's compensation?

Mrs. Avey: It has no provision on workmen's compensation that I can see.

Mr. Carter: If I had my druthers and was starting from scratch, what I would do in the constitution would be simply make it clear that the legislature had the power to enact laws in this area, period.

Mr. Wilson: Which I think has been done.

Mr. Carter: Well, they have added a lot more stuff. My feeling is that we are really tilting at windmills here. Obviously we don't have enough support of labor to sponsor some changes. They are not even here. I'm certain that we are not going to get any support from employers to change what we've got here. So it seems to me that it's probably an exercise in futility to try and talk about doing anything from a realistic standpoint. I remember when we started this commission, we had Dr. Harvey Walker, who has since passed away, **giving us an overall** view of the constitution. And when he came to this workmen's compensation thing he said this is a ridiculous thing to have in the constitution - it ought to be taken out. And Frank King got up and said "over my dead body". Now, my point is that labor, I'm sure, would be absolutely adamant about taking anything out relating to workmen's compensation out of the constitution. And they obviously aren't sufficiently interested in making any changes to make an appearance.

Mr. Aalyson: The only change I recommend would be that there be no distinction between the handling of injuries and diseases.

Mr. **Herrold:** Nothing has been said as to why that distinction is there. Perhaps it should be. That is that it is felt that there are a myriad of occupational diseases. Let's take one - parrot fever. You work in a store where they have parrots from South America and you get parrot fever. That's a terribly complicated disease which is very hard to distinguish from pneumonia, but if you treat it like pneumonia, the patient dies. I had a case once. It takes a very skilled physician to diagnose and treat it. And there are any number of occupational diseases equally complicated. It was felt that since this is such a problem involving high degrees of expertise among doctors, it's something that we shouldn't be presenting to the average juror. Just terribly complicated and we are going to keep it to the administrative agency where the people who develop the expertise can deal with it. That's why they're different.

Mr. Wilson: Do you feel, Craig, that back when this was originally written if the wordage had been "for the purpose of providing compensation to workmen and their dependents, for death, injuries, and/or occupational diseases," that you wouldn't be in the situation you're in now?

Mr. Aalyson: I think we'd be closer to the situation. Does the fact that it is difficult to treat and diagnose a particular occupational disease which might cause somebody's death mean that he shouldn't get compensation? And right now, that's what it amounts to.

Mr. Carter: You mean, because of the board?

Mr. Aalyson: Because of the lack of skill, he talked about, in treating them. No, I think because of the court. I think the court thinks that they must distinguish between occupational disease. I don't know why the legislature does it, except that I think the legis-

lature has been subjected to a strong lobby. Now, why labor has never been able to get through occupational disease, I don't know, except that maybe they haven't pressed it, because, as Russ says, there aren't that many cases out of a total number, although they got a coal miners' disease through. You know, the unions are interested in their specific area.

Mr. Carter: The constitution doesn't deny the claimant any rights under this.

Mr. Aalyson: Under Supreme Court interpretation, I think it does.

Mr. **Herrold:** I must disagree. I wrote the brief for that case for the employer. And it goes on point 36. The constitution had almost nothing to do with it in that in the case you're speaking of.

Mr. Aalyson: Except they say in the constitution they mention injury and occupational disease.

Mr. **Herrold:** But that's not what the Supreme Court hangs it on. It's on the language in specific statutes. Point 36 is the key one.

Mrs. Sowle: And the court must have said that the statute was constitutional, but nothing in 35 prohibited the legislature...

Mr. **Herrold:** Nobody argued about the constitutionality of it.

Mr. Aalyson: The court mentions the constitution as distinguishing, they mention disease and injury both, and so they say, "We're going to distinguish because of that".

Mr. Carter: Then the laws doing so are valid then.

Mr. Aalyson: That's never been tested, that's what Katie asked.

Mrs. Sowle: But I assume that if that's what the court said the court would also say if the general assembly provided the same kind of trial by jury and appeal de novo and all **for** injuries and occupational disease, that would certainly be constitutional, too.

Mr. Aalyson: I think so. All I say is that I think the two ought to be treated the same. If you want to get rid of a jury trial, you get rid of it for both of them. But if you have it, you have it for both of them. And if you are going to compensate, you compensate for both. You don't put some restriction on the extent of disability. A man with silicosis is not entitled to compensation right now, unless he is totally disabled.

Mrs. Sowle: I couldn't agree with you more on the merits, but I question whether practically any of this belongs here.

Mr. Aalyson: If we do not permit a distinction between the two then we provide for the silicotic disease to be compensated. Now, I would be glad to try to come up with something which would just eliminate any distinction, any discrimination between the handling of one as opposed to the other, and let all of this other stuff go.

Mr. Wilson: Constitutionally, there is no discrimination, as we read the constitution.

Mr. Aalyson: Well, I think we ought to make that clear, if that's what you think.

Mr. Carter: I'm with Katie. I think the problems that exist in this field are not well

dealt with in the constitution. That's my conclusion. That they are more properly dealt with in the legislature. I'm really disappointed that we have so much already in here, but I dispair of making any changes, as a practical matter.

Mrs. Sowle: The whole management-labor area, it seems to me, presents this, not just workmen's compensation. It would be like making the Taft-Hartley act part of the constitution.

Mr. **Herrold:** As it stands today.

Mrs. Sowle: Yes.

Mr. Carter: I would be delighted, Craig, to consider any language that you would want to propose in this area.

Mr. Aalyson: I think we should try to cut off the thing. I will try to bring up something. We'll take a quick look at it next time. If we can't we'll leave it as it is. I think it would be difficult to come up with something which will do what I feel ought to be done without getting statutory in character.

Mrs. Soule: You know, this is perfectly gratuitous and not part of the committee's responsibility, but try to think where the solution to this kind of shifting may lie, the only analogies that I can see are areas in which Bar Assocation work has come up with, by getting lawyers from all of the different disciplines together on it, because I don't see a solution from labor, as such, or management, as such. But lawyers who are constantly dealing with these areas perhaps can get together.

Mr. Aalyson: My feeling has always been that claimants' lawyers and employers' lawyers should sit down and try to draft one. But there doesn't seem to be a whole lot of incentive to do that.

Mr. **Herrold:** If you and I were to draft it, unless labor agreed with it or management agreed with it, there would still be the same old fight. It might not be all bad that the pendulum swings. That may be the way our system works.

Mr. Carter: That's of course, the fundamental question.

Mr. **Herrold:** That's right.

Mr. Carter: What do you leave up to the legislature which reflects the changes in times and what do you freeze in the constitution? If in doubt, I like to leave it out of the constitution.

Mr. Wilson: Until such time as we've come up with that happy millenium ... between labor and management, we'd better leave the constitution able to swing with it.

Mr. Carter: As we look back to the history of our constitution, with one exception, of the initiative and referendum, and there are valid reasons for that exception because really what you are doing there is taking away things that the legislature doesn't want to see happen, ways of introducing new legislation outside of the legislature. So you've got to spell it out. But with that one exception it seems to me that we're very wise not to do so many things that we see in the constitution today that were put in of a statutory nature and once they're in they're hell to get out, and they cause all kinds of mischief in the years to come. Again, I say, if in doubt, leave it out. I think that's a good rule to follow.

There was discussion about a new name for the committee.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
December 18, 1974

Summary

The Elections and Suffrage Committee, also to be concerned with miscellaneous matters met on December 18, 1974 at 10 a.m. in the Commission offices of the Neil House. Present were committee members Craig Aalyson, chairman, Senator Corts, Messrs. Carter and Huston, and Mrs. Sowle. Russ Herrold of Vorys, Sater, Seymour & Pease, and Robin Obetz with Williams, Murray, Deeg & Ketcham attended the meeting. Ann Eriksson was present from the staff.

Mrs. Eriksson: I prepared a redraft of the statutory initiative proposal to take to the Commission.

Mrs. Sowle: The significant change in it is the removal of the direct initiative, and that is the only real change in it, isn't it?

Mrs. Eriksson: Yes. The direct initiative could be presented separately. I would assume that if you do that, the direct initiative would probably not secure enough votes. The whole section was voted on at the last meeting and didn't get enough votes, presumably because of the direct initiative provision. But I think, as a committee, if you are still in favor of the direct initiative, then this is a way of presenting it separately to the commission, and then it still might be defeated. On the other hand, if you as a committee, prefer simply to delete the direct, and just present the indirect, we can do so.

Mrs. Sowle: I think the committee's feeling was favorable to the direct initiative. But I wonder whether Dick will have anything to say about the policy of presenting it again to the commission.

Mr. Aalyson: I think it was his suggestion that we submit it in two separate sections so as to secure approval of the indirect, without having the whole thing fail because the direct was included.

Mrs. Sowle: I realize that we were expected to come back with the indirect. I would favor sending both back. I just wonder if he will have any comments about sending the direct back when that seemed to be the thing that was defeated.

Mrs. Eriksson: There were four negative votes, three of which were clearly because of the direct initiative and the fourth opposition on the basis of the numbers rather than a percentage, so that there were 3 negative votes to the direct initiative.

Mr. Aalyson: And how many in the affirmative?

Mrs. Eriksson: Not sufficient - 18, I believe. We need 22 votes.

Mr. Aalyson: And the rest of the people haven't voted by mail, or otherwise?

Mrs. Eriksson: No. We had to close the roll call because it had already been held over from one meeting.

Mr. Carter .: I had a chance to look at this (new Article XIV, Section 2 and 2a), and I thought it was alright.

Mr. Aalyson: I think so too. What is the status with regard to the voting? When this

comes in, do we start a new voting procedure?

Mrs. Eriksson: Yes.

Mr. Carter: Hopefully, if both of those pass, we might recombine them. But then I got to thinking, you've got the same problem going to the legislature, you've got the same problem going to the ballot. So maybe its best to leave the two separate. I was the one who wanted to avoid the duplication the first time around. That wasn't so wise, I guess.

Mrs. Eriksson: We need 22 votes now because we are now a full commission.

Mr. Carter: I don't know whether Mr. Huston is clear on the background of this or not.

(Mr. Huston commented that he had heard the commission discussion and some of the objections to the direct initiative.)

Mr. Carter: I might review for a few minutes what the position of the committee is. It would be helpful to Bob and maybe sharpen up our insights for the presentation to the commission. When we started out, I was against the direct initiative which is one of the two questions. Much for the same reason that Don Montgomery advanced - that we've gotten along pretty well without it and it is kind of a tricky business opening up Pandora's box to voters writing legislation. But shortly after getting into it, I became persuaded that it is a mistake not to have it. One reason is this question that Linda brought up that we never discussed in committee - it's a safety valve for the people when they are frustrated. The second thing, which our chairman has brought up on numerous occasions, is that not having the direct initiative encourages constitutional amendments by initiative which is a very bad thing. And then Craig feels, and many members of the Commission feel, that the direct initiative is something that the people should have a right to - there is an inherent right, which is important. And, of course, we had the recommendation from the Secretary of State, that we should have a direct initiative. He wanted to get rid of the indirect initiative because of the procedural problems. It was a messy business as far as the Secretary of State was concerned.

(The committee welcomed Senator Corts).

Mrs. Sowle: Senator, we are simply going back over some of the discussion that we had before about direct and indirect initiative. The staff has prepared a new submission to the commission so that we can present the proposal for direct and indirect initiative separately. We felt as if the proposal failed the commission primarily because of the direct initiative. I think those are the major reasons. The only other reason that occurs to me you could put under the constitutional amendment, under number 2, or make it a separate one, and that is that there are issues where members of the public might feel the general assembly is simply not going to pass and it is pointless to present them to the general assembly. Just trying to think of one, I mentioned at the commission meeting, perhaps a problem of salaries of legislators. The margarine issue is often given as an example, and I think you may have mentioned that, Dick, where voters know the general assembly is not going to pass this, so why put them through that long procedure?

Mr. Carter: Let's call it the sensitive issues question. Now, I think we ought to also list the disadvantages.

Mr. Aalyson: It bypasses the deliberative legislative process.

Mr. Carter: That's the major one.

Mrs. Eriksson: And not only the deliberative but the drafting skills that are located in the legislative process that are not available to others.

Mr. Carter: Actually, I would be very happy if the commission went along with section 2 and we didn't get 2a. I would prefer to have 2a.

Mr. Aalyson: Have we not provided with regard to direct initiative that the ballot board will play a part?

Mrs. Eriksson: The ballot board will play a part in all of the processes, yes.

Mr. Aalyson: I was thinking of the drafting problem you mentioned before.

Mrs. Eriksson: Well, that won't have to do with the drafting of the legislation, only the explanation and what's on the ballot.

Mrs. Sowle: In the direct initiative, the ballot board does not play a part, does it?

Mrs. Eriksson: Yes. The ballot board would play a part in the explanation and the ballot language for all initiative and referendum matters.

Mrs. Sowle: That's in that long procedural provision and that did pass. Everything has passed except the initiative section.

Mr. Carter: We'd have a very poor recommendation to present if we didn't have anything on the initiative.

Mrs. Eriksson: What it would mean is that the existing section would stay there. Which would mean that there would be some conflicts.

Mr. Carter: We've changed section numbers, the whole procedure.

Mrs. Eriksson: Yes, it would be in a different place in the constitution.

Mrs. Sowle: That's principally what we have to say in presenting section 2 then, that we simply have to have this because what we have presented is a total reorganization. The present provision is very poorly drafted.

Mr. Carter: Section 2 really doesn't make any change over what we have now. It's merely a clarification - a cleaning up of the procedural aspects of it. And I think the Secretary of State's office supports this. I think we could then present the direct initiative and get that passed, and then submit the indirect and have a little bit of debate on the pros and cons of that. Let's get 2 before the commission before we argue about the direct initiative.

Mrs. Sowle: So there would be two separate motions.

Mr. Carter: That would be my feeling. I will make a motion that the committee adopt this revised recommendation.

Mrs. Sowle called for those in favor to vote 'aye'; those opposed, 'nay'. There were no 'nays'.

Mrs. Sowle: The only other thing that we had remaining in my area is the corporations issue that Nolan Carson raised towards the end of the meeting. He desired assurance that our proposal covers foreign corporations.

Mr. Carter: To make sure that we have the power to classify non-profit. I have taken some language. Have you got anything from Nolan?

Mrs. Eriksson: No.

Mr. Carter: I spent several hours on this. It turned out to be a rather difficult drafting job. "General laws may be passed, altered and repealed for the formation of, the granting of powers to and classification of domestic corporations not governed under Article XVIII of this Constitution and for the regulation,and taxation of corporations generally, both domestic and foreign." The second sentence would not change.

Mrs. Sowle: So you have separated the domestic and the foreign and what powers the general assembly needs with respect to each one. That sounds very good.

Mr. Carter: Now, the rationale. Basically, I took the present sentence. You remember we wanted to get the concept of general laws and we wanted to leave in that they could be altered and repealed because of the Dartmouth case, so that I have started out by saying "general laws may be passed, altered and repealed..." It's the Dartmouth case. "...for the formation of, the granting of powers to and classification of domestic corporations..." None of those functions, as I see it, apply to foreign corporations. "...not governed under Article XVIII..." The definition is here. "...and for the regulation and taxation of corporations generally, both domestic and foreign."

Mrs. Sowle: And classification would apply only to corporations that are formed under the laws of the State of Ohio.

Mr. Carter: Classification would be only for domestic corporations. I don't think the state would have any power to classify foreign corporations.

Mrs. Eriksson: By going to a statement that says "general laws may be passed" you have not quite negatived the idea that you cannot have special laws.

Mr. Carter: I thought that was pretty clear. I agree it weakens it. The present language is "only general laws may be passed..." And this just says "general laws may be passed..."

Mrs. Sowle: And was it the committee's conclusion that there wasn't another provision that prohibited special acts with regard to corporations?

Mrs. Eriksson: Only the general provision with respect to uniformity and that, because it is worded a little bit differently in the Ohio Constitution, is perhaps, not quite as satisfactory as it otherwise might be.

Mr. Aalyson: If you say "general laws may be passed" I'm not so sure that that may not exclude special.

Mr. Carter: How about if you added the word "only"?

Mr. Aalyson: Of course there would be no question about it then. I'm not so sure that you need the word "only". By saying "general laws", I think the rules of statutory construction might, particularly when we take them together with the committee's minutes, indicate that we intend to exclude special laws.

Mrs. Eriksson: Under the statement that we already had it would be very simple to cure the classification problem by simply adding the word "classify". I just didn't think too much more about the foreign corporation problem.

Mr. Carter: You could argue that corporations not governed under Article XVIII include both foreign and domestic corporations. I think that's valid argument.

Mrs. Sowle: I don't see that as a problem.

Mr. Carter: Nolan was so concerned about it. He is involved in corporate law. You might argue that this exclusion could apply really only to domestic corporations because it's a state constitution and the exclusion is for state municipalities. Yes, the 'classified' is easy to handle. It's the other one that gets sticky.

Mrs. Eriksson: If you're going to include foreign corporations, perhaps you need also to give them powers. You don't give them general corporate powers. But you may give them powers to do certain things. For instance, you might license a foreign corporation to conduct a certain business or activity in Ohio. And aren't you giving powers by doing that?

Mr. Carter: I would think that would be under the area of regulations. To me the powers are granted by charters, and of course, the charter is the thing that the state has no role to play in of a foreign corporation. One of my alternatives was "Laws of a general nature may be passed". But that's the same problem - it doesn't prohibit special laws which is really the thrust of the present words.

Mrs. Eriksson agreed.

Mr. Carter: You might say for the chartering and classification of domestic corporations. Now the chartering, because that's what we are talking about in the granting of powers to and formation of is really the chartering of corporations.

Mr. Aalyson: Nolan's problem is classification and regulation of foreign corporations?

Mr. Carter: He wants to make sure that there is no question that the state has the right to control securities laws, you know, the business activities of foreign corporations doing business in the state.

Mr. Aalyson: How about all corporations doing business in Ohio....

Mr. Huston: Why don't we just put in all corporations not governed under Article XVIII?

Mr. Aalyson: The word 'all'

Mr. Carter: The problem with that is....."all corporations may be formed, empowered and classified" when the state doesn't have any power to do that. I have some logic problems with that.

Mr. Aalyson: What's your problem with the corporations doing business in Ohio?

Mr. Carter: Then it's a question of the definition of 'doing business in the state' and that's a very **sticky area.** You know, foreign corporations might argue then that selling securities in the state is not doing business.

Mr. Aalyson: How about "corporations doing business in the state or selling securities in the state..."

Mr. Carter: That's getting back, pretty much, to the language we have now which tries to spell it out. This doing business in the state is a very controversial thing as you well know in the telephone situation. We ought to stay away from that without having any definition of it.

Mr. Aalyson: How about "corporations engaged in any activity within the state"?

Mr. Carter: You might get into some tricky business of someone sending a representative...

Mr. Aalyson: That's an activity within the state, I would think.

Mr. Huston: The present law doesn't cover that.

Mr. Carter: You're getting into a very sensitive area here as to when corporations are engaged in activities in a state and to what extent they are subject to regulations by the state. I really think we ought to stay away from that in the constitution.

Mrs. Sowle: And your proposal does avoid those kinds of things?

Mr. Carter: It says "laws may be passed". And then it's up to the courts to determine whether or not the law is constitutional; of course, many of these are federal questions rather than state questions. There is a tremendous argument on who has to pay income tax & franchise taxes.

Mrs. Sowle: Really, the only problem at all that I can see with your proposal, Dick, is the problem of the special legislation.

Mr. Aalyson: Adding the word 'only' would take care of it.

Mrs. Sowle: Another way to do that, I don't have yours in front of me, would be to say "General laws, and no special laws,..." The simplest way would be to say "only".

Mr. Carter: We certainly don't want to get in a position where we take away any of the state's power to regulate securities transactions by foreign corporations.

Mrs. Sowle: It might be a nice thing if we could discuss this very briefly with Nolan before the meeting. One problem is making sure that that first part on domestic corporations not contain anything that has to apply to foreign. I see no problem with it. How does everybody like the idea of putting "only" in front of 'laws'?

Mr. Aalyson: It would certainly make it specific but I think that the rules of construction would require that if the term 'general laws' is used you exclude special laws.

Mrs. Sowle: You mean "expressio unius est exclusio alterius"?

Mr. Aalyson: How do you feel about that Ann?

Mrs. Eriksson: I agree.

Mr. Aalyson: The addition of the word 'only' is certainly not going to detract I think.

Mrs. Eriksson: Grammatically, I'd hate to start out a constitutional section with the word 'only'.

Mr. Aalyson: You could say 'general laws only may be passed'. I don't see any need for it myself.

Mr. Carter thought that "general laws only' was not a bad idea.

Mr. Carter: Another suggestion "Laws of a general nature may be passed or "Laws of a general application may be passed..."

Mrs. Eriksson: I think the more usual expression in the constitution is 'general laws'.

(Mr. Carter asked Mrs. Eriksson to take a copy of the proposal Mr. Carson to see if he had any thoughts on it).

Mrs. Sowle: What would you think of possible adding a sentence on special laws at the end of this?

Mr. Aalyson: Prohibiting the passage of special laws.

Mrs. Sowle: "No special legislation shall be passed for these purposes". I'm sure it could be worded better than that.

Mr. Aalyson: I think we would accomplish our purpose better if we feel that it is necessary by saying "general laws only".

Mrs. Eriksson: I'm inclined to think that Craig's correct. If you say 'general laws' the implication is certainly that you can not pass special legislation.

Mr. Aalyson: And too, I assume that the minutes of these meetings are going to be available to whomever might have to interpret this.

Mrs. Eriksson: The report of the commission to the general assembly would contain it.

Mr. Aalyson: And its clear that we do not intend that special legislation shall be passed.

Mrs. Sowle: Am I right,though, that in construing constitutional provisions they do not look for legislative opinion, under the theory that the words speak for themselves?

Mr. Aalyson: I should think they would look to the drafters of the provision the intent to see what was meant.

Mr. Huston: I've looked that up many times--This history of the constitutional provision. The debates on the existing constitution.

Mr. Aalyson: I'd certainly feel that if the Supreme Court or any court ever got that question they would, particularly if it was available. Oftentimes, of course, things are not available, but here it will be available. Is this intended to be the entire section?

Mrs. Eriksson: No, you'd add the provisions about the stockholders - the second sentence.

Mr. Carter: I move that we modify our report to the Commission to change the first sentence to this one.

Mr. Aalyson: I'll second.

A vote was taken. All voted 'aye'; none voted 'nay'.

Mrs. Sowle: We will resubmit it with that modification but we'll try to show this to Nolan before the meeting.

Mrs. Eriksson: The Superintendent of Banks commented that he thought we ought to take some kind of position on that banking statute which apparently flies in the face of the constitutional provision about superadded liability. But I don't know that really that's our responsibility. I think this Committee and the Commission then would be expressing the position that there should not be liability beyond the purchase price of the stock. And I would assume that it is your intention that that would apply to all corporations, banking corporations as well as other corporations. But I don't think we need to go so far as to say that we think a statute is constitutional. I believe that that's not our role. And I think that we would simply express our opinion that the provision should remain in the constitution essentially as it is. I'm sure that nothing is ever going to happen to it until there are some bank failures and some court tests on it and that may not happen.

(Mrs. Eriksson invited Mr. Russ Herrold to join them at the table)

Mr. Aalyson: I think everyone was here last meeting except Sen. Corts on our discussion of workmen's compensation, at which time Mr. Herrold, who is a member of the law firm of Vorys, Sater, Seymour & Pease, and which firm represents the Ohio Manufacturers Assn., appeared. I think that the gist of his opening remarks were that he did not see any reason for changing the specifications of the amount of a premium which could be charged for the purpose of promoting the health, safety, and welfare under this provision of the constitution. I don't think that there was any adverse reaction to his position from the members of the committee. It was generally felt that that would be left as it presently is. Then there was presented a document framed by the members of the Workmen's Compensation Committee of the Ohio Association of Trial Lawyers who are primarily claimants' representatives in workmen's compensation, which would have made very substantial changes in the constitution. For the most part, the committee as well as Mr. Herrold were opposed to these suggested changes because they were felt to be fairly statutory in character and should not be a part of the constitution. At the end of the meeting I did suggest that I might attempt to draft a proposal which would serve to seek equal treatment in some areas of workmen's compensation where I think it probably does not now exist. - the handling of injury cases as opposed to occupational disease cases. One area where there is a difference is that there is no right of appeal to a court for a jury trial from an adverse decision involving an occupational disease claim. That may be the most significant area. There is another which I personally feel should receive treatment in the constitution. In occupational diseases which involve the respiratory tract, one has to be totally disabled before one is entitled to compensation. I think this is not what was intended in the original drafting of the constitution, but again, it may be a statutory element. Before I present the draft that I have prepared, I'd like to have the sense of the committee as to whether they feel any change should be made at all. If that's the sense of the committee, I don't see any point in arguing a position which I might think matters. On the other hand, I would be glad to submit to the committee for reference and possible discussion what I have prepared.By way of background let me say that in the last committee meeting there was some discussion as to why there is differentiation in the right of appeal to court between occupational disease and injury claims. I mentioned

a case and have it with me. Quoting from the case, the Supreme Court says, "as pointed out in Johnson vs. the Industrial Commission, Sec. 35 of Art II of the Ohio Constitution differentiates between injury and disease and the word 'injury' as used in our workmen's compensation statutes does not ordinarily include a disease..." Now, they are talking about the right of appeal to court in this case. So they feel that the constitution makes a distinction between injury and disease. My personal position, as I stated earlier, is that there should be no such distinction between injury and disease in the constitution if, in fact, there is some. I have prepared and will distribute a suggested change which the committee may well feel is statutory in nature and if they do feel that way there is a very good reason why they would. This same case which I have referred to has a dissenting opinion in it in which Judge Herbert who then was a member of the court says"the statutes attempt to provide that there shall be no distinction between occupational disease cases and injury, and yet the Supreme Court in the majority opinion has said that there is." So what I have done, in essence, is take the statute which Judge Herbert referred to as attempting to equate the two types of disabling conditions and embodied it as a part of the constitution, so that the Supreme Court could have no question as to whether it was intended that those should be treated on an equal basis.

Mrs. Sowle: May I ask why the court decided one situation was appealable and the other not?

Mr. Aalyson: This is very simple. The statute reads that appeal may be taken in every injury case. And there is a second statute which reads almost as this change in the constitution which says the rights, liabilities, benefits, immunities, and what not pertaining to injury cases shall apply to occupational disease cases. And yet the Supreme Court says that in the constitution there is a differentiation, therefore, we are going to say there is a differentiation in the right of appeal. I made one other change which is not significant which was suggested by Jack at the last meeting. I changed the word 'or' to the word 'and' earlier on because the word 'or' seems to imply some difference whereas 'and' puts it in the conjunctive sense.

Mr. Carter: The remedy could be statutory.

Mr. Aalyson: Clearly.

Mr. Carter: The question that comes to my mind then as to whether or not it should be a matter for the constitution rather than for the legislature.

Mr. Aalyson: There is some question as to whether it can be statutory in view of the statute which exists and which was upon in this decision. In the Code, Section 4123.68 is that section which deals with occupational disease. The next section, Section 4123.69 says "Every employee mentioned in 4123.68 of the Revised Code and the dependents and the employer or employers of such employee shall be entitled to all the rights, benefits, and immunities, and shall be subject to all the liabilities penalties, and regulations provided for injured employees and their employers by Sections 4123.01 to 4123.94, inclusive," which is the whole code. Judge Herbert in commenting on this says, in his minority opinion, that one of the rights which the claimant shall have is the appeal to court and since this says that occupational disease claimants shall have the same rights as other claimants, obviously they have an appeal, but the Supreme Court says no...

Mr. Herrold: Craig, if you look at that case, it doesn't turn in any way on the constitution. It would have been very easy for the general assembly to provide for such an appeal if it intended to do so.

Mr. Aalyson: Of course, Judge Herbert says this is what they intended by the enactment of .69.

Mr. Carter: Yes, I understand. But it is, nevertheless, true, is it not, Craig, that the General Assembly could expressly provide for this in the following section on occupational disease.

Mr. Aalyson: You mean could they specifically say there shall be a right of appeal in occupational disease?

Mr. Carter: Yes.

Mr. Aalyson: Of course I think they can.

Mr. Carter: So that in that case there wouldn't be any question about the constitutionality

Mr. Aalyson: That's probably true, yes. I don't think there would be any question.

Mr. Herrold: It would have been very easy for the general assembly to provide for such an appeal if it intended to do so, by either eliminating the word "injury" before the word "case" in a certain section, or by adding the words "or occupational disease" after the word "injury" in other sections.

Senator Corts: Could I ask a question? Does this committee believe that there should be the right to appeal in those cases? Has there been an argument submitted that there should not be a right of appeal?

Mr. Herrold: The argument is that in an occupational disease case it is peculiarly a medical question, and usually a pretty **complex type of condition.** The argument is, and it has always been adopted when it's made in the legislature, and it comes up every session, really, that this is a matter best decided finally by an expert board which the commission is supposed to be, having before it the expert testimony of letters of physicians who specialize in these areas. And that to put that sort of question before a jury is contrary to prompt adjudication, for one, and expert adjudication, secondly.

Mr. Carter: My position on this matter is that I really don't know enough about it to take a stand on that question, on that issue. My feeling was that this is something that is more appropriately the kind of thing that I would like to have our elected representatives make judgments on. And these judgments change as people learn more about these things, rather than freezing something into the constitution. So I didn't have any position on it one way or the other.

Senator Corts: I just wondered if there is a feeling between the commission that a right to appeal on any matter is a constitutional right.

Mr. Aalyson: I championed the cause last meeting that both the employer and the claimant should be guaranteed a right to appeal to a court from any adverse decision of the Industrial Commission except extent of disability, by constitutional guarantee.

Senator Corts: Is anybody prepared to, in some fashion, say what rights are not appealable other than these?

Mr. Aalyson: Presently, as I understand it, there are two areas where an appeal is not available. One is extent of disability. Do you have 40 or 60 or 70% disability. You

could argue this forever, so I agree that this is a salutory type of provision. Second, would be in occupational diseases as opposed to injury. Those are the only two instances I know of where there cannot be an appeal to jury. Now, the denial of the right of appeal in the extent of disability is specifically by statute. The denial of the right of appeal in occupational diseases is by inference because nothing is said about the appeal and the supreme court in this decision has said there is a distinction and therefore there is no right.

Mrs. Sowle: And there is no appeal in the traditional sense, an appeal on questions of law?

Mr. Aalyson: It's an appeal on law and fact. It's a trial de novo.

Mrs. Eriksson: In the occupational disease cases, is there not, nevertheless, the right of appeal to the court of appeals on law?

Mr. Aalyson: Yes.

Mrs. Eriksson: So that presumably that meets the due process argument. Because I think

no administrative agency would adjudicate finally.

Mr. Herrold: I don't think a due process argument has ever been asserted.

Mr. Aalyson: I've never heard or one.

Mrs. Eriksson: No, but I think these arguments are being asserted more and more now in administrative agency decisions.

Mr. Herrold: Thar argument has never been asserted in any workmen's compensation case to my knowledge. Upon the basis that Article II, Section 35 has not been felt to be subject to the due process arguments.

Mrs. Eriksson: But it is a potential argument. Many of these things are changing today as far as administrative agencies are concerned.

Mr. Herrold: Yes, that's true. There are four steps at which this matter can be reconsidered on law or fact before the decision of the Industrial Commission becomes final under present law in occupational diseases, plus the fifth, more limited step of mandamus. In injury cases you have a statutory right of appeal.

Mr. Carter: There is nothing in the constitution that prohibits the right of appeal.

Mr. Herrold: Nothing.

Mr. Carter: And, to me, that's where we ought to stop. That's my feeling.

Mr. Aalyson: My feeling is that the Constitution not only should not prohibit, but it should guarantee the right of appeal.

Mrs. Sowle: But your provision doesn't really guarantee the right of appeal either, Craig, does it, because if the general assembly decided to remove the provision for appeal in injury cases...

Mr. Aalyson: Yes, it doesn't guarantee it. Actually, I would prefer to reword this to say that the right of appeal shall be guaranteed, but that was felt to be too statutory last time in the way that the other people had framed it. So I didn't come back with that.

Mrs. Sowle: And really what you are talking about is maybe not as well described by saying right of appeal. It's trial by jury that you are really talking about.

Mr. Aalyson: Yes, that's right.

Mr Herrold: Our different position is a question of, should we have an expert, supposedly, administrative body whose decision is final or should everything in this area be ultimately disposed of by jury? Certainly, there would be many employers who would like to, at least in the last four years, have been able to appeal their cases to a jury and had no worse of a chance. So I don't think you can draw this line on employer - labor.

Mr. Aalyson: That's a valid argument. I think it's a question: should there be a right to have a jury decide or should there not, in this case? As we both said, the political complexion of the Industrial Commission seems to change the nature of the orders that come out and therefore it seems to me that maybe a jury of one's peers is the last best hope of either side, in this case or in these cases.

Mr. Herrold: But when you have 9,000,000 open pending cases, contemplate the possibility

of appeal in 10% of those to a jury is horrendous, isn't it?

Senator Corts: Could I hear the statutory language which permits appeal?

Mr. Aalyson: The statute reads "The claimant or the employer may appeal a decision of the Industrial Commission in any injury case other than a decision as to the extent of disability to the court of common pleas,etc..."

Senator Corts: Where does it guarantee the right to trial by jury?

Mr. Aalyson: It goes on later to say that the case shall be turned to a jury. "The court or a jury under the instructions of a court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate."

Senator Corts: Really what the statute is giving is not a right to appeal but a right to a trial de novo.

Mr. Aalyson: Right.

Senator Corts: And does either party have the right to appeal on questions of law or abuse of discretion or any of that thing on the part of the board?

Mr. Aalyson: Only by mandamus.

Mr. Derrold: Only in those two limited categories that you spoke of. And then, in a very difficult way, of mandamus in which the only way that could be upset is to show a gross abuse of discretion.

Mr. Aalyson: And what it amounts to is that if there is any evidence to support the administrative agency's finding, then the court will not upset it.

Mrs. Sowle: In mandamus, the scope of review would be very limited.

Mr. Aalyson: Yes, very narrow. You must find that, essentially as I understand it, there is no evidence to support the decision below. I'm sure Russ can think of cases that involve an employer. One that comes to my mind just happens to be an occupational disease case where there was an autopsy which disclosed without question that death was due to silicosis, and yet there were other medical opinions in the case which did not have the benefit of the autopsy which said it is not due to silicosis and the board decided that it was not due, and the Commission said that there was evidence to support their position, therefore the court did not upset it. A factual situation which is almost unbelievable because of the autopsy.

Mrs. Sowle: Did that go upon mandamus?

Mr. Aalyson: It went upon mandamus.

Mrs. Sowle: And it was affirmed?

Mr. Aalyson: It was affirmed on the basis that there was medical evidence to support the position of the Industrial Commission even though that medical evidence as judged by you and I sitting here may have fallen in the face of the autopsy. This happens on both sides. It doesn't only happen on the claimant's side. Although it's a remedy, it's not a practical remedy in that many instances.

Senator Corts: What is there in the constitution which gives one the right to appeal?

Mr. Aalyson: There is nothing in the constitution.

Senator Corts: It's all statutory?

Mr. Aalyson: Yes.

Senator Corts: The right of appeal in every type of case?

Mr. Aalyson: Yes.

Mr. Herrold: And to be consistent, if you were going to write this in the constitution, shouldn't it apply to all other agencies too? Why workmen's compensation?

Senator Corts: I wondered why the statutory provisions do not apply to administrative appeals generally? I presume the reason it doesn't is because the legislature acted specifically on this one subject.

Mr. Aalyson: I think workmen's compensation has always tended to be treated specially because of the enabling section of the constitution.

Senator Corts: You say there are 9,000,000 cases pending?

Mr. Herrold: Yes. Let's say I'm injured and I draw some money today, my case would remain subject to being reopened for 10 years. That's how the figure is built up so high. It may be more than 9,000,000 now. It was 9 three or four years ago in Ohio.

Mr. Carter: I certainly don't want to take the position that I am against treating occupational diseases on the same basis as injury. I'm not taking that position at all. I just don't know enough about it to take that kind of a position. But I somehow or another have a hard time coming to the conclusion that this is a proper matter to be handled in the constitution. As a matter of fact, I stated at the last meeting, that my feeling is that the whole workmen's compensation area has no place in the constitution.

Senator Corts: I agree with you there, but the fact that it is in here might ...

Mr. Aalyson and Mrs. Sowle: Maybe we ought to repeal it.

Mr. Herrold: I think you'd be deluged with phone-calls. Certainly it would create a lot of problems.

Senator Corts: That's another right to work situation.

Mr. Carter: Yes, that's one of the problems with... That's why I feel so strongly about this direct initiative thing is that so often what happens is that material gets in the constitution that has no place in the constitution but once it's there, you've got a different ball-game getting it out than never putting it in to start with, and it leads to a lot of bad things in the constitution as things that shouldn't be there. I'm not saying that they're bad in fact.

Mr. Aalyson: I think there can be not much question if one looks at this entire article that it is essentially, at this point, without a change, legislative in character, the whole thing. That is, perhaps, the only valid argument for saying that something which is also legislative in character might well be placed therein.

Mrs. Sowle: So I can see how something ended up in the constitution. But whether that means you want to add legislative material is another question. I agree that I don't think we want any more statutory type of material in here than is essential. And I think the problem that you present, Craig, it certainly sounds to me as if it can be corrected in the general assembly without having to change anything here.

Mr. Aalyson: I assume that the sense of the committee now is that there should be no modification with the exception of the possible modification at 'and' or 'or'. Does anybody have a feeling about that? That was Jack's suggestion. To tell you the truth, I hadn't really thought about it. I throw it in there because he had suggested it.

Mr. Huston asked whether he thought that was significant enough to put the whole section before the voters?

Mr. Aalyson: I don't know whether it is or not. Jack suggested that this might be a means of accomplishing the entire purpose.

Mr. Herrold: I'm not sure I know what effect it has, but I'm a little troubled by the fact that we have injuries and occupational diseases which, in the case law and the way they are handled are events which happen at work. And yet death is something that happens outside of work. So I wonder if they should all be connected by an 'and'.

Mr. Huston: In your second sentence you have the same thing - damages for such death, injuries, or occupational disease - you have the 'or' in there too.

Mr. Herrold: This may be a way-out argument, but I don't know whether this would mean since in order to be compensable the injury has to be connected to your work, or happened at your work, really, or in the scope of your employment, and so is the occupational disease. Would this have the effect of ruling out a death that happened 20 years later as a result of something that happened at work. But it didn't happen at work, it happened in bed. This is the kind of semantic problem that first occurs to me.

Mr. Carter: One of the things that we were cautioned as commission members way back at day one was that anytime we make a change in the constitution, even some kind of very frivolous change, it tends to upset the whole apple cart - all of the decisions must be relitigated in view of that change.

Mr. Huston: I feel with regard to this 'or' or 'and', that this is such an insignificant change that if we are not contemplating changing the intent of the section, I would just leave it the way it is. I agree that the suggested change in this new draft is a matter that should be left to the legislature to deal with. That was the intent of the section of the constitution to begin with, to enable the legislature to pass the law.

Mr. Carter: Verifying their authority.

Mr. Huston: Verifying their authority. That was the only reason the constitutional provision was enacted.

Senator Corts: It offends me that there aren't rights of appeal in certain kinds of cases where there are in others. I would think that if the legislature failed to act, and if this group thought it should be in, that would be where it should be. My inclination without knowing a lot about the law would be that it should be in here.

Mr. Carter: You are not persuaded by the fact that there are other remedies, such as the right of initiative or legislative remedies.

Senator Corts: Of course, we could say that about everything we do. We could use that as a reason not to do anything, I suppose.

Mr. Carter: I wasn't thinking of a constitutional amendment. I was thinking of a statutory remedy.

Senator Corts: The very fact that you have indicated, as I say, I haven't had experience in this field, but the very fact that you indicated that there are political considerations in the make-up of the board, make the conclusion stronger that there ought to be the right of appeal, and if the legislature won't provide, then I think we should.

Mr. Huston: Generally, isn't the right of appeal from an administrative agency through the court and not to a jury? Administrative agency appeals are generally to a court which purportedly has some expertise in the application of the law.

Mr. Aalyson: I don't know much about administrative agency work but isn't it true also that administrative agencies generally are concerned with a fact finding situation such as is peculiar to a jury?

Mr. Huston: All administrative agencies are that way. Because actually the only thing you're doing, you're going before an administrative agency rather than a court, that's the first step - going before your administrative agency, such as PUCO. They have to make findings of fact and conclusions of law.

Mr. Aalyson: I understand, but facts are of a different type. This is so similar, for example, to a personal injury case, where you said: did this accident happen this way and was the disability produced by the occurrence? Which is traditionally a jury type of function as opposed to rate-making or things of that sort which are involved in administrative agency appeals.

Mr. Huston: In this particular type of case you are actually, you might say, doing away with the common law rights. You're eliminating the right of the employer to introduce evidence of negligence on the part of the individual. The individual waives his right of negligence against the employer. You're reducing it to a set of rules and regulations by which the rights of both parties are eliminated, which does give you a little different perspective. And it isn't something that the legislature has deemed necessary to regulate, because there is no other means for accomplishing a result, such as in connection with your monopolistic-type services. Where you have a PUCO regulation, that's in lieu of a competitive effort. In connection with SEC work, you do not have an application or a right of appeal to a jury. This is the only one I know of where you have a trial de novo in a lower court.

Mr. Aalyson: And yet the legislature has felt that this is necessary in injury cases, and one has difficulty I think, despite Mr. Herrold's argument, in saying that there should be a different type of appeal in an occupational disease case. One might say that these involve a medical question but, almost invariably, so does the injury case. The mere fact that there has to be medical evidence doesn't seem to me to be a justifiable basis for denying the appeal to the person who is just as severely disabled even though it might be by a disease as opposed to an injury.

Mr. Herrold: The language you have here really goes much further than just guaranteeing appeal. It covers everything you could think of vis a vis the two categories.

Mr. Aalyson: I'd be glad to modify the language to merely guarantee the right of appeal. As I say, according to Judge Herbert at least, and my own interpretation, what I feel

ought to be done. But the court said it doesn't do it. It's difficult for me to sit here and say the legislature can do this if the courts can disregard it.

Mr. Herrold: This amendment has been introduced every year in the last twenty while I have been participating. I would be amazed if it were not introduced again this time.

Mr. Aalyson: One might have been a little more confident in his prediction if the governorship hadn't changed. But that again creates a problem,, you see. It shifts back and forth as we both indicated.

Senator Corts: The argument that this thing was heard before a board of experts, that they're more expert than the jury doesn't persuade me at all. However I can see why you ought not have two trials - why you shouldn't have a trial before the board and then be guaranteed the right to retrial before a court. I can see that.

Mr. Aalyson: That used to be the case under rehearings. I don't know why that was changed.

Senator Corts: Under the administrative appeals act, you go off on appeal of the record before the board and I suppose that what I would favor, if I favor anything, is that that kind of appeal would be granted in these cases.

Mr. Aalyson: That used to be the situation as to injury cases. There was a record made of the administrative agency which went up and you considered the record.

Mr. Herrold: I wouldn't be against that legislative change either. I've operated under both systems. I prefer it as a matter of ease and simplicity to go up on record. The reason it was changed, I think, was you put a lot of jurors to sleep when you rest on record.

Senator Corts: When I think of an out and out appeal, I think of it from the court of common pleas to the court of appeals on questions of law.

Mr. Herrold: I would prefer to see it on the basis of law only, although employers would have had a hard time the last four years - but that's a legislative matter, it seems to me.

Senator Corts: Yes, it is.

Mrs. Sowle: It seems to me the only concern of the constitution legitimately is to make sure that the legislature has the power to enact workmen's compensation legislation and that was originally the problem. But the details of that and how it should work, seems to me those things ought to be subject to change from time to time on the basis of experience. All the constitution should do is to permit the general assembly to legislate in this area.

Mr. Aalyson: Even though I admit to being strongly pro-plaintiff and claimant, I thought maybe we ought to modify this very drastically simply by saying the legislature or the general assembly may enact laws.

Mrs. Sowle: Do the same thing we did in the corporation area.

Mr. Aalyson agreed.

Mr. Carter: We discussed this at the last committee meeting and that's where we got into

this discussion of the ball bouncing back and forth and I had trouble at the last committee meeting on some things. The arguments were we got the constitution - let's not change it. On other things, we should make changes because of the political shifts.

Mrs. Sowle: It seems to me it would be pretty hard to boil down those first two sentences.

Mr. Huston: That's the essential part of it.

Mr. Carter: That was the original in 1912, as I recall. The balance was added later.

Mr. Herrold: You are not proposing deleting the rest of the present section, I gather.

Mrs. Sowle: No, that isn't what I was suggesting.

Mr. Herrold: I meant Craig in his draft.

Mr. Aalyson: No, I wonder if it's necessary. When I looked at it, I thought something might be "The General Assembly may enact laws providing for workmen's compensation for persons who suffer injury or occupational disease or death". I don't think you need "death". I think "death" is nothing more than the ultimate injury.

Mr. Herrold: That's what the first sentence says.

Mrs. Sowle: Yes.

Senator Corts: What are the hatch-marks on page 2, "...the decision shall be final"?

Mr. Aalyson: I don't think we ever got to a discussion of that. That would be consistent with the right of appeal to court in cases involving violation of specific safety requirements. We never got to a discussion of that last time or this time.

Mr. Herrold: This would have another effect - that hatch-mark on the earlier draft. This is the sentence relating to the violation of specific safety requirements, which presumably this was allowed to be repealed.

Mr. Aalyson: Yes, that's what I say. This would be consistent with the right of appeal. It would bring it in there as well.

Mr. Herrold: This is where the commission has awarded a penalty, and of course it so called it because the employer didn't comply with some specific safety requirement such as "Thou shalt guard your band-saw" and the employer didn't and the employee lost his hand. But the Commission now has discretion to allow if they find the injury was due to such violation, they can allow a penalty of from 15 to 50% additional compensation which comes directly from the employer's pocket. And this would put that in the hands of the jury and subject to the motions that would flow from it.

Mr. Aalyson: If no one has any further discussion, the chair will entertain a motion if anyone cares to make one.

Mrs. Sowle: Do you need a motion not to change something?

Mr. Carter: I think that we're going to present this matter to the commission as to what the committee judgment is, and of course, you always have the right of filing more than one report to the commission.

Mr. Aalyson: Is it a propos for the chair to make the motion?

Mr. Carter: I would like to make a motion that we amend the present provision solely to provide for the right to trial by jury in any case involving an adverse decision, except extent of disability, and of course I want that right to obtain to the employer or the employee.

Mrs. Sowle: I'll second it for purposes of discussion.

Mr. Aalyson: I have nothing further to say in discussion. It's simply a feeling I have that the right should be guaranteed in the constitution. The gentleman who has not been introduced to the committee is Mr. Robin Obetz. Robin was formerly chairman of the Columbus Regional Board of Review and presently is a member of the law firm that handles primarily employer's work.

Mr. Huston: In such a situation, do you put the claimant in a real difficult position by virtue of the fact that your employer has the wherewithall to appeal practically every case.

Mr. Aalyson: Not involving extent of disability. As far as I am concerned, he really has that now. Except occupational disease cases. What I'm trying to bring in is occupational disease cases.

Mr. Huston: I'm just raising this as a question. Do you think that puts the employee at a disadvantage?

Mr. Aalyson: Speaking as an employee's representative, no.

Senator Corts: Let me see if I understand. Under the decision of the board, injuries may be now appealed in a trial de novo.

Mr. Aalyson: Correct.

Senator Corts: Under the authority of the statute and not the constitution.

Mr. Aalyson: Yes.

Senator Corts: And your motion would then make it a constitutional guarantee of appeal for both injury and occupational disease.

Mr. Aalyson: Yes, from an adverse decision not involving extent of disability.

Mr. Obetz: Taking the reverse, why don't you eliminate trial by jury in every case?

Mr. Herrold: Yes, why not. That would be more consistent with the theory of workmen's compensation.

Mr. Obetz: And I'm not convincted that isn't the answer.

Mr. Herrold: Most states have it that way. Ohio is one of the fairly few that allow jury consideration.

Mr. Aalyson: First of all, as I've indicated earlier, I think that you cannot permit political judgment in these cases as now is the situation. Second, I think if you try to eliminate trial by jury, you'd have another right to work situation on your hands in

Ohio, just as surely as the other proposition which was mentioned this morning which I've forgotten. Every workman in the state would rise up and get rid of not only the legislature, but maybe the Constitutional Revision Commission by shotgun approach.

Mr. Obetz: I disagree. I think if they had the intent originally on occupational disease cases, and there really in my opinion is very little difference, the converse is why not disallow for injury? Or the same position is why not have allowed for occupational disease cases as they do in injuries. I think you want to be consistent maybe.

Mr. Aalyson: That's what I'm saying.

Mr. Obetz: Why not the reverse? I think there is a lot of merit to the reverse for claimants and employers.

Mr. Aalyson: This is a matter of judgment.

Mr. Herrold: There is one consideration that maybe ought to be tossed in and that is in your court system the biggest single category of cases is workmen's compensation cases. There are more of those than any others now.

Mr. Aalyson: I have no means of challenging that. You mean the largest number of cases in a single category. But you are not saying that there are more workmen's compensation cases than all other cases.

Mr. Herrold: No. The court has categories: workmen's compensation, personal injury, contract, appropriation, and so on.

Mr. Aalyson: The motion is to amend the present article to guarantee a right to trial by jury from any adverse decision by either party, from the Industrial Commission, not involving extent of disability. It's been seconded.

(Mr. Aalyson voted 'aye' and all others voted 'nay'.)

Mr. Carter: I would like to say that I voted no because I think this is a statutory matter.

Mr. Aalyson: The motion fails. The chair will entertain a motion with regard to submitting the matter to the commission with a recommendation for no change. And I don't know that we need such a motion.

Mr. Carter: I think we do as a procedural matter, and I will make that motion, that we recommend to the commission that there be no change in the section.

Mrs. Sowle seconded the motion.

Mr. Aalyson called for discussion. There being no discussion he called for a vote. The committee voted unanimously 'aye'. The motion carried.

Mr. Carter: You are entirely at liberty to file a minority report if you choose to do so Craig, and I have a great deal of empathy for your position in this thing.

Mrs. Sowle: As a legislative matter I am very sympathetic.

Mr. Aalyson: I confess to the feeling that it is a legislative matter. I think we prefaced our remarks initially when we opened discussion of this section that if there were some way we could keep it from becoming a cyclical thing, a bouncing ball thing. Every legislature that comes up something gets in there and maybe there is no way to

do that.

Mr. Carter: Alright. That takes care of that matter. Do you have any other matters that have to be brought up before the committee?

Mr. Aalyson: I don't believe there are any matters presently pending. Ann has submitted some material on other matters - public welfare and of employees such as wages and hours and things of that sort but we've just gotten the research reports, and it is not something that could be taken up by the committee at this time.

Mr. Aalyson thanked Russ Herrold and Robin Obetz for coming in. Robin Obetz commented that Craig might put his appearance also with the Ohio Self-Insurance Assocation.

The committee will meet at the call of the chairman.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee: Miscellaneous
January 23, 1975

Summary

The Elections and Suffrage Committee met on January 23 at 10 a.m. in the Commission offices in the Neil House. Present were committee members Craig Aalyson, Chairman, Richard Carter and Jack Wilson. Ann Eriksson, Director, and Brenda Avey attended from the staff. Liz Brownell attended for the Ohio League of Women Voters.

The meeting opened with a continuation of the discussion of the language on corporations, presently Article XIII. Ann Eriksson commented that Katie Sowle had no further comments or changes to recommend regarding the language put forth by Mr. Carter. She had two questions. One, whether it was really necessary to include the language excluding the coverage of municipal corporations.

In view of the history of Article XVIII, all agreed that it probably should be included, so that the words "classified" and "regulated" don't apply to municipal corporations. Since they were included in there originally in Article XIII, it is well worth trying to exclude them.

Mr. Carter: You remember when we had this problem of trying to define what a corporation was in context with our constitution. I think we ought to leave it in.

Mr. Wilson: I think it's an improvement.

Mr. Carter: I would flip a coin as between "A" and "B" of my proposals. "B" is a couple of words shorter and I think it reads better. I like "formed in this state and elsewhere" better than "domestic and foreign". Foreign is a word that I think requires definition.

Mrs. Eriksson: It keeps with the basic format that the committee had originally designed.

Mr. Carter: I think it's a good sentence. It is a little different than what Nolan had. Do you see any substantive difference?

Mr. Aalyson: I don't know that I have ever understood precisely what Nolan's problem was?

Mr. Carter: He was very concerned of the possibility that the committee's proposal might be construed as not applicable to foreign corporations. Our argument was that the legislature has the plenary power and there is no reason to spell it out. Nolan was concerned about dropping the clause. He wanted to make sure that the state had the authority for the governing of foreign corporations - who sold securities in the state, et cetera. The second thing he felt is that the legislature could clearly have the power to classify foreign corporations, as well as domestic corporations. For example, as non-profit or profit. I think he has probably got a good point there. I think what we had was perfectly alright, but since Nolan was concerned that it might have some limitations, it's easy enough to change.

Mr. Wilson: The first paragraph suggested would cover all corporations other than municipal corporations, whether formed in Ohio, Timbucktoo, or Saudi Arabia.

Mr. Carter agreed.

Mr. Carter: I move to adopt the language in the last paragraph "B" language in the January 13 memorandum.

Mr. Wilson seconded the motion.

All voted yes.

Mr. Carter: I do think it is a tremendous improvement over what we have in the constitution from an English, editorial, and simplification point of view, even though it doesn't represent any substantive change. Now we need somebody to present the report to the Commission because Katie is not going to be there.

Mr. Wilson: Now that I have just reread there is one point on a word that is in here. "Supervise". Does "regulated" encompass "supervise"?

All agreed that it did.

Mr. Aalyson volunteered to present the revised recommendation to the Commission at this afternoon's meeting.

Mrs. Eriksson: The total recommendation of the committee involves the substitution of this language for everything in Article XIII, except that we would refer some of the provisions in there to another committee-the eminent domain provision. You remember we had discussion about that.

Mr. Aalyson: That's already been presented to the Commission though - the fact that we were going to refer that.

Mrs. Eriksson: The whole report was presented to the Commission, but we took no action on it.

...PARTMENT OF MENTAL HYGIENE AND CORRECTION

DIVISION OF CORRECTION
1211 STATE OFFICE BUILDING
COLUMBUS, OHIO 43215

July 1, 1971

John J. Gilligan
Governor
James T. Welsh
Acting Director
Bennett J. Cooper
Commissioner

JUL 6 1971

Mrs. Ann M. Ericksson, Director
Ohio Constitutional Revision Commission
20 South Third Street, Room 212
Columbus, Ohio 43215

Dear Mrs. Ericksson:

This is in reply to your correspondence of June 8, 1971. We appreciate your consideration of soliciting our opinions and suggestions as problem areas that your various study committee may chose to review.

In my present position I am of course aware of those sections of the Ohio Constitution that have effect on the responsibilities of this office and the Division of Correction. Their significance have been especially noteworthy due to their effect in limiting or restricting development of new and innovative programing in adult corrections.

Due to the obvious failure of the traditional penal institution and programs to provide meaningful rehabilitation of offenders by isolating them from all community involvement the field of corrections has recently a new mandate to emphasize the positive aspects of the offender. Traditional punitive procedures are being replaced with treatment and training. Work release and early community placement is being substituted for institutional isolation. Finally, the social and moralistic ostracism of the felon is now being replaced with the objectivity and understanding of the pragmatic behavorial sciences.

Therefore, in offering our suggestions we not only solicit the analysis of your study committees but also some measure of public opinion or reaction to changing the traditional legal restrictions set on offenders.

Our suggestions pertain to the following sections of the Ohio Constitution.

A. Article I Sec. 12 provides in part

"No person shall be transported out of the State for any offense committed within the same;..."

The existance of this constitutional provision would obviously bar any attempt to establish multi-state regional correctional facilities. In order to permit Ohio to participate in any such program that may be established in the future, this constitutional provision must either be extensively amended or eliminated (Note: the U. S. Department of Justice, through its Law Enforcement Assistance Administration has offered funds for this multi-state cooperation among various states but we (Ohio) have not been able to respond to such a proposal.)

B. Article II Sec. 4 Abolishing prison contract labor...

> "No person in any...penal institution or reformatory while under sentence thereto, shall...be allowed to work at any trade, industry, or occupation, wherein or whereby his work or the product or profit of his work shall be sold, farmed out, contracted or given away..."

We suggest that this Section be revised in order to permit "work-release", "work Furlough" which has proven to be effective elsewhere in the nation. If its version can emphasize the rehabilitative role in insuring skilled training and stable, meaningful employment rather than cheap convict labor for exploration which the present section guards against we feel that it would be more compatible for all concerned.

Also, the restriction of the use and sale of "prison-made" goods to political sub-divisions solely, perhaps could be expanded to include any tax exempt organization. With this revision we could develop full and meaningful production in our industries, increase inmate compensation above a few pennies a day to a scale capable of creating incentive without using funds of the hard pressed general revenue resource. This could be implemented without greatly increasing the ire of either private industry or labor unions.

C. Article V Sec. 4 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."

If the rehabilitation of offenders is commensurate with fostering citizenship and social responsibility then this Section of the Ohio Constitution should be perhaps re-evaluated.

The majority of convicted felons are not sentenced to penal institutions. The expanded use of probation and also parole indicates that supervision in a community setting is adequate for the majority of offenders.

They continue to be taxpayers and live in their locale rather than being in a distant institution.

Federal parolees are entitled to vote in Ohio elections yet State parolees are prohibited by law.

Since community re-integration and socialization is being proported as being essential and desirable it would seem logical that those laws which hinder total participation should be re-assessed as to their original significance in today's concept of handling offenders.

This concludes our suggestion. In conclusion I would like to repeat our original purpose in proposing them, namely, to garner a re-action to them as much as offering reasons for their consideration.

We would appreciate being placed on your mailing list so that we may keep abreast of your interesting and challaging work.

Respectfully submitted,

Bennett J. Cooper
Commissioner
Division of Correction

BJC:MJK:cs

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
June 14, 1973

Research Study No. 23

Federal and Ohio Constitutional Provisinns concerning elections, and law and cases affecting voting rights under such provisions

This paper briefly describes provisions of the United States Constitution relating to elections, and the substantive provisions of federal law affecting voting rights. It then discusses a number of recent cases which set forth rights of voters and candidates in light of federal constitutional requirements.

The paper then lists in outline the Ohio Constitutional provisions relating to elections, and selects from this outline those provisions which have been invalidated by federal law or cases, or concerning which the law or cases raise questions.

This paper examines only questions concerning voting rights and the related rights of elective candidates; it does not discuss apportionment, procedural fairness concerning political parties, or election procedures.

United States Constitution

The U. S. Constitution requires members of the Senate and the House of Representatives to be chosen by the electors of each state, and requires that they have the qualifications requisite for electors of the most numerous branch of the state legislature. (Sec. 2 of Article I and 17th Amendment)

Remarks: This provision has been held to create a right to vote for representatives derived from the Federal Constitution, a right which is secured against the actions of individuals as well as of states. It embraces the right to cast a ballot and to have it counted honestly. Where a primary election is an integral part of the procedure of choice, the Constitution safeguards the rights of qualified electors to participate therein. Congress may protect these rights by legislation. A state may not add to the qualifications required by the Constitution.

The times, places and manner of holding elections for these offices shall be prescribed by each state legislature, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators. (Sec. 4 of Article I)

Remarks: It is under this section that the original federal laws guaranteeing the elective franchise were enacted. (Below) It is also under this section that the states apportion federal legislative districts. (Sec. 2 of the 14th Amendment requires apportionment.)

Each house is the judge of its elections, returns, and qualifications of its own members. (Sec. 5 of Article I)

Remarks: Under this authority Congress has overriden state laws purporting to disqualify candidates on various grounds.

The President is to be chosen by an electoral college, the members of which are to be appointed as the state legislature directs, equal in number to the number of Senators and Representatives to which the state is entitled in Congress. Procedures of the electoral college are prescribed in the Constitution. (Sec. 1 of Article II, and 12th Amendment)

The requirement of apportionment of the members of the House of Representatives according to population, and the principle of equal protection of the laws, are contained in the 14th Amendment. That amendment also prohibits any person from holding office who, having once taken an oath of office as a member of Congress, officer of the United States, member of a state legislature, or as an executive or judicial officer of a state, has engaged in insurrection or rebellion against the United States.

Remarks: The "equal protection" clause of this amendment is the basis for the "one man, one vote" cases under which the federal courts have invalidated many state apportionment plans, or has given aid or comfort to its enemies.

Specific protections of the franchise which appear in the Constitution are:

Race, color. The right of citizens to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. (15th Amendment)

Sex. The right of citizens to vote shall not be denied or abridged by the United States or by any state on account of sex. (19th Amendment)

Poll Tax. The right of citizens to vote in any primary or other election for President, Vice President, electors therefor, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax. (24th Amendment)

Age. The right of citizens who are 18 years of age or older to vote shall not be denied or abridged by the United States or any state on account of age. (26th Amendment)

Federal voting laws

The original federal laws guaranteeing the elective franchise were civil rights laws directed at prohibiting racial discrimination.

The law states that all citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, county (etc.)or other territorial subdivision shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude. (42 U.S.P.A. 1971)

The law then states specific prohibitions, first for persons acting under color of law:

A. In determining whether any individual is qualified to vote, from applying a standard, practice, or procedure different from those applied to other individuals within the same county or other political subdivision who have been found by state officials to be qualified to vote.

B. Denying the right to vote because of an error or omission on any record or paper relating to an application, registration, or other act or requisite to

voting, if the error or omission is not material in determining whether the individual is qualified under state law to vote in the election.

C. Employing any literacy test as a qualification for voting unless the test is administered to everyone and is conducted wholly in writing, and a certified copy of the test and the answers given by the individual is furnished to him within 25 days of his requesting it.

The law prohibits a person, whether acting under color of law or otherwise, from: intimidating, threatening, coercing, or attempting to do so, any other person for the purpose of interfering with the right of such person to vote or to vote as he may choose, or to cause him to vote for, or not vote for, any candidate for federal office.

Another of the early laws which is still in effect, prohibits a military officer from prescribing or attempting to prescribe the qualifications of voters in any state, or interfering with the freedom of any election, or with the exercise of the free right of suffrage in any state. (42 U.S.C.A. 1972)

The Voting Rights Act of 1965 added provisions to cure some of the inadequacies of the foregoing provisions. Substantive additions included:

Sec. 1973. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen to vote on account of race or color.

Sec. 1973b. No citizen shall be denied the right to vote in any federal, state, or local election because of his failure to comply with any test or device. (However, this applies only to certain states, measured by the following test: the Attorney General must find that the state required a test or device as a prerequisite for voting either on November 1, 1964, or November 1, 1968, and less than 50% of persons of voting age residing in the state were registered on those dates or less than 50% of such persons voted in the presidential elections in those years.

Sec. 1973h. Although containing substantive prohibitions in addition to the prohibition against poll taxes in the 24th Amendment, the law contains provisions for enforcing the prohibition. This applies to elections for both federal and local officers.

Sec. 1973i. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under federal law, or is otherwise qualified to vote, and no person shall willfully fail or refuse to tabulate such person's vote.

(b) No person shall intimidate, threaten, or coerce, or attempt to do so, any person for voting or attempting to vote or for urging or aiding any person to vote, or for exercising any powers or duties under federal law (e.g. provisions for poll watchers and examiners).

The Voting Rights Act of 1970 broadened the "test or device" prohibition and added residence and age to the subjects to which the federal Elections Franchise law addressed itself. (42 U.S.P.A. 1973aa) That Act contained the following:

Sec. 1973aa. Test or device. The law applied the prohibition against use of tests or devices to states other than those "problem" states to which the 1965 law applied, and defined "test or device" as: any requirements that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class. This part of the law applies to all elections. Oregon v. Mitchell 400 U. S. 112 (1970) 91 S. Ct. 260.

Sec. 1973aa-1. Durational residence, absentee ballots for presidential elections only, the Congress made a finding that the imposition and application of the durational residence requirement as a precondition to voting, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections:

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across state lines;

(3) denies or abridges the privileges and immunities guaranteed under Article IV, Sec. 2, Clause 1 of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights and due process and equal protection of the laws that are guaranteed to them under the 14th Amendment;

(6) does not bear a reasonable relationship to any compelling state interest in the conduct of presidential elections.

On the basis of these findings, the law states that Congress declares it necessary to completely abolish the durational residency requirement for presidential elections, and to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

The law then prohibits denial of the right to vote on the basis of a durational residency requirement, or because the person is not physically present at the time of the election if he complies with state or local law for the casting of absentee ballots.

The law requires each state to provide by law for registration or other qualification of residents who apply to vote, not later than 30 days prior to any presidential election; and requires each state to provide for absentee voting for anyone who applies not later than 7 days prior to the election, and who returns the ballots not later than the time for closing the polls on the day of the election.

1973bb-1. Age. The same law requires states to allow 18-year-olds to vote. The U. S. Supreme Court found the provision unconstitutional in U. S. v. State of

Arizona, 400 U. S. 112,91 S. Ct. 260 (1970). The 26th Amendment, allowing 18-year-olds to vote in all elections, was adopted by the states in the following year.

In addition to the provisions of federal law setting forth substantive rights, the law contains various provisions for enforcement, to which this memorandum does not address itself.

Some pertinent cases

For many years the states imposed various residential requirements as a prerequisite to voting under authority of Pope v. Williams, 193 U. S. 621, 24 S. Ct. 573 (1907), which held that the states had power to impose reasonable residence restrictions on the availability of the ballot.

In 1965, however, the Supreme Court applied the Equal Protection clause to state laws governing qualifications of voters. In Carrington v. Rash, 380 U. S. 89, 85 S. Ct. 775 the Court held that the state of Texas could not disenfranchise military men.

The Texas Constitution prohibited any member of the armed forces of the United States who moves his home to Texas, during the course of his military duty from ever voting in any election in Texas so long as he is a member of the armed forces.

The state claimed that this was necessary in order to immunize its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community; and to protect the franchise from infiltration by transients.

The Court stated the following as the background for its holding:

> "Texas has unquestioned power to impose reasonable residence restrictions of the availability of the ballot. Pope v. Williams, 193 U.S. 621, 24 S. Ct. 573. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50, 79 S. Ct. 985. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution."

The court found the Texas constitutional provision an invidious discrimination in violation of the 14th Amendment, and said that if a military man is in fact a resident, with intention of making Texas his home indefinitely, as other qualified residents he has a right to equal opportunity for political representation. The court pointed out that other transient classes in Texas, such as students, patients in hospitals, and civilian employees of the U. S. Government, were given an opportunity to show that they were bona fide residents. Conversely, in the case of military personnel, the Constitutional presumption was conclusive, incapable of being overcome.

Dunn v. Blumstein

Two years after Congress enacted the prohibition against durational residency requirements in presidential elections, the U. S. Supreme Court in effect made this provision applicable to state and local elections in Dunn v. Blumstein, 405 U. S. 330, 92 S. Ct. 995 (1972).

Tennessee, under the law invalidated by the court, closed its registration 30 days before election, but required residence in the state for one year, and in the county for three months as a prerequisite for registration.

The Court, observing that strict review of statutes distributing the franchise is called for, because such statutes "constitute the foundation of our representative society", cited the test of Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 89 S. Ct. 1886 (1969) whether the exclusions are necessary to promote a compelling state interest. (This emphasis was supplied by the Court in the Dunn case.) Another reason for the need to cite such a compelling state interest, said the Court, is that the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.

The Court referred to the Voting Rights Act of 1970 as an example of what is reasonable. That Act prohibits durational residence requirements and allows registration to close 30 days prior to a Presidential election, the reasonability of which was upheld in Oregon v. Mitchell, supra. The court in that case had found "no explanation why the 30-day period between the closing of new registrations and the date of the election would not provide, in light of modern communications, adequate time to insure against frauds".

The Court rejected the idea that a person needs a year of residency in a state to develop "a common interest in all matters pertaining to the community's government". Quoting its opinion in Carrington v. Rash (supra) the Court said "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."

Justice Blackmun, dissenting, observed that the Court has in the Dunn case overturned its 1904 decision in Pope v. Williams (supra).

The holding in Dunn v. Blumstein was applied directly to the Ohio law in 1972 in Schwartz v. Brown, Civil Action 72-118 of the Federal District Court for the Southern District of Ohio. The Court found the Ohio Constitution's six-month residency requirement to be violative of the Equal Protection Clause of the Fourteenth Amendment.

Other lower federal courts have held a number of other state residential requirements invalid, including one enacted by Florida after the Dunn decision, creating a 60-day residence requirement, with 30-day closing of registration. In Hinnan v. Sebesta, 346 F. Supp. 913 (1972), the Federal District Court held the requirement invalid, saying that if a so-day deadline for registration is sufficient to assure that registration by other residents had been done properly, it was also a sufficient period to check on new residents.

Other applications of the Dunn decision:

Residency requirement for candidates. In Green v. McKeon, 468 F. 2d 883 (1972),

the U. S. Court of Appeals for the 6th Circuit held a two-year residence requirement for candidates for office under a city ordinance invalid, on the ground that although the requirement applied to candidates, it was in the interest of the voters to have a choice of candidates without impediments that could not be justified as necessary to promote a compelling governmental interest.

In Mancuso v. Taft, 341 F. Supp. 574 (1972) a federal district court invalidated a city ordinance under which a police officer was required to give up his job in order to run for the state general assembly.

In this case, as in a number of cases which have followed the Carrington and Dunn cases, the emphasis of the court was on the broadness or "crudeness" of the statute or ordinance, implying that a more selective approach to achieve the intended objective might have been upheld. (See the following case.)

Students. in Wilson v. Symm, 341 F. Supp. 8 (1972) a federal district court held to be valid a procedure followed by a local registrar under Texas law, whereby the registrar required college students to fill out a questionnaire in order to rebut a presumption established by state law that a college student is a non-resident. The registrar had allowed married students, and students whose parents were residents, to register without filling out the questionnaire.

The Court cited the Carrington cas as controlling, saying that the Court in that case had found the irrebuttable presumption too crude, and thus that determination by this more discriminating method was acceptable.

In Newburger v. Peterson, 344 F. Supp 559 (1972), the federal district court found "too crude a blunderbuss" the New Hampshire rule that a student in order to acquire residence must have the intention to stay permanently. In that case, the student had admitted that upon graduation, he planned to leave the state. The court said the only intent required was a present intent to be a resident.

An Ohio statute on voting residence of students was found contrary to the Equal Protection Clause by a federal district court in Anderson v. Brown, 332 F. Supp. 1195 (1971). For persons over 18 the test for obtaining the right to vote was "residence"; for students it was residence plus "the establishment of or acquisition of a home for permanent residence." The court found no rational relationship between the classification and any legitimate state purpose. (Sec. 3505.05, R. C. repealed effective 1972).

Federal enclaves

States have attempted to declare that a person living in a federal enclave cannot establish a voting residence in that state. The U. S. Supreme Court in Evans v. Cornman, 398 U. S. 419, 90 S. Ct. 1752 (1970) held this to be contrary to the Equal Protection Clause of the 14th Amendment. In that case, the persons who were refused the right to register lived on the grounds of the National Institute of Health in Maryland.

In a similar case in Ohio, Section 5 of Article V of the Ohio Constitution was held unconstitutional insofar as it denies a person the right to register because he lives on the grounds of a federal enclave. (Stencel v. Brown, Civil Action 72-331, U.S. Dist. Ct. for the Southern District of Ohio, Eastern Division, June 4, 1973) In that case, the plaintiff was an Air Force officer living in a federal

enclave in Montgomery County. The Court found the facts indistinguishable from those in the Cornman case.

(The Ohio Constitutional provision involved was: "No person in the military, navel, or marine service of the United States, shall, by being stationed in any garrison, or military, or naval station, within the state, be considered a resident of this state.")

Other

Federal district courts have found invalid a state requirement that two successive primaries elapse before a voter can change his party affiliation. (Nagler v. Stiles, 343 F. Supp. 415 (1972)); and a Detroit city ordinance that a member of council must be at least 25 years of age (Manson v. Edwards, 345 F. Supp. 719 (1972). In each case, the court said it could find no compelling state interest to require these qualifications.

In a New York case, a Federal District Court held that a state is not required to provide absentee balloting for a primary election, because it was not practical. Fidell v. Board of Elections, 343 F. Supp. 915 (1972)).

Ohio Constitution

Electoral franchise. Ohio constitutional provisions relating to the electoral franchise are found primarily in Article V. These include:

Sec. 1. Who may vote

Sec. 3. Voters, when privileged from arrest.

Sec. 4. Forfeiture of elective franchise.

Sec. 5. Persons on military station not resident.

Sec. 6. Idiots or insane persons.

In addition Sec. 1 of Article XII prohibits a poll tax.

Eligibility for office

A number of constitutional provisions relate to eligibility to hold office. These are:

Article II:

Sec. 2. Election of representatives and senators.

Sec. 3. Residence requirements.

Sec. 4. Eligibility to hold office.

Sec. 5. Who may not hold office.

Article IV:

Sec. 6(C). Election of judges

Article XV:

Sec. 4. Person elected must have qualifications of elector.

Sec. 5. Duelists ineligible.

Sec. 7. Oath of office.

Procedures

Provisions concerning procedures for election of officers are found in:

Article II: Sec. 6. Each house judge of its election returns.

Sec. 11. Filling of vacancies in General Assembly.

Sec. 21. Trial of contested elections.

Sec. 27. Election of officers to be provided by law.

Article III:

Sec. 1. When executive officers to be elected.

Sec. 3. Election returns.

Sec. 4. Election returns.

Secl 18. Election of successors to certain state offices.

Article IV:

Sec. 6. Election of judges.

Sec. 13. Election to fill judicial vacancies.

Article V:

Sec. 2. By ballot

Sec. 22. Office-type ballot

Sec. 7. Direct primaries

Article X:

Sec. 2. Election of township officers

Article XVII:

Sec. 1. When elections held

Other. Other constitutional provisions which relate to elections or which contain election requirements are:

Article II:

Secs. 1 through 1g. Initiative and referendum.

Article X:

Sec. 1. Referendum when municipality transfers powers to county.

Sec. 3. Initiative and referendum on county charters.

Sec. 4. Vote on county charter commission.

Article XI:

Secs. 1 through 14. Apportionment.

Article XVI:

Sec. 1. Amendment of constitution by ballot.

Sec. 2. Vote on constitutional convention.

Sec. 3. Convention to be placed on ballot every 20 years.

Article XVIII:

Sec. 5. Public utilities referendum.

Sec. 8. Referendum on municipal charter commission.

Sec. 9. Amendments to charter.

Sec. 14. Election requirements.

As discussed below, a few of these provisions are evidently invalid under federal law or federal court interpretations of U. S. Constitutional provisions. In a number of cases, also, while there appears to be no case authority upon which to base a conclusion of invalidity, in applying the principles enunciated by the recent cases or federal law, questions arise. The following material includes reference to the provisions of the Ohio Constitution which are invalid, and those whose status may merit consideration because of some of the rules set forth in recent federal law and cases.

Voting age, six months residence

Section 1 of Article V, allowing 21-year-olds to vote was invalidated by the adoption of the 26th Amendment to the U. S. Constitution in 1971.

The requirement of six months' residence was invalidated by Schwartz v. Brown (supra) the Federal District Court case which specifically applied the Dunn.v. Blumstein rule to the Ohio law.

Forfeiture of franchise because of conviction

Section 4 of Article V states:

"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."

The Second Circuit Court of Appeals upheld a similar New York provision in 1967, in Green v. Board of Elections, 380 F 2d. 445, cert. denied 389 U.S. 1048, 88 S. Ct. 767. The court relied on Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590 which held that depriving convicted felons of the franchise is not a punishment but rather a nonpenal exercise of the power to regulate the franchise.

The court said that it was adhering to the following principle:

"A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (Citing Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 55 S. Ct. 538 (1935).)

Where the elective franchise is concerned, however, it would appear that the burden of proof has switched since the announcement of the rule relied upon by that court. Since the franchise is a "fundamental right", the state is no longer given such a presumption; rather, the question is whether the state can show that this burden on the right to vote is necessary to promote a compelling state interest.

An additional element tending to support validity of the Ohio provision is the reference in Section 2 of the 14th Amendment to the U.S. Constitution; which provides that when the right to vote at any election for federal officers or the executive or judicial officers or legislative members of a state is denied or abridged, the basis of representation of that state is to be reduced proportionately to the number of people disenfranchised--unless the disenfranchisement is for"participation in rebellion or other crime". This has been cited as implied approval of state provisions disenfranchising convicted felons.

Person on military station not a resident

Section 5 of Article V states:

"No person in the Military, Naval, or Marine service of the United States, shall, by being stationed in any garrison, or military, or naval station, within the State, be considered a resident of this State."

This provision would appear to be invalid under the rule of Evans v. Cornman (supra) (see discussion above). The U. S. District Court for the Southern District of Ohio, Eastern Division, on June 4 of this year found that case specifically applicable to the Ohio provision.

Idiots, insane persons

Section 6 of Article V states:

"No idiot, or insane person, shall be entitled to the privileges of an elector."

While at first glance it may appear facetious to include this section among Ohio constitutional provisions which may be subject to question, again one must refer to the Dunn, Carrington, and other cases which have attacked the "crudeness" of broad rules denying the franchise to citizens. Also, the Voting Rights Act of 1970 prohibits a state from requiring, as a prerequisite for voting in any election, that the voter demonstrate the ability to read, write, understand, or interpret any matter.

Residence of members of General Assembly

Section 3 of Article II states:

"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."

Under the rule of Green v. McKeon, 468 F. 2d 883 (1972), U. S. Court of Appeals for the Sixth Circuit (supra), this requirement of the Ohio Constitution would be invalid.

The Green case involved the city charter of Plymouth, Michigan, which required that in order to be a city commissioner, one had to have resided in the city for two years. The court held that a durational residential requirement penalizes the exercise of the basic constitutional right to travel. In answer to the city's argument that a residential requirement tends to assure that a candidate will become familiar with local problems, the court replied that the city's charter requirement was unnecessarily broad. The court cited the following language from Dunn v. Blumstein (supra):

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means' "

Although the Dunn case concerned a voter, not a candidate, the Green court quoted the U. S. Supreme Court in saying that the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. (Bullock v. Carter 405 U. S. 134, 92 S. Ct. 849 (1972))

Later a federal district court in Delaware came to the opposite conclusion concerning that state's three-year residential requirement for candidates for state legislature. The court said that it refused to submit all durational residency requirements to the "compelling state interest" test, and that to do so misconstrued the holdings of the Supreme Court in this regard. The "compelling interest" test would apply, the court said, only if a "fundamental right" were involved, or the state's classification was "suspect", neither of which was the case with the Delaware statute. The Bullock case, it said, involved a discrete minority group, because by requiring a large filing fee for candidates, it related to the resources of the voters supporting a particular candidate, and thus discriminated against impecunious groups.

A dissenting judge of the three-judge court said he found the three-year residency requirement excessive, and too "crude" in relation to the legitimate objective of the statute.

Moving of residence following apportionment

Section 13 of Article XI requires the Apportionment Board to allow 30 days for persons to change residence in order to be eligible for election in a new district.

Since Section 1 of that article requires the plan to be published by October 5 of the year preceding the year in which the election occurs (in 1971, 1981, etc.), the section in effect requires that the candidate for a seat in the General Assembly have resided in the new district approximately one year before his election.

Questions are applicable to this requirement, similar to those applicable to the requirement of Section 3, Article II, above (one-year residence requirement).

Also, since the apportionment process offers opportunities for discriminating against minority groups, this section may be more vulnerable to constitutional attack than the simple state residence requirement. The possibility of discrimination against a discrete minory, lacking in the facts before it, was the basis upon which the court in the Walker case refused to find invalidity based upon the holding in the Bullock case.

The operation of this provision may also be seen to have more of an effect upon the voter, because the objective of the majority party on the Apportionment Board is to separate effective members of the opposition from their voting support; the brevity of the 30-day requirement may be seen to make it unnecessarily difficult for an incumbent to cope with the action of the Board, with no "compelling state interest" to insist upon so short a period.

Age of judges

Section 6 of Article IV prohibits election or appointment of a person as judge if he is 70 years of age or older.

Although we can allude to no cases in this connection, one's attention turns to it when reading some of the recent cases concerning qualifications of voters and candidates. If a court is willing to apply the "compelling state interest" rule to this situation is this requirement "tailored" to serve the state's legitimate objective under the Dunn rule? Are there other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity? Is it discriminatory to limit the age of judges, but not the age of members of the other two branches of government?

Duelists ineligible

Section 5 of Article XV states:

"No person who shall hereafter fight a duel, assist in the same as second, or send, accept or knowingly carry a challenge therefor, shall hold any office in this State."

The question here is similar to that in forfeiture of franchise because of

conviction of crime, above, although one step removed because it applies to office-holders and not voters. Also applicable would be the considerations discussed under residence of members of the General Assembly above.

June 19, 1973

Secretary of State Ted W. Brown

CONDENSED DESCRIPTION OF CONSTITUTIONAL AMENDMENTS PROPOSED TO THE COMMITTEE ON ELECTIONS AND SUFFRAGE

1. Creation of a three-member committee, one member of whom is the Secretary of State, to prescribe the form of the ballot for proposed Constitutional amendments, which prescribed form would not be subject to judicial review or veto. The purpose of this amendment is to couch ballot language in simpler non-legalistic terms to promote better voter understanding.

2. To provide an election for the unexpired term for the office of Governor similar to the election now required for other offices and to require all such elections to be held at the first general election occurring after the vacancy instead of being deferred to the next even-year election. The purpose of this amendment is to provide the people with a voice in filling the vacancy in the office of Governor and to provide a more immediate election for the unexpired term after any vacancy occurs in a statewide office.

3. To eliminate the Constitutional requirement for perfect ballot rotation and to permit the General Assembly to establish such ballot rotation by statute The purpose of this amendment is to eliminate a challenge which has been raised in court as to the constitutionality of mechanical voting equipment and to eliminate the necessity for a board of elections which uses mechanical equipment to equalize precinct size in order for their precinct-by-precinct rotational pattern not to be found unconstitutional.

4. To make the Ohio Constitution reflect the 18 year old voting age and the minimum 30 day residence period which are mandated by the United States Constitution and by other Federal law. Ohio Constitution presently contains provisions for a 21 year voting age and for a six month state durational residence period, both of which are unconstitutional.

5. To repeal a section of the Ohio Constitution which denies members of the armed service from acquiring a voting residence from a residence situated on a military installation. This provision was found unconstitutional by the United States District Court.

# # # # #

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
July 23, 1973

Voter Information About Constitutional Amendments

The committee has discussed two matters concerning the placing of proposals to amend the Constitution before the voters: how to determine the best time or times for seeking voter approval, and how to inform voters about the content, meaning, and source of the proposal.

Questions of timing involve such considerations as: should constitutional amendments be placed on the general election ballot in November (in even-numbered or odd-numbered years; to coincide with presidential or nonpresidential elections?); on the primary election ballot in even-numbered or odd-numbered years; or at a special election called for that purpose? Should CRC proposals appear on the ballot with other proposals? Is voter reaction likely to be positive or negative when a large number of constitutional amendments appear at the same time?

Most of the questions regarding timing are not researchable, and are presented for discussion, and to weigh the pros and cons on each.

How voters are officially informed about proposed constitutional amendments is researchable, however, since all states except Delaware require voter approval in order to amend the state Constitution and, therefore, each of the 49 states has procedures for placing amendments on the ballot, and most states have procedures for informing voters about the proposals.

This memorandum discusses official voter information procedures for initiated constitutional amendments, which are permitted in approximately 14 states, and legislatively-proposed amendments. Amendments or new constitutions proposed by conventions are not included.

Summary

Voters receive official information about proposed constitutional amendments in two ways: (1) the question on the ballot on which they are asked to vote "yes" or "no" when they enter the voting booth; and (2) whatever method is employed by the state to inform voters about the proposal prior to election day. Many states also require the posting of certain information about amendments in the polling places on election day, but this information is generally either the same information that was published, or mailed to voters, or some lesser information than either of these. We have not located any surveys indicating the extent to which voters read or ask to see the information posted in the polling place, and this memorandum does not describe in any detail the state variations on this point.

I. The alternative possibilities for providing for the preparation of the ballot language would seem to be:

A. If a legislative proposal:

1. By the General Assembly

2. By the Secretary of State

3. By the Attorney General

4. By a committee appointed by one of the foregoing, or appointed by the Governor

5. By a committee specifically designated as consisting of one or more of these officials: Secretary of State, legislative leaders or legislative proponents of the measure, Attorney General, Governor

B. If an initiated measure:

1. Any of the above

2. The proponents of the measure

If the provision for the preparation of the language, whether in the Constitution or in the statutes, is silent on the question of court review, it is assumed that a method can be found to take the issue to court by someone who is dissatisfied with the language. If court review is to be prohibited, it would have to be specified in the Constitution. Another possibility is to provide for court review, but to provide time limits within which a challenge to the language can be taken to court, and within which the court must act in order to timely prevent the issue being validly placed before the voters.

II. The possibilities for official pre-election voter information would seem to be (either or both):

A. Newspaper publication (now used by Ohio for both initiated and legislative proposed amendments)

1. Consisting of one or more of the following

a. Text of amendment

b. Summary or explanation ("fair and impartial")

c. Arguments for and against

d. Fiscal implications

e. Text of how the measure will appear on the ballot

f. How it will change existing provisions

2. State or local expense

3. Number of times, and in how many or what kind of newspapers

4. How close to election

5. Query: how effective is newspaper publication?

B. Voter Information Pamphlets

1. Consisting of one or more of the above, plus expansion on some of these items such as the detailed analysis by the legislative counsel and rebuttal to the arguments (both in California)

2. May also contain information about candidates

3. Primary, general, and/or special elections

4. State or local expense

5. Distribution

   a. Mail to voters

      Secretary of State, or Secretary of State mails to local boards of elections which are responsible for mailing to voters

   b. Other distribution: Available at local boards of elections, a location in each precinct, polling places, other public places such as schools

Note: The Model State Constitution does not provide for either publication or voter information pamphlets. The tentative draft of the new Model Election System, under preparation by the National Municipal League, provides that the chief election officer (Secretary of State in Ohio) should provide and disseminate voter information or explanations of state offices and state issues. However, the tentative draft does not specify details about carrying out this duty.

I. Ballot Language

In Ohio, the Secretary of State prepares the ballot language for initiated constitutional amendments, although the statute (section 3519.21 of the Revised Code) permits the person or committee proposing the amendment to submit to the Secretary of State a suggested ballot "title" (apparently synonymous with ballot "question" - that which the voter sees and upon which he is asked to express approval or disapproval) and the Secretary is to give full consideration to such suggestion. The statute requires that the ballot title give "a true and impartial statement of the measures in such language that the ballot title shall not be likely to create prejudice for or against the measure."

The Attorney General is required, in Ohio, to approve a summary submitted by the initiators of a constitutional amendment before the Secretary of State supplies petitions to the persons who will solicit signatures. This summary is required to be fair and truthful, and its purpose is to insure that persons signing the petitions have understanding of the purpose and intent of the proposed amendment. The summary does not have an official function, however, after the petitions are filed.

In the case of constitutional amendments submitted by the General Assembly, in Ohio, the Secretary of State is authorized, by statute, to prepare a "condensed test" which will properly describe the question, issue, or amendment. The full text is then required to be posted in each polling place. (Section 3505.06 of the Revised Code). As a matter of practice, the General Assembly frequently provides suggested ballot language (the "condensed text") in the resolution adopting the proposed constitutional amendment, and the Secretary of State generally uses such language for the ballot when it is supplied by the General Assembly. Some doubt has been cast upon this practice because the Constitution (Section 1 of Article XVI) does not provide for it and it would appear that the Secretary of State is not bound to use the legislature's language. No contest on this point has ever been litigated. As a matter of fact, the Ohio Constitution is silent on the question of precisely what goes on the ballot in the case of a legislatively-proposed constitutional amendment.

The language on the ballot for constitutional amendments, whether submitted by an initiative petition or by the legislature, has frequently been scrutinized by the courts. An examination of the cases leads to the conclusion that, in order to meet possible court challenges, the tendency in Ohio is to make such language increasingly technical, for complete accuracy; such accuracy may tend to obscure the major issues involved because the issue is difficult to read. An early Ohio Supreme Court case, involving an initiated constitutional amendment (the statute merely required the language on the ballot to "designate the issue) held that the language on the ballot is not all-important, so long as it does not deceive or defraud voters, because voters should study the issues before entering the voting booth. (Thrailkill v. Smith, 106 Ohio St. 1, 1922). However, cases since that time, involving both state constitutional amendments and municipal questions, have tended to quibble more and more with the language on the ballot, when that issue is raised.

For this reason, and to insure certainty in the method of preparing the ballot language for legislative proposals, the Secretary of State has prepared a proposed amendment to Section 1 of Article XVI which would provide for a ballot commission consisting of the Secretary of State and two other persons to be designated as provided by law to provide the form of the ballot at least 75 days before the election. Seventy-five days is the current statutory time before an election when the Secretary of State is required to submit the official ballot language to local boards of election for ballot printing.

One of the Secretary of State's proposals, preferred by him, provides that the ballot as prescribed by the ballot commission shall be final and not subject to appeal to or review by any other body. The other proposal is silent on this point.

The Model State Constitution, in a provision applying both to initiated constitutional amendments and legislative constitutional amendments, provides for "a ballot title which shall be descriptive but not argumentative or prejudicial, and which shall be prepared by the legal department of the state, subject to review by the courts." (Section 12.02)

Since one of the Secretary of State's problems is the necessity to certify constitutional amendments to local boards of elections in time to have the ballot printed to mail to absent voters (and to have the necessary publication, but that does not take 75 days), if it is felt desirable not to preclude court review of the ballot language, a special time sequence could be established either in the Constitution or by law pursuant to constitutional permission. The proposed ballot language, however prepared, could be available for examination by any person for a limited period of time, or published, or notice of its availability published, another limited period of time designated for filing court challenges, and another limited period given for court decision. If the Supreme Court were designated the court in which to file such challenges (as is the case in legislative apportionment cases), no appeal time would be needed.

Varying procedures are used in other states for the preparation of the ballot language and, in some cases, it is not possible to distinguish, from reading the laws or the Constitution, between the question which confronts the voter in the voting booth and the summary or explanation of the amendment which may be prepared for pre-election publication, either in newspapers or by means of a voter information pamphlet. However, a summary of the methods used would seem to be as follows:

1. Ballot language prepared by the Secretary of State

2. Ballot language prepared by the Attorney General (or chief legal officer)

3. Ballot language prepared by the General Assembly or legislative body

4. Ballot language prepared by a committee composed of some or all of the foregoing, or by persons appointed by one of the foregoing officials, or appointed by the Governor.

II. Other Official Voter Information: Publication and Pamphlets

Until 1971, the Ohio Constitution and implementing laws provided different methods for publicizing constitutional amendments depending upon whether they were elector-initiated or legislatively-proposed. Section 1g of Article II (initiated measures) required that the Secretary of State publish a pamphlet containing the text of the proposed amendment and arguments pro and con, limited to 300 words each. The pamphlet was required to be mailed or otherwise distributed to each voter. Legislative proposals, on the other hand, (Section 1 of Article XVI) are published once a week for five consecutive weeks preceding the elction in at least one newspaper in each county where a newspaper is published without benefit of explanation or arguments.

In 1971, by constitutional amendment (although the relevant statutes have not yet been changed) Section 1g of Article II was changed to omit the requirement of mailing or otherwise distributing to each voter, and, in its place, is now a publication requirement similar to that applying to legislatively-proposed amendments. As a result, the only difference between initiated and legislative proposals in Ohio is that the publication of initiated proposals carries with it arguments and the publication of legislative proposals does not.

The Secretary of State is suggesting that the method of informing voters about legislative proposals be altered by including in the publication "an explanation of the proposed amendments, or arguments for or against the same," which shall be prepared in a manner provided by law. Whereas the Constitution specifies the manner of naming persons to prepare arguments against a proposed initiated constitutional amendment (the initiators prepare the arguments for the measure), the persons to prepare both pro and con statements on legislative proposals would be provided by law. The Secretary of State further suggests adding: "The Secretary of State may cause to be published and distributed pamphlets or other publications for the purpose of further informing the electors concerning such proposed amendments." This language would authorize, but not require, the Secretary to distribute additional information and would leave the nature of such information to the Secretary of State or, possibly, to the General Assembly which might implement this provision by law (although the authority to do so might be questioned).

As shown on Appendix A. a number of states which provide for initiated constitutional amendments also provide for explanations or arguments to be prepared and published or mailed to the voters. The information about Ohio, of course, is not up to date since the provision for mailing has been removed from the Constitution; Illinois should also be added to the list of states permitting initiated constitutional amendment (for limited purposes, however) but the Illinois provision says nothing about voter information.

Following is a brief explanation of the initiative process in Ohio in order to clarify who prepares what, followed by an examination of the laws and constitutional

provisions of all the states regarding voter information by publication or by pamphlet.

I. Initiated constitutional amendments in Ohio

To understand the provisions of the Ohio Constitution relating to proposing constitutional amendments by the initiative method, it must be understood that those provisions are generally considered "directive," i.e. the setting forth the method for submitting petitions, the number of signatures required, and the method of publicity, all considered mandatory by the courts.

In 1927 the Attorney General in 1927 OAG 1073 State v. Fulton 99 Ohio St. 168, 124 N.E. 172 (1919) stated that Ohio Constitution Article II, Section 1g placed a mandatory duty on the Secretary of State to obey the constitutional commands for the printing of proposals by initiative regardless of the fact that neither the Constitution nor the laws of the state specifically provide in detail the manner and method for so doing. The Ohio Supreme Court in State v. Hildebrant 93 Ohio St. 1, 112 N.E. 138 (1915) reaffirmed this position by declaring that Ohio Constitution Article II, Section 1g ordering the Secretary of State to print and disseminate (now publish) an argument against any proposed amendment must be obeyed by the Secretary of State.

Article II, Section 1g grants the power to the General Assembly, but does not direct that this power be used, to pass laws to facilitate the operation of the provisions of the section, but in no way to limit or restrict either the provisions or powers reserved therein. The General Assembly enacted Chapter 3519. of the Ohio Revised Code under this authority.

II. Constitutional amendments by initiative are provided for in Ohio Constitution Article II, Sections 1a, 1b, and 1g and are codified and embellished in Ohio Revised Code Chapter 3519.

The first step is the submission to the Attorney General of a petition, in writing signed by 100 electors stating the proposed constitutional amendment under Ohio Revised Code section 3519.01, the Attorney General reviews such petition for the sufficiency of the signatures, 72 OAG 82, and to determine that the statement of the proposed amendment is a true and fair one, Ohio Revised Code section 3519.01.

If the statement is found to be fair and true, the Attorney General shall certify it as such, Ohio Revised Code section 3519.01. If the Attorney General, upon the finding as to the truthfulness and fairness of the statement, fails to certify the statement, he is subject to an action on a writ of mandamus. Such was the case in State v. Brown 29 Ohio St. 2d 235, 58 Ohio Op. 2d 489, 281 N.E. 2d 187 (1972) and the Attorney General was mandated to certify the statement.

Once the statement has been certified, a verified copy of the original petition and a summary of the Attorney General certification are filed with the Secretary of State. The Secretary of State establishes the form and appearance of the initiative petition, Ohio Revised Code section 3519.01.

The petitioners designate a committee, Ohio Revised Code section 3519.02, of three to five persons who will represent the petitioners in all matters and who will prepare the arguments or explanations in favor of the proposal, Ohio Revised Code section 3519.03.

The initiative petition is then circulated for purposes of signing and the

signed petition is then filed again with the Secretary of State. After this filing, but before the election on the proposal, arguments and explanations for and against the proposal are filed, Ohio Revised Code section 3519.03, and the proposed constitutional amendment is publicized, Ohio Revised Code section 3519.19.

Although the statutes still require a publication mailed or otherwise distributed to each voter, the Constitution was amended in 1971 to eliminate reference to distribution and to require, instead, newspaper publication.

The Secretary of State prepares the ballot title and an impartial statement of the measure. Ohio Revised Code section 3519.21.

Thus, both the Attorney General and the Secretary of State have certain duties within the initiative process. The Attorney General receives the original petition, examines it for the sufficiency of signatures and the fairness and truthfulness of the summary statement, and if found to be fair and truthful, the Attorney General certifies the statement.

The Secretary of State publishes the proposed amendment and the arguments and explanations for and against it and prepares the ballot title.

III. Voter information on proposed constitutional amendments in other states.

Voter information may be provided for in one or both of two ways. First, the state constitution may specifically establish the mode of publication, if there is one, as is done in Ohio, and in the Colorado Constitution Article XXII and Florida Constitution Article 11 section 3. The second method is that the state legislature may enact laws to supplement the constitutionally provided method of publication, or may enact statutes providing the only method of publication, as in West Virginia. Such state statutes may apply to all proposed constitutional amendments, whenever they occur, or may be re-enacted each time a constitutional amendment is proposed, as in New Jersey and Rhode Island.

Some states have no methods for publication of proposed constitutional amendments as in New Hampshire, South Carolina, Oklahoma, Oregon, and Alaska.

A unique approach to voter information is that taken in Georgia which provides that the duty of publicizing a proposed constitutional amendment resides in the Constitutional Amendments Revision Board, established by Acts, 1970, p. 640. This Board is composed of the Governor, Lieutenant Governor, and Speaker of the House of Representatives.

In the states that do have a requirement of publicizing proposed constitional amendments, such publicity is usually done through newspaper publication or a voter information pamphlet.

A. Voter information through newspaper publication.

Where voter information is publicized by way of newspaper publication, the format of that published notice is established by the state constitution or statute. In Florida, Florida Constitution Article 11 section 5(b), the proposed amendment is published with the date of election in one newspaper of general circulation in each county in which a newspaper is published. In Illinois, Illinois Constitution Article XIV, section 2 the proposals of the General Assembly are published in newspapers with an official explanation. In Maine, M.R.S.A. Title 1, section 353, the proposal is published in the daily newspapers with an explanation describing the

intent and content of the constitutional amendment, as proposed. The Attorney General prepares the explanation. In Michigan, Michigan Constitution Article 12 section 2, the newspaper publication includes the proposed amendment in full, the existing constitutional provision, and the question as it will appear on the ballot.

When the proposed amendments are to be published in the newspaper, some length of time is usually established for its publication. In most states that require newspaper publication, that time is usually stated in terms of a period preceding the election date. In Ohio, Constitution Article XVI, section 1 that period is once a week for five consecutive weeks preceding the election. The question is raised as to whether this period is the minimum period before the election or whether this can mean any block of five consecutive weeks, say, three months before the election. The shortest length of time in any state requiring newspaper publication is in Florida Constitution Article 11 section 5(b) which requires publication only twice, once in the tenth week and once in the sixth week immediately preceding the election.

The longest period is three months, twelve weeks, or 90 consecutive days immediately preceding the election. This time period is used in Arizona Constitution Article XXI, section 1, Arkansas Constitution Article XIII section 1, Kansas Constitution Article 14 section 1, Wisconsin Constitution Article XII section 1, and Wyoming Constitution Article XX section 1.

There are some special provisions for newspaper publication that are worthy of note. Colorado Constitution Article XXIII section 1 and Indiana, Burns Ind. Stat. Anno. section 29-4201 require that initiated constitutional amendments be published in two issues of two newspapers of opposite political faith in each county of the state. Maine, M.R.S.A. Title 1 section 353 provides for publication in each daily newspaper of the state. South Dakota S.D.C.L. section 12-13-1 requires that amendments proposed by the general assembly be published in legal newspapers of general circulation.

New Mexico has the only provision for publication in a foreign language. New Mexico Constitution Article XIX section 1 provides that proposed constitutional amendments may be published in both English and Spanish when there are newspapers in both languages in the county.

B. Voter information by voter information pamphlets.

Voter information pamphlets are used for election information for familiarizing voters with candidates, issues, proposed constitutional amendments, or all three. This discussion is limited to voter information pamphlets only as they are used to publicize proposed constitutional amendments.

The states which have specifically adopted voter information pamphlets for the purpose of publicizing proposed constitutional amendments are Arizona, California, Illinois, Oregon, and Washington. In California, Illinois, Ohio and Oregon the states, among others, that provide the initiative method for use in proposing constitutional amendments, adopt voter information pamphlets as the means by which to publicize those proposals.

North Dakota and Montana had provisions in statutes for voter information pamphlets which were repealed in 1965 and 1969, respectively.

The content of the voter information pamphlet varies in each state but certain

items may be common to more than one state. The items which are included and the states which include them are:

1. The exact copy of the existing constitutional provision. California Election Code section 3570 and Illinois S.H.A. Ch. 7½ section 2.

2. The form in which the proposed amendment will appear on the ballot. Arizona R. S. section 19-123 (A) (2), Illinois S.H.A. Ch. 7½ section 2, Oregon R.S. section 255.410, and Washington R.C.W.A. section 29-81-010 (f) (5).

3. The official ballot title, Arizona R. S. section 19-123 (A) (2), California Election Code section 3571 and Washington R.C.W.A. section 29-81-010 (b).

4. A description title prepared by the Secretary of State. Arizona R.S. section 19-123 (A) (2).

5. The number by which the issue will be designated on the ballot. Arizona R.S. section 19-123 (A) (2), Oregon R.S. section 255.410, and Washington R.C.W.A. section 29-81-010 (a).

6. A copy of the measure submitted to the voter. Where the proposal is made by the state legislature, as in California, Illinois, Oregon, and Washington, the form is that submitted by the General Assembly, California Election Code section 3568, Illinois S.H.A. Ch. 7½ section 2, Oregon R.S. section 255.410, and Washington R.C.W.A. section 29-81-010 (f) (5).

7. Arguments for and against the measure. Arizona R.S. sections 19-123 (B) and 19-124 (A) permits these arguments to be filed by any person who also deposits with the secretary of state the amount of money needed to cover the cost of including the argument in the pamphlet, A.R.S. section 19-124(B). In California, the arguments favoring the initiative proposal are prepared by the "author of the measure and one member of the same house who voted with the majority on the submission of the measure . . .", California Election Code section 3555. The argument opposing the measure is drafted by "one member of that house who voted against it, /who/ shall be appointed by the presiding officer of that house . . .", California Election Code section 3556.

In Illinois, the General Assembly prepares the argument in favor of the proposed amendment and the minority of the General Assembly may prepare the argument in opposition. S.H.A. Ch. 7½ section 2.

Oregon permits the argument in favor of the proposal to be written by the person or organization filing the initiative petition and the argument opposing the measure to be filed by any person or organization O.R.S. section 255.421 or any other persons or organizations subject to filing fees, O.R.S. section 255.450 (2).

Washington statutes provide that arguments favoring the passage or rejection of the proposal be submitted by committees for and against, composed of 2 members of the legislature that favored or opposed the measure in their houses and may include a public member. R.C.W.A. sections 29-81-030 and 29-81-040.

8. Explanation of the proposed amendment. In Illinois, this explanation is prepared by the General Assembly, S.H.A. Ch. 7½ section 2. Oregon R.S. section 254.220 provides for an explanatory statement prepared by a committee of three citizens, two of which are appointed by the secretary of state and who appoint the third member, O.R.S. section 254.210.

Washington R.C.W.A. section 29-81-020 provides that the explanatory statement is to be prepared by the Attorney General and may be appealed from, within ten days prior to the filing with the secretary general, in the superior court of Thurston county (Olympia is the capitol of Washington state and county seat for Thurston county). The decision of the court is final.

9. Explanation of the existing law. Washington is the only state that requires the inclusion of this explanation. The explanation is prepared by the attorney general and may be appealed in accordance with R.C.W.A. section 29-81-020 referred to above.

Once the voter information is compiled, it must be distributed. Arizona R.S. sections 19-123 (B) and (C) require distribution by the secretary of state delivering a quantity of pamphlets equal to the number of registered voters in the county to the board of supervisors of each county. The election board thereafter offers one copy of the publicity pamphlet to each elector applying to vote at the primary election, the voting on the proposed constitutional amendment taking place at the next general election. Any persons registering to vote in the general election between the primary and general elections are offered a copy by the county recorder.

In Oregon R.S. section 255.241 and Washington R.C.W.A. section 29-81-140, the secretary of state mails a copy of the pamphlet directly to each elector.

In California Election Code section 3573, the secretary of state delivers copies of the pamphlet to the county clerks who mail them to the electors.

In Illinois, S.H.A. Ch. 7½ section 2, the secretary of state furnishes boards of elections sufficient copies of the pamphlet for them to supply a copy to each elector. The boards, impliedly, are to mail the copies as the "secretary of state shall reimburse each county for postage and other mailing expenses incurred by the county clerk in making such distribution . . .," S.H.A. Ch. 7½ section 2.

Appendix A

States Using Initiative to Amend Constitutions--Legal Requirements for Furnishing Information on Issues to Voters

1. Arizona--Secretary of State prepares a publicity pamphlet containing text of the proposal and pros and cons.

2. Arkansas--Abstracts of proposals to be posted at election places, plus press publication.

3. California--Text of proposal and pros and cons printed in a publicity pamphlet and mailed to all voters.

4. Colorado--Publication of texts in newspapers.

5. Massachusetts--Full information on proposal, legislative action and reports, and pros and cons sent to every voter.

6. Michigan--Publication of purpose of proposal in newspapers; ballot on constitutional amendments shall contain statement of purpose.

7. Missouri--Publication of amendments in newspapers.

8. Nebraska--Texts of proposals and pros and cons published (place not specified).

9. Nevada--Proposals of constitutional amendments published.

10. North Dakota--Advertisement of a proposed constitutional amendment shall be published by the Secretary of State in any newspaper or pamphlet.

11. Ohio--Text of proposal and pros and cons mailed to each voter.

12. Oregon--Publication of voters pamphlet with pros and cons, and distribution by mail to each voter.

13. Oklahoma--Publication of proposals in newspapers together with explanations.

Source: Initiative and Referendum, A Resume of State Provisions, Congressional Research Service, December, 1970.

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Elections and Suffrage Committee

Voter Registration

Introduction

Voter registration and the potential and actual effects it has on voter turnout in elections have been the focus of much discussion. Citizens' groups and legislators alike have suggested changes in current registration procedures. Thirty-three state constitutions contain registration provisions; 26 states mandate the legislature to provide for registration and seven states permit registration laws. Ohio is in the minority of states whose constitutions do not mention registration. This paper reviews the current discussion and the provisions in other state constitutions, so that the committee, should it feel some provision for registration should go into the Ohio Constitution, will have the necessary background.

Registration: Pro and Con

The pros and cons of voter registration have led to heated debates in many groups interested in maximizing voter participation in Federal, State and local elections. A study of reports of U.S. Senate Committees, the League of Women Voters, political analysts and other students of the problem indicate many inequities in current registration procedures. These reports also raise important questions about the constitutionality, validity, and general usefulness of voter registration practices in America today. One observation endorsed by the vast majority of reports on this issue is that current voter registration provisions are a major obstacle to voters and representative government alike.

The need which gave rise to registration laws in the early 1900's may in fact be present in America today, but it appears that the process by which that purpose is served is defective. Voter registration became fashionable around the

turn of the century, when corrupt political machines, as in New York, were stuffing ballot boxes with fraudulent votes of unqualified or non-existent voters. Much legislation had been adopted between 1896 and 1927, and by 1940 practically all populous urban states, excluding the South, had enacted permanent registration laws- permanent in that re-registration was accomplished by voting at least once in a specified number of elections. Another kind of registration employed was periodic registration where, in Texas, for example, annual registration provisions required that each year's new registration by mail invalidated information on the previous year's registration lists. The National Municipal League's book, Model Voter Registration System states that "the basic purpose in requiring voters to register prior to the election is to assure that only those who are qualified shall be permitted to vote." But, as Randall Wood, former Director of Elections for Texas, reported, the poll tax was a 'qualification' that prevented and discouraged many from voting because a lot of people couldn't afford to pay the tax. Prerequisites to registration have been seen in retrospect and are currently viewed as deterrents or barriers for certain groups to vote. In the Senate Hearings on Voter Registration, Senator Kennedy refers to the cost of transportation to the board of elections or wherever registration is done as a 'de facto poll tax'. In Senate Bill 2457, sponsored by Senator Kennedy, which was a subject of the hearings, the following was included under "Declaration and Findings":

> "Section 2. (a) The Congress hereby finds and declares that the administration of voter registration procedures by the various States as a precondition to voting in Federal elections- (1) denies or abridges the constitutional right of citizens to vote in Federal elections; (2) denies or abridges the constitutional right of citizens to enjoy free movement across State lines; (3) denies or abridges the privileges or immunities of citizens of the United States, deprives them of due process of law, and denies them the equal protection of the

laws, in violation of the fourteenth amendment; (4) denies or abridges the right to vote on account of race or color in violation of the fifteenth amendment; (5) denies or abridges the right to vote on account of sex in violation of the nineteenth amendment; (6) denies or abridges the right to vote on account of age in violation of the twenty-sixth amendment; (7) in some instances has the impermissible effect of denying citizens the right to vote because of the way they may vote; and (8) does not bear a reasonable relationship to any compelling State interest in the conduct of Federal elections."

The rationale behind registration laws is on the one hand honorable, in that it seeks to prevent voting fraud. On the other hand, procedures which, statistics bear out, have eliminated or retarded the registration of certain social and economic groups, and implicitly their participation in the democratic process, smack of the corruptness that voter registration should eliminate. As Senator Kennedy said in the Senate Hearings on Voter Registration in 1971, "... I agree with the point made by Senator Humphrey earlier. The real election fraud today is the fraud being perpetrated on those who are unable to vote because of unreasonable registration registration requirements."

Opinion concurs on the fact that most fraud is institutionalized rather than on the individual level, and that the most stringent voter requirements won't stop ballot stuffing if 'a collusion of local officials' is bent on it. As a matter of fact, it becomes apparent that <u>any</u> relaxation or change in registration laws which creates greater participation of voters will reduce rather than perpetrate fraudulent voting and its results, for two reasons: (1) If more people can represent themselves at the polls, there will be fewer fraudulent votes cast in their names, and (2) If greater representation is effected, fraudulent votes will carry less weight in the elections because they will be a smaller percentage of the total votes.

What are the major ills which new registration laws are trying to cure? The

paramount issue is the low voter turnout in U.S. elections, on Federal, State and local levels, compared with the turnouts in other democratic countries where percentages range from a 'low' of 70% to a high of over 90% where compulsory voting is not required. According to the President's Report on Registration and Voting Participation in 1963, Italy has topped 92% in each of the four national elections preceding that report. West Germany's turnout ranged between 78.5% and 87.8% during the preceding 15 years. Italy and West Germany are similar in that 'municipal and communal officials compile lists of electors resulting in the automatic registration of nearly all eligible persons. There are no literacy or property requirements.' Italians vote on Sunday and until noon on Monday. In West Germany, elections are held on Sunday. In Canada, where election turnout has been about 80%, 'enumerators must visit each dwelling in the country and register every possible voter.' In the Scandanavian Countries, local government units initiate enrollment of all potential voters, with high voter turnouts.

That registration procedures are a significant factor in voter turnout is borne out by history. Voter turnout was consistently high in the late 1800's with a peak of 85.6% in the 1876 election. Of course, fraudulent voting could have accounted in part, for this high turnout. In the early 1900's, when the bulk of registration laws were passed, participation declined steadily until 1920 when it reached a low of 44.2%. Since then it has climbed to and hovered around 60% reaching a high of 63.3% in the 1952 presidential election. Many factors can account for the rise in spite of registration laws. The vote was given to women, and if women turned out in disproportionately large numbers, this could account for the increased turnout. Many states repealed their periodic registration provisions, and citizens' groups became involved in registration drives. In 1968, in the United States, 89% of all the registered voters, 61% of all the qualified voters participated in the presidential election. Of the 39% who did not vote,

81% were not registered. In 1972, less than 55% of those eligible for the franchise, voted.

Why? In the Senate Hearings in 1973, Senator Fong offered the following evidence: In 1968, the Bureau of the Census surveyed 50,000 households. Of these people, 26,942 did not register to vote. The question asked them was "What was the main reason that you did not vote or register to vote?" and the answers were the following: "10.6% said they did not vote because they were not citizens of the United States and had not lived here long enough to be qualified to vote. There were 11.2% saying they did not like politics, or never got around to register and were not interested. 53.3% said they were just not interested in the elections or that they never liked politics. Others gave other reasons, saying they were unable to register because they were without transportation or could not take time off from work, and these were 13%, 9.5% gave other reasons for failing to register; and 2% answered "I do not know" ". It is worth noting at this point that those factors frequently referred to as obstacles affect a small number of the households sampled. The wide-spread dislike for politics could be contingent on registration procedures, but specific evidence on this contingency was not available. As a matter of fact, it is curious that so little research has been done among the non-registered portion of society. Those problems which are cited as major obstacles may in fact be problems which <u>could</u> be obstacles, but they really haven't been shown to <u>be</u> obstacles as some of the reports purport.

In their report, <u>Administrative Obstacles to Voting</u>, the League of Women Voters illustrate many of the specific problems inherent in current registration laws. The obstacles which confront the person who wants to register are numerous. In a nationwide study of 251 communities, 77% had no Saturday registration, and 75% had no evening registration in non-election months. In the 30 days prior to the close of registration, 38% had no additional hours. In 52% of the registration

places the offices were hard to find because they were not clearly marked. Bilingual assistance was not available in 30% of the communities where it was needed. Local officials are given power by state authorities to conduct elections, but the report shows that there is no adequate administrative mechanism to gauge how and if they comply with election law provisions. Election officials were seen as an obstacle to outreach groups, those citizens' groups who take the initiative regarding voter registration drives. Organizations must deal with innacurate registration lists, financial charges for lists supposedly available to the public. In addition, where authorization to appoint deputy registrars was requested, the League of Women Voters reports it "was not granted 25% of the time, 31% were limited as to the number of deputies allowed, and 10% reported a limit to the number of forms a deputy registrar could obtain at any one time, an effective way of limiting the number of citizens registered."

To what extent do these obstacles exist in Ohio? Although six areas in Ohio were among the communities studied by the League of Women Voters, the report does not specify which states are guilty of what. Some information is given in the "Summary of Voting and Elections Questionnaire" put out by the League of Women Voters of Ohio. Thirty-eight of the 50 counties which were studied reported. Although 27 of the counties reported opening the county office before 9:00 (usually 8:30) none of them were open past 5:00. Six had regular Saturday hours, and eight had special hours at the end of the registration period. Thirty-one of the 38 boards of elections conduct area registration, two in high schools, 21 on an annual basis, eight biennially and two irregularly. Twenty-nine of the 38 boards do not conduct precinct registration. Ten of the boards make special efforts to register disabled voters, and 21 do this on request. Four of the counties studied do not yet have registration. Another interesting observation is that it does not appear that any correlation exists between the percent of registrants and

registration opportunities. The top three of the 88 counties regarding percent of eligible voters registered: 81.3, 80.4, and 78.4% did not have any greater registration opportunities than did counties with only 52 or 54% participation. The counties with low voter turnout often offered additional hours, and extensive temporary registration programs in 1972, the year of the report. One fact which supports the thesis that registration procedures reduce voter turnout is that in the nine counties where no registration exists, the average turnout was 66%, which is higher than the average of 60% for counties where registration is required.

Other obstacles include a lack of uniformity of residency requirements for State, County and local elections. Absentee registration procedures differ from state to state, as do procedures for absentee voting. In some states, mere absence is sufficient to obtain an absentee ballot, in other states only certain reasons for absence suffice. Special forms, authorization procedures and varying deadlines clog the statutes which potential absentee voters must deal with. In 1963, a candidate for Cincinnati council was hospitalized a few days before an election, and was unable to go to the polls. He lost the election by one vote. In all but 32 states, registration closes more than 30 days before the election. In the interim, election interest reaches its peak, and many qualified voters are disfranchised. One of the most blatant examples of this obstacle concerns the 18 year-olds in Mississippi who were given the right to vote by the 26th Amendment two days before registration closed on July 2nd. Thousands of people waiting on line to register were denied their vote by the prompt closing of registration places. Others who reside in states where re-registration is accomplished by voting, or where cancellation of registration occurs by not voting in a certain number of consecutive elections, went to the polls to vote and were unable to because they had not been notified of their ineligibility, or had erroneously been purged from election lists, with no redress.

Disproportionately low voting occurs among certain groups of people. Income level, occupation, educational level, and college attendance (for youths between 18-24) are shown as significant factors in registration. Mr. Ben Wattenberg, of the Coalition for a Democratic Majority which is currently investigating the problem of broadening the base of political participation, observed,

> "... largely because of the archaic and complicated registration laws throughout the States, it is Americans of the lower socio-economic classes who are vastly underrepresented in the political process. Demographically our voters are disproportionately drawn from the ranks of the well-to-do, the highly educated and those in the higher occupational categories. Politically it is the activist and the militant who are disproportionately registered. Conversely, it is the poor, the black, the least educated, the blue-collar citizens who are disproportionately less likely to be registered. They are far less likely to be registered than are the cause-oriented militants and activists from either end of the party."

Statistics which were presented by Mr. Wattenberg at the 1973 Senate Hearings on Voter Registration indicate that: (1) Of the percent of eligible voters that were registered to vote by educational level in 1968, 71.7% of elementary school graduates were registered, 77.8% of those with high school degrees were registered, and 87.9% of those with five or more years of college were registered; (2) Of the percentage of eligible voters who are registered to vote by family income level in 1968, 65.4% of those with incomes under $3000 were registered, 78.3% of those with incomes between $7500-9999 were registered, and 87.8% of those with incomes of $15,000+ registered; (3) Of the eligible youths (18-24 who registered to vote) 80% of the college youth registered and only 55% of the non-college youth did so; (4) Of the eligible workers who registered to vote by occupational classification, 70% of the blue-collar workers were registered and 84% of the white-collar workers registered to vote.

Can this disproportionate representation be explained entirely or to a large extent by obstacles to registration? As the previously cited Census Study indicates, only 13% of the households cited those obstacles as reasons for not registering or voting. The 53% who were not interested or did not like politics could include large numbers of members from these underrepresented groups, but evidence to support this is scarce. There are also no statistics in support of the thesis that of those 13% who were hindered from registering by obstacles, a large majority were members of these underrepresented groups. The whole question of why some people vote and others don't is so complex, that to make registration procedures a panecea for all ills can cloud the issue. For example, of the lower income class, how many non-registered are welfare or social security recipients for whom non-voting must be explained by factors other than not having time to register? Of the youths who don't attend college, can their low representation be accounted for by time consuming registration, or are there other factors of greater significance, such as their not being exposed to electioneering and election issues as much as those who attend college are? These and other questions must be answered to give present arguments against registration greater validity.

The alternatives to the present registration system that have been discussed range from creating a registration system on a national level, to the elimination of registration entirely. Every proposal that has been made to rectify the inequities of the present registration system has two prominent features: (1) That the responsibility for registration must be placed with the government rather than with the individual, and (2) That greater uniformity in registration procedures must be created.

In 1971, four bills were presented to the U.S. Senate Committee on Post Office and Civil Service. The first bill, entitled "Universal Enrollment Act of 1971" recommended door-to-door enrollment on a national level under the direction of the

Bureau of Census. This would be done every 4 years in the three-week period immediately preceding the week of the Federal election, whereby each elector would be given an enrollment certificate to attest to his qualifications. Senate Bill 2445, "National Federal Voter Enrollment Act", advocated mailing two copies of a standard enrollment form with Income Tax forms under the auspices of the Internal Revenue Service. Copies of the form would be available at post offices for qualified voters who don't pay taxes. Senate Bill 2457 establishes a Universal Voter Registration Administration to create data processing centers for lists of registrants, and create registration forms available to be scanned by computer and mailed postage free. Senate Bill 2574 required pre-addressed postcards to be sent to every household in a jurisdiction where registration exists, and for additional registration forms to be available at post offices.

What do these bills have in common? All of them attempt to take the responsibility for registration out of the hands of the voter and place it in the hands of some Federal Agency. Several of the bills use resources of some existing agency which already has on file the names and addresses of most households, as would the Bureau of Census, or of most persons over 18,the Internal Revenue Service. This would allow an enrollment agency to reach more people initially whether by mail or by door-to-door canvass. Minimal energy and time would be required of the voter to register.

In February and March of 1973, Senate Bills 352 and 472 were introduced before the Committee on Post Office and Civil Service. These bills contain the gist of the 1971 bills with refinements in response to the preliminary problems of the initial proposals. Senate Bill 352 establishes a Voter Registration Administration to prepare and mail voter registration forms, and the forms to notify the voter of the acceptance or rejection of his registration application within 30 to 45 days prior to the close of registration. The bill also provides for financial assistance to

the states for the cost of this registration for federal elections plus additional payments for states which adopt this system for all elections. State laws retain their status under the bill because the proposal states that 'an individual who is eligible to vote under state law and who is registered to vote under the provision of S.352 is entitled to vote in Federal elections in that state.'

One of the paramount issues in evaluating Senate Bill 352 is its susceptibility to fraudulent voting. The bill provides that the registration form include the state law as well as an affidavit, which, if signed, attests to the cognizance of these laws on the part of the voter. In addition, persons are designated to investigate any allegations of fraudulent behavior. The penalty is stated as 'not less than $5000 or 5 years in jail, or both.' Randall Wood, former Director of Elections in Texas, testified that Texas now uses mail registration and that in the 30 years in use, it was shown no more susceptible to fraud than personal registration was. Mail registration was necessitated by Texas' annual registration system, until 1971 when re-registration was accomplished by voting. Other speakers questioned the time alloted between the mailing and the elections, but it was decided that with the cooperation of those parties charged with conducting and aiding in such investigations, these improprieties could be dealt with efficiently.

Looking at Texas' low voting record - in the 40% range - casts doubt as to the efficacy of mail registration. Randall Wood claims that the system was not as effective as it could have been because no provision was made for deputy registrars. As he and other point out, there are many persons who don't have mailing addresses, persons such as traveling salesmen could be away from home during the months prior to the election, and in tenements mail boxes are often ripped off the wall. This seems to indicate that mail registration alone cannot maximize voter participation as well as mail registration with other registration procedures could. The major advantage of the senate bill is that it creates a uniform procedure for all states,

at least in Federal elections. Even if other methods were used to augment the results of mail registration, those qualified voters with mailing addresses who are at home 30 to 45 days before the close of registration could count on being able to register by mail. Another problem with the provisions of Senate Bill 352 is with states whose primary determines the outcome of the November election. It was noted that if the mailing occurs before the November election in these states, maximum participation would not occur. The bulk mailing must occur before the primary to achieve these results. Of course, two mailings would be most desirable in these cases, but would the cost be prohibitive? It could be left up to each state to decide when they wanted their mailing. This possibility was not explored to any degree in the Senate Hearings.

Senate Bill 472 authorizes grants for diversified programs: expanded registration hours and facilities; mobile registration; door-to-door registration; re-registration drives; and post-card registration. The intended advantage is to consider the needs of each state or locality and gauge registration practices to meet those needs. However, in addition to the lack of uniformity, this is pretty much the way states or localities are operating now, with make-shift registration drives. The one thing Senate Bill 472 offers is a Federal subsidy to support these drives, which is an answer to numerous complaints that registration drives lose efficiency because of poorly paid and poorly trained workers.

The question arises as to how wise are these drives? Statistics bear out that in states where contests were held as to which city could register the most people, 99% of eligible voters were registered in some cases. In Idaho, where door-to-door canvassing was authorized, in the 1960 election there was an 80.7% turnout at the polls. In New York, in 1972, volunteer mobile registration drives succeeded in registering 453,000 persons, more than twice the number of people who registered that year under ordinary registration procedures, and obviously at very little cost.

What are the pitfalls, if any, to these kinds of registration efforts? A statement by David Dinkins, Board of Elections of New York City pointed out some of the problems with various forms of registration in his city. State laws require bi-partisan registrars which limited volunteer participation since one-tenth as many Republicans volunteered as did Democrats. He noted that registration drives, out of necessity, employ temporary part-time and voluntary registrars. Without sufficient training, they often did not transcribe material correctly or transmit completed registration forms to the Board of Elections in time for those forms to be valid. One political analyst noted a foible of door-to-door canvassing. In a survey he conducted, he found that more people were registered on the lower floors of apartment buildings than on the higher floors, observing that canvassers sometimes run out of steam between the second and third floors. Some noted that registration drives take on a partisan flavor, and are used by candidates of one party or another in speeches to tell of how they are reaching out to this group or that group.

It was maintained by sponsors of this bill that it is not any more susceptible to fraud than present systems. This is probably true. But it would appear that Senate Bill 352 is more likely to prevent fraud, as the least complicated and most uniform system will offer the least number of loopholes for those intent on fraudulent voting behavior.

An alternative to procedures to simplify registration in order to increase voter participation is to eliminate registration entirely. In 1951, North Dakota repealed the registration laws in effect since 1895. City officials, given the power to invoke registration as they see fit, have not reinstated registration in any one of the 40 elections held in North Dakota since 1951. The system works as follows: if an elector has voted before, his name is on a poll list. If he is a new voter, a qualified voter can vouch for him at the polls. It is not specified whether a voter who is new to a precinct in North Dakota but has voted before in

another precinct can transfer his name to the poll list of his new precinct. If the voucher is not sufficient to satisfy an official, he must sign an affidavit attesting to the truth of vital statistics about him, and he is guilty of perjury if he misrepresents information. Present at every election are party challengers who can question any 'suspicious' voter. Llloyds B. Omdahl, author of Fraud Free Elections are Possible Without Voter Registration - A Report on North Dakota's Experience, observes that party challengers are so little needed to challenge the veracity of the voter, that most of them help out in the administration of election day affairs. He reports that the present system is widely supported. 76% of election officials responded to surveys conducted by the Bureau of Governmental Affairs of the University of North Dakota. They concluded: (1) The number of new voters appearing to be qualified on election day is not large; (2) In almost every precinct, election officials feel satisfied that voter qualification can be established at voting places on election day; (3) In the opinion of election officials, very few fraudulent votes are cast; (4) On the basis of voter prosecution, fraud is virtually non-existent in North Dakota elections; (5) Motivation for fraudulent voting is as great in competitive North Dakota elections as in competitive elections elsewhere. It is notable that the turnout in North Dakota elections has been high, as high as 78.5% in the years since 1951.

The advantages to eliminating registration are numerous. In addition to eliminating all the 'theoretical' obstacles to voting which are inherent in complex registration procedures, large sums of money now spent on administering registration could be saved. North Dakota's experience is evidence that fraud-free elections are possible without registration - in North Dakota at least. But what about the political machines such as Tammany Hall which ruled New York, and the Daley machine which thrives in Chicago today? Would fraudulent practices flourish in even greater extremes if registration was eliminated?

Mike Royko, author of Boss sheds much light on politics in Cook County, Mayor Daley's jurisdiction. Election fraud is best seen as an element of the whole political spectrum. Election results are frequently challenged in Cook County, but not as often as they might be if the expense was not borne by the challenger. Royko says "The machine never misses a chance to steal a certain number of votes and trample all over the voting laws." He notes that in some wards, politically obligated doctors sign stacks of blank affidavits attesting to the illness of people they have never seen, thus permitting the precinct captain to vote the people in their homes as absentee voters for reasons of illness. In an election recount in 1960, the rechecks revealed a switch of 10,000 votes in the 900 precincts where paper ballots were used. It would seem that many of the city's hierarchy are indebted to Mayor Daley for where they are. And their politics are, or have got to be, a function of their indebtedness if they want to stay where they are. Registration provisions, whether lax or strict, lose some of their import in this type of situation. For example, would or could election officials purge polling lists in predominantly anti-Daley or anti-Democratic districts, without these officials soon losing their jobs under one pretense or another? According to Mr. Royko, they could not. The power of election officials to conduct honest elections in a city so ruled by a party machine is greatly hampered. The N.Y. Times, November 9, 1972 issue stated that a major election day complaint in Chicago was the alleged disfranchisement of middle-class black voters by a pre-election canvass. As many as 175,000 were wrongly purged. Registration procedures have been either used to one party's advantage by wrongly and overly enforcing them or by ignoring them completely. Chicago's recent history shows that both are more than possible-they are commonplace. Would the most stringent registration laws or the elimination of registration laws change the realities in Cook County? Maybe, but not in and of themselves, it would seem.

What do all the statistics and the arguments show? For one thing, in the places where registration does not exist there is a higher voter turnout than in places where registration is a prerequisite for voting. Evidence that, at least in Ohio, increased registration opportunities don't necessarily mean increased voter turnout, might indicate that other factors are of equal or greater importance to maximizing voter participation. As is shown by other countries, voting on Sunday might be one of those factors. The need remains to pinpoint more specifically the reasons why the non-voters don't vote.

Registration and State Constitutions

The question of how the constitution should deal with registration is another unsettled issue. Thirty-three state constitutions provide for registration either by mandate or permissive provisions for the legislature.[1] Among these states, some provide for periodic and some for permanent registration. The Model State Constitution recommends the following: "Section 3.02. Legislature to Prescribe for Exercise of Suffrage. The Legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for registration of voters, absentee voting, the administration of elections and the nomination of candidates." There is little else in the way of guidelines to include registration provisions in a constitution.[2] Upon looking at the newer state constitutions, all provide for registration laws. The Alaska Constitution, effective in 1959, says that the legislature may provide a system of permanent registration for voting and voting precincts within election districts. In Hawaii, the 1959 Constitution says that the legislature shall provide for registration of voters, and absentee voting. The 1964 Michigan Constitution also mandates the legislature to provide for voter registration and an absentee voting system. Pennsylvania's 1968 Constitution says that registration laws must be uniform and may apply to cities only. The 1971 Illinois Constitution provides

1- See Appendix A
2- See Appendix B

that the General Assembly by law define permanent registration for voting purposes and that registration laws be general and uniform. Virginia's Constitution, effective in 1971, is unique in that it mandates that registration cannot be closed more than 30 days before the elections in which they are being used.

Commentators espouse two different points of view about giving the legislatures the power to define and regulate registration laws. The first view is that broad legislative freedom could enable the legislature to alter the size and composition of the voting body through registration laws. The Hawaii Constitutional Studies presents the statements of two commentators on this view:

> "...a definite association between restrictive rules and procedures for registration and limited competition between major parties in the states in which the cities of our sample are located. Presumably, it is easier for a party in power to pursue a restrictive policy toward registration if its opposition is weak. Conversely, success in restricting registration presumably indicates some success in influencing the composition of the population of registered voters, which in turn makes it easier for the party in power to stay in power. While the abilities of Southern politicians to construct electorates have long been appreciated, relatively little curiosity has been shown about similar endeavors on the part of their Northern colleagues. It seems unlikely that the latter any more than the former, have always acted without design in establishing rules for registration." (p. 38, Hawaii Constitutional Studies, Article II)

Another commentator notes that in Michigan between 1949 and 1963, cotemporaneous with Democratic governorships, the state had permanent registration laws. The voter's name stayed on the poll lists provided he voted once in every four year span. In 1963 both houses of the legislature and the governorship were under Republican control and the law was changed to requiring that a person vote once every two years in order to remain registered.

"The report concluded: The significant consideration was that the Democrats had far more persons in the low-information, low-motivation categories than did the Republicans; the Democrats would thus be deprived of more potential supporters by the law change." (p. 38, Hawaii Constitutional Studies, Article II)

The other point of view is that legislatures should be given the power to regulate and define registration procedures because this power entails the power of flexibility, "to revise and improve methods of registration as a result of technological developments in data processing and record keeping." This group feels if the latter attempt to control suffrage requirements through registration laws, the courts are powerful enough to control the legislature.

Appendix A

REGISTRATION PROVISIONS IN STATE CONSTITUTIONS

STATE	LEGISLATURE MANDATED TO PROVIDE FOR REGISTRATION	LEGISLATURE PERMITTED TO PROVIDE FOR REGISTRATION	NO PROVISION
Alabama	x		
Alaska		x	
Arizona	x		
Arkansas	x		
California			x
Colorado			x
Connecticut			x
Delaware	x		
Florida	x		
Georgia		x	
Hawaii	x		
Idaho		x	
Illinois	x		
Indiana	x		
Iowa			x
Kansas	x		
Kentucky	x		
Louisiana	x		
Maine			x
Maryland	x		
Massachusetts			x
Michigan	x		
Minnesota			x
Mississippi	x		
Missouri		x	
Montana			x
Nebraska			x
Nevada	x		
New Hampshire			x
New Jersey			x
New Mexico	x		
New York	x		
North Carolina	x		
North Dakota			x
Ohio			x
Oklahoma	x		
Oregon	x		
Pennsylvania	x		
Rhode Island	x		
South Carolina	x		
South Dakota			x
Tennessee			x
Texas		x	
Utah			x
Vermont			x
Virginia	x		
Washington	x		
West Virginia	x		
Wisconsin		x	
Wyoming		x	

Appendix B

SOME CONSTITUTIONAL PROVISIONS DEALING WITH REGISTRATION

Delaware - There shall be at least 2 registration days in a period not more than 120 days nor less than 60 days before and ending not more than 20 days nor less than 10 days before each general election.

South Carolina - Registration books to close at least 30 days before an election.

Virginia - (specifies what the registration form should contain, viz. age, name, occupation, social security number, address).

Pennsylvania - contains the permissive note that the registration laws may be applied to cities only. Also mandates laws must be uniform.

Louisiana - Specifies who shall comprise the Board of Registrars, viz. the Governor, Lieutenant Governor and Speaker of the House. It also states that registrars will be appointed by the governor or police juries depending on the population of the city or town.

New York - Registration to be completed at least 10 days before election.

The New York Constitution permits the Legislature to establish a system or systems of permanent personal registration. Where the Legislature doesn't mandate this kind of registration, the Constitution prescribes the other methods that must be used.

a) Annual personal registration in cities or villages having 5,000 or more persons.

b) Non-personal registration in areas outside cities or villages having 5,000 or more inhabitants.

In 1965, the Legislature amended the Election Law to require permanent personal registration throughout the state for state elections. The Right to Vote, put out by the Temporary State Commission on the Constitutional Convention in New York, notes that the only Constitutional restriction remaining is upon the type of registration that may be used in areas where the legislature has not mandated permanent

personal registration. The report discussed the danger of arguments calling for the selection of methods of registration to be left entirely to the discretion of the Legislature "because this is basically an administrative matter". It states that without Constitutional safeguards, the Legislature could impose a possibly inconvenient system of annual personal registration in all parts of the state, or a system of non-personal registration in populous urban areas which would involve risks of fraud.

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Elections and Suffrage Committee
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Standards for Ballot Language, Ohio

Guidelines for the preparation of ballot language may be found in three distinct sources of the law. First, the Ohio Constitution, Article II, section g (initiative) states "Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. "Thus, as the law now stands, the title is placed upon the ballot per constitutional mandate and subject to statutory law providing otherwise. Ohio Revised Code section 3505.06, for legislative amendments, provides the proper ballot content to include: not the full text of the proposal but "A condensed text that will properly describe the . . . amendment . . . as prepared and certified by the secretary of state . . ."

The constitutional guideline and the statutory guidelines present the minimum requirement of the ballot language that is, that it "properly describe the amendment." As a result, the courts have been required to pass on the sufficiency and the appropriateness of some ballot language. Such ballot texts have been challenged as too long, too short, too technical, too argumentative, too ambiguous, too positive, or too negative. State v. Foster 20 Ohio Misc. 257, 49 Ohio op. 2d 460, 25 N.E. 2d 5 (1969)

Court reactions to these challenges have set forth various criteria for determining the appropriateness or sufficiency of such ballot language. The first criteria employed is the compliance of the ballot language to the basic requirements of the statutes, ignoring the constitutional requirements as being replaced by the statute. The court has found that to fulfill the requirement of a "condensed text that properly describes the amendment," the ballot language must be less than the

full text of the proposal if the proposal is so long as to make its full printing on the ballot inconvenient or impractical, Prosen v. Duffy 152 Ohio St. 139, 87 N.E. 2d 342 (1949), State ex rel. Commissioners of Sinking Fund v. Brown, Secretary of State 167 Ohio St. 71, 4 Ohio OP. 2d 35, 146 N.E. 2d 287 (1957), and if the ballot language is less than the full text, it must "properly describe" that text.

The question of what properly describes is considered in view of the contention that each ballot language should not mislead the voters, State ex rel. Commissioners of Sinking Fund, supra; should not be speculative or argumentative, Beck v. Cincinnati 162 Ohio St. 473, 124 N.E. 2d 120 (1955), should not arise from any effort to deceive or mislead the voters or defraud the voters, Thrailkill v. Smith, Secretary of State 106 Ohio St. 1, 138 N.E. 532 (1922), and should be direct Thrailkill, supra at p; 9

A policy decision that has been made by the courts in the past but which might be incorporated into a constitutional amendment to aid the drafters of ballot language and the courts which review such language is that of deciding the purpose of such ballot language: to merely identify to the voter the issue upon which he is voting or to inform the voter of the actual content of the proposed amendment. The choosing of the former alternative presupposes a viable system of publication of the text of the amendment and other information and relying on such system to inform voters. If such alternative were chosen, the criteria for ballot language would be greatly limited and more time would be available to formulate the actual ballot language. The latter alternative has seldom been chosen by the court as the objective for the reason that to assume this as the objective is to increase the required content on the ballot.

The Ohio Supreme Court in Thrailkill v. Smith, supra, at p. 9 stated ". . . printed matter upon the ballot was not designed to perform the function of informing the voters of the text and effect of the propositions, but that it was chiefly for purposes of identification." This same view was held by the same court as late as 1969 in State v. Foster, supra at p. 261 when the court, relying on Foreman v. Brown

stated "The best one can really hope for from a ballot description is that it be sufficient to advise the voter of which of various amendments submitted at that particular election he is then voting on."

But, without overruling either Thrailkill or Foreman, the Ohio Supreme Court in Minus v. Brown, 30 Ohio St. 2d 75, 81, 59 Ohio Op 2d 100, 283 N.E. 2d 131 (1972) said that "Ohio Revised Code section 3505.06 serves to inform and protect the voter and presupposes a condensed text which is fair, honest, clear and complete, and from which no essential part of the proposed amendment is omitted." Thus, it might be concluded that when one begins with the premise that the purpose of the ballot language is to "inform" the logical result is a more comprehensive ballot statement and the use of more technical language in order to comply with stricter standards of judicial review. Whereas, using the ballot language to merely identify the particular issue being voted on places the burden of information on publication and other means of informing him.

Whatever purpose is chosen, the ballot language must be directed toward a class of readers and thus meet the level of understanding possessed by that class. The Ohio Supreme Court in Markus v. Thurmbull Board of Elections 22 Ohio St. 2d 197, 203, 259 N.E. 2d 501 (1970) named the class as average citizens when they said: "The ballot must fairly and accurately present a statement of the question or issue to be decided in order to assure a free, intelligent, and informative vote by the average citizen affected."

In conclusion, then, the constitutional mandate to the writers of the ballot language should include: first, the purpose which the ballot language is to serve--information or identification; second, criteria expressing the manner from which such ballot language is to proceed, as not fraudulently intended, and the direction of such ballot language, as direct, nonspeculative, and nonargumentative, and finally, naming the group toward which the language is to be addressed, as the average voting citizen.

Footnote: Although the Minus case seems to effectively overrule Thrailkill I think that Thrailkill is still good law because: first, the main holding in Thrailkill goes to the fraudulent or misleading effects of ballot language which, if such intents were shown would still effectively cause the ballot language to be voided; and secondly, because the only part of Thrailkill questioned specifically was obiter dictum in that case.

In addition, I don't think the Minus case should be overemphasized as first O'Neill, in that decision, relied on the Markus case and Burton which are in fact contradictory to his statement and secondly, Minus is out of the stream of cases on the point of the purpose of ballot language.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
August 20, 1973

Research Study No. 25

Forfeiture of elective franchise resulting from conviction of crime

> 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.
>
> Sec. 4, Art. V
> Ohio Constitution

All but a few states take away the vote from a person convicted of an infamous crime, or a felony.

Ohio's provision, above, is substantially unchanged from the original version in the Constitution of 1802. The provision does not appear to have been mentioned in the Debates of 1850. There is virtually no judicial interpretation of the provision, or of the statutory sections enacted under its authority.

The General Assembly has interpreted its authority under the constitutional provision to extend to any felony. Sec. 2961.01 of the Revised Code states that a person convicted of a felony in this state, unless the conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust, or profit. It states that pardon restores his rights.

A "felony" as used in the Ohio statutes is any offense which may be punished by death or by imprisonment in the penitentiary. (Sec. 1.06, R. C.) If the maximum term for an offense is longer than one year, imprisonment is to be in the penitentiary (Sec. 1.05 R. C.); thus, a felony is any offense for which the maximum penalty includes imprisonment in the penitentiary for more than one year.

Sec. 2967.16 states that a prisoner who has served the maximum term of his sentence or who has been granted his final release by the adult parole authority shall be restored to the rights and privileges forfeited by his conviction.

On the other hand, if the convicted person has been placed on probation, and the probation period ends or is terminated without the person having gone to prison, the judge of the court of common pleas may restore the defendant to his rights of citizenship of which he was deprived under Sec. 2961.01 (above). (Sec. 2951.09, R. C.) The effect described is changed effective January 1, 1974 by the new criminal code.

There is also a misdemeanor which causes one to lose his right to vote. Under Section 3599.02, a person convicted of sale of his vote is guilty of bribery. Since he may be imprisoned not more than one year, this is not a felony. The section specifically states that he shall be "excluded from the right of suffrage and holding any public office for five years next succeeding such conviction".

The new criminal code, which takes effect January 1, 1974, amends Sec. 2961.01, above-described. It retains the provision disenfranchising any person convicted of a felony, and expands it to include felonies under the laws of any other state or the United States, but it adds the following statement:

> "When any such person is granted probation, parole, or a conditional pardon, he is competent to be an elector during the period of probation or parole or until the conditions of his pardon have been performed or have transpired, and thereafter following his final discharge."

It also adds a provision to Sec. 2967.04, R. C., concerning pardon by the Governor, stating that an unconditional pardon relieves the convicted person of all disabilities arising out of the conviction.

The Equal Protection Question

Holdings and statements in a number of cases in recent years have raised a question as to validity of state constitutional provisions and statutes disenfranchising criminals, in light of the Equal Protection clause of the 14th Amendment. The federal holdings specifically on this point would uphold the validity of the Ohio provision. However, the primary case is a 1967 court of appeals decision; several more recent U. S. Supreme Court decisions on other aspects of the voting right have increasingly emphasized the nature of the vote as a fundamental right, causing some question as to whether the Supreme Court would establish a new rule if the proper case were brought before it.

Cases which shed light on the possible validity or invalidity of Ohio's provision have arisen in California and New York, which have constitutional provisions similar to Ohio's, referring to denial of the vote to persons convicted of "infamous crimes". The legislatures of both states had interpreted this to include all felonies, as has the Ohio General Assembly. This is in accord with the prevailing construction of the phrase "infamous crimes".

The California Supreme Court, in Otsuka v. Hite, 64 Cal. 2d 596 (1966) held that "infamous crimes" could not be so construed. In that case, the plaintiffs were denied the right to vote on the basis of a conviction during World War II for refusing to report for induction. The court found the refusal to be on religious grounds, and said that to construe this as an "infamous crime" would create an unreasonable classification in violation of the Equal Protection Clause of the 14th Amendment.

The court examined the origin and history of the phrase "infamous crimes", and concluded that the framers of the state constitution had intended the term to encompass only those crimes which evidence "the kind of moral corruption and dishonesty" inherent in bribery, perjury, forgery, and malfeasance in office. Such persons could reasonably be deemed a threat to the elective process, hence such a classification would be consistent with the Equal Protection Clause--but not a person who refused to be drafted on religious grounds, not, impliedly, many other persons convicted of various types of felonies which were not "infamous" in nature. The court cited a leading case, Washington v. State, 75 Ala. 582 (1884) in which the court found that one tenable ground for depriving a former criminal of the vote is to protect the electoral process from persons so "morally corrupt" that they might sell their votes or commit election fraud. (Even this ground was rejected by the California court in a later case in which it held that the state cannot disenfranchise criminals. See below.)

In the following year, a similar provision in the New York state constitution, with statutes interpreting "infamous crime" to include felonies as such, was examined

by the U. S. Court of Appeals. Green v. Board of Elections, 380 F 2d 445, cert den'd 389 U. S. 1048 (1967)

In that case the plaintiff had been convicted under the Smith Act for conspiring to overthrow the government. The court, relying on Trop v. Dulles, 356 U. S. 86 (1958), refused to find the New York provisions invalid. The court cited Trop v. Dulles to answer two of plaintiff's arguments: (1) that the disenfranchisement provision was a bill of attainder (the Trop v. Dulles court said it was not, since the bill of attainder clause only applies to statutes imposing penalties and disenfranchisement was not a penalty)and (2) that disenfranchisement was not a "cruel and unusual punishment" in violation of the 8th Amendment. Judge Friendly, writing the opinion in the Green case, stated his reasoning in support of disenfranchisement of felons as follows:

> "A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. * * * * A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be."

The Green case rule was adhered to by a federal district court in Texas in 1972 (Hayes v. Williams, 341 F. Supp 182). The court, upholding a Texas constitutional provision disenfranchising all persons convicted of a felony, also cited the commentary to its state constitutional provision, as follows:

> "* * * * Texans were aware that the property qualifications had excluded some undesirable groups from exercising the right to vote, and without the property test, there was justification for specific disqualifications necessary for the good of the state. Therefore the constitution of the Republic stipulated that laws were to be passed excluding from the right of suffrage those who in the future were convicted of bribery, perjury, or other high crimes and misdemeanors * * * This stipulation was carried over into the Constitution of 1845 with some slight changes, the list of crimes reading: bribery, perjury, forgery, or other high crimes * * * The same crimes appear in all subsequent constitutions until the present one in which it was limited solely to felonies.
>
> "Strong arguments were made in all the constitutional conventions against disenfranchising men convicted of certain crimes on the basis that no man should be doubly penalized for his actions. But the argument that the polls should be guarded against unsafe elements led to the retaining of the disqualification."

The 14th Amendment itself is cited as support for the validity of state criminal disenfranchisement provisions. Section 2 of that amendment states that when the right to vote is denied to any of the male inhabitants of a state who are 21 years of age and citizens, except for participation in rebellion or other crime, the basis of representation in Congress for that state shall be reduced. This is said to indicate approval of the criminal disenfranchisement principle as an exception to other 14th Amendment protections. (See Fincher v. Scott, below.)

Against this line of reasoning, however, stand some recent U. S. Supreme Court cases enunciating the importance of the voting right and the strict rules which must be followed in protecting this right. Notable is Dunn v. Blumstein, 405 U.S. 330 (1972), in which the court stated that strict review of statutes distributing the franchise is called for, because such statutes "constitute the foundation of our representative society". The court also added emphasis to language from one of its earlier holdings, stating: "the court must determine whether the exclusions are necessary to promote a compelling state interest."

A federal court of appeals has alluded to the significance of Dunn v. Blumstein and the constitutional reasoning that it represents, in connection with a criminal disenfranchisement case. In Dillenburg v. Kramer, 469 F. 2d 1222 (1972) the U.S. Court of Appeals, Ninth Circuit, overturned the ruling of the district court which had found no substantial federal question in the complaint of a paroled felon who was denied the right to vote under constitutional and statutory provisions of the state of Washington denying voting rights to unpardoned persons convicted of crimes punishable by imprisonment in the state penitentiary. (Although not the same language, this is substantially the effect of the Ohio provision.)

The court did not find the Green case conclusive as precedent. Because the reasoning of the court in the Dillenburg case represents an excellent current statement of the issue of validity of state disenfranchisement provisions, and because of the similarity between the Washington and Ohio provisions, we quote at length from that case:

> The interest asserted by appellant is the right to vote. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strikes at the heart of representative government." (Reynolds v. Sims 377 U.S. 533 (1964). Because the right to vote is fundamental, a governmental classification that impairs or denies the right will not survive equal protection attack by showing that the distinction on which the classification rests bears some rational connection to a legitimate governmental end. "It is certainly clear now that a more exacting test is required for any statute which 'places a condition on the exercise of the right to vote' . . . If a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest' . . ." (Dunn v. Blumstein)
>
> Courts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes. The temptation to identify the interest as state concern for additional punishment has been resisted because the characterization creates its own constitutional difficulties. Search

for modern reasons to sustain the old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process (e.g., Green v. Board of Elections of City of New York)or a quasi-metaphysical invocation that the interest is preservation of the "purity of the ballot box." (E. g., Washington v. State(1884) 75 Ala. 582)

Few decisions have penetrated the disenfranchisement classification to ascertain whether the offenses that restrict or destroy voting rights have anything to do with the integrity of the electoral process or whether there is any constitutionally valid distinction between the class of offenses that disenfranchise and the class of offenses that do not. When the facade of the classification has been pierced, the disenfranchising laws have fared ill. (E. g., Stephens v. Yeomans D.N.J. 3- judge court 1970) 327 F. Supp. 1182; Otsuka v. Hite (1966) 64 Cal. 2d 596,)

Washington law disenfranchises those persons convicted of crimes "punishable by death or imprisonment in the state penitentiary." (Wash. Rev. Code sec. 29.01-080) It is immaterial under the statute that the offender is not sentenced to death or to state prison. The classification is not based on any qualities of the offender; it rests solely on the nature of the punishment that can be given for an offense. The Washington Legislature's selection of the offenses that may subject a person to imprisonment in the state penitentiary and those that cannot do not follow any perceivable pattern. Among the offenses that are punishable by imprisonment in the state penitentiary are bigamy, dueling, adultery, and membership in a subversive organization. One convicted of bribing a witness can be sentenced to the penitentiary, but one who influences a juror cannot. A wide variety of offenses directly related to the electoral process cannot result in disenfranchisement because they do not carry a potential state prison sentence.

Appellee does not explain why disenfranchisement of those convicted of offenses that can result in confinement in state prison is "necessary" to vindicate any identified state interest. (E. g., Kramer v. Union Free School District 395 U.S. 621 (1969). Indeed appellee has not yet attempted to point out any distinction between those offenders who are disenfranchised and those who are not that bears some rational connection to a legitimate state aim. (E. g., Bullock v. Carter 405 U.S. 134 (1972).

Appellee has chosen instead to rely upon the Supreme Court's summary affirmance in Beacham v. Braterman (S. D. Fla. 3-judge court 1969) 300 F. Supp. 182, aff'd without opinion (1969) 396 U.S. 12, and the holding in Green v. Board of Elections of the City of New York, supra, which cases, appellee says, establish the insubstantiality of appellant's constitutional contentions.

/5/ A summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance. (Citations) Were summary affirmance weightier, however, the decision in Beacham would not control this case. Beacham's treatment of the equal protection argument was confined to an unanalyzed quotation from Green. The Court did not address itself to the classification arguments presented here.

If Green is confined to its holding that Green did not have standing to challenge the constitutionality of New York disenfranchisement laws it can be harmonized with the recent decisions of the Supreme Court in the voting rights area. Green had been convicted for conspiring to organize the Communist Party as a group to teach and to advocate the overthrow of our Government by force and violence. He was in no position to argue successfully that his crime was unrelated to potential disturbance of the elective process. However, to the extent that Green defines the equal protection issues in the terms of Metropolitan Casualty Ins. Co. v. Brownell 294 U.S. 580 (1935), the decision cannot be squared with the reasoning of such cases as Dunn v. Blumstein, Bullock v. Carter, Evans v. Cornman, Cipriano v. City of Houma, Kramer v. Union Free School District No. 15, and Carrington v. Rash.

/6/ Earlier in our constitutional history, laws disenfranchising persons convicted of crime may have been immune from attack. But constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber. "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." (Harper v. Virginia Board of Elections 383 U.S. 663 (1966). In the wake of the many decisions dismantling restrictions on voting rights, we cannot say that this challenge to Washington laws is now unsubstantial."

In a case even later than this (March 30, 1973), the California Supreme Court said that it had not been strict enough in the Otsuka case (supra):

In the seven years since Otsuka, the test for judging the constitutionality of a state-imposed limitation on the right to vote has become substantially more strict. At least since 1969 it is not enough that there be a rational relationship between the restriction and the compelling state interest: the restriction is now constitutionally permissible only if it is "necessary" to promote that interest and to be "necessary" it must constitute, inter alia, the "least burdensome" alternative possible.

(Ramirez v. Brown, cited in U. S. Law Week, 4/10/73)

The court went on to observe that various reforms over the past 100 years have radically diminished the possibility of election fraud--that it may have been feasible in 1850 to influence the outcome of an election "by rounding up the impecunious and thirsty,furnishing them with free liquor, premarked ballots, and

transportation to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squadron of computer technicians".

The court then stated that the range of penal sanctions to prevent election fraud in California were "more than adequate to detect and deter whatever fraud may be feared" and declared disenfranchisement by reason of crime no longer constitutionally permissible.

Two months later, in its May 7 session, the U.S. Supreme Court affirmed, (without opinion) the decision of a federal district court in North Carolina, holding that North Carolina may constitutionally deny the franchise to convicted felons. Fincher v. Scott, 352 F. Supp. 117 (1972) 41 LW 3590 (1973). The three-judge court below relied upon the reason that Section 2 of the 14th Amendment implicitly approves of denial of the franchise to criminals in stating that the basis of a state's representation in Congress shall be reduced if the state denies the right to vote to anyone "except for participation in rebellion, or other crime". The court also rejected the plaintiff's contention that denial of the franchise was "cruel and unusual punishment" in violation of the 8th Amendment, basing its rejection on Trop v. Dulles, supra.

We would also highlight the following points which have been made in connection with this question:

"Purity of ballot box". This basic justification for disenfranchisement of criminals is put in question by the U.S. Supreme Court in Carrington v. Rash, 380 U.S. 89 (1965). In that case the state had argued that it was proper to prohibit servicemen stationed in Texas from voting, because of the state's need to immunize its elections from the concentrated balloting of military personnel whose collective voice may overwhelm a small local civilian community, and to protect the franchise from infiltration by transients. The court rejected this argument, saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."

Right of citizenship. A number of U.S. Supreme Court cases have said that the vote is a basic right of citizenship. in U.S. v. Texas, 252 F. Supp 234, aff'd 384 U.S. 155 (1966) the court said that citizenship is an ineffective right "if its ultimate objective can be denied at the ballot box." And the court in Trop v. Dulles (supra) had said that "Citizenship is not a license that expires upon misbehavior . . . and deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."

Right to travel. State disenfranchisement provisions have a chilling effect on the right to travel, because a person convicted of a felony would be discouraged from entering a state where he has no voting right. This principle has been given much status in residence-law cases. See Thompson v. Shapiro,270 F. Supp 331 (1969)

Method of restoration is unequal. Since pardon is at the discretion of the governor or a board, people in identical circumstances will be treated differently, in violation of the Equal Protection Clause.

The foregoing two arguments were proposed by Elizabeth and William DuFresne in an article in 19 DePaul Law Rev. 112 (1969) in which they argue that the court came to the wrong conclusion in Green v. Board of Elections, supra. It is their conclusion

that the state could disenfranchise a person for crimes related to elections only, as being a sufficiently narrow category that the state could insist this was "necessary" to further a "compelling" state interest. They note, however, that even this disenfranchisement could not be for life.

A writer in 50 No. Caro. Law Rev. 903 (1972) cited the "balancing formula" in Williams v. Rhodes, 393 U.S. 23 (1968), urging that denying the vote even to persons who violate the elections law does very little to assure the "purity of the ballot box", and that this factor should be outweighed by the desire of the state to release its prisoners on terms of reasonable trust and confidence.

State constitutional provisions

A recent survey of state constitutional provisions restricting the voting rights of persons convicted of crime revealed only three states which had no such provision--Maine, New Hampshire and Vermont, although the latter two states have statutory disqualifications. (21 Rutgers Law Rev. 297, 1967.) In Colorado and West Virginia, the disqualification is limited to the time in which the person is serving his sentence. Pennsylvania's restriction applies only to persons involved in sale of votes and even then is limited to the election at which it occurs.

The other states fell into the following categories:

"Felony, or "felony or treason". Arizona, Arkansas, Connecticut, Delaware, Hawaii, Kansas, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin. Also included in this classification are those states which provide that conviction for a crime carrying a specified penalty acts as a bar, such as North Carolina, Oregon (those convicted of a crime punishable by imprisonment in the state penitentiary), and Michigan (anyone committed to a jail or penal institution).

"Infamous crime" California, Illinois--subsequently changed (see below), Indiana, Iowa, Tennessee, Washington, and Wyoming. This classification overlaps the first, since the term "infamous crime" has been interpreted in some states to be synonymous with "felony". It is also frequently interpreted to mean a crime punishable by imprisonment in the penitentiary.

Certain specified crimes. Massachusetts (corrupt practices in respect to elections), Mississippi (bribery, theft, arson, obtaining money or goods under false pretence, perjury, forgery, embezzlement, or bigamy), New Jersey (blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crimes against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury), South Carolina (burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larcency, or crimes against the election laws, and Utah (treason, or crime against the elective franchise.)

Both general and specific offenses. Alabama (specific crimes, crimes punishable by imprisonment in the penitentiary, infamous crime, or crime involving moral turpitude,) Alaska (specific crimes, felony involving moral turpitude, crimes punishable by imprisonment in the penitentiary and involving conduct contrary to justice, honesty,

modesty or good morals), Florida (specific crimes, felony, infamous crimes), Georgia (specific crimes, crimes involving moral turpitude punishable by imprisonment in the penitentiary), Idaho (specific crimes, felony, infamous crime), Kentucky (specific crimes, felony, such high misdemeanors as general assembly may declare), Louisiana (specified crimes and misdemeanors and felony), Maryland (larceny or infamous crime), Missouri (crimes relating to voting or felony), New Mexico (felony or infamous crime), New York (bribery or infamous crime), Ohio (specific crimes and infamous crimes), Rhode Island (bribery or crime infamous at common law), and Virginia (specific crimes and felony). Note: lack of indication of subsequent change should not be construed to indicate that the provision has not been changed since the date of this survey.)

Following are the constitutional provisions of selected states:

CALIFORNIA. Art. II, Sec. 3. The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privilege of an elector in this state. (Amended 1972. The only change was the direction that the legislature act; before the constitutional prohibition was self-executing.)

DELAWARE. Art. V, Sec. 5.02(b). The General Assembly may deny the right to vote to persons convicted of a felony and to mentally incompetent persons. (Amended July 1, 1973. Former provision: "The General Assembly may impose the forfeiture of the right of suffrage as a punishment for crime.")

ILLINOIS. Art. III, Sec. 2. A person convicted of a felony, or otherwise under sentence in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence. (Amended 1970, accompanied by the note: "This formulation avoids the problem of defining "infamous crime" which was so troublesome to the Illinois courts under the old provision." The old provision read: "The General Assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes.")

INDIANA. Art. II, Sec. 8. The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime (1851)

MARYLAND. Art. I, Sec. 2. No person above the age of twenty-one years, convicted of larceny, or other infamous crime, unless pardoned by the Governor, shall ever thereafter be entitled to vote at any election in this state . . . (1867)

MICHIGAN. Art. II, Sec. 2. The legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution. (1963)

NEW JERSEY. Art. II, Sec. 7. The legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right. (1947)

NEW YORK. Art. II, Sec. 3. The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime (1939)

PENNSYLVANIA. Art. VII, Sec. 7. (Condensation) Any person who shall give . . . an elector, any money . . . for his vote at an election . . . and any elector who shall receive . . . any money . . . for his vote at an election . . . shall thereby forfeit the right to vote at such election . . . (1874)

TEXAS. Art. VII, Sec. 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of a felony subject to such exceptions as the Legislature may make (1954)

WISCONSIN. Art. III, Sec. 2. No person under guardianship, non **compos mentis** or insane shall be qualified to vote at any election; nor shall any person convicted of treason or felony be qualified to vote at any election unless restored to civil rights. (1848) (An Attorney General's opinion states that "felony" for this purpose means that which was considered a felony at the time of adoption of the Constitution.)

The Model Penal Code of the American Law Institute proposes the following provision (Sec. 306.3): A person convicted of crime shall be disqualified (1) from voting in a primary or election if and only so long as he is committed under a sentence of imprisonment and (2) from serving as a juror until he has satisfied his sentence.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
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Research Study No. 26

Initiative and Referendum: Introduction and History of Ohio Provisions

Introduction

The initiative and referendum, or "direct legislation" as they are often called, permit the people, by petition and election, to enact laws or to veto laws enacted by the appropriate legislative body. As applied to constitutional amendments, the initiative generally permits the people to adopt constitutional amendments directly, without having the approval of the legislature. Statutory initiative may be either direct or indirect--the first meaning that, by petition, the people may place a proposed law directly on the ballot for approval or rejection by the voters; the second meaning that the people's petition must first be presented to the legislature. If the legislature enacts the law, the petitioners have accomplished their objective; if the legislature fails to act or acts in a way unsatisfactory to the petitioners, they then have the right (usually by filing another petition with additional signatures) to have the proposed law placed on the ballot for approval or rejection by the voters.

In Ohio, constitutional amendments may be directly initiated by the people, and laws may be indirectly initiated--there are no provisions for doing either the other way.

Direct legislation first secured constitutional recognition in American state government in 1898, when South Dakota amended the state constitution to permit the use of the initiative and referendum at the statutory level. In the years from 1900 to 1909, six states[1] followed the example of South Dakota, four of these states[2] extended the initiative provisions to amendments to their state constitutions. It was during the so-called "progressive era," 1910 to 1915, that twelve states adopted provisions permitting both the initiative and referendum, and Ohio was one of these. Ten of those states, including Ohio, have made the initiative available as to constitutional amendments. Three other states, Maryland, New Mexico, and Kentucky, have referendum provisions only, and Kentucky's is extremely limited in scope, applying only to tax and classification of property laws.

There has been scant development since 1918 in state development of initiative and referendum constitutional provisions; only Massachusetts and Alaska have been added to the list and, most recently, Illinois has added an initiative provision for constitutional amendments relating only to the Legislative Article of the new Illinois Constitution. However, although the impetus for direct legislation reached its peak in the early part of the 20th century, no tendency to reverse or abandon these provisions has been observed.

The initiative and referendum tide was the culmination of a crusade for direct legislation by the various Populist movements prominent in the political scene in the 1890's and early 1900's. Numerous "muckraker" exposes of corruption in government appeared in the journals of the era, raising a popular clamor to "turn the rascals out", and instilling a widespread distrust of the usual legislative process.

The demand for the initiative, referendum and recall became an integral part of reform programs throughout the county. With the recall, corrupt officials could be removed from office; with the referendum, bad legislation could be invalidated; and

with the initiative, the conventional legislative process could be bypassed entirely, or at least partially.[4] The mood of the times was one of public indignation and a desire for direct action.

The Initiative and Referendum in Ohio

The strong interest in constitutional revision that was generated in Ohio in the years leading up to 1912 was to a large degree a reflection of the progressivism which swept the United States in the first decade of the 20th century. Major among the progressive reforms desired by the reformers was direct legislation for the people--via the initiative and referendum. The initiative and referendum had been mentioned well before the calling of a constitutional convention in Ohio; men like Herbert Bigelow of Cincinnati (who was later to be chosen President of the Constitutional Convention) had tried to get such provisions through the Ohio General Assembly to no avail. With the approval of the convention call, Bigelow and other progressives of the state began the effort for what was viewed as one of the major reforms that was to come out of the constitutional convention.

Bigelow and other reformers founded the Progressive Constitutional League, and to eradicate any doubt about what they meant by "initiative and referendum" in the minds of the voters that would be voting for delegates to the constitutional convention, they spelled out the details of their proposal: specifying the exact percentage of voters required to begin procedures for direct legislation (12 per cent or less for the submission of constitutional amendments, 10 per cent on initiated legislation, and 8 per cent on referendums), insisting on its application to all political subdivisions of the state, and stipulating decisions by majority vote on the measure itself rather than by a majority of the total votes cast in the election. When delegates were elected to the constitutional convention, Bigelow was elected, and so were 60 others who were pledged to this kind of a referendum and initiative movement. Twenty-six more delegates had spoken in favor of the principle of this reform. The general feeling in the state at that time was that the constitutional convention of 1912 was going to be a highly progressive one, as the attitude in a state toward direct legislation was widely felt to reflect its politics.

The 1912 Constitutional Convention

Popular legislation was one of the liveliest topics of discussion to engage the attention of the 1912 Constitutional Convention. Debate on the subject was more lengthy than that on any of the other subjects with which the convention dealt, occupying more than three straight weeks of the delegates' time. The issue involved both politics and emotion. Speakers to the Convention such as William Jennings Bryan, California Governor Hiram Johnson, and Theodore Roosevelt advocated the reform directly in their addresses. (It is interesting to note that one of Roosevelt's biographers calls his speech "the most sincere and the most disastrous of Roosevelt's public addresses;")by proposing the initiative and referendum and also in proposing popular review of judicial decisions, the former President strengthened the resolve of the conservative Republicans to defeat his renomination whatever the cost.[5] Of the other guest speakers to the Convention, Theodore Burton gave the initiative and referendum only qualified support, and Judson Harmon and J. B. Foraker opposed it in their speeches.[6]

Although Bigelow was elected President of the Convention, and although a majority of the delegates to the Convention were pledged to the initiative and referendum, the fight for the provisions was not to be an easy one. Robert Crosser of Cuyahoga

County, a progressive delegate to the Convention and Chairman of the Initiative and Referendum Committee, explained in Mercer's Legislative History that although the opponents of the proposal were convinced that they lacked the votes to defeat the initiative and referendum, they sought to surround these processes with "safeguards" to make them as innocuous as possible. This appeal for proper protective devices was also attractive to the moderates. The task of the enthusiastic believers in the principle was thus to frame a measure which met the demands of the conservatives and the moderates without destroying an effective direct legislation system. Those members of the convention, including Crosser, who were enthusiastic in their support of the initiative and referendum were termed radicals. They contended, however, that if it were a good thing for the people to have the right to initiate laws, which the Legislature had refused, and right to veto objectionable laws passed by the Legislature, then it should be made reasonably easy for them to do so. Much of the opposition believed that the initiative and referendum would discount the value of representative government, or that it would diminish the sense of responsibility in the legislature--and thus sought to put various limitations on its usage.

Because the progressives at the Convention expected to have to compromise, they put forth their most radical proposal first: a fixed number of signatures on petitions, with no requirement for geographical distribution over the state, and the direct as well as the indirect initiative. This proposal was introduced by Crosser as Proposal Number 2 on January 17, 1912. It provided for state-wide legislative referendums on petition of fifty thousand voters, state-wide initiatives on a petition of 60,000 voters, and constitutional amendments on petition of 80,000 voters. Crosser said later of the proposal:

> I favored it because it would not become increasingly difficult to make use of this remedy as population increased. I also argued, and believe still, that this is the sound principle, not only for the reason already given, but for the further reason that according to our representative form of government, wherein an agent of the people known as a legislator could initiate laws, the number of people required to elect a member of the Legislature is fixed, and not based upon percentages. Therfore, the right of the people to initiate laws directly should not be made any more difficult than to initiate them indirectly through their members of the legislature. (Crosser in Mercer, Ohio Legislative History, p. 443)

On January 18, the proposal was sent to the Committee on Initiative and Referendum.

As the difficulties in getting the Crosser amendment as originally proposed to the Convention became more evident, the discussions were removed from the Committee on Initiative and Referendum to a caucus of the 60 delegates who were friendly to the principle. Opponents condemned this method as "steam-roller tactics" and unsuccessfully tried to outlaw caucus by vote of the convention, but Bigelow defended the procedure on the grounds that a majority had been sent to the Convention to pass such an amendment, and that they had the right to iron out their differences in detail among themselves before they debated with their opponents.[7] The first victory for the Bigelow forces came at the Convention when the delegates voted to table a resolution proposed by Delegate Halfhill, a conservative against the initiative and referendum, which would have condemned the caucus method and instructed all delegates not to sign their names to any pledge of support.

The progressive forces held weekly caucuses during February, which revealed varying degrees of support among the proposal's sympathizers, with only a narrow majority in favor of the proposal as initially designed. The main areas of controversy arose over whether the number of signatures to petitions should be fixed or a percentage, and over whether the initiative should be indirect or direct. A compromise agreement was adopted and approved 50 to 1 at the caucus held on February 23, and once again progressive forces for the initiative and referendum were united. The compromise provided for the percentage system; 4 per cent of the electors could initiate legislation to be referred first to the General Assembly (the indirect initiative); 8 per cent could submit a measure directly to the people (the direct initiative); 12 per cent could propose an amendment to the constitution; and 6 per cent could hold a referendum vote on a law passed by the legislature. Roosevelt's speech was delivered two days before this caucus, advocating the indirect initiative, and may have swayed the caucus in favor of the compromise. The initiative and referendum committee added another change specifying that in each case half of the required percentage of signatures had to be obtained from half of the counties of the state. (Crosser maintains in Mercer, Ohio Legislative History, that the idea of distributing signatures over half of the state had its chief support among those who were really inwardly opposed to the initiative and referendum, and that the same alignment of the convention's membership took place in regard to whether the provision would include the direct initiative.) The amendment was given its second reading on March 12 in the form of the compromise developed in the caucus with the addition concerning the distribution of signatures as added in the committee.

The remainder of the month of March was spent in debate on the proposal. It was argued by the friends of the reform that the people of Ohio had lost faith in representative government because of the corruption and irresponsibility of the legislature, and that the initiative and referendum would give them a larger direct share in policy-making. Typical speeches in favor of the initiative and referendum are those of Samuel A. Hoskins and Stephen S. Stilwell.[8] Opponents criticized the proposal giving the reasons that it was against the spirit of representative government, that the people were not capable of making their own laws, that the initiative and referendum had not had good effects in those areas of the country and in Switzerland where it was already in practice, and that the provisions recommended by the committee still did not include adequate safeguards for direct legislation. The bogy of the single tax was also raised by the opposition, seeking to discredit the proposal by linking it with this radical doctrine. The single tax--the idea espoused by Henry George which would abolish all other forms of taxation and raise all public revenues from the single source of a tax on land at its full rental value--was linked with the campaign for direct legislation because single taxers believed that the initiative would open up a way for their campaigns in spite of legislatures which were normally hostile to such taxation. The Fels Fund Commission (a single tax organization) had taken an active part in the direct legislation movement in Ohio and in the movement for a constitutional convention, and Bigelow was widely felt to be a single taxer. (The Single Tax Movement in the United States by Arthur Nichols Young, p. 239-240.) The conservatives and land-owners at the Convention were very afraid of such a single tax, or any provision which might make its development less difficult, and their fears gave them further grounds on which to oppose the proposal for the initiative and referendum. One of the conservatives, E. L. Lampson, proposed to prohibit the use of the initiative to initiate either a law or a constitutional amendment to impose a single tax in Ohio. "I'll stand here," he declared, "and defend the home owners and the farmers . . . of Ohio against this monstrous single tax . . . until my tongue is palsied and clings to the roof of my mouth."[9] President Bigelow attempted to shut off debate by ruling that a motion

had carried to recess the convention, despite the clamor for a vote on the Lampson proposal, but the ruling of the chair was overruled, and the proposal was submitted for discussion.

The debate made it apparent that the general sentiment of the convention was not in favor of the low percentages which had been proposed or the direct initiative. On March 26, Bigelow appointed a special committee to redraft the work of the caucus in order to meet many of the objections which had been raised during the debate. The revision was presented and explained on March 27 by John R. Cassidy of Bellefontaine. (Warner, p. 322) Bigelow made his major speech at the Convention in support of this proposal for the initiative and referendum. Bigelow was a preacher by profession, and his speech has the quality of a sermon. He maintained that the initiative and referendum were necessary to protect the representative of the people from temptation, and also to educate the people in democracy. Bigelow stated that the initiative and referendum were the "greatest tools of democracy" and said that the task of the convention was a profoundly "religious one", in his highly emotional speech, using many biblical quotations. Bigelow further announced that the progressives were willing to accept the provision that the initiative could not be used to impose a single tax, and the conservatives realized that they were defeated. The Cassidy amendment was accepted by a vote of 97 to 15, but the radicals had had to give ground on every controversial point. The direct initiative was eliminated for laws and retained only for constitutional amendments; the percentage for indirect initiative petitions for laws was increased from four to six; and the use of the device was prohibited for proposing laws enacting classification of property or the single tax. President Bigelow defended the last proposition to his friends, assuring them that it would not interfere with the adoption of land-tax reform whenever public opinion was ripe, since the prohibition applied only in initiated <u>laws</u> and not to initiated <u>constitutional amendments</u>. Bigelow felt that the latter procedure could be used at some later time to remove the reservation against the single tax. (Warner, p. 322-323)

The proposed amendment came up for third reading at the Convention on March 28, at which time, Crosser, who was still dissatisfied with the amendment as the Convention had adopted it, again reopened the issues of the high percentages and the failure to provide for the direct initiative for laws. The amendment was again referred to a special committee in the interest of shortening the debate, and the following day, the committee presented its recommendations. It recommended that the percentage on petitions to initiate directly a constitutional amendment be cut from 12 to 10, and it proposed a compromise on the procedure to be used in initiating laws. The indirect initiative was to be made only the first, not the final, step in the process of lawmaking by the people, and the percentage of electors required to invoke this procedure was reduced from six to three. Then, if the legislature failed to enact the bill in the form proposed, and the sponsors, thereafter, obtained the signatures of another three per cent of the electors, making a total of six per cent, the proposed law could be submitted directly to the people. The effect was to reinstate the direct initiative but to restrict its use to the second step after the indirect initiative had been tried and had failed. These changes were accepted by the Convention and incorporated into the final version of the Initiative and Referendum Amendment, which was approved by the Convention by a vote of 85 to 14 on May 29. (Warner, p. 323)

<u>Use of the Initiative and Referendum in Ohio</u>

Since adoption of the initiative and referendum provisions in 1912, the

initiative has placed issues on the ballot 38 times, 32 of which proposed constitutional amendments. Of the 6 initiated laws appearing on the ballot, 2 were passed and 4 defeated by the voters. In addition, at least eight times petitions have been filed proposing laws which were placed before the General Assembly. In one case, the General Assembly passed the law; in the other two, although the General Assembly did not pass the law, the matter was not taken to the voters by the petitioners. Of the 32 initiated constitutional amendments since 1912, 23 have been defeated and 9 have been adopted.

Ten laws passed by the General Assembly have been taken to the voters under the referendum provisions. Only once has the General Assembly's action been upheld by the voters. The referendum has not been used in Ohio since 1939.

The initiative, however, continues to be used. At the November, 1972 general election an initiated constitutional amendment was before the voters; it was defeated. The last election at which an initiated law was on the ballot was in 1965, but as recently as 1971 an initiative petition for a law was filed with the General Assembly.

FOOTNOTES

1. Utah, Oregon, Montana, Oklahoma, Maine, and Missouri

2. Utah, Oregon, Oklahoma, and Missouri

3. Arkansas, Colorado, Arizona, California, Nebraska, Washington, Idaho, Ohio, Nevada, Michigan, North Dakota, and Mississippi (subsequently held invalid).

4. (Initiative and Referendum in Wisconsin and Other States, Wisconsin Legislative Reference Bureau, Informational Bulletin 65-4, July 1965, p. 2)

5. Warner, Hoyt Landon, Progressivism in Ohio, 1897-1917, Ohio State University Press for the Ohio Historical Society, p. 318.

6. According to Warner, by voicing his conscientious scruples against the initiative and referendum, Ohio Governor Judson Harmon sacrified his chances for progressive support in the Democratic presidential race.

7. Warner, op.cit., p. 320.

8. Proceedings and Debates of the 1912 Convention, I, 901, 933, respectively, as in Warner, op.cit., p. 346

9. Proceedings and Debates of the 1912 Convention, I, 713, as in Warner, p.321.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
August 27, 1973

Research Study No. 26A

Initiative and Referendum: Ohio Provisions (Article II, Sections 1-1f, inclusive)

Two basic questions can be raised relating to the initiative and referendum:

1. Should there be initiative and referendum provisions in the Constitution?

2. If there should be such provisions, should they state basic principles and leave implementation to the legislature or should they be self-executing?

The Ohio Constitution presently contains initiative and referendum provisions, providing for direct initiative for constitutional amendments, indirect initiative for laws, and referendum for laws, with some exceptions. Although there are implementing statutes, the constitutional provisions themselves are largely self-executing and were so intended by their drafters, the Constitutional Convention of 1912.

This memorandum, which examines in detail the provisions of the Ohio Constitution providing for initiative and referendum, does not attempt to answer these two questions. It assumes that the answer to the first one is yes, and to the second, that they should be, insofar as possible, self-executing. These questions, as well as some suggestions for changes made by persons who have studied the operation of the initiative and referendum in Ohio and elsewhere, will be included in a subsequent memorandum.

Each section (Sections 1 through 1f, Article II) is set forth, followed by its history and an explanation, including interpretations and questions raising points which might be considered for change, either substantively or for clarification.

Article II

Section 1. The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, or any item in any law appropriating money passed by the General Assembly, except as hereinafter provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

History

The 1912 amendments proposed by the Convention rewrote the section, adding the underlined language. In 1918, the section was amended pursuant to an initiated petition to permit referendum on actions of the general assembly ratifying proposed amendments to the United States Constitution. This provision was subsequently held violative of the federal Constitution (Hawke v. Smith, 253 U. S. 221) and was removed by amendment in 1953.

Explanation

The basic concepts of initiative and referendum for Ohio are set forth in this section; none of the details. It provides:

1. The people have the right to propose laws to the General Assembly and subsequently and under conditions provided in later sections, to adopt or reject them at the polls.

2. The people have the right to propose amendments to the Constitution and to adopt or reject them at the polls. This right is independent of the General Assembly.

3. The people have the right to adopt or reject any law, section of law, or item appropriating money passed by the General Assembly, with exceptions.

Although the section further says that the people have the right to propose amendments to the Constitution to the General Assembly, there are no provisions to implement this right, neither constitutional nor statutory, and it may be considered not to exist. It is possible that the drafters intended to give the people the same right to propose constitutional amendments indirectly as they are given with respect to laws, as well as the right to propose constitutional amendments directly but all subsequent provisions which provide for the indirect initiative refer only to "laws."

The most recent version of the Model State Constitution provides only for initiated constitutional amendments. Prior versions provided also for initiated laws and the referendum; these provisions have been moved, without comment, to an Appendix in the Sixth Edition. The initiative provided for in the Appendix is indirect--that is, the legislature is given an opportunity to enact the law before it can be submitted to the voters. As noted in Research Study No. 26, detailing the history of the initiative and referendum movement in Ohio, the initial proposal at the 1912 convention provided for the direct initiative, and one of the compromises made by

the progressives in the course of the convention was to eliminate the direct initiative for laws and retain it only for constitutional amendments, thus placing Ohio among the states which requires that an initiated law must be submitted to the General Assembly first and may only be submitted to the voters, and then only by filing additional petitions, after failure of the General Assembly to act in a way satisfactory to the sponsors.

Restrictions on the Use of the Initiative and Referendum Section 1d contains restrictions on the use of the referendum which will be detailed in a discussion of that section and section 1e contains a specific limitation on the use of the initiative to pass a law--that it shall not be used to classify property for tax purposes nor to enact the single tax.

Other than these restrictions, the only significant restrictions on the power of people are contained in this section (section 1).

1. It must be a law. The power of referendum with respect to laws passed by the General Assembly refers to "law, section of any law, or any item in an appropriation act." This would seem to preclude any power to refer to the people things passed by the General Assembly--particularly, resolutions--which are not laws. This question has apparently never been raised in Ohio except with respect to a municipal question, but there the Court held that a resolution of city council could not be referred to the people under charter initiative and referendum provisions which provided only for reference of laws or ordinances. (State ex rel. Barberis v. Bay Village, 31 Ohio Misc. 203, 1971) Similarly, that which is proposed by an initiative petition (other than a constitutional amendment) must be a law--it cannot be a resolution or a general statement of policy to be subsequently turned into a law by the legislative body. Again, this question has not been raised statewide but a court decision relating to a municipal question would appear to be applicable (Beckstedt v. Eyrich, 120 Ohio App., 338, 29 O OP. 2d 170, 1963)

2. People cannot do anything legislature cannot do. An important restriction contained in this section on the power of the people to enact laws by using the initiative is that contained in the last sentence "The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

Some applications of this doctrine are obvious. For example, section 28 of Article II states that "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; . . ." and it seems clear that the people would also be forbidden to pass such laws.

3. People can pass unconstitutional law or amendment. Several limitations on the right of initiative and referendum have been implied in other states and efforts made in Ohio to obtain judicial approval of such limitations. One such implied limitation which was emphatically rejected in Ohio is whether the people will be enjoined from passing an unconstitutional law, or initiating an unconstitutional constitutional amendment. A law might violate either the federal or the state constitution; a constitutional amendment might be inconsistent with another portion of the same constitution (but would not thereby be held to be unconstitutional since the later amendment would govern) or might violate the federal constitution. Ohio courts have consistently held, however, they will not enjoin the election on the basis that the proposal, if adopted, will be unconstitutional nor will they permit the Secretary of State or any other official to withhold from the ballot a measure which, in his opinion, if adopted, would be unconstitutional. The Supreme

Court laid this question to rest in 1922 in State ex rel. Marcolin v. Smith, 105 Ohio St. 570.

Some courts in other states have taken the opposite position on proposed initiated measures which, if adopted, would be unconstitutional. The question has been an important one in recent years largely because of efforts, through the use of the initiative or referendum, to adopt anti-fair housing measures or to repeal fair housing measures duly enacted by the legislative authority. In at least one instance (Milwaukee) a court enjoined the election on an initiated anti-fair housing measure on the grounds that the ordinance, if adopted, would violate the equal protection clause of the federal constitution. Upon reflection, however, the Ohio rule would seem to be the better rule. If the court rules on the constitutionality of a proposed law or constitutional amendment before it is adopted and determines that it is constitutional, it may preclude the determination of unconstitutionality later when, during the course of administering the new law, it is found to be of unequal application, or contain serious defects or omissions which were not, and could not be, anticipated at the time of the initial drafting. To find a law unconstitutional before it is adopted means the application of the law to hypothetical, not real, cases.

4. The people may do by initiative what they cannot do by referendum. Another restriction which has been implied on the use of the initiative is that the people may not initiate a law which will repeal or amend a law passed by the legislature which is not subject to the referendum. As stated by some courts, the initiative may not be used as a substitute for the referendum. This proposition, also, is untested with respect to state law, but the Supreme Court has answered it in cases arising under municipal ordinances and the answer would seem to be applicable to state laws as well. In Ohio, the answer is that the initiative is available to amend or repeal a law not subject to the referendum. The Supreme Court initially held otherwise (Smith v. City of Fremont, 116 Ohio St. 469, 1927) but this case was overruled by the Supreme Court in 1951 in Sharpe v. Hitt, 155 Ohio St. 529, in which the court ruled that municipal voters may, by initiative, repeal an ordinance passed by council as an emergency or by initiative, enact an inconsistent ordinance, so long as the subject matter came within the legislative powers of the municipal corporation. Similarly, there is no restriction on the power of the General Assembly to alter or repeal a law enacted by the people through the initiative. In at least one state (Arizona) the legislature is constitutionally prohibited from altering or repealing an initiated law and in other states (e.g. Washington) an extraordinary legislative majority is required or a certain period of time must intervene.

5. Can the people do that which the General Assembly is specifically ordered to do? One additional limitation on the initiative and referendum might be the inability of the people to initiative laws or act in referendum on laws passed by the General Assembly on matters on which the Constitution specifically orders General Assembly action. Again, this issue has been tested with respect to municipal powers but not state powers. Specifically, the Ohio Supreme Court has twice rules that the initiative was not available to the people of a municipality to fix the wages and other matters (hours, or minimum number of employees) of certain local employees, when the city charter specifically directed city council to take such actions.[1] An

1. State ex rel. Werner v. Koontz, 1950, 153 Ohio St. 325; State ex rel. Lautz v. Diefenbach, 1956, 165 Ohio St. 495.

analogy on the state level would be section 20 of Article II, which requires the General Assembly to fix the term of office and the compensation of all officers in cases not otherwise provided for in the Constitution. Could the referendum be applied to a statute enacted by the General Assembly fixing the salary, for example, of judges? Could the people initiate a law fixing judicial salaries? The answers to these questions are not known.

Article II

Section 1a. The first aforestated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the Constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the Secretary of State, and verified as herein provided, proposing an amendment to the Constitution, the full text of which shall have been set forth in such petition, the Secretary of State shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors."

History

This section was added in 1912 and has not been amended.

Explanation

Section 1a sets forth some of the basic provisions with respect to initiated constitutional amendments. Although most of the details regarding petitions and signatures are to be found in sections 1g, several significant provisions are set forth here:

1. Constitutional amendment initiative in Ohio is direct--that is, if the procedures are followed properly, the proposal is submitted directly to the people without first submitting it to the legislature.

2. The number of signatures requires is 10%.

3. The proposal is submitted at the "regular or general" election "in any year" subsequent to 90 days after the filing of the petition.

The Model State Constitution provides for the constitutional amendment initiative, differing from the Ohio provision in one major respect. A constitutional amendment proposed by the initiative process is "indirect" in the Model--that is, it must be submitted to the legislature first and is only submitted to the voters if it fails to receive legislative approval. The Model also contains a provision authorizing withdrawal by the sponsors of an initiative petition at any time prior to its submission to the voters. Although the Comments to the Model argue that this provision does not in any way jeopardize the popular control over the initiative, it is difficult to see how the people could keep control under these circumstances. There are, of course, good arguments on the side of permitting people to change their minds as a result of the deliberative process of a legislative body. However, rather than simply permitting withdrawal, if the indirect initiative is desirable for constitutional amendments, it would seem better to adopt the provisions of the Ohio statutory initiative, which permit submission to the voters upon obtaining additional signatures after the legislature is given the opportunity to act, but which apparently permit anyone to go about the business of obtaining the additional signatures.

The Model does not specify the number of signatures required. Comments to section 12.01 of the Model state that the number of signatures varies among the states

providing for the initiative from 3% to 15%, and that only North Dakota specifies an absolute number of signatures, the number being 20,000.

The original sponsors of the initiative and referendum at the 1912 Constitutional Convention argued strongly that a fixed number of signatures, rather than a percentage of electors, should be provided for submission of questions to the people. In 1939, a proposed constitutional amendment was submitted to the people by initiative petition which would have provided, among other things, a fixed number of 100,000 signatures for submission of an initiated constitutional amendment, rather than 10%. It was defeated.

The "90 day" provision in the Ohio section has given rise to several cases and attorney general opinions. (This should not be confused with the 90 days allowed for a referendum petition to be filed.) According to Thrailkill v. Smith 106 Ohio St. 1 (1922), the day of the filing of the petition is the first day of the 90 days. The election must be subsequent to 90 days after filing, counting the day of filing as the first day. The times within which the Secretary of State and the various county boards of elections must determine the validity of the signatures and the sufficiency of the petition come within the 90 days, and are set forth in section 1g and in the statutes. However, if there are not enough valid signatures, the sponsors have an additional 10 days in which to obtain them, and this falls within the 90 day period. It is the date of the filing of the initial petition that is important, not the date of which sufficient additional signatures are filed, even though an election may intervene which could, if it were used as a base, change the number of signatures required. (State ex rel. Ilg v. Myers, 127 Ohio St. 171, 1933).

One matter as yet undetermined is what a "regular or general" election is for the purposes of this section. It seems clear that a "general" election falls the first Tuesday after the first Monday of November in every year, but whether a "regular" election would include an election occurring the first Tuesday after the first Monday in May, normally known as a primary election, has not been decided. It might be noted that the General Assembly is authorized by Section 1 of Article XVI to submit constitutional amendments at a general or a special election and the term "regular" is not used.

The Attorney General has interpreted "in any year" to mean the year in which the petitions are filed. As applied to constitutional amendments, this ruling is not bad, but as applied to initiated laws or the referendum it could create an impossible situation under some circumstances.

Section 1b. When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes. If said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the referendum. If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the general assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection at the next regular or general election, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months, if no action has been taken thereon, or after the law as passed by the general assembly shall have been filed by the governor in the office of the secretary of state. The proposed law shall be submitted in the form demanded by such supplementary petition, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly. If a proposed law so submitted is approved by a majority of the electors voting thereon, it shall be the law and shall go into effect as herein provided in lieu of any amended form of said law which may have been passed by the general assembly, and such amended law passed by the general assembly shall not go into effect until and unless the law proposed by supplementary petition shall have been rejected by the electors. All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in 1a and 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. If conflicting proposed laws or conflicting proposed amendments to the constitution shall be approved at the same election by a majority of the total number of votes case for and against the same, the one receiving the highest number of affirmative votes shall be the law, or in the case of amendments to the constitution shall be the amendment to the constitution. No law proposed by initiative petition and approved by the electors shall be subject to the veto of the governor.

History

This section was adopted in 1912 and has not been amended.

Explanation

Section 1b contains the details regarding initiating a law by the people and its subsequent submission to the people for approval or disapproval except such details as are provided in section 1g or by statute. It also contains some provisions which are applicable both to initiated laws and initiated constitutional amendments and an effective date provision for initiated constitutional amendments. Since the section is lengthy, if one were rewriting the Constitution solely for form

and clarity, this section could easily be divided and portions of it separated to make clear those provisions which apply only to the process of initiating and getting on the ballot a proposed law.

As noted earlier, the statutory initiative in Ohio is of the indirect type. Two separate petitions are necessary to get a proposal to the voters, and an opportunity for action by the General Assembly must intervene between them. A proposed constitutional amendment in 1939 would have, among other things, converted Ohio's indirect statotory initiative into direct initiative, and changed the per cent to a fixed number. It was defeated.

The process is as follows (with comments where appropriate):

1. Three per cent of the electors file with the Secretary of State a petition proposing a law, setting forth the full text thereof in the petition.

Comment: The three per cent on the first petition and the three per cent of additional signatures on the second petition equal six per cent, the number required for a referendum petition. This contrasts with 10% required for a constitutional amendment. The relationship--requiring more signatures for a constitutional amendment than for a law-- accords with most theoretical writing on the subject. The original sponsors of the initiative and referendum in 1912, as noted earlier, wanted a fixed number of signatures rather than a percentage which, as they knew, would increase the number of signatures required as the state grew in population.

2. The Secretary of State is required to submit the proposal to the next "session" of the General Assembly commencing at least 10 days after the filing.

Comment: "If there are sufficient presumptively valid signatures . . . there is an absolute duty on the Secretary of State to certify the petition to the General Assembly irrespective of whether it can be proved that in some way some or all of the signatures contained in the initiative petition are invalid." Durell v. Brown, 29 Ohio App. 2d 133, 1971.

On several occasions, the question has been raised as to the meaning of "session" in this section. The Constitution, until the recent legislative amendments, provided for the "regular" session of the General Assembly to begin the first Monday in January in the odd-numbered year and the only other "session" referred to in the Constitution was a special session which, until recently, could be called only by the Governor. Over the years, the general interpretation of "session" as used in the Constitution was that it meant either the regular or a special session. When, for example, the General Assembly recesses for a fixed, and perhaps lengthy, period of time, the re-commencing of the "session" following the recess would not be likely to have been considered a "session" for the purposes of submission of an initiated law, although the question has never been decided.

Now, however, that the Constitution provides for a first regular session to commence in the odd-numbered year and a second regular session to commence the following year of each General Assembly, it seems likely that each such session would be considered a "session" for the purposes of this section. If this is the case, the length of time which the initiators of a law have to wait before submission of their proposal to the General Assembly if they file their petitions too late to be submitted at the beginning of the odd-numbered year session has been reduced. One of the arguments of the original sponsors of the initiative and referendum in 1912 for the direct,

as opposed to the indirect, statutory initiative, was the length of time between General Assembly sessions to which the proposal could be submitted. The force of this argument would seem to be reduced if the above reasoning is correct.

With respect to a special session, the only question would be whether, if the Governor called the session and limited its purposes, an initiated law could be submitted if not included within such purposes.

Details are lacking in the Constitution regarding how an initiated bill is brought before the General Assembly, but no serious problems seem to have arisen in practice. The Secretary of State delivers the bill either to the Clerk of the Senate or to the Clerk of the House (or, perhaps, to both) and the bill is given a number and introduced with other bills, with or without legislative sponsors.

3. If the General Assembly passes the law as submitted, it is subject to the referendum.

Comment: If passed by the General Assembly as submitted, the initiators are, presumably, satisfied and have no further right to get the proposal to the voters except through the regular referendum process. In other words, it will not take 6% instead of 3% to get the matter on the ballot. An interesting, and unanswered, question in this respect is the status of an initiated law which would not otherwise be subject to the referendum--for example, a law levying a tax can be initiated in Ohio but such a law, if a General Assembly initiated law, goes into immediate effect and is not subject to the referendum (see section 1d). The same is true for laws appropriating money for the current expenses of government.

4. If the General Assembly amends the initiated law and passes it, it is subject to the referendum or a supplementary petition can be filed demanding its submission to the voters, either in its original form or with any or all of the legislative amendments.

Comment: As noted above, a question might arise with respect to referendum if the law is one levying a tax or appropriating money for the current expenses of government.

If the form of the law as passed by the General Assembly is not satisfactory, the supplementary petition demanding its submission to the voters must set forth the version of the law to be submitted, and that may be the law in its original form or "with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly." This seems to make it clear that those petitioning for submission to the voters may choose which legislative amendments they like and discard those they do not like. Amendments are made to bills at several points in the legislative process--by committee action or by floor action in either house. A committee report containing amendments is deemed to have incorporated the amendments in the bill, and these amendments may be included in the form of the proposed law in the supplementaty petition even though the house itself never voted on the bill (Pfeifer v. Graves, 88 Ohio St. 473, 1913).

5. If the General Assembly fails to pass the bill or if it takes no action within four months from the time it is received by the General Assembly, supplementaty petitions may demand the submission of the proposal to the voters.

Comment: What is action by the General Assembly? If the bill is referred to committee but nothing more happens, is this "no action" so that the initiators must act within 90 days after 4 months, or is this then failure to pass the bill so that the initiators can wait until the end of the session before the 90 days begins to run?

The Attorney General has held that there is nothing to preclude the General Assembly from acting after the expiration of 4 months on an initiated bill.

6. Supplementary petitions signed by 3% of the electors, in addition to those who signed the original petitions, demanding the submission of an initiated law under one of the conditions set forth above, and containing the version of the law to be submitted, must be filed with the Secretary of State not later than 90 days after "the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months, if no action has been taken thereon, or after the law as passed by the general assembly shall have been filed by the governor in the office of the secretary of state."

Comment: If either House indefinitely postpones the bill (or, presumably if a committee of either house indefinitely postpones the bill), that constitutes "rejection" by the General Assembly and the 90 day period begins to run then. (Spahr v. Brown, 19 Ohio App. 107, 1925).

Supplementary petitions must also be verified as provided in section 1g and the statutes, and are subject to the other rules applicable to petitions. However, there would not appear to be any reason why the same persons who initiated the proposal to begin with would be the only persons who could circulate the supplementary petitions.

7. If the initiated law has been passed but amended by the General Assembly and it is subsequently, by supplementary petition, submitted to the people for vote, the General Assembly version does not take effect until the people have voted on the proposal and then, if the voters adopt the initiated version, the initiated version takes effect in lieu of the General Assembly version.

Comment: Since the General Assembly version would be subject to a referendum, with the exception of those not subject to referendum pursuant to section 1d, it would be possible to have both the General Assembly version and the initiated version of a law on the ballot at the same time. If both are adopted by a majority of the voters, it is not clear whether the rule of the largest affirmative vote is applicable or whether the initiated version prevails under the "in lieu" provision above even though the General Assembly version records the greater number of affirmative votes.

8. "All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Last Proposed by Initiative Petition First to be Submitted to the General Assembly." "

Comment: This sentence appears to be misplaced. The initiative petition last described in the section are the supplementary petitions and it does not seem logical to include the phrase "to be submitted to the General Assembly" on the supplementary petitions since the proposal has already been submitted to the General Assembly. If, on the other hand, a distinction is intended between "initiative" petition and "supplementary" petition, the expression "last above described" would seem unnecessary since only one type of initiative petition is described in this section prior to this sentence.

9. Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors.

Comment: It is not clear why "measure" is used here or whether there is a difference between a measure and a proposed law. Could the people combine in one law, for one vote, substantive law and appropriations, as the General Assembly is wont to do? Is this language intended to prevent such combination, or, as is more likely, is it only intended to make clear that two separate laws cannot be combined for one vote? Since this sentence refers to the form of the ballots and not to the petitions, it appears to place some sort of duty on the Secretary of State, who is responsible for establishing the form of the ballots.

10. The effective date of a law or constitutional amendment submitted by the initiative to the voters is 30 days after the election if approved by a majority of the electors voting thereon.

Comment: The purpose of postponing the effective date for 30 days is not clear, since laws adopted by the initiative are not subject to gubernatorial veto, and there does not seem to be anything which is required to happen in the 30 day period. Again, if the initiated law is a tax levy or an appropriation for current expenses of government, there is a conflict with section 1d which provides that such laws go into immediate effect. Why should the people's tax levy be postponed for 30 days while the General Assembly's tax levy goes into immediate effect?

With respect to constitutional amendments, those proposed by the General Assembly go into effect when adopted by the people, but those initiated by the people, according to this section, do not go into effect for 30 days. If the amendment itself contains any postponement of the effective date, whether the amendment is proposed by the General Assembly or by initiative petition, such postponed effective date must appear on the ballot so that, when the people vote on it, they vote with knowledge of the postponed effective date; otherwise it is ineffective and the amendment takes effect pursuant to the appropriate constitutional provision. (State ex rel. Schwartz v. Brown, 32 Ohio St. 2d 4, 1972; Euclid v. Heaton, 15 Ohio St. 2d 65, 1968). An earlier case, State ex rel. Duffy v. Sweeney, 152 O.S. 308 (1949) casts doubt on the ability to alter the 30 day effective date for initiated constitutional amendments in any fashion but the circumstances and ballot language of that case do not make a clear cut procedure to follow.

11. Conflicting proposed laws and conflicting proposed constitutional amendments submitted at the same time and adopted by a majority of those voting thereon are resolved by declaring the version adopted that which received the highest number of affirmative votes.

Comment: The provision in this section relating to conflicting proposed constitutional amendments has been held to apply to constitutional amendments submitted by the General Assembly as well as to those submitted by initiative petition (State ex rel. Greenlund v. Fulton, 99 Ohio St. 168, 1919). However, it is not quite so clear whether conflicting proposed laws refers to laws passed by the General Assembly and submitted to the people by referendum petition or only to those submitted to the people by initiative petition.

12. Laws proposed by initiative and approved by the people are not subject to gubernatorial veto.

Article II

Section 1c. The second aforestated power reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect.

History: Section 1c was adopted in 1912 and has not been amended.

Explanation: Section 1c sets forth the details relating to the referendum, except as they are found in section 1d, section 1g and the statutes. An important provision in section 1c is the fixing of the effective date for all laws passed by the General Assembly (with exceptions found in section 1d) as 90 days after filing in the office of the secretary of state by the Governor.

In counting the 90 day effective date, the day of filing in the Secretary of State's office is excluded. (Heuck v. State ex rel. Mack, 127 O.S. 247) The following day is day #1 and the law takes effect on day #91. A referendum petition, signed by 6% of the voters, can be filed any time within the 90-day period.

A referendum petition can challenge "any law; section of any law or any item in any law appropriating money" passed by the General Assembly. Section 1d, however, prohibits the referendum on appropriations "for the current expenses of the state government and state institutions" so that item in laws appropriating money refers to nonappropriation items in appropriation bills and appropriations which are not for current expenses, such as appropriations for capital expenditures.

In this section, as in the other initiative and referendum sections, the meaning of "regular" election is not clear. The election must occur subsequent to 60 days after the petition is filed. For comment on "in any year" see section 1a.

A single referendum petition may not attack two or more separate and distinct laws (Patton v. Myers, 127 O.S. 169, 1933).

Since a referendum petition may attack part of a law, and the section provides that the portion not referred will go into effect at the time it otherwise would take effect but the portion referred will not take effect until the people have voted on it and only then, of course, if the majority vote in favor of it, situations could arise in which part of a law takes effect but cannot be enforced because the main portion of the law is held in abeyance waiting a popular vote. However, because

of the infrequent use of the referendum in Ohio, and particularly in recent years, this problem is difficult to illustrate. A more real problem is one which is similar but arises under section 1d, and that is the distinction between a law levying a tax and one which merely relates to a tax.

No sections of laws nor items in an appropriation act have ever been referred to popular vote in Ohio; only whole laws.

Article II

Section 1d. Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum.

History: Section 1d was enacted in 1912 and has not been amended.

Explanation: Section 1d lists three types of laws which go into immediate effect and which are not subject to the referendum: emergency laws, tax levies, and appropriations for current expenses. "Immediate effect" is interpreted to mean when signed by the governor, not when filed in the office of the Secretary of State.

It is noteworthy that, although these laws are not subject to the referendum, the initiative may be used to adopt, amend, or repeal any of them.

Emergency Laws: In the last 25 regular sessions of the General Assembly, the percentage of emergency laws enacted has ranged from .3% to 27% of the total number of laws for the session. The low point, terms of total number of laws enacted, was in the first session examined--1921-22, when 146 laws were passed. Of these, 13 or 8%, were emergency laws. The total number of laws per session was highest in 1967-68, when 503 laws were passed, of which 69, or 11%, were emergencies. The two highest years for percentages of emergency laws were 1935-36, with 25%, and 1939-40, with 27%. Thirteen per cent of the laws enacted in 1971-72 were emergencies, and 11% in each of the two previous regular legislative sessions.

Section 1d sets forth these rules for emergency laws:

1. An emergency law must be one which is necessary for the immediate preservation of the public peace, health or safety.

2. It goes into immediate effect (i.e., when signed by the Governor).

3. It is not subject to the referendum.

4. To pass as an emergency, a law must receive 2/3 of all members elected to each house.

5. The reasons for the emergency must be set forth in one section, upon which a separate roll call, yea and nay, shall be taken. The emergency section remains a part of the bill only if it receives a 2/3 majority on the separate roll call in each house.

One basic question about emergency laws, perhaps the most controversial one, is whether courts will review a legislative declaration of an emergency. Will the courts examine the reasons given by the legislature and determine whether, in fact, these reasons show a necessity for the immediate preservation of public peace, health and safety? Will the courts examine facts and evidence extrinsic to the legislative declaration to determine whether an emergency exists? In Ohio, the answer is no.

Originally, the Ohio Supreme Court held that the emergency declaration could be challenged in court, but the determination was obiter dictum, and subsequent Supreme Court cases rejected the reasoning of this case. The matter was finally laid to rest in State ex rel. Schorr v. Kennedy, 132 Ohio St. 510 (1937) by a statement that the people intended the legislature to make the determination of the emergency, and the General Assembly is the exclusive arbiter of this decision. If the General Assembly abuses the power, the people can change the Constitution.

The procedural aspects of the emergency declaration must be strictly complied with; the constitutional provisions are deemed mandatory for this purpose. That is, the reasons for the necessity must be set forth, otherwise there is no valid emergency clause; the roll calls must be clearly set forth in the journals of the two houses. The effect of the failure of one of the essential elements of an emergency--failure to set forth the reasons for the necessity, failure to take a separate roll call on the emergency, failure of the bill to receive 2/3 on final passage--is not to invalidate the legislation, assuming all constitutional requirements are met for the passage of ordinary legislation--but only to invalidate the emergency section, and the effect of that is to convert the bill into an ordinary 90-day law and make it subject to a referendum. Activities which take place pursuant to a law assumed to have passed as an emergency can later be ratified if they are found to have been premature, assuming that the law was not defeated on a referendum.

This discussion about what are essentially legislative procedures may lead to the conclusion that emergency clauses are used on bills for purposes other than true emergencies, and have no relationship to the referendum and this is, in fact, the case. Some, although not all, laws enacted as emergencies have emergency clauses attached not because the public peace, health or safety is endangered nor because the General Assembly is attempting to avoid the possibility of a referendum, but because there is a deadline to be met which falls sometime between the date of enactment and 90 days hence--it may be the beginning or end of a fiscal or a calendar year or quarter or other period, it may be an election deadline, or a court-imposed deadline which requires action by a certain time. The dilemma of whether a true emergency exists creates a problem for some legislators, who refuse to vote in favor of the emergency section unless they believe it to be a real emergency even though they favor the legislation.

A possible way out of this dilemma would be to devise a method by which legislation could take effect within the 90 days, perhaps with a special legislative vote and perhaps with a requirement that the reason for the date chosen be stated, but not preclude the possibility of referendum. Having the referendum apply to a law which is already in effect would simply be a way of providing for an initiative process to repeal a law, but making it direct rather than an indirect initiative. Another decision could then be made about whether to retain the present emergency language and finality of the legislative determination of an emergency.

Appropriations: Only appropriations "for the current expenses of the state government and state institutions" (i.e., when signed by the Governor) and are not subject to the referendum. Other appropriations--for capital improvements, for sundry claims--are subject to the same rules with respect to effective date and referendum possibilities as are other laws.

It should be remembered that a referendum may be applied, under section 1c, to a law, section of a law, or item in a law appropriating money. Thus, the petition for a referendum might challenge only one item of proposed expenditure, whether or not it constitutes an entire section of the law; indeed, the entire appropriation act itself is frequently one section. Appropriation acts often contain substantive

law, in addition to items of expenditure, and such substantive law can also be challenged as an "item" in a law appropriating money.

Most of the cases and attorney general opinions setting forth law and rulings regarding items in appropriation acts deal with the gubernatorial veto, since the Governor's veto power extends to "any item or items in any bill making an appropriation of money". Others have dealt with whether a particular item was "for the current expenses of the state government and state institutions" for the purpose of knowing whether the appropriated money was available immediately, but these decisions have not been for the purpose of determining the availability of the referendum.

Laws Providing for Tax Levies: The interpretation of "laws providing for tax levies" is the most troublesome of the three categories of laws specified in section 1d which go into immediate effect and which are not subject to the referendum. This is particularly the case with tax laws because section 1c, in addition to permitting a referendum against any section or item of a law, makes it clear that ". . . the remainder of the law shall not thereby (i.e., by the filing of a referendum petition) be prevented or delayed from going into effect."

How have Ohio courts applied the rule of Section 1(d) that "/1/aws providing for tax levies . . . shall go into immediate effect"?

In State ex rel. Schreiber v. Milroy, 88 Ohio St. 301 (1913) in the year following adoption of Sections 1(a) through 1(g) of Article II the question involved an act of the General Assembly that imposed a limitation upon the aggregate amount of taxes that could be levied and affected creation of the county budget commission. Specifically, it provided that in counties in which the amount of taxable property in cities and villages exceeds the amount of taxable property outside cities and villages that the third member of the commission should be the city solicitor of the largest municipality in the county. The action was brought by the city solicitor of such a city, claiming right to a position on the commission on and after the date upon which the act was approved by the governor and not 90 days after filing with the secretary of state. But the Court rejected his claim, holding that the act in question was not a law providing for a tax levy. Said the Court, "The general assembly did not in this act impose a tax, stating distinctly the object of the same, nor did it fix the amount or the percentage of value to be levied, nor did it designate persons or property against whom a levy was to be made. It merely imposed certain limitations and created an agency." It was, therefore, an act subject to the referendum and could not become effective for 90 days.

In State ex rel. Donahey v. Roose, 90 Ohio St. 345 (1914) the Ohio Supreme Court faced the question of whether an act containing some sections subject to the referendum takes effect only as a whole after the expiration of 90 days from the date it is filed. The Court decided that it did not, and that Section 1 of an act providing for a tax levy of ½ mill on all taxable property within the state went into immediate effect. Said the Court in its syllabus:

> "Section 1c of Article II of the Constitution of Ohio expressly provides for a referendum not only upon any law but any section of a law. All sections of a law not subject to the referendum provisions of this section of the Constitution go into immediate effect when approved and signed by the governor."

State ex rel. Keller v. Forney, 108 Ohio St. 463 (1923) is frequently cited for the proposition of law contained in its syllabus that "exceptions to the operation of laws, whether statutory or constitutional, should receive strict but reasonable construction. The language of Section 1d, Article II of the Constitution, expressly enumerating certain exceptions to the people's right of referendum upon acts of the General Assembly, must be construed and applied with reference to this rule." Before the Court was an act "to revise and codify the laws relating to the levy of taxes and the issue of bonds by taxing subdivisions and to establish a budget system for local expenditures. " The Court said that legislation authorizing or limiting local taxation is subject to referendum and cannot take effect until 90 days after filing.

"This section of the Constitution," reasoned the Court, "relates to the exercise of a state power and therefore the only tax levy in the mind of the Constitution makers was a state tax levy. It is unbelievable that the Constitution makers ever thought of mere local levies in this connection, levies that are made, not by the state, but by local authorities .. ." In a frequently quoted syllabus, the Court said further:

> "The express language 'laws providing for tax levies' is limited to an actual self-executing levy of taxes and is not synonymous with laws 'relating' to tax levies or 'pertaining' to tax levies or 'concerning' tax levies or any agency or method provided for a tax levy by any local subdivision or agency."

The Ohio attorney general has found the following to be "Laws providing for tax levies":

(1) An act to increase the rates of excise taxes on gross receipts and earnings of certain public utilities and to apply the increased revenue resulting therefrom to the general fund of the counties for county statutory relief and welfare purposes. The attorney general made no distinction as to sections within the act, concluding that under the tests of the Forney case the "statutes . . . are clearly of the kind contemplated by . . . Article II, Section 1d . . . The act imposes a tax, stating distinctly the object of the same, the percentage of value to be levied, and designating the persons and property against whom and which the levy is to be made." 1935 OAG 43 (#3841)

(2) An act amending the definitions section in the sales tax, in particular the paragraph defining "retail sale" by the addition of a provision that "farmers and horticulturists shall be considered manufacturers or processors in the interpretation of this act." The attorney general here cited the Milroy case because, he said, "the court apparently recognized that an act which designated persons or property against whom a levy is to be made would be "a law providing for tax levies." The section amended by the act in question he found "inextricably interwoven" with the tax levying section. 1935 OAG 648 (#4311)

(3) Definitions section, in addition to tax levying sections in the liquor control act. 1935 OAG 705 (#4340)

(4) (a) A section in the liquor control act requiring certain permit holders to furnish bond to the state, one of the conditions being liability for taxes on the part of principal and surety. (The preceding opinion held that one of the definitions sections was not subject to referendum because it was a law providing for a tax levy. That section provided for the issuance of various classes of permits, and the attorney general reasoned that the bond provisions "must be considered as being a part" of the

definitions-permit section.

(b) A "retaliatory" section of the same law imposing additional taxes, fees and charges on products of manufacturers from states which impose greater taxes, fees and charges on products of Ohio manufacturers than upon manufacturers located in such states.

(c) Sections prescribing penalties for various violations of law requiring the affixing of stamps to containers of beer, ale and other malt liquor and conferring the power to seize such malt liquors where the tax was not paid, because these provisions "tend to and do relate to the provisions . . . which impose(s) a tax on the sale or distribution in Ohio of beer, ale, and other malt liquors . . ." and "must be deemed to be a part of and incidental to a statute which provides for a tax levy." 1935 OAG 759 (#4396)

The same opinion held that two sections establishing a penal offense for manufacture or sale of beer or intoxicating liquor without being the holder of a permit do not provide for a tax levy "nor do these statutes in any wise enforce a law providing for a tax levy."

It also declares that a general penal section applying to the violations of the liquor control act not otherwise prescribed and a section providing for a refund to certain permit holders of their unexpired permit fees were subject to referendum and not a part of any statute which provides for a tax levy.

(5) An amended section prescribing the rates of taxes levied upon the operation of motor vehicles (present R. C. 4503.04) because it both fixes the amount and designates the kinds of motor vehicles subject to the tax and thus meets the tests of Milroy and Forney. 1937 OAG 875 (#524).

(6) A definitions section in the liquor control act and a section that provided for the issuance of liquor permits of various kinds and fixed permit fees, in many cases based upon the amount of business done. As to the former amended section the attorney general had little difficulty. "Inasmuch as Section 6064-1 General Code contains definitions of terms, which definitions are to be used in the construction and interpretations of Sections 6064-41 and 6064-42 General Code (which two sections he noted specifically provide for the levying of a tax on various products having the specified alcoholic content), Section 6064-1 must be considered as a part of the tax levying provisions."

The second section gave him more trouble. Although his predecessor had held the permit section to be excluded from referendum (see (4) above - 1935 OAG 759) the opinion points out that this was "because the then amended section contained a definition which was necessary for the interpretation of "the levying sections." Examining the amended permit section, the attorney general termed it a "licensing section" but noted that fees collected thereunder had produced "substantial revenue." He then explored the question of whether the permit fee should be construed as a tax or a regulatory measure and concluded that "taken as a whole the legislature in the enactment of the Liquor Control Act . . . acted in the exercise of its police rather than its taxing power." (Emphasis added.) However, he pointed out, the only reason for the referendum exemption applicable to tax levies that he could see was that the revenues of the state should not be delayed by referendum "be they derived through an exercise of the taxing power or through an exercise of the police power."

Noting the substantial revenues that had been produced, the attorney general felt "compelled to conclude that this is a section 'providing for tax levies' . . . 1937 OAG 1279 (#)

(7) A section under which by its terms a "tax is hereby levied on the sale or distribution in Ohio of beer, ale, porter, stout and other malt beverages . . ." even though the section as amended by the act contained an inadvertent error in the definition of malt beverages covered. The application of Section 1d gave the attorney general little difficulty. He held that the tax should continue to be collected despite an error in the act that applied it to malt beverages containing not less than 7 per cent alcohol instead of beverages containing not more than said percentage. 1937 OAG 1417 (#777)

(8) Two sections as amended to exclude from the definition provisions of these sections corporations theretofore included as "signal companies" and public utilities for purposes of excise taxes and property assessment by the tax commission. (If the sections in question did not go into effect until 90 days after filing they would not have been required to pay excise taxes in the year 1937 nor would they have been liable for corporate franchise taxes for that year.) The attorney general said: "With respect to this question, Sections 5415 and 5416 General Code now, as before their amendment, are part of a comprehensive statutory scheme for the assessment . . . of the property of public utilities for purposes of local taxes and for the assessment and levy of excise taxes as such upon public utilities." They were, he said, "a component and essential part of this statutory scheme of taxation, in this that their provisions are definitive, defining the corporations which with respect to the nature of their business have the legal status of public utilities for purposes of taxation." These sections, he concluded "now, as before their amendment, define the persons or corporations which as public utilities are subject to the incidence of the excise tax provided for by the related and following sections . . . and for this reason they are likewise laws providing for tax levies within the meaning of the constitutional provision . . ." The attorney general cited 1935 OAG 648 (2 above) amending the definition of "retail sale" so as to exclude certain sales from incidence of the tax. 1937 OAG 1429 (#779)

(9) Unemployment compensation act, notwithstanding that in enactment the General Assembly had added an emergency clause. Nevertheless, said the attorney general, the act represented in part at least the exercise of the power of taxation. 1937 OAG 100 (#1769)

(10) Section fixing a percentage of gross premiums to be assessed against foreign insurance companies as a tax upon business done in this state. The attorney general cited Forney tests and said that the section being amended by the legislation in question fixes the amount or percentage of value and designates the property against which the levy is made and was "self executing" because no additional legislation was needed. 1939 OAG 561 (#451)

(11) Section establishing employer contributions under the unemployment compensation law and authorizing employer payment of voluntary contributions. Here the attorney general was confronted with the question of whether the unemployment compensation law levies a tax. On the authority of Carmichal v. Southern Coal and Coke, 301 U. S. 495 he ruled that it does. Other sections amended and enacted by the same act, he said, are not statutes levying a tax and therefore do not become effective immediately since the act contained no emergency clause. As to the portion governing

voluntary contributions he added: "I am not unmindful of the fact that there may be certain sentences and certain clauses in such act which do not in and of themselves levy a tax and which might be argued as pertaining to a tax, rather than levying a tax. However, I am unable to find any provision of law which would authorize a part of a section to become effective at one time and part of a section to become effective at a different time." 1943 OAG 378 (#6207)

(12) Two sections in the motor vehicle registration law, both amended by an act that included additional amendments and enactments relating to the same general subject of motor vehicle registration and that were distinguished by the attorney general as to effective date. Here the definitions section was amended to exclude certain vehicles from the definition of "commercial car" and the section prescribing the schedule of annual license tax rates upon motor vehicles was amended to increase such rates for the newly defined category of "commercial car" and to establish rates for the motor vehicle category (bus) excluded from the definition. The rate section also increased certain minimum taxes. Both were held to be laws providing for tax levies, both "inextricably interwoven" with the section containing the operative language actually levying the tax. Sections distinguished as not becoming effective immediately although included in the same act were one providing a different method of distribution of revenues collected and several others relating to penal offenses concerning overweight vehicles and vehicular equipment. 1951 OAG 164 (#435)

In 1961 Sub. H. B. 330 amended R. C. 5739.02 of the sales tax law, a section that contains operative provisions governing levy of the tax as well as its purposes, rates and exemptions. The amendment provided an exemption for the sale of prescription medicines and medically prescribed devices. The question put to the attorney general was whether the exempting of such items constitutes a law providing for a tax levy. Ruling that it did not, the attorney general said that although the act before him amended the section of law creating and levying the tax, "the tax in question and the levy of the tax were authorized by previous acts of the General Assembly, not by the bill in question." The rule relied upon was stated in In re Hess, 93 Ohio St. 230, at 234 as follows:

> "The provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amendatory act."

Case law on the effective date of tax levies and acts containing tax levies is sparse in Ohio. The Roose case and at least two of the attorney general's rulings have taken the view that an otherwise referrable section of a measure would be subject to referendum even if combined with sections excluded from the device but there have been no cases directly on point.

Although the attorney general has made a number of rulings on the subject, few generalizations can be made on the basis of the above summary. Where definitions sections have been found to be "inextricably interwoven" with sections containing the operative language of tax imposition, the attorney general has extended to them the application of section 1(d) of Article II, calling for immediate effect.

On the other hand, laws providing only the "machinery for tax levies have been held not to fall within "immediate effect" provisions (1927 OAG 605). A law providing for exemptions from the inheritance tax was not a law "providing for" a

tax levy (In re Neff, Hamilton County Probate Court, 80 Abs. 439, 1958). Nor was a law increasing the exemptions from the sale tax (1961 OAG 2385)

It was contended that the recent initiative effort to amend the Constitution with respect to the income tax was an unconstitutional effort to effect a referendum on a law providing for a tax levy, but the Supreme Court, in State ex rel. Schwartz vs. Brown, 32 Ohio St. 1, 1972 held otherwise.

The problems of making tax laws effective on a date between "immediately" and 90 days hence are the same, and probably more acute, then those affecting emergency laws.

In a 1950 law review article on the initiative and referendum in Ohio commentators Jefferson B. Fordham and J. Russell Leach observed: "The referendum would doubtless be available as against a measure repealing a state tax. This observation is offered despite its academic ring."[3]

3. Fordham and Leach, "The Initiative and Referendum in Ohio," 11 Ohio St. L.J. 495, 525 (1950).

Article II

Section 1e. The powers defined herein as the "initiative" and "referendum" shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

History: Section 1e was adopted in 1912 and has not been amended.

Explanation: The long struggle about classification of property for tax purposes, and the history of the "single tax" movement, are interesting and instructive histories in Ohio and elsewhere. However, for the purposes of a present-day reading of the Constitution, it is perhaps only relevant to note that the section only forbids the use of the initiative and referendum to pass laws authorizing classification or the single tax and does not forbid the use of the initiative to amend the Constitution for such purposes. (Thrailkill v. Smith, 106 Ohio St. 1, 1922)

The Constitution has, in fact, been amended to permit classification of personal property, and only land and improvements thereon are still subject to the uniform rule of section 2 of Article XII. Section 1e is a restriction only on the people, by means of initiative or referendum, and does not restrict the General Assembly so long as what it does is otherwise constitutional. (State ex rel. Lampson v. Cook, 44 Ohio App. 501, 1932).

With respect to section 1e, Professor Harvey Walker commented in his 1951 review of the initiative and referendum provisions: "The first of these prohibitions already has been avoided by the amendment of Article XII, Section 2, of the constitution to permit such classification. The second seems so improbable today that the elimination of the whole section might now be accomplished."[4] The Fordam and Leach article comments: "While, as we have seen, the single tax movement was still vigorous in 1912, at this day the fear of the ghost of Henry George seems very unreal. In view of the relative ease of amending the constitution, this limitation is pretty weak, in any event."[5]

4. Wilder Foundation, "An Analysis and Appraisal of the Ohio State Constitution, 1851-1951, Chapter 3.

5. Fordham and Leach "The Initiative and Referendum in Ohio," 11 Ohio State Law Journal 495 (1950).

Article II

Section 1f. The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

History: This section was adopted in 1912 and has not been amended. It should be kept in mind that Article XVIII, dealing with the organization and powers of municipal corporations, was adopted at the same time.

Explanation: Initiative and referendum powers are provided for the people of municipal corporations in two ways: by statute, for cities and villages which do not have charters, or by charter. Cities and villages which do not have charters are bound by the statutes with respect to the procedures for initiative and referendum, and when these powers are available; city council cannot, by ordinance, alter these provisions. On the other hand, charter cities and villages can write their own initiative and referendum provisions, and are not bound by the same rules as are constitutionally or statutorily applied to the state initiative and referendum powers and procedures. The only restriction on charter cities and villages is that the questions on which initiative and referendum may be used by the people of the city or village must be a question which the municipality is authorized by law (including, of course, the constitutional home rule provisions) to control by legislative action.

Initiative and referendum powers are not required to be reserved for the people of counties, or townships, or any other political subdivisions, except for specific instances provided elsewhere by the Constitution. A county referendum is required on the adoption of an alternative form of county government, and on changing county boundaries. Municipalities and townships may transfer powers to counties, but the people must be given initiative and referendum rights with respect to measures transferring powers or revoking such transfers. Initiative and referendum rights must also be reserved to the people of any county which has a charter, on all matters which the county may control by legislative action.

The General Assembly has, by statute, given initiative or referendum, or both, rights to the people of counties and townships in certain instances--township zoning ordinances and county optional taxing powers are two examples.

Since many court cases relating to municipal initiative and referendum are based on charter provisions, it will not serve any useful purpose to review all of them here. Some municipal initiative and referendum problems concern the relationship between the initiative and referendum provisions and provisions of Article XVIII, particularly section 5 thereof.

Insofar as municipal charters provide for initiative and referendum in the same or substantially similar language as that in the Constitution, interpretations of that language will be the same. For example, if emergency legislation is permitted a city council by charter and such legislation is not subject to the referendum, by charter provision, the courts will take the same view of the declaration of an emergency by council that they take of a similar declaration by the state legislature--that the procedures specified in the charter must be followed exactly, but the courts will not look behind the declaration and inquire into the reasons for the emergency. Unless a different provision appears in the charter, a measure which is

not subject to the referendum may, nevertheless, be amended or repealed by using the initiative, and city council may repeal or amend an initiated measure. Measures initiated by the people must be ordinances, not merely questions of policy to be implemented by city council. Courts will not keep a measure off the ballot because of claimed unconstitutionality.

A city can, by charter, provide for more or fewer reasons for taking legislation out of the referendum than are provided in the Constitution for state laws. The levy of a tax, for example, may be subject to referendum if not prohibited by charter.

The administrative-legislative distinction which is important, particularly in the use of the initiative and referendum at the municipal level, in other states, notably California, has been applied in Ohio but few cases discussing the distinction or setting forth standards or guidelines for applying it exist. As a general statement, it can be said that city councils may engage in some activities which are not truly legislative in character, but more administrative; these administrative actions are not subject to the referendum. Applying this rule in specific instances is more difficult. An amendment to a zoning ordinance and an ordinance relating to parking spaces have been held to be legislative, hence subject to the referendum; a resolution approving a low rent subsidy program has been held to be administrative.

The Ohio Supreme Court cases have held that municipal wages and other personnel matters which the charter provided should be established by council cannot be fixed or altered by initiative.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee Research Study No. 27
September 19, 1973

Voting Rights of Idiots and Insane Persons
Article V, Section 6

Constitutional provisions are intended to protect individuals as well as society. Just as the Bill of Rights enumerates sacred individual freedoms, the constitution elsewhere restricts civil liberties when deemed detrimental to the whole society. Accordingly, specific groups of persons are denied such civil rights as the right to hold public office and the right to vote. By the Ohio Constitution as well as other state constitutions and statutes, these groups include: persons guilty of felony, treason, bribery, and idiots and insane persons. Research Study No. 25 deals with criminals.

This paper discusses the rights of idiots and insane persons to vote in four sections: (a) the history of laws prohibiting idiots and insane persons from voting, (b) relevant sections of the Ohio Revised Code,(c) a discussion of who can vote,(d) conclusions and alternate approaches. An Appendix listing statutory and constitutional provisions of other states regarding voting restrictions of the mentally ill is found at the end of the discussion.

I

History

Article V, Section 6: No idiot, or insane person, shall be entitled to the privileges of an elector.

The Ohio Constitution, like many other state constitutions, still uses the words "idiot" and "insane", words which have fallen into disfavor and are replaced in some of the newer state constitutions and statutes by terms more narrowly defined. For example, the Virginia Constitution uses the phrase "persons adjudicated to be mentally incompetent by law". New York statute contains the words "persons judicially determined mentally incompetent", and the Ohio Revised Code uses the terms "mentally ill" and "mentally retarded", the latter term founded on discernible anatomical causes. These terms indicate greater understanding of psychic disorder as well as a greater interest in the civil rights of persons so inflicted. But these are very recent strides.

Arguments about voting rights of the insane and idiotic were non-existent in the 19th century and the words of Section 6 of Article V in our present Ohio Constitution have not been changed since adopted in 1851. That any improvement in understanding and treatment of the mentally ill occurred was largely the work of Dorothea Dix, who in 1843 pointed out that mentally ill people were sick, in need of treatment rather than incarceration, and of Isaac Ray, an American forensic psychiatrist. In 1869 he stated the objectives of laws relative to admission of patients to mental hospitals:

> "In the first place, the law should put no hindrance in the way to the prompt use of those instrumentalities which are regarded as most effectual in promoting the comfort and restoration of the patient. Secondly, it should spare all unnecessary exposure of private troubles and unnecessary conflict with popular prejudices. Thirdly, it should protect individuals from wrongful imprisonment. It would be objection enough to any legal provision that it failed to secure these objects

in the completest possible manner."

Although some states followed the recommendations of Dr. Ray in an informal manner (in 1881, Massachusetts encouraged voluntary admission of patients), the first serious treatise on the rights and responsibilities for mentally ill was a proposal drafted for state legislation called the "Draft Act". This recommendation, published in 1952, was prepared by the National Association of Mental Health. The Draft Act was the forerunner of modern legislation providing for treatment for the mentally ill, and many of its recommendations are followed in Ohio today. Among these are provisions: for voluntary admission to mental hospitals; for admission on medical certification; for formal judicial proceedings for indeterminate, involuntary hospitalization which exclude the jury and the compulsory presence of the proposed patient; and to protect individuals from wrongful imprisonment by specifying permissible time limits for detention without a hearing.

Most importantly, for the purposes of our discussion, the proposal formalizes the intrinsic difference in the rights of the voluntary patients, and those adjudged judicially ill involuntarily. The Draft Act states:

> Section 21. (a) Subject to the general rules and regulations of the hospital and except to the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose restrictions, every patient shall be entitled...
>
> (3) To exercise all civil rights, including the right to dispose of property, execute instruments, make purchases, enter contractual relationships, and vote, unless he has been adjudicated incompetent and has not been restored to capacity.

The Draft Act illustrated the use of due process regarding the mentally ill by illustrating the difference between committment and detention. Dr. Francis J. Braceland, in his testimony before the U.S. Senate Subcommittee on Constitutional Rights of the Mentally Ill, in 1961, stated:

> "Of great importance are the laws that provide for emergency committment when something occurs in which it is necessary to study a person for a limited time...One may examine a man and detain him. He is detained for observation, because this word "committed" is a serious one,... Committed patients lose their automobile license, their right to vote, and sometimes they have difficulty in getting a job."

II

Statutory Provisions

The Ohio Revised Code contains provisions regarding mentally ill patients in Chapters 5122., 5123., and 5125. The Revised Code contains a clear cut distinction between voluntary and involuntary patients. Their method of hospitalization differs as does their degree of awareness of their situation - by legal definition. In fact, the code defines the two types separately under "mentally ill individual" and "mentally ill individual subject to hospitalization by court order".

> Sec. 5122.01 (A) "Mentally ill individual" means an individual having an illness which substantially impairs the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations, and includes "lunacy", "unsoundness of mind",

"insanity", and also cases in which such lessening of capacity of control is caused by such addiction to alcohol, or by such use of a drug of abuse that the individual is or is in danger of becoming a drug dependent person, so as to make it necessary for such person to be under treatment, care, supervision, guidance, or control."

Sec. 5122.01 (B) "Mentally ill individual subject to hospitalization by court order" means a mentally ill individual who, because of his illness, is likely to injure himself or others if allowed to remain at liberty, or is in need of care or treatment in a mental hospital, and because of his illness lacks sufficient insight or capacity to make responsible decisions with respect to hospitalization."

One of the major objections leveled against these definitions is that the term "mentally ill individual," which is in need of definition, is being defined in the Code by words themselves in need of definition, obsolete words, or legal terms which are inappropriate to define a medical term. In addition, not all of the persons in mental hospitals are described by the two terms defined above. Voluntary patients may come to a mental hospital because they feel unable to cope with their problems alone. While the treatment afforded by a mental institution may prove beneficial to voluntary patients, their problems need not be as severe as those ascribed to a "mentally ill individual". Between the black and the white, the mentally ill and the mentally healthy, there is a grey area which includes persons to whom treatment proves beneficial, but whose disfunctions are not as grave as those described in the two definitions. These individuals are not defined in the statutes. These problems lead to many others, most important to this discussion, is a lack of a standard by which to judge who does and who does not fall under these definitions. Fred A. Dewey, in his article Imprisonment of the Mentally Ill: An Inquiry into the Deprivation of Civil Liberties Under Ohio Laws and Procedures, cites the following as one of several objections to the laws:

"The fact that the definition of a mentally ill individual is stated to include "lunacy", "unsoundness of mind" and "insanity" throws no light upon, but rather obscures, the meaning of the phrase under discussion. "Lunacy" is not a medical term but is an obsolete legal term for a major mental illness which had its origin in a primitive belief in moon madness. "Of unsound mind" is defined in the Ohio Revised Code (1.02 (E) Baldwin 1971) as including all forms of mental deficiency or derangement. Under this definition, who could qualify as mentally well? Are all judges, psychiatrists, physicians, lawyers and other persons who participate in the disposition of persons alleged to be mentally ill free of every kind of mental derangement? Are all of them entirely free of all illusions, fantasies, delusions, manias, phobias, and egomania?"

According to the Revised Code, a voluntary patient who enters a mental hospital either of his own request, or by that of parent or guardian, depending on age, shall be treated until such time as release is requested. The voluntary patient, who requests his release in writing, or who doesn't object to that request for release by a next of kin, or whoever, will be released unless:

"(T)he head of the hospital, within ten days from the receipt of the request, files or causes to be filed with the probate court of the county where the patient is hospitalized or of the county where the

patient is a resident, an affidavit that in his opinion the patient is mentally ill and the release of the patient would be unsafe or detrimental for the patient or others, release may be postponed on the filing of the affidavit for as long as the court determines to be necessary for the commencement of proceedings as provided in sections 5122.11 to 5122.15 inclusive of the Revised Code, but in no event for more than ten days."

Involuntary hospitalization may occur in one of several ways:

Sec. 5122.06 "Non-judicial hospitalization: ninety-day limitation."

Under this section, a person who does not object in writing may be admitted to a hospital on the application of a friend, relative, spouse, guardian, or head of any institution where the individual may be, and certification by two licensed physicians "that they have examined the individual and that they are of the opinion that he is a mentally ill individual subject to hospitalization by court order."

Sec. 5122.08 "Emergency hospitalization with medical certificate: sixty-day limitation."

A person may be admitted to any hospital upon the application of anyone who believes the individual is likely to cause injury to himself or others if not constrained. In addition, a certification from one physician is required stating that he, too, is of the opinion that the person is mentally ill, and consequently is likely to cause harm to himself or others.

Sec. 5122.10 "Emergency hospitalization without medical certificate: five-day limitation."

Any sheriff, police officer, or health official can take an individual into custody and to a general hospital if they have reason to believe the person is mentally ill and his remaining at liberty will prove injurious to himself or others; pending examination and certification by a licensed physician. Persons included under the previous two sections may also be taken into custody under this section.

Three alternatives are open to patients admitted under the preceding sections. First, within the time limitation mandated by the statutes, the hospital staff may determine that the individual is not in need of psychiatric care, and he will be released. Second, an affidavit may be filed with the probate court requesting a hearing to determine whether the individual may be committed to the mental institution. Thirdly, "Where an affidavit is filed alleging that a party is mentally ill, and such a party is hospitalized, but prior to a hearing of the matter, such party signs an application for voluntary admission, the proceedings should be dismissed." In re Leitner, 87 Abs 467 (1961).

When a hearing is held before the probate court for the purpose of judicial hospitalization, persons specified in the Code are notified (the proposed patient may or may not be notified), an investigation may be conducted by the probate court, and a pre-hearing medical examination is performed. If the court finds the person not to be mentally ill, "it shall order his discharge forthwith" (RC 5122.15). If the person is found to be needing treatment, the court may order him to one of several hospitals or to the care of a private psychiatrist, for a period not to exceed ninety days. Section 5122.15 also states, "Any individual who has been

designated for examination or treatment under this section may, at any time during the ninety-day period, apply for voluntary admission to a hospital under section 5122.02 of the Revised Code. If, at the expiration of the ninety-day period or at any time prior thereto, the court, after a hearing finds that such individual is mentally ill and subject to hospitalization by court order, the court may order "indeterminate hospitalization in a hospital."

The crucial effect of the medical ailment on the legal rights of an individual indeterminately hospitalized is stated in section 5122.36:

> Legal effect of indeterminate hospitalization. Indeterminate hospitalization pursuant to section 5122.15 of the Revised Code, is an adjudication of legal incompetency. Legal incompetency under this section is sufficient grounds for the appointment of a guardian pursuant to Chapter 2111 of the Revised Code...Final discharge pursuant to section 5122.21 of the Revised Code operates as a restoration of legal competency..."

Therefore, the individual who comes before the probate court, is declared mentally ill subject to hospitalization by court order, and indeterminately hospitalized has received due process, and has lost his civil rights, among those, his right to vote.

The major point to be made is that section 5122.36 is the sole justification for taking away the rights of an indeterminately hospitalized mentally ill person, and leaving intact the rights of a voluntarily admitted mentally ill person. He who comes before the courts either retains or loses his rights by due process, and he who does not come before the courts cannot be denied his rights.

III

Who Can Vote?

The present situation for determining who can not vote because of mental illness is unsatisfactory for two reasons:

First, unlike Section 4 of Article V which says that the General Assembly shall have the power to exclude persons convicted of infamous crimes from voting or holding public office, Section 6 of Article V is a direct prohibition - "No idiot, or insane persons, shall be entitled to the privileges of an elector." (emphasis added).

The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or does not fall into the categories. The authority which denies the vote to mentally ill persons resides in the statutes, section 5122.15 dealing with legal incompetency. But this arrangement neither carries out the letter nor the spirit of the constitutional prohibition.

Second, the Supreme Court has ruled that a state must have "a necessary and compelling interest" that would be promoted by the disfranchisement of certain persons.

> "Therefore, if a challenged state statute grants the right to vote to some bonafide residents of requisite age and citizenship and denies

> the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School District 395 U.S. 627 (1969)

As will be discussed in greater detail later in the memorandum, an examination of how excluding mentally ill persons from voting can "promote a necessary and compelling state interest" raises serious questions about why other groups are not disfranchised to promote that same interest.

The problems with the fact that the General Assembly is not expressly given the power, by the constitution, to exclude idiots and insane persons from voting, and powerless to carry out the constitutional prohibition, is two-fold. First, the law now tolerates the voting of some persons who may in fact be mentally incompetent. Second, there are no procedures specifying how a determination of idiocy or insanity is to be made. The only provision which touches upon this determination is section 5122.15 of the Revised Code which says that the probate court shall decide whether a patient is in need of indeterminate hospitalization. The loss of voting rights is based upon a person in need of indeterminate hospitalization also being legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls, or in the case of contested election results. In the latter instances, there are no prescribed methods for how hearings must be conducted, by whom they shall be conducted, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is insane or an idiot allows persons whose opinions are unpopular, or whose lifestyles are not well-received in their community, to be challenged on the basis of insanity at the polls, under the present constitution, with the further consequence that they may lose their right to vote without any medical evidence whatever!

The tolerance which the law now has toward mentally ill patients is in part a response to the consideration that was voiced in the Draft Act and by those interested in the treatment of the mentally ill, that incentives should be given to people with mental problems to seek help on their own, without the embarassment of being carted off by the sheriff or police officer. With the provisions currently in effect, voluntary admittants are advised of the rights to release and are further encouraged to seek help by not having to face a court trial to gain admittance for treatment. Assume that a voluntary patient is aware of his right to request release, but that it is never requested by the patient or his next of kin, because the patient is comfortable in the hospital. This patient whose mental illnesses are being treated by the hospital staff, can vote, according to the present statutes.

> Sec. 5122.03 (B) Judicial proceedings for hospitalization shall not be commenced with respect to a patient unless release of the patient has been requested by himself or his guardian who has applied for his admission.

(Note: Involuntary admissions who were formerly considered mentally ill subject to hospitalization by court order, may switch their admission to voluntary, before or within 90 days after a hearing before the probate court. These people, who someone felt to be so ill as to be in danger of causing injury to themselves or others unless immediately restrained, are now legally entitled to partake in the voting process.)

A person who is a voluntary admittant to a mental hospital, who may, in fact, be suffering from severe mental disorders, maintains his civil rights, such as the

right to vote, because his case never comes before the courts, and the court never has the chance to decide on the question of legal incompetency.

> "The probate court is without authority to inquire into the question of mental illness on its own motion; to invoke the jurisdiction of the probate court, an affidavit is required to be filed pursuant to Sec 1890-23 of this section. 1949 OAG 1278. (GC 1890-23 now RC 5123.18)

(Note: Former RC 5123.18 repealed. See RC 5123.27).

The only jurisdiction the head of the hospital has over the vote of a voluntary patient concerns the type of ballot by which the patient may vote. Since the patient becomes in a sense the "ward" of the hospital, and the head of the hospital his "guardian" the latter may decide whether the patient is well enough to go to the polls, or if he must remain in the hospital during election day. Within the existing law, that person is entitled to vote by absentee ballot.

> Sec. 3503.18 Reports by health officer, probate judge, and clerk of the court of common pleas.
>
> ...at least once each month, the probate court shall file with the board the names and residence addresses of all persons over 18 years of age who have been committed to any hospital for the insane, epileptic, or feeble minded...the board shall remove from the files and cancel the registration forms of ineligible registrants.

Since the voluntary patient who does not request release will not come for judgment before the probate court, his name could not be on the monthly list sent to the Board of Elections. Mr. Bushman, Deputy Director of the Franklin County Board of Elections, reports that the number of patients in mental hospitals requesting absentee ballots is negligible, but the ballots are available to them if their names are on the polling lists, and all other registration procedures are met.

Senator John Carroll testified during the 1961 Senate Hearings on the Constitutional Rights of the Mentally Ill:

> "...committment procedures seem to be an all-or-nothing thing, that patients are found to be either mentally sound or completely incompetent and very rarely is this the case. Voting rights, for instance, are denied to the committed individual, whether he be in, or released from the hospital...For every individual who has been committed and denied his rights, there are many more people who are equally as mentally ill who have never been committed and who have their full rights."

The second prong of the problem stemming from the General Assembly not being given the power by the Constitution to exclude idiots and insane persons from voting exists because not all persons whose sanity or insanity is questioned are inmates of mental hospitals. If there are no procedures prescribed by law as to how a finding of insanity or idiocy is to be made for these people, then the protection of individuals against a misuse of the denial of the right to vote is not safeguarded. Occasionally, people express views that are so diametrically opposed to that of their listeners, that the latter cry out "You must be out of your mind!" While some people maintain lifestyles, ideologies, or opinions that seem outlandish to others, or even to their community as a whole, the community should not have the power (it certainly does not have the right) to deprive any individual of their

civil rights because of individual habits or opinions (habits and opinions which in and of themselves are not unlawful). At the present time, a person could be challenged at the polls on the basis of insanity, and the determination made there by elections judges. Since there are, at present, no legal requirements on how the hearing is to be conducted, what evidence and testimony is required or may be admitted at the hearing, election officials have a very free hand in deciding who is or is not insane at the polls. It is the same in contested election cases. The courts are without legal procedures that determine how these hearings must be conducted, and what evidence is required for a finding of insanity. Surely, the rights of a person whose sanity was in question would be better safeguarded if at least one medical opinion was requred by law.

The problems become even greater because of the inadequate definitions of "idiot" and "insane". The definitions as they are now are intricately woven with a finding of the need for hospitalization by court order and other legal ramifications. In addition, the definition of a mentally ill person found legally incompetent contains the idea that this person is somehow dangerous -"is likely to injure himself or others, if allowed to remain at liberty". This idea or notion of violence certainly does not characterize all mentally ill persons in need of hospitalization. Withdrawal and catatonic states which make mentally ill persons passive and baby-like don't fall into the prior description, but may be just as detrimental to his ability to participate in voting.

Most importantly, the courts, and election judges working within these inadequate and misleading definitions can use their own judgment and let their own prejudices mix to deny individuals the right to vote. If the only persons who could be denied their right to vote were persons who were declared legally incompetent because of their being mentally ill subject to hospitalization by court order, that would be a lesser evil than allowing a person's vote to be discounted because the court feels he is insane (whatever insane means).

An early Ohio court decision reveals much in the way of criteria viewed as indicative of lunacy or commitment to an insane asylum. An election was held to determine whether the sale of intoxicating liquor should be allowed in a certain area. The result of the election was 166 votes in favor of the sale and 167 votes against. The votes of 5 persons were challenged, one of which was alleged insane. The court stated its opinion about the voter in question:

> "It cannot be disputed that he is a person of diseased mind, of a limited mental capacity, incapable of carrying on in an intelligent manner the ordinary affairs of life, having no distinct ideas on the question of morality, right or wrong, and one who would probably not be responsible for any criminal act committed by him. His knowledge is so circumscribed and limited as not to include the most ordinary affairs, having no adequate knowledge of the value of money, or any definite conception of size or direction. The court would not hesitate a moment in judging him a proper person to be confined in an insane asylum were the matter brought before the court on an affidavit of lunacy; neither would there be any hesitation in appointing a guardian for him were a proper application made for that purpose..." In Re South Charleston Election Contest 3 N.P.N.S. 373 (1905)

The court decided to throw out the vote of this man, Leroy Pitzer, with the following explanation:

"The Court cannot convince himself that with 166 intelligent men voting on the one side and 166 intelligent men voting on the other, the deciding vote should be cast by a man of such limited intelligence as Leroy Pitzer. It clearly appearing to the court that he comes well within the class of persons prohibited from voting under the term idiot and insane person, as such terms are defined by medical and legal writers and decisions of Ohio courts..."

Since the 14th Amendment to the U. S. Constitution states "nor shall any State... deny to any person within its jurisdiction the equal protection of the laws", a state must justify prohibiting specific groups from voting by standards acceptable to the Court. Case law states that when the fundamental right of voting is involved (as it is in prohibiting insane and idiots from voting) the exclusion must promote a "necessary and compelling state interest" which was the courts opinion in Kramer v. Union Free School District 395 U.S. 627 (1969)

Two ways of stating the compelling state interest in restricting mentally ill persons from voting could be: (a) an interest in maintaining a knowledgable electorate so that the process of government by the people could be most effective; (b) an interest in maintaining the integrity of the whole system of elections. The success of the electoral process depends, to a large extent, on the confidence that people have in that system. If people thought idiots and insane persons could vote, they might regard elections as a farce. Similar arguments have been offered to disfranchise criminals and persons who could not pass literacy tests because they, either not being of good moral fiber or unable to read the English language could certainly not be trusted to vote intelligently.

While many arguments have been put forth for and against these views, recent evidence indicates that the disfranchisement of mentally ill persons may rest on a misunderstanding of their ability to participate as members of a knowledgable electorate. If the interest of the state is in having only those persons vote who have a demonstrable understanding of the basic framework of their government, that is certainly a praiseworthy and respectable desire. But the presumption seems to be that mentally ill persons subject to hospitalization by court order, do not possess this minimal understanding and therefore the state us justified in denying them the franchise. Conversely, (since the repeal of literacy tests) it is assumed that persons whose mental illness or fitness is not in question, are capable of voting as knowledgable electors. This is clearly false. First, since there is no test presently administered to electors on their awareness of the issues and candidates, there is no justification for making the blanket statements that all voters are knowledgable electors, for some may be just as ignorant on the issues as the person who has been determined legally incompetent because he is mentally ill, and therefore excluded from the voting populace. Secondly, at the meeting of the Elections and Suffrage Committee of the Constitutional Revision Commission on August 14, 1973, the discussion revealed that current legal requirements often obscure the issues which ballot language is about, and even intelligent voters are confused about what they're voting on. Thirdly, the report which is described below offers significant evidence that the exclusion of mentally ill persons on the grounds that they threaten the existence of a knowledgable electorate may not be a justifiable exclusion.

This report, entitled "Mental Patients and Civil Rights: A Study of Opinions of Mental Patients on Social and Political Issues," by Marguerite Hertz, Ph.D., et al., states that mental patients are frequently regarded en masse as incompetent and irresponsible persons, and are often denied civil rights including the rights to marry,

divorce, enter contracts, drive, and to vote.

> "No study has been made of the ability of mental patients to form reasonable opinions on public matters, but not many question the voting restrictions for this group."

The objective of the study was to determine whether the degree of responsiveness to political and social issues differed significantly from patient group to control group. The patient group consisted of 220 patients at a Cleveland State Hospital: 100 male and 120 female, and the control group was comprised of 110 employees: 50 male and 60 female. The two groups were matched for age, educational level, race, sex, social class, and media influence. The latter compatibility was obtainable because both patients and employees were from the greater Cleveland area and exposed to the same television, radio, and newspaper information. The subjects of the report were given 82 questions to which they could respond yes (agree), no (disagree) or undecided. The test was administered during March 7-11, 1960 after Kruschev visited the United States.

> "Opinions sought from patients and employees was at a time when there was considerable public debate on national defense, missile power and space programs, and on relationships with Soviet Russia. Similarly, it was at a time when important national issues were being discussed in preparation for the 1960 election."

The data which the questionnaire was designed to test and the responses of the groups follows:

(a) Degree of responsiveness - median responses
Patients - 77%
Employees- 76%
(b) Capacity for decisiveness-Patients and employees departed from a 50-50 split on the issues in the following manner
agreed with issues as presented - 48 times
disagreed with issues as presented - 22 times
departed from 50-50 split - in 60 out of 82 issues
(c) Patients and employees "voted the same ticket" 70 out of 82 times.
(d) Asked if voted in last 10 years
Patients - 50%
Employees- 69%

It would be overhasty to generalize on the basis of one study, but the results do call into question the opinion that inmates of mental institutions cannot function as part of a knowledgable electorate, since the report shows that they exhibit the same voting tendencies as the employees, who are "unquestioningly" part of the knowledgable electorate. If the report is indicative of the majority of inmates of mental institutions, than the argument that the integrity if the electoral process would be threatened or made farcical by the participation of mentally ill persons, that argument would be based on prejudice rather than on fact.

In the interest of creating a balance between the protection of individuals against a misuse of the denial of the right to vote and the protection of the vote against its use by mentally ill persons, it is beneficial to look at selected decisions of other states on this matter.

Most of the case law concerning voting rights of the metally ill has concerned contested elections which call into question whether the vote of a person alleged to be mentally ill, or of unsound mind, shall be counted. There is no abundance of court decisions on this matter which indicates that voting rights are not often questioned on these grounds. But the variations in the decisions indicate that standards are not fixed for the determination of the contested issues.

In Illinois, a state which has no constitutional or statutory provision for disfranchising those with mental disorders, the Court has been asked to decide on the competency of some individuals for the purpose of elections. The Court did not find that any of the voters brought before them should have their votes discounted, but the decisions indicate a feeling that persons of some intangible degree of mental incompetence can be disfranchised. For example, in Welsh v. Shumway, Ill. 54, 76 (1908), evidence that Mr. Hall was "just like a baby that he had no mind at all" was counterbalanced by a judge swearing him in as a legal voter stating that Hall had answered every question asked of him and that he (the judge) considered from the way he answered them that "his mind was all right, though he was nearly blind, hard of hearing, and decrepit." The Clark v. Robinson, 88 Ill 498 (1878) decision, asserted that "A lunatic or distracted person is not a qualified voter and that his vote may be rejected upon a contest." The Court also stated in its opinion that "it is fair to presume from this decision and other decisions that the vote of a person non compos mentis ought not to be received." Welsh v. Shumway, 232 Ill. 54, 76 (1908).

In Pennsylvania, which also has no constitutional or statutory provision disqualifying mentally disordered individuals from voting, courts have held that certain persons were disqualified. In 1861, the Common Pleas Court in Thomas v. Ewing, 1. Brewst. 92 (1861), held that a voter can be disqualified if it is shown that he was non compos mentis, independent of a finding of lunacy. In 1967, the court disqualified a voter because as a result of a cerebral hemmorage he could not understand the effect of his vote or for whom it was cast.

> "Nowhere in the Code do we find any language concerning the casting of a vote by one in this condition. The Legislature, we think, however, indicates its intent that such person should not be entitled to vote, for in Section 102 of the Code, persons confined to mental institutions are specifically exempt from the definition of a 'Qualified Absentee Elector'." In Re Absentee Ballot Appeals, 81 York 137 (1967)

In states which have constitutional provisions or statutory provisions prohibiting mentally ill from voting, court cases concern whether an individual falls into the class of persons disfranchised. In the case of Ohio law, only one other case, other than In Re South Charleston Election Contest, 3 N. P. N. S. 373 (1905) deals with the case of discounting the vote of a person alleged insane. In Sinks v. Reese, 19 Ohio St. 306, 320 (1869), the Supreme Court stated:

> "We are further of the opinion that the court below erred in counting for the contestor the vote of one Wortz, whome the testimony clearly shows, we think, to be an idiot..."

IV

Conclusion

In the proposed constitution of Delaware (Article 5, Section 5.02) the con-

stitution as revised will give the General Assembly the power to deny the right to vote to mentally incompetent persons. This is an important step forward, if the proposed constitution, which has passed the Senate, passes the House and is adopted. It would serve both to protect the rights of the mentally ill with regard to voting, and also, it would protect the rights of the state in protecting the election system. The constitutional provision would also place the responsibility on the General Assembly to establish a method or procedure as to how hearings on the question of insanity, when a person's right to vote is challenged, must be conducted.

The proposed Delaware constitution uses the words "mentally incompetent". The constitution of Ohio should be amended to delete the archaic terms "idiot and insane" and replace them with more specific language such as "mentally incompetent" or words to that effect. The Ohio Constitution could also be amended to delegate the responsibility of determining the procedure for hearings on insanity when voting rights are challenged to the General Assembly. In order to safeguard the rights of both interested parties: the State and the mentally ill, language which has specific and uniform application would be better able to do the job.

APPENDIX A

MENTAL ILLNESS AND VOTING RIGHTS
GROUPS DISFRANCHISED IN STATE CONSTITUTIONS AND STATUTES

Alabama - idiots and insane persons (statutory)
Alaska - persons judicially determined of unsound mind (statutory)
Arizona - idiots, insane persons, and persons under guardianship (statutory)
Arkansas - idiots, and insane persons (constitutional)
California - idiots and insane persons (constitutional)
Colorado - persons under guardianship, non compos mentis, insane persons (statutory)
Connecticut - idiots and mentally ill persons (statutory)
District of Columbia - persons adjudged mentally incompetent by court (statutory)
Delaware - idiots and insane persons (constitutional)
Florida - persons adjudicated mentally incompetent (statutory)
Georgia - idiots and insane persons (constitutional)
Hawaii - non compos mentis (constitutional)
Idaho - under guardianship, idiotic and insane persons (constitutional)
Iowa - mentally retarded, incompetent, under guardianship by legal determination (statutory)
Kansas - persons under guardianship, non compos mentis, insane persons (constitutional)
Kentucky - idiots and insane persons (constitutional)
Louisiana - "All persons notoriously insane whether interdicted or not" (constitutional)
Maine - persons under guardianship (constitutional)
Maryland - lunatics, non compos mentis, persons under guardianship (statutory)
Massachusetts - persons under guardianship (statutory)
Minnesota - persons under guardianship, non compos mentis, insane (constitutional)
Mississippi - idiots and insane persons (constitutional)
Missouri - idiots, persons under guardianship (constitutional)
Montana - Mentally incompetent persons defined by idiots and insane persons (constitutional)
Nebraska - idiots and insane persons (constitutional)
Nevada - idiots and insane persons (constitutional)
New Mexico- idiots, insane persons, and persons under guardianship (constitutional)
New Jersey - idiots and insane persons (statutory)
New York - persons judicially determined mentally incompetent (statutory)
North Carolina - idiots and insane persons (statutory)
North Dakota - persons under guardianship, non compos mentis, insane (constitutional
Ohio - idiots and insane persons (constitutional)
Oklahoma - idiots and lunatics-persons in institution for mentally retarded (constitutional)
Oregon - idiots and mentally diseased persons (constitutional)
Rhode Island - lunatics, non compos mentis or under guardianship (constitutional)
South Carolina - mentally incompetent persons (statutory)
South Dakota - persons under guardianship, non compos mentis, insane (constitutional)
Tennessee - persons judicially determined mentally incompetent (statutory)
Texas - idiots and lunatics (constitutional)
Utah - idiots and insane persons (constitutional)
Virginia -"no persons adjudciated to be mentally incompetent by law" (constitutional)
Washington - idiots and insane persons (constitutional)
West Virginia - persons of unsound mind (constitutional)
Wisconsin - non compos mentis, persons under guardianship (statutory)
Wyoming - idiots and insane persons (constitutional)

States with no groups disfranchised:
Illinois, Indiana, Michigan, New Hampshire, Pennsylvania, Vermont

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
September 24, 1973

Article V, Section 2a
Office Type Ballot: Alternation of Names

Since approval by the voters of Sec. 2a of Article V of the Ohio Constitution in 1949, two statutes prescribing procedures for rotation of ballots have been held to be in violation of the section. While the question of proper rotation of paper ballots apparently has been laid to rest, one should defer a conclusion as to machine ballots pending the outcome of an appeal presently before the Ohio Supreme Court.

The "notation" provision of Sec. 2a, Article V is

> The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

The Ohio Supreme Court in State ex rel Russell v. Bliss, 156 O.S. 147 (1951), held that this provision is self-executing, and therefore that a statute varying the prescribed procedure is unconstitutional and void. That case invalidated General Code Sec. 4785-80, which set forth the following procedure:

> The total number of ballots upon which the names of all the candidates to be printed thereon are the same, shall be printed in as many series as the number of candidates in the largest group of candidates seeking the same nomination or nominations. Such total number of ballots to be printed divided by the number of series to be printed shall determine the number of ballots to be printed in each series. On the first series of ballots the names of the candidates in each group of candidates shall be in alphabetical order. On each succeeding series the name of the candidate in each group of candidates which was first in the preceding series shall be last, and the names of each of the other candidates in each group shall be moved up one place. The printed ballots shall then be combined in tablets by assembling series of ballots, each consisting of one ballot of each series printed as above described, assembled in the same consecutive order in which the series, of which each ballot is a part, was printed, and by combining as many of such assembled series of ballots as may be necessary to make tablets consisting of the number of ballots required for each precinct.

As an example, if there were five candidates in a city council race, and two running for mayor, five series of ballots would be printed. This would result

in an inequality in the mayor's race, where one candidate would appear in first position twice for every three times the other candidate so appeared. Properly, ten series should be printed, so that all names may appear first an equal number of times. (The present statute prescribing procedures for the "office type ballot" incorporates the language of Sec. 2a, then states how it may be complied with, requiring "the least common multiple" of the number of names in each of the several groups of candidates to be used, and the number of changes made in the printer's forms to correspond with such multiple -- e.g. where there are five candidates in one race and two in another, the least common multiple would be ten. Sec. 3505.03, R.C.)

A provision for voting machine rotation in Sec. 3507.07 of the Revised Code was declared void by the court in State ex rel Wesselman v. Board of Elections of Hamilton County, 170 O.S. 30 (1959). That provision read:

> On each voting machine the names of the candidates of each political party at any general election shall be arranged in a separate horizontal row or vertical column under or opposite the title of the office so that on each voting machine the names of all candidates of each political party will appear in the same horizontal row or vertical column. The order of such rows or columns shall be rotated by precincts in regular serial sequence, so that the names of the candidates of each political party shall appear, in so far as may be reasonably possible, substantially an equal number of times in each of the rows or columns appearing on the voting machines of the voting district under the titles of the offices for which they are candidates. Where there is more than one candidate for the same office of the same political party the names shall be rotated as equally as possible in the bracket under the title of the office sought.

The court held that, as in the Bliss case, supra, the constitutional provision is self-executing, and the statute inconsistent with it. It said that the conflict was more serious in this case than in the Bliss case. Essentially, the court pointed out that the statute provides for a different type of rotation from that of Sec. 2a, including a "rotation within a rotation".

The voting machine issue did not arise in the Hamilton County case, although two years earlier it had been the subject of an Attorney General's opinion (1957 OAG 984). The problem, in essence, was stated as follows:

> "There are a total of thirty-four voting precincts in the City of Sandusky at the present time. Each precinct presently is provided with two voting machines, except that one of the precincts has only one machine. In printing voting machine ballot labels for use at an election of members of the City Commission, the names of the candidates, are totated on successive labels; however, since the ballot label on any particular voting machine cannot be changed during the course of an election, it follows that the rotation of the names of candidates on the ballot in each precinct is limited by the number of voting machines used in the precinct. In view of the fact that the number of candidates for election to the City Commission always exceeds the number of voting machines used in any one precinct, it follows that the rotation of names on successive ballots provided for in Section 45 of the city charter cannot be accomplished with the use of voting machines."

The question asked was whether the Board of Elections could lawfully use voting machines, or whether it was required to use paper ballots in order to comply with the city charter.

The Attorney General answered, first, that it was Sec. 2a of Article V of the Ohio Constitution which the Board had to comply with, not the city charter, since the constitutional provision was self-executing and was binding on charter municipalities. And since the constitutional provision required compliance "in so far as may be reasonably possible" (a leeway not contained in the charter provision), the Attorney General found nothing to prevent the use of voting machines.

The presently operative statutory language concerning rotation of machine ballots, in Sec. 3507.07, which has not been invalidated by the courts, is as follows:

> The names of candidates required to be rotated alphabetically shall be rotated by precincts in regular serial sequence, so that each name of a list or group of candidates for an office shall appear upon the several voting machines used at the election an equal number of times, as nearly as practicable, at the top, at the bottom, and in each intermediate place under the title of the office sought. The ballot labels of all issues shall be arranged in the order provided in section 3505.06 of the Revised Code for paper ballots. In each precinct where the voting machine is used, the board of elections shall provide and conspicuously post at the polling place before opening the polls on election day a sample ballot in full or reduced form, which shall be arranged in the form of a diagram showing the ballot label face of the voting machine as it will appear on the face of the voting machine on election day. Such sample ballot shall contain suitable illustrated instructions for voting on the voting machine.

The Court of Common Pleas of Hardin County recently held the above provision unconstitutional, as in violation of Sec. 2a of Article V, but the Court of Appeals for Hardin County reversed it. An appeal was filed on March 29, 1973, with the Ohio Supreme Court, upon which a hearing is scheduled October 10. (State of Ohio ex rel John L. Roof vs. the Board of Commissioners of Hardin County, Case No. 73-264.)

The Court of Appeals cited State ex rel Automatic Registering Machine Co. v. Green, 121 O.S. 301 (1929) as authority that the constitutional requirement that all elections be by ballot does not prevent use of voting machines.

The court then found Sec. 3507.07 not in conflict with Sec. 2a of Article V, saying that it agreed with the Court of Common Pleas of Mahoning County (in Bees v. Gilronen, 66 OLA 130, 1953) that the constitutional amendment as approved by the electorate in 1949 -- i.e. Sec. 2a-- had in mind the use of voting machines and intended the office ballot to apply to their use.

The facts of the instant case were: the greatest number of machines in the precinct was three; there was no variation of order of names on the machine, once locked; all machines in each precinct were programmed alike -- i.e. all candidates appeared in the same position on each machine in the precinct; and the printer made the choice as to which was the starting precinct for beginning rotation of series. (The appellant also noted that the precincts varied in size from 138 to 853 registered voters.)

The court found, using a hypothetical set of three candidates for an office,

that under the circumstances candidate A would appear at the top of the ballot 3959 times, candidate B 4685 times, and candidate C 4433 times.

The Court of Appeals agreed that this was not compliance with the constitutional requirement, but said that the Board of Elections could have complied, and that the statute is not invalid. It did not invalidate the election, because it said that issue was not raised. The court said that the Board of Elections has the duty to oversee operations of the elective process, including purchase of necessary and appropriate equipment, and arrangements for printing, further admonished the board that it could arrange precincts more equally, so that rotation would work out properly. The court then went on to say:

> The requirement of the constitutional provision, Article V, Sec. 2a, is that the names of candidates be rotated substantially equally insofar as reasonably possible, and it is our view that a precinct-by-precinct programming for such appropriate rotation may be planned and supervised by the Hardin County Board of Elections.
>
> The language of the constitution does not specifically state, nor do we believe it means, that the candidates' names must be rotated as to each voter on each ballot. The intent and meaning of such provision is that each candidate shall receive substantially the same treatment insofar as positioning on the ballot. Conversely, the intent of such section is that no candidate shall receive an unfair advantage in such ballot position.
>
> Such type of programming to effect a fair and equitable result conceivably may be carried out with the use of the instant machines in accordance with the mandate of the constitutional provision, and in accordance with R.C. 3507.07.
>
> ...and if the programming and presentation of candidates' names is applied appropriately by the Board of Elections, the use of these voting machines could well be in conformity with the intent and purpose of such constitutional provision.

In his brief to the Supreme Court, the appellant characterized these as "judicially mandated extrinsic requirements", stating:

> Whether this failure of the voting machine manufacturer to reconstruct its machine in accordance with basic election law requirements should be the basis for reconstructing the basic election law rather than the machine, must be carefully examined.

The crux of the appellant's argument is that the constitutional provision is "an imperative, not a comparative". He states that one can't say the constitutional provision means "as far as possible by any particular method of ballot form chosen, however small the possibility of rotation by such method." Appellant argues that the machine must be able to do it as well as any other method, i.e. as well as the rotation by paper ballot.

Federal constitution

The author of an article in 45 So. Calif. Law Rev. 365 (1972) urges, as an applicable principle, consideration of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution in ballot-rotation cases. His conclusion after study of ten statewide elections in California, and earlier studies on this subject,

was that the first-listed candidate has an advantage, the intensity of bias depending upon several factors: (1) the office (there is less "capricious" voting in gubernatorial elections than in judicial elections); (2) amount of publicity; (3) educational level of the electorate; and (4) complexity of the voting process. He concluded that as a minimum, one can attribute at least a 5 per cent increase in the first listed candidate's vote total to positional bias, and that this will be exceeded in most elections.

The author's frankly stated purpose in making the study was to provide a factual basis for legal action to declare California's statute unconstitutional. That statute requires the name of the incumbent to be placed first on each ballot.

His 14th Amendment argument is that citizens voting for an unfavorably positioned candidate will lose to a group of equal strength whose candidate appears first -- thus violating the one-man, one-vote principle, the same as when citizens of an under-represented area lose influence in the legislature to a district with the same total population, but favored by malapportionment.

Although the Ohio statute is clearly not as vulnerable to attack on 14th Amendment grounds as the California statute reserving the first position for incumbents, the relative inflexibility of voting machines in allowing rotation of names affords an argument on this ground under the recent line of federal cases indicative or an increased sensitivity to voting rights such as Dunn v. Blumstein, 405 U.S. 330 (1972). The 14th Amendment point is, at the moment, speculative, although the trend of federal cases (see Research Study No. 23) is too evident to be ignored.

It should be emphasized here that this discussion concerns the Ohio voting machine statute and its implementation, and not the validity of Sec. 2a of Article V, which does not appear to have any fault insofar as the 14th Amendment is concerned.

Status of the law

A. Ohio's statute concerning paper ballots -- Sec. 3505.03 of the Revised Code -- does not appear to be in conflict with Sec. 2a of Article V of the Ohio Constitution. It requires that the printer make as many changes in the ballot, for purposes of rotating the sequence of names, as the "least common multiple of the number of names in each of the several groups of candidates". This is the type of statute which evidently is required under the decided cases, to avoid conflict with Sec. 2a.

B. Unless the Ohio Supreme Court modifies or reverses the decision of the court of appeals in the Hardin County case, the present statute governing machines ballots will be valid, except for the last paragraph which was declared unconstitutional by the Ohio Supreme Court in 1959. The statute requires rotation of names of candidates by precinct in regular sequence. The following rules, to ensure acceptability under Sec. 2a may be inferred from the court of appeals opinion:

1. Names are to be rotated alphabetically.
2. Names are to be rotated by precinct, and within precincts in serial sequence (i.e. from one machine to another.)
3. A voting machine is acceptable even though it is incapable of changine or allowing change of ballot position once locked for the election. (On the other hand, one cannot infer that a machine would

be acceptable that did allow change during the election.

4. A Board of Elections must oversee operations of the election to ensure that the constitutional requirement is complied with. (i.e. it cannot leave choice to the printer as to the precinct in which to being alphabetical rotation).
5. A Board of Elections should arrange its precincts to contain as near an equal number of voters as possible, so that rotation by precincts will work.

(As an incidental matter, to avoid confusion of the reader, it should be noted that the General Assembly this year repealed Sec. 3507.07 effective November 21, 1973. The repeal does not affect the principles stated by the Court of Appeals for Hardin County, nor does it moot the appeal to the Supreme Court, since the issue is whether a voting machine is able to comply with Sec. 2a of Article V. Presumably, the Secretary of State will need to adopt regulations setting out procedures for operation of voting machines, including requirements for rotation, and in adopting these regulations he has the opinion of the Court of Appeals for a guide-- or the Supreme Court, if it should express a different opinion.)

C. Although it is not possible at present to state what constraints may be placed upon state action in this regard by the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, it appears not unlikely that a state statute or constitutional provision could be invalidated on that basis if it resulted in an unfair distortion in election results. For instance, the Arizona Supreme Court invalidated a provision in that state which required all candidates in groups to be listed alphabetically without rotation; its decision was based on the "privileges and immunities" clause of the Arizona Constitution. (Kautenberger v. Jackson, 85 Ariz. 128 (1958)). Similarly, the California statute placing incumbents at the top on all ballots seems highly vulnerable to attack on that ground. The appellant in the Hardin County case suggested invalidity of voting machine use on that ground because of discrimination against older people who sould not figure out how to operate the machines, but the court of appeals rejected that theory. It would appear that following the rules set out by that court, in addition to ensuring compliance with Sec. 2a, would also prevent invalidity under the 14th Amendment.

Secretary of State's proposals

The committee has already received two suggestions for changing the ballot rotation language from the Secretary of State. In his letter to the committee dated June 19, Secretary of State Brown stated:

> The third proposal would amend Article V, Section 2a to eliminate the necessity for perfect ballot rotation and the possibility that an election may be invalidated for failure of the printed ballots to meet present constitutional requirements concerning such rotation. Variation "A" would allow the rotation to be by precincts, rather than individual ballots. This would be preferable to present requirements, for both economic and administrative reasons. Variation "B", which has already been submitted to Senator Stanley J. Aronoff, but which has not yet been introduced, would remove specific rotation requirements from the constitution entirely, and authorize the General Assembly to provide for such rotation by law. We prefer variation "B" because it offers more flexibility, in that it could be later changed without the

necessity of a constitutional amendment, and on the general principle that whenever possible, such matters should be set forth in the statutes rather than in the constitution.

Variation "A" is as follows:

Sec. 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be ROTATED BY PRECINCTS IN REGULAR SERIAL SEQUENCE, so ~~alternated~~ that each name OF A LIST OR GROUP OF CANDIDATES FOR AN OFFICE shall appear UPON THE BALLOT (insofar as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except....

Variation "B" is as follows:

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated ~~that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of~~ WITHIN the group in which such name belongs. THE GENERAL ASSEMBLY MAY PROVIDE BY LAW FOR SUCH ROTATION. Except....

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
October 8, 1973

Research Study No. 28

Voters - When Privileged from Arrest
Article V, Section 3

The Ohio Constitution, much like other state constitutions, contains a provision which grants a privileged status to voters when exercising their elective franchise, thus making them free from arrest for actions other than treason, felony, or breach of the peace.

> Article V, Section 3: Electors, during their attendance at elections, and in going to, and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace.

This provision appeared in the 1802 constitution, and was repeated in the 1851 constitution and the 1912 constitutional convention debates with no discussion or interpretation of the provision.

The Ohio Constitution extends the privilege from arrest to one other group of people at specified times and places.

> Article II, Section 12: Senators and Representatives, during the session of the General Assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace; and for any speech or debate, in either House, they shall not be questioned elsewhere.

The Ohio Revised Code, in section 2331.11 further extends the privilege and enumerates the conditions under which persons are privileged from arrest.

(A) Members, clerks, sergeants at arms, door-keepers, and messengers of the senate and house of representatives, during the sessions of the general assembly, and while traveling to and from such sessions, allowing one day for every twenty-five miles of the distance, by the route most usually travelled; whoever arrests such a person in violation of this division of this section shall pay one hundred dollars, to be recovered by civil action, in the name and for the use of the person injured;

(B) Electors, while going to, returning from, or in attendance at elections;

(C) Judges of the courts, while attending court, and also during the time necessarily employed in going to, holding, and returning from the court which it is their duty to attend;

(D) Attorneys, clerks of courts, sheriffs, coroners, constables, criers, suitors, jurors, and witnesses, while going to, attending, or returning from the court;

(E) Females, on mesne or final process for any debt, claim, or demand arising upon contract;

(F) Israelites and such other persons as religiously observe the last or any other day of the week as a day of worship, on such day, within, going to, or returning from their places of worship, or during the time of service, and while going to or returning therefrom;

(G) A person doing militia duty under the order of his commanding officer or while going to or returning from the place of duty or parade.

The United States Constitution, Article I, Section IV, provides for the privilege from arrest of Senators and Representatives on conditions substantively the same as our state constitution. However, the federal constitution contains no provision making electors privileged from arrest.

Suprisingly, there is little case law interpreting either the state or federal constitutional provisions, and most of the cases deal with persons other than electors. From the available cases, however, some conclusions can be drawn about the effect of the constitutional provisions. The questions which this memorandum will attempt to answer are: (a) Why should certain persons be privileged from arrest at some times and not at others; (b) What is a breach of the peace; (c) Are persons denoted in the constitutional and statutory provisions privileged only from civil arrest; (d) Are there any instances where said persons may be arrested on civil process; (e) What is arrest, and can an arrest be construed to include service of process; and finally (f) does the constitutional privilege have a significant application in conjunction with present constitutional and statutory provisions? A select summary of other state constitutional provisions for voter arrest is presented in the Appendix.

Why should certain persons be privileged from arrest at some times and not at others?

An examination of the groups of people exempt from arrest, and the conditions upon which this exemption rests, reveals a desire upon the part of the law-makers to relieve these people from conflicting obligations. For example, legislators are elected to do a job. If they could be imprisoned or detained at the whim of individuals for insignificant complaints, the proceedings of the legislature could be continually hindered. Attorneys who take on the charge of defending a client whose very life could depend upon the presence of the attorney at the trial, must somehow be safeguarded against the claims of creditors in order to do their job. The whole system of democracy, elections, and representation of the people depends on electors being able to cast their votes, and so the law must choose carefully those instances where an elector may be prevented from exercising his franchise. Witnesses, judges, military persons alike must be as unhindered as possible in the execution of their duties, if the mechanism of government is to move forward.

The privilege from arrest is restrictive. Senators are not privileged from arrest year-round, but only when they are engaged in legislative duties. The same restriction applies to all privileged groups - only when they are exercising the obligations inherent in their role are they privileged from arrest.

What is a breach of the peace?

The Revised Code carries out the restriction of the Ohio Constitution in Sec. 2331.13.

> "Section 2331.11 to 2331.13 inclusive, of the Revised Code do not extend to cases of treason, felony or breach of the peace, nor do they privilege any person specified in such sections from being served with a summons or notice to appear. Arrests not contrary to such sections made in any place or on any river or watercourse within or bounding upon this state are lawful."

The question has arisen as to whether "breach of the peace" includes cases in which actual personal violence is not present, whether breach of peace includes any indictable offense, or includes only those cases enumerated in the statutes as against the public peace.

It is necessary to draw a distinct line between civil and criminal actions in order to have the clearest understanding of the cases which have sought to interpret constitutional and statutory provisions. A criminal offense is an offense against the state, and would include any offense which threatens the welfare of the state, and for which offense a person may be punished, whether by fine or imprisonment. A civil action is an action between persons, where the welfare of the state is not threatened, but the welfare of one of the parties is threatened by the failure of the other to carry out a promise, or the civil rights of one of the two parties is invaded. Civil actions would include breach of contract, and tort actions such as negligence.

Breach of peace has been held to include all criminal offenses.

> "Now, as all crimes are offenses against the peace, the phrase, "breach of the peace" would seem to extend to all indictable offenses, as well as those which are, in fact, attended with force and violence..."
> Williamson v. U.S., 207 U.S. 425 (1907)

> "Every indictable misdemeanor is a breach of the peace and its author may be arrested at any time and in any place, in Ohio."
> In re Carroll, 12 Bull 9 (1874)

The arguments of the prosecution of In re Carroll offer insight into why a breach of the peace must be construed to include all indictable offenses. The case involved a man who was playing baseball on a Sunday in a park which was not allowed. The man claimed he could not be arrested according to Section 5458 Revised Stats. which provided that no person shall be arrested on Sunday, and the defense cited Revised Stats. 5459, that the privilege did not extend to treason, felony, and breach of peace, to justify the defendant's claim. The prosecution held that his action was a breach of the peace, and he was subject to arrest. The prosecution offered a long and convincing argument about the irrational consequences of allowing non-violent breaches of the peace to go unpunished, and how Sunday could become a day of lawlessness if such a view were carried out.

In a later case, State v. McCoy, 99 Ohio App. (1955), the court held that not every indictable offense was a breach of the peace. The case concerned a minor traffic violation which was found not to be a breach of the public peace.

Both the Carroll and McCoy cases considered whether violence must accompany an offense in order for it to be a breach of the peace, and the McCoy case speaks of "offenses against the public peace". That opinion could raise interesting questions as to whether only offenses against the public peace are

criminal because private peace can be construed to be a civil right. The prosecution's argument in the Carroll decision pre-empted that kind of reasoning by stating that constitutional and statutory provisions refer to"breach of the peace" as any peace, without alleging a distinction between its consideration of public and private peace.

A fairly recent case, Akron v. Mingo 169 Ohio St. 511 (1969) resolved the conflicting court decisions in the Carroll and McCoy decisions:

> "The determinative question is whether the provision of Sec. 2331.13 R.C. that Sec. 2331.11 and 2331.12 R.C., granting privilege from arrest, "do not extend to cases of treason, felony, and breach of the peace," grants immunity only from civil arrest for the reason that the phrase "breach of the peace" includes all criminal offenses."

There the Ohio Supreme Court said that the interpretation placed by the Supreme Court of the United States in Williamson v. U.S. upon the words "treason, felony, and breach of the peace," as used in the U.S. Constitution, Article I, Section 6, excepting such class of cases from the operation of the privilege from arrest, is applied to the same words appearing in the Ohio Constitution, Article II, Section 12, and in Revised Code section 2331.13 and, in Ohio, there can be no immunity for arrest for a criminal offense because the exception to the immunity provision includes all crimes and misdemeanors of every character.

Are persons denoted in the constitutional and statutory provisions privileged only from civil arrest?

If "treason, felony, and breach of the peace" are interpreted so as to include all criminal offenses, then it would seem that the privilege from arrest extends only to civil actions.

An annotation to Gross v. State, (Ind.) 117 N.E. 562 in 1ALR 1156 said:

> "It is provided by the Constitution of the United States and the constitutions of practically all states that members of Congress or of state legislatures shall be exempt from arrest while in attendance at a session of their body or while going to or coming from their place of meeting, except in cases of treason, felony, and breach of the peace. These exceptions are uniformly held to include all criminal offenses so that the exemption applies only to arrest in civil cases."

The Williamson case asserts that the meaning of the exemption was clearly understood at the time of its adoption in the Articles of Confederation as a privilege similar to that accorded to members of the English Parliament.

Lord Chief Justice Denman in Stockdale v. Hansard 7 C&P 737 (1837) offers an explanation of the parliamentary privilege, and the extent of the privilege.

> "The proceedings of Parliament would be liable to continual interruption, at the pleasure of individuals, of everyone who claimed to be a creditor could restrain the liberty of the members...In early times, their very horses and servants might require protection from seizure under legal process, as necessary to secure their own attendance."

An annotation to the 1969 opinion in Powell v. McCormack, 395 U.S. 486, 23 L. Ed. 2d. 491, at page 917 of the Lawyers Edition volume reports:

> "The privilege or immunity from arrest which Article 1, section 6, clause 1 grants a United States Senator or Representative has been held to be a narrowly limited one. Thus this privilege from arrest has been held limited to physical restraint or detention, but inapplicable to the service of a summons or subpoena or to the attachment of property; the provisions exempting from the privilege 'treason, felony, and breach of the peace' has been held to apply to all criminal offenses, so as to make the privilege from arrest applicable only to arrests made in connection with civil suits; and it has been recognized that, on the basis of the express terms of Article 1, section 6, clause 1, the duration of a Senator's or Representative's privilege from arrest is limited to the period during which he is attending a session of Congress and to an additional reasonable period during which he is going to or returning from such session."

The earliest Ohio case dealing with legislative immunity from arrest is apparently one that is contained in Ervin Pollack's volume of Unreported Ohio Decisions prior to 1823 and is a decision of the Supreme Court of Ohio, December 1818, entitled Ex Parte Kerr and described in the following terms:

> "Joseph Kerr of Ross County, was elected to the state legislature and after his election was arrested on a capias ad satisfaciendum. An act of the legislature, 1 Chase 494, February 14, 1805, secured specified persons from arrest in certain cases, such as, members of the general assembly during the time necessarily employed in travelling to and returning from the place of their meeting. Kerr was arrested, however, before the time allowed for his departure for the legislature. When the time for the meeting of the legislature arrived, he applied to the supreme court, in session, for a habeas corpus but was remanded (on two successive tries) on the ground that, as his arrest took place before the privilege accrued, he did not come within the provisions of the law."

Mr. Pollack states that, in the absence of any known opinion, this summary of the case was prepared by the editor from the information furnished in a publication entitled "Western Spy", December 19, 1818. It apparently has to do with statute and not constitution, relates to time of arrest, and is not helpful with respect to the distinction between civil and criminal cases. The term "capias" used in the case description was a judicial writ - defined as a writ of execution which commanded the sheriff to take the party named, and keep him safely, so that he may have his body before the court on a certain day, to satisfy the damages or debt and damages in certain actions. It deprived the party taken of his liberty until he made the satisfaction awarded.

What is arrest? Can arrest be construed to include service of process?

In an annotation to Long v. Ansell 63 App. D.C. 68 (1934) in 94 ALR 1471, the claim is that "the immunity of legislators, if it exists at all hinges on the judicial construction of the word "arrest" and on other generally worded constitutional or statutory provisions or on public policy." Arrest has commonly been defined as a detention of a person, as opposed to service of summons which is a notice of action.

In 1957, the Ohio Supreme Court held that section 2331.11 does not grant a privilege from service of summons in a civil action (i.e. notice that the action has been commenced and requiring an answer to avoid default.)

The question in Walsh v. Mooney, 13 Ohio C.C. (N.S.) 90 (1909 Circuit Court) is a slightly different one, concerning whether a member of the Ohio Senate was exempt or immune from service of summons in a county of which he was not a resident and in which he was present on senatorial business. The action, one for damages for breach of promise of marriage, was a civil action. The common pleas court upheld the defendant senator's motion to quash service. The circuit court affirmed, but the case was based upon a statutory, not a constitutional, interpretation. Two separate sections of the code were relied upon to exempt the defendant not only from arrest but from service of summons, by which a civil action is commenced.

The opinion discusses an earlier case in which a non-resident of Ohio, in Cincinnati upon requisition of the Governor, was served with both summons and an order of arrest. The court there reportedly had found the non-resident exempt from both service of summons and order of arrest not on the basis of statute but that "it had been the law from time immemorial" to exempt someone from out of state summons as well as arrest when he had been brought into the state to attend litigation in that state.

Walsh v. Mooney further states:

> "...the Legislature did not intend to provide that a member of the Senate might be relieved from the duty of answering some petition filed against him in a county other than his residence until the session had closed and he had returned home, and then he must answer; but the section, we think, clearly indicates that during the session, or during the period necessary to travel to and return from the session, and especially when the matter in question is a cause of action which arose more than 10 days before the beginning of the session as mentioned in Section 5031, the privilege is that he will not be summoned at all, and that no legal summons can be served upon him excepting of course in the county of his residence..."

Section 2307.40 of the Revised Code provides that:

> "A member of the senate or house of representatives, or an officer of either branch of the general assembly, shall be privileged from answering to a suit instituted against him in a county other than the one in which he resides upon a cause of action which accrued ten days before the first day of the session of the general assembly of which he is an officer or a member. All proceedings in actions to which such a person is a party shall be stayed during such session, and the time necessarily employed in going thereto and returning therefrom."

Neither the case nor statute apply to voters in their attendance at elections.

Are there any instances where persons may be arrested on civil process?

1. Debt

Section 15 of the Bill of Rights (Article I) of the Ohio Constitution says

that "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud."

Chapters 2713.and 2331. of the Revised Code provide for arrest in civil actions. Chapter 2713. states that a defendant can be arrested before judgment only in the manner prescribed by statute, and excepting proceedings for contempt and actions prosecuted or judgment obtained in the name of the state to recover fines and penalties. Section 2713.02 provides for arrest of a defendant in civil actions before judgment on the following grounds:

(1) that the defendant has removed, or begun to remove, any of his property out of the jurisdiction of the court with intent to defraud his creditors;

(2) that he has begun to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors;

(3) that he has property, or rights of action, which he fraudulently conceals;

(4) that he has assigned, removed, disposed of, or begun to dispose of his property, or a part of it, with intent to defraud his creditors;

(5) that he fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought;

(6) that the money, or other valuable thing, for which a recovery is sought in the action, was lost by playingat any game or by means of a bet or wager.

An arrest before judgment in a county court may be had on certain enumerated grounds which are substantially the same as the first five enumerated.

An execution against the person of a judgment debtor is provided for by Section 2331.01 of the Revised Code, "requiring the officer to arrest such debtor and commit him to the jail of the county until he pays the judgment, or is discharged according to law." The occasions when execution may issue against a judgment debtor are substantially the same as those times a defendant may be arrested before judgment, with the additional grounds in the case of a judgment debtor that he may be arrested, "When the judgment debtor was arrested on an order before judgment and has not been discharged as an insolvent debtor, or the order has not been set aside." (Section 2331.02 (F)).

No Ohio cases challenging the constitutionality of these provisions have been located, but a recent case involving arrest of a defendant before judgment was the New Jersey case of Perlmutter v. DeRowe, 58 N.J. 5, 274 A. 2d 283 (1971). Comparable to Section 2713.02 of the Revised Code is a New Jersey statute that allows arrest of a defendant in civil actions before judgment. The plaintiff issued affidavits that the defendant fraudulently contracted the debt or incurred the demand, and the defendant was required to post bond that he would guarantee his presence at the trial. The defendant charged that incarceration for an alleged civil debt prior to judgment in a suit, unless bail be furnished to secure the debt, violates the constitutional provisions prohibiting imprisonment for debt. The court held against the defendant. The fact that so recent a case questioned the constitutionality of statutes allowing imprisonment for debt indicates that the constitutionality of these statutes remains an open question in Ohio.

2. Contempt

Privilege from arrest on civil process raises related questions concerning the nature of contempt of court procedures, under which one found guilty can be punished by fine or imprisonment not to exceed ten days, or both, under Chapter 2705, of the Ohio Revised Code. Section 2705.01 has been said to recognize the common law right of a judge to find a person in direct contempt of court because it recognizes the right of the judge to "summarily punish" a person guilty of misconduct in the presence of the court. Section 2705.02 enumerates grounds for punishment for contempt that has been recognized as "indirect contempt" - i.e. contempt committed at a distance from the court in time or locate - for any of the following acts:

(a) disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;

(b) misbehavior of an officer of the court in the performance of his official duties, or in his official transactions;

(c) failure to obey a subpeona duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;

(d) the rescue, or attempted rescue of a person or of property in the custody of an officer by virtue of an order or process of court held by him;

(e) failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of his recognizance.

R.C. 2705.03 provides for a hearing, authorizing the issuance of process to bring the accused into court; R.C. 2705.04 provides for bail; R.C. 2705.05 governs trial; and R.C. 2705.06 authorizes imprisonment until an order is obeyed, when contempt consists of omission to do an act which the accused can yet perform.

Section 2705.10 states that contempt procedures furnish a remedy in situations when subpoenas are issued and not obeyed. Some of these code sections have been superseded by the Civil Rules of Procedure (e.g. Sections 2317.11 to 2317.22 having to do with the means of securing attendance of witnesses.) Civil Rule 45 (F) relative to the issuance of subpoenas recognizes powers of contempt.

Contempts of courts have been classified not only as direct and indirect, but also as civil and criminal in nature. Contempt is considered to be "civil" if the punishment is wholly remedial and operates prospectively, according to commentators on the subject.

Acknowledging the difficulty of classifying contempt as civil or criminal, Ohio Jurisprudence states : "Civil Contempt has been defined as that which exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposing party therein. In other words, civil contempts are those instituted to preserve and enforce rights of private persons -- they are civil, remedial and coercive where as the commitment for a criminal contempt is punitive." 11 OJur 2d Contempt 95.

The discussion in Ohio Jurisprudence notes that although it has been stated

that contempts enumerated by statute in R.C. 2705.02 are civil in nature, it would appear that a proceeding under that statute may be punitive in nature, and thus take on the aspect of a proceeding to punish a criminal contempt. If both remedial relief and punishment are given, say the authorities, the latter gives color to and dominates the proceedings.

The question of civil vs. criminal contempt is one that could be explored at length. Little law on the subject in Ohio has been located. Arrest in civil cases would apparently extend to civil contempt and little further. Beach v. Beach, 99 Ohio App. 428 (1955) is authority for the rule that nonpayment of alimony comes within Section 2705.02 of the Revised Code and is classed as a civil contempt. In syllabus 3 of that case the court said:

> "A civil contempt is that which exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposing party therein and proceedings for contempt to enforce a civil remedy and to protect the rights of parties litigant should be instituted by the aggrieved parties and in the name of the party in the cause out of which it arose; and where, in an action for divorce, the defendant husband is ordered to pay temporary alimony and the failure to pay such alimony results in a contempt charge, instituted under Section 2705.02 in which such defendant is fined and ordered imprisoned under Section 2705.05 and where in an appeal from such order the wife is styled as plaintiff appellee and the husband as defendant appellant the proceedings in contempt were properly instituted and correctly captioned, the wife for whose benefit the order was made was the aggrieved party and is the real party in interest."

State v. Cook 66 Ohio St. 566 (1902) involved the arrest of defendant husband and a holding that a final money decree for alimony is not a debt within the purview of the constitutional inhibition against imprisonment for debt but is such an order as that under statute-punishment as for a contempt may follow wilful failure to comply with it.

Holloway v. Holloway 130 Ohio St. 214 (1935) held that a contempt proceeding does lie against a husband for failure to pay alimony as provided in a separation agreement which is incorporated into and made part of a divorce decree.

Finally, Hogan v. Hogan, 29 Ohio App 2d 69 (1972) holds:

> "Language contained in a separation agreement which commands one of the parties to do or refrain from doing a specified act, when incorporated into and made a part of a divorce decree, is raised to the dignity of a decree of court, becomes a command by the court, and is generally enforceable by proceedings to punish as for a contempt under R.C. 2705.02, subject to the defenses generally applicable in such cases, notwithstanding that the command sought to be enforced may have been meant to effect a settlement of the parties in the marital property."

Chapter 2705. authorizes issuance of process to appear for a hearing in contempt cases (R.C. 2705.03) but speaks of the issuance of "another order of arrest" when a party released on bail fails to appear.

In Hastings v. Hofstadter, 258 N.Y. 425 (1932), it was held that service of

subpoena was not an arrest within the meaning of a statute according members of the legislature privilege from arrest. The legislatorin this case was subpoenaed for the purpose of securing his testimony before a legislative committee; and the court declared that, if the fact that a subpoena is not an arrest were to be disregarded, there would remain the fact that a legislator cannot assert his privilege against the legislature itself. The court declined to decide whether the service of a subpoena would be an arrest within the spirit of the statute, if the service had been in aid of a proceeding pending in court.

An early Pennsylvania case is reported to the same effect, involving a motion of attachment against a U.S. congressman for not attending court under a subpoena and involving section 6 of Article I of the federal constitution. The Pennsylvania court here said that it "cannot be asserted that service of subpoena is an arrest. It is a mere notice to a party to appear and give testimony." Respublican v. Duane, 4 Yeates 347 (1807).

Other cases held that service of subpoena was not in a literal sense an arrest. One well known case is that of James v. Powell, 26 A.D. 2d 295 (N.Y. Sup. Ct. App. Div. 1966). An important issue in that case was application of a statute on civil contempt for failure to respond to a subpoena. Powell did not deny jurisdiction of the New York court in civil contempt, but set forth in defense that the subpoena was issued and made returnable during congressional session.

Failure to obey the subpoena carried with it the possibility of arrest in the event of disobedience, a factor that caused a dissenting judge to take the position that the immunity of Section 6 applies. The majority opinion, however, stated that under the Hastings decision a subpoena is not an arrest. Observed the majority: "Whether or not the fact that a subpoena may if disobeyed give rise to an arrest brings it within the spirit of the constitutional exemption, has not been authoritatively passed upon, and differing views have been expressed."

Then, examining the purpose of the exemption from arrest the majority concludes that it is to prevent interference with the legislative process and that "it is the broad principle that any such restriction of the judicial branch is limited to the instances where the exercise of judicial power would constitute an actual interference with the legislative or executive branches as distinct from one that is theoretical or conditional."

The record was evidently devoid of a showing of attempted service of subpoena and accommodation to its terms. "The filed record in this and in the companion case leave no room for speculation that the debtor was not amenable to examination at any time or place. And the question of whether attendance on the subpoena would, in fact, work an interference was never presented."

The appellate division held judgment debtor Powell guilty of criminal contempt and imposed a $250 fine and 30 day jail sentence from which he was excused upon compliance with an order of examination. The decision was subsequently affirmed by the highest court in the state without opinion. 18 N.Y. 2d 931 (1966)

3. Waiver of privilege

If an elector, legislator, or other privileged person were arrested on civil process, he is required to state his objection to being arrested on the grounds that he is temporarily privileged from civil arrest. Failure to do so amounts to

a waiver of the privilege. The court said, in Wood v. Kinsman 5 Vt. 588 (1833),

> "A claim of exemption from civil arrest must be interposed in the proceeding at the first opportunity, or it is waived."

Does the constitutional privilege from arrest have a significant application in conjunction with present constitutional and statutory provisions?

The foregoing discussion reveals that the privilege from arrest is very limited owing to the fact that civil arrest is a highly unusual procedure which occurs in exceptional cases where a judgment debtor may be arrested because of fraudulent actions, or in the unlikely case of a person being guilty of civil contempt. The extent of the privilege from arrest is described in Long v. Ansell 94 ALR, 1468:

> "The constitutional exemption has never been interpreted as a retreat for Congressmen and Senators for arrest for crime. At the time of the adoption of the Constitution, there were laws in the states authorizing imprisonment for debt in aid of civil process. Undoubtedly, it was to meet this condition that the exemptions in federal and state Constitutions were aimed. The reason for incorporating this provision in the Constitution has largely disappeared...That which at the time of the adoption of the Constitution was of substantial benefit to a member of Congress has been reduced almost to a nullity."

Conclusion

The constitutional provision which grants electors privilege from arrest does not appear to state a significant privilege, nor to be used. It could be removed from the constitution, since the legislature may provide for the privilege by law, and in fact has done so for groups not mentioned in the constitution.

APPENDIX

Constitutional Language Regarding When Voters Privileged from Arrest

A) Most states which specify that voters are privileged from arrest during elections use language substantively identical to that of the Ohio Constitution:

Article V, Section 3: Electors, during their attendance at elections, and in going to and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace."

These states are: Alabama, Arizona, Arkansas, Colorado, Delaware, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, and Washington.

1) Some constitutions vary slightly in that they contain additional provisions:

California, Iowa, Maine, North Dakota, Utah, and Wyoming, use the words, "on the days of election"

North Dakota includes "illegal voting" among the list of crimes.
Kentucky includes "violation of the election laws".
Georgia mentions "larceny".

B) Five state constitutions specify immunity from arrest by virtue of any <u>civil process</u>.

These states are Connecticut, Minnesota, Nevada, Virginia, and West Virginia.

1) Nevada restricts the privilege to "any general election".
Connecticut specifies, "At all elections of officers of the state, or members of the General Assembly..."

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
November 13, 1973

Article III, Sections 3 and 4; Article II, Section 21
Election Returns for State Officers; Contested Elections

The Ohio Constitution specifies the procedure by which results of elections for state executive officials: governor, lieutenant governor, auditor of state, secretary of state, treasurer of state, and attorney general shall be declared. The present Sections 3 and 4 of Article III of the constitution remain unchanged from their form when adopted in 1851. This is not to say that no move was made to amend these and related sections of the executive article, but that such movements were unsuccessful. This historical development of these two sections is closely connected with the entire executive article, much of which has been discussed in earlier memoranda presented by the Legislative-Executive Committee. Sections 3 and 4 of Article III were considered by the Legislative-Executive Committee, but were referred to the Elections Committee because the subject matter was more appropriate to the latter group's studies. This memorandum will discuss in some detail changes and proposed changes relating to the two sections dealing with election returns for the executive branch.

The two sections of Article III now read:

> Section 3. The returns of every election for the offices, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be the highest, and equal in votes, for the same office, one of them shall be chosen by joint vote of both houses.
>
> Section 4. Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Election returns for the executive branch was dealt with in Article II, Section 2 of the 1802 constitution. It concerned only the election of governor because prior to the 1851 Constitution, the members of the executive branch were not constitutional offices or, as in the case of the secretary of state, were appointed rather than elected. (The status of these and other state officers is discussed in great detail in memoranda from the Legislative-Executive Committee.)

> Section 2. ...The returns of every election for governor, shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the speaker of the senate, who shall open and publish them, in the presence of a majority of the members of each house of the general assembly; the person having the highest number of votes shall be governor; but if two or more shall be equal and highest in votes, one of them shall be chosen governor by joint ballot of both houses of the general assembly. Contested elections for governor, shall be determined by both houses of the general assembly, in such manner as shall be prescribed by law.

The 1851 Constitution speaks of an executive branch rather than just a supreme executive officer. The offices of lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general became constitutional offices, all elected at general elections.

Section 3 in 1851 was changed slightly from the 1802 constitution version. In the 1850-1850 constitutional convention debates, some of the suggestions that were not agreed to were substituting "Legislature" for "general assembly" and including the 1802 provision regarding contested elections for governor in the 1851 proposal. Eventually it was decided to leave the term "general assembly" unchanged and to omit the provision regarding contested elections from that section completely. The suggested changes finally adopted changed reference to the speaker of the senate to President of the Senate, and added a requirement that he shall make the election report during the first week of the session. In addition to opening and publishing the results, as provided in the 1802 section, the 1851 version added "and declare the results".

The discussion of contested elections was taken up by the committee studying the legislative article. Since the revised executive article created an executive branch with all officials being elected by the voters of the state at large, the matter of providing for the orderly settlement of contested elections was deemed important by the committee members. Two proposed provisions were offered before agreement was reached. The first proposal allowed contested elections for the executive department, judges of the Supreme Court and all offices elected by the state at large to be determined by both houses of the general assembly in the matter provided by law. The general assembly would provide legislation governing contested elections for all other offices elected. The proposal was not well received by the committee because some members feared that the law might allow for the board of commissioners, for example, to decide contested election cases regarding its own membership, since such persons were not elected by the state at large. A second proposal would have empowered the general assembly to provide by law for the conduct of all election contests, with the proviso "that no elections shall be contested before either House of the General Assembly, except in reference to their own body". A motion was made to strike the proviso from the proposal in order to prevent the legislature from sitting as a tribunal for contested seats of its own body. Upon observing that Article II, Section 6 provided that each House shall be the judge of the election, returns, and qualifications of its own members, the proviso was omitted because it was merely a repitition of another section of the same Article, not to prevent the legislature from judging election contests concerning its own members. The language finally agreed to remains unchanged in our present constitution.

> Article II, Section 21. The General Assembly shall determine, by law, befor what authority, and in what manner, the trial of contested elections shall be conducted.

Laws concerning recounts and contest of elections are found in Sections 3515.01 to 3515.16, inclusive, of the Revised Code.

Section 4 was a completely new addition to the article, and its substance appeared in an amendment to Section 16 of the proposed executive article. The original proposed section provided that all members of the executive branch would be elected for 2-year terms, and that the governor would fill any vacancies for the remainder of the term or until the disability was removed which created the vacancy. The amended Section 16 provided:

The Secretary of State, the Auditor, Treasurer, and Attorney General, shall be elected at the same places and in the same manner as the Governor. The Secretary of State, Treasurer, and Attorney General for the term of two years, and the Auditor for a term of four years, and until their successors in office shall be qualified. If the office of either of the officers in this section named, shall become vacant by impeachment, resignation, death, or removal, or the incumbent become incapable of performing the duties of the office, the Governor shall fill the vacancy of the office until the next annual election and until his successor shall be elected and qualified, when such vacancy shall be filled by an election. Provided, the vacancy shall have occured 30 days previous. And in the election of any officer in this section named, where a vacancy shall occur, the same shall be for a full term; and if the General Assembly shall not convene at a regular session in January next succeeding said election, the returns thereof shall be sealed up and transmitted to the acting Secretary of State, by the returning officers, and the acting Governor shall, in the presence of the officers of the Executive Department, or a majority thereof, open and declare the result of said election prior to the first Monday in January next preceding said election.

One of the delegates, Mr. Brown of Carroll said "it would be indispensible to have annual general elections. He thought the people would prefer to have an election once in a year, rather than to have a swarm of officers to elect once in two years. We on the part of the Committee saw no reason why when a vacancy should occur, the people might just as well fill it at the first election, as at any other."

(p. 349 Constitutional Convention Debates 1851)

According to another provision of the 1851 constitution, Article II, Section 25, the legislature would commence on the first Monday of January, biennially, beginning in 1852. Hence the problem of an election being held in the November before a January when the legislature would not be in session, and the President of the Senate being unable to declare the results. It was in response to that kind of a situation, where a vacancy might occur, that the latter provision of Section 16 of Article III was given as a solution.

The section was divided after it was submitted to the Standing Committee on Revision, and made into what are now Section 18 and Section 4 of Article III of our present constitution.

The 1874 constitutional convention sought to leave out Section 4 of Article III, and provided that in case of vacancy, the governor should fill it until the first election for governor held more than 30 days after the vacancy occurs. This proposal, if adopted, would have prevented an election to fill such vacancies for almost two years, and would have precluded the problem of the General Assembly not being in session in the January after the election. The proposed constitution, however, was not adopted.

The consideration of the short ballot dominated the 1912 constitutional convention and its consideration of the executive article. Proposal number 16 offered to amend Sections 1-4 of Article III by making the secretary of state, treasurer of state, and attorney general, and several other officials elected at the same time, appointed by the governor. Under the proposal the governor and lieutenant governor would have two-year terms, and the auditor would have a term of four years. No mention was made of what would happen in case any of these

three elected offices had to be vacated, in the proposal, except to say that their term of office shall continue until a successor is elected and qualified. Proposal number 16 was tabled after the eloquent speech of Mr. Hoskins who said that it was not the spirit of the short ballot to make the governor omnipotent, and that the vastly increased power of the governor granted by the proposal was not justified simply to remove six names from the ballot.

Section 4 of Article III permits the legislature to provide the manner in which election returns shall be made to the Secretary of State and declared by the Governor in the event that the General Assembly is not in session the January next following an election for any of the state offices.

Revised Code Section 3505.33 specifies how the board of elections shall determine and declare the results of elections, and mandates the board of elections to certify abstracts of the results to the Secretary of State on prescribed forms. The offices of the executive branch are contained in forms 2 and 3. The section provides that in addition to one copy of the form being kept by the board, one sent to the Secretary of State, that "One copy of Form No. 2 shall promptly be mailed to the president of the senate of the general assembly at his office in the statehouse." R.C. 3503.34 provides:

> "During the first week of the regular session of the general assembly following a regular state election, the president of the senate, in the presence of a majority of the members of each house of the general assembly, shall open, announce, and canvass the abstracts of the votes case for the offices of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general as contained in the Form No. 2 sent to him as required by section 3505.33 of the Revised Code, and shall determine and declare the results of such election for such offices. The candidate for each such office who received the largest number of votes shall be declared elected to such office. If two or more candidates for election to the same office receive the largest and an equal number of votes, one of them shall be declared elected to such office by a majority of the votes of all members of the senate and the house of representatives of the general assembly. If said Form No. 2 has not been received by the president of the senate from the board of elections of any county, the secretary of state, upon request of the president of the senate, shall furnish to him such copies of Form No. 2 as have not been received by him. When said canvass has been completed and the results of the election declared, the president of the senate shall certify to the secretary of state the names of the persons declared elected together with the title of the office to which each has been elected, and from such certification the secretary of state shall issue a certificate of election to each official declared elected and so certified to the secretary of state. Thereupon the governor shall forthwith issue a commission to each of the persons elected to such offices upon the payment to the secretary of state of the fee required by section 107.07 of the Revised Code.

Section 3505.35 of the Revised Code authorizes the Secretary of State to determine and declare the results of all elections for officers reported in Form No. 3. This form includes all the state officers in Form No. 2 as well as chief justice and judge of the Supreme Court of Ohio, members of the senate of the congress of the United States, members at large of the house of representatives of the congress of the United States, district members of the house of representatives of the congress of the United States and all questions and issues submitted to the voters of the entire state. The Secretary of State is authorized to determine

ties, in the case of equal and highest votes, by lot, and to post a declaration of the results conspicuously for at least five days. The tie-breaking decisions of the Secretary of State are binding for all offices except those for executive officials.

> Section 3505.35. Such declaration of results made by the secretary of state, in so far as it pertains to the offices of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general, is only for the purpose of fixing the time of the commencement of the period of time within which applications for recounts of votes may be filed as provided by section 3515.02 of the Revised Code.

This limitation of the Secretary of State's authority seems to be included because of Section 3 of Article III which requires all tie-votes for these offices to be decided by the General Assembly.

In trying to discern why Section 3 was included in the constitution, the historical situation in 1802 is very important. At that time, there was no secretary of state who had the responsibility of chief elections officer. The General Assembly was a constitutional body with continuity and perhaps that is why when the election returns were directed to the seat of government, this meant the General Assembly.

Today, the Secretary of State is the chief elections officer and is trusted to make decisions regarding all aspects of the elections process including breaking tie-votes for those offices which are not outside of his authority by constitutional provision. The results of elections are certainly revealed long before the General Assembly meets in January when the President of the Senate makes this news "public". The constitutional provision requiring such election results to be delivered in a sealed envelope and secret until two months after the election seems to be an anomaly, given the present practices and powers of the Secretary of State.

Conclusion

Section 3 of the constitution's executive article seems to be out-dated since the Secretary of State has been designated by statute as the chief elections officer. The declaration of the results of elections of executive officers by the General Assembly seems to be no longer warranted, especially since the results are made known long before the first week in January. If the General Assembly is the proper authority to settle a tie vote by joint vote of both houses, perhaps the section could be amended to require that the Secretary of State must notify the President of the Senate of such tie-votes and the General Assembly make the final decision. In such a case, the law might provide that a designated official accompany the Secretary of State when he is canvassing the votes for governor and the rest of the executive branch, to preclude any wrongdoing on the part of the Secretary of State. Clearly, any reference to the vote for executive officers, in cases where no tie votes exist, being transmitted to the President of the Senate in a sealed envelope, and then declared by him in January, ought to be removed from the constitution.

If the General Assembly did not want to retain its power to decide tie-votes, Article III, Section 3 could be repealed. Section 3505.35 of the Revised Code should then be changed to make the Secretary of State's decisions binding for the executive office holders as well as all the other elected officials for which the procedure by which he declares the results is now provided for in the statute.

The approval of a constitutional amendment by the voters in 1972 requiring the General Assembly to meet in January of every year renders Section 4 of Article III no longer necessary, since the General Assembly would always be in session when it came time for the President of the Senate to reveal the results of the election for a state office.

The provisions of Article II, Section 21, granting the General Assembly the power to determine, by law, the manner in which contested election trials shall be conducted, do not give the General Assembly any power that it would not have by virtue of Section 1 of that Article, "The legislative power of the state shall be vested in a General Assembly..." Therefore, the repeal of Article II, Section 21 would not diminish the power of the General Assembly in this regard. However, the section could be retained if its repeal were considered to be problematic, since its provisions are just a repitition of the powers inherent in the General Assembly.

State	Governor takes office as of March, 1974		Legislature convenes in regular session		
			Year	Month	Day
Alabama	1/18/71	(Monday)	Odd	May	First Tuesday
Alaska	12/5/70	(Saturday)	Ann.	Jan.	Third Monday
Arizona	1/4/71	(Monday)	Ann.	Jan.	Second Monday
Arkansas	1/14/73	(Sunday)	Odd	Jan.	Second Monday
California	1/4/71	(Monday)	Even	Dec.	First Monday
Colorado	1/12/71	(Tuesday)	Ann.	Jan.	Wed. after first Tues.
Connecticut	1/6/71	(Wednesday)	Ann.	Odd-Jan.) Ev.-Feb.)	Wed. after first Mon.
Delaware	1/16/73	(Tuesday)	Ann.	Jan.	Second Tuesday
Florida	1/5/71	(Tuesday)	Ann.	Apr.	Tues.after first Mon.
Georgia	1/12/71	(Tuesday)	Ann.	Jan.	Second Monday
Hawaii	12/7/70	(Monday)	Ann.	Jan.	Third Wednesday
Idaho	1/4/71	(Monday)	Ann.	Jan.	Second Monday
Illinois	1/8/73	(Monday)	Ann.	Jan.	Second Wednesday
Indiana	1/8/73	(Monday)	Ann.	Nov.	Third Tues. after first Monday (*)
Iowa	1/8/73	(Monday)	Ann.	Jan.	Second Monday
Kansas	1/8/73	(Monday)	Ann.	Jan.	Second Tuesday
Kentucky	12/7/71	(Tuesday)	Ev.	Jan.	Tues. after first Mon.
Louisiana	5/9/72	(Tuesday)	Ann.	May.	Second Tuesday
Maine	1/7/71	(Thursday)	Odd	Jan.	First Wednesday
Maryland	1/20/71	(Wednesday)	Ann.	Jan.	Second Wednesday
Massachusetts	1/20/71	(Wednesday)	Ann.	Jan.	First Wednesday
Michigan	1/1/71	(Thursday)	Ann.	Jan.	Second Wednesday
Minnesota	1/6/71	(Wednesday)	Odd	Jan.	Tues.after first Mon.
Mississippi	1/18/72	(Tuesday)	Ann.	Jan.	Tues.after first Mon.
Missouri	1/8/73	(Monday)	Ann.	Jan.	Wed. after first Mon.
Montana	1/1/73	(Monday)	Ann.	Jan.	First Monday
Nebraska	1/7/71	(Thursday)	Ann.	Jan.	First Tuesday
Nevada	1/4/71	(Monday)	Odd	Jan.	Third Monday
New Hampshire	1/3/73	(Wednesday)	Odd	Jan.	First Wednesday
New Jersey	1/17/74	(Thursday)	Ann.	Jan.	Second Tuesday
New Mexico	1/1/71	(Thursday)	Ann.	Jan.	Third Tuesday
New York	1/1/71	(Thursday)	Ann.	Jan.	Wed. after first Mon.
North Carolina	1/5/73	(Friday)	Odd	Jan.	" " second Mon.
North Dakota	1/2/73	(Tuesday)	Odd	Jan.	Tues.after first Mon.
Ohio	1/11/71	(Monday)	Ann.	Jan.	First Monday (**)
Oklahoma	1/11/71	(Monday)	Ann.	Jan.	Tues.after first Mon.
Oregon	1/11/71	(Monday)	Odd.	Jan.	Second Monday
Pennsylvania	1/19/71	(Tuesday)	Ann.	Jan.	First Tuesday
Rhode Island	1/2/73	(Tuesday)	Ann.	Jan.	First Tuesday
South Carolina	1/9/71	(Saturday)	Ann.	Jan.	Second Tuesday
South Dakota	1/2/73	(Tuesday)	Ann.	Jan.	odd-Tues.after third Mon. ev.-Tues.after first Mon.

State	Governor takes office as of March, 1974		Legislature convenes in regular session		
			Year	Month	Day
Tennessee	1/16/71	(Saturday)	Odd	Jan.	First Tuesday
Texas	1/16/73	(Tuesday)	Odd	Jan.	Second Tuesday
Utah	1/1/73	(Monday)	Ann.	Jan.	Second Monday
Vermont	1/4/73	(Thursday)	Odd	Jan.	Wed. after first Mon.
Virginia	1/12/74	(Saturday)	Ann.	Jan.	Second Wednesday
Washington	1/8/73	(Monday)	Odd.	Jan.	Second Monday
West Virginia	1/15/73	(Monday)	Ann.	Jan.	Second Wednesday
Wisconsin	1/4/71	(Monday)	Ann.	Jan.	First Tues. after Jan.15
Wyoming	1/2/71	(Saturday)	Ann.	Jan.	odd- Second Tuesday ev.- Fourth Tuesday

Ohio Constitutional Revision Commission
Elections and Suffrage Committee: What's Left
March 31, 1975

Constitutional Provisions Concerning Report of Election Results to the Legislatures of Selected States

Alaska - Article III, Section 4. The Governor's term begins the first Monday in December after election.
Article II, Section 3. The legislative session begins on the fourth Monday in January.
There is no provision in the constitution requiring the declaration of election results or the resolution of tie votes by the General Assembly.

Hawaii - Article III, Section 11. The legislature convenes the third Wednesday in January.
Article IV, Section 1. In case of a tie vote for governor, the winner shall be determined according to law. The term of office of governor begins the first Monday in December after election.

Iowa - Article III, Section 2. The session of the General Assembly begins the second Monday in January.
Article IV, Section 15. The terms of Governor and Lieutenant Governor shall commence on the second Monday in January next after election.
Article IV, Section 4. Tie votes for Governor and Lieutenant Governor shall be resolved by joint vote of the General Assembly.

Kentucky - Section 36. The session of the General Assembly begins Tuesday after the first Monday in January.
Section 73. The Governor's term begins the fifth Tuesday after election.
Section 70. Tie vote for Governor is determined by lot as prescribed by the General Assembly.

Louisiana - Article III, Section 8. The legislature shall meet in regular annual session on the second Monday in May.
Article V, Section 4. The Governor and Lieutenant Governor shall enter upon the discharge of their respective duties on the first day following the announcement by the Legislature of their election.
Article V, Section 2 contains a requirement like that of Ohio's Constitution - (Art. III, Sec. 3) that the election results for Governor and Lieutenant Governor be sealed and transmitted to the legislature, etc.

Montana -Article V, Section 3. Legislative sessions commence as provided by law.
Article VI, Section 1. Executive branch terms begin first Monday in January.

North Dakota - Article II, Section 41. The legislative term begins the first day of December after election, or at such other time as provided by law.
Article III, Section 74. Tie votes for governor broken by two houses at next regular session.

Oregon - Article IV, Section 4. Legislative session begins second Monday in January.
Article V, Sections 4 and 5. Reporting of election results to General Assembly and transmission (sealed, etc.) for the office of Governor similar to Ohio's language in Article III, Section 3 of Ohio Constitution. The governor's term begins as provided by law.

Texas - Article III, Section 5. Commencement of legislature as provided by law.
Article IV, Section 4. Governor's term begins first Tuesday after legislative

session begins or as soon thereafter as is practicable.
Article IV, Section 3. Requirement for transmittal and reporting of election results similar to that of Ohio Constitution for executive officers.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee: "What's Left"
March 27, 1975

Limitations on Calling Special Sessions of the General Assembly (selected states)

State	Legislature may call	Legislature may determine subject	Limit
Alaska	2/3 legislature	Yes	30C
Hawaii	Petition of 2/3 members of each house	Yes	30L*
Kentucky	No	No	None
Louisiana	Petition of 2/3 members of each house	Yes, if legislature convenes itself	30C
Montana	Petition of majority of members	Yes	None
Pennsylvania	Petition of majority of members	No	None
Texas	No	No	30C

'C' stands for calendar days

'L' stands for legislative days

* - session may be extended

Comment

The Proceedings of the Illinois Constitutional Convention in 1970 include a proposal to revise the executive article with respect to the canvassing of votes for the executive branch by the legislature, and the breaking of tie votes by the legislature. The proposed amendment, which was approved by the convention, eliminated the constitutional requirement that the results of elections for executive officers be canvassed by the House after organized, and that, in the event of a tie, there would be a joint vote of both houses. The amendment proposed that election returns be transmitted to the secretary of state or other person or body provided by law to examine and total the results. In the event of a tie, contestants would draw lots to determine which shall be elected. The proposal was further amended to allow substitution of the state board of elections for the secretary of state as the recipient of the election returns. The section reads as follows:

> Article V, Section 5. The election returns for executive offices shall be sealed and transmitted to the Secretary of State, or other person or body provided by law, who shall examine and consolidate the returns. The person having the highest number of votes for an office shall be declared elected. If two or more persons have an equal and the highest number of votes for an office, they shall draw lots to determine which of them shall be declared elected. Election contests shall be decided by the courts in a manner provided by law.

One delegate commented" We are trying to set up some machinery so that the governor will be officially elected and can make his plans and so on before the legislature comes in - getting ready to make his appointments and so on." (p. 1288)

Louis E. Lambert, the author of "The Executive Article" which appears in State Constitutional Revision, W. Brooke Graves, Editor, observes "Of the (legislative) session which begins in January following the November election, the governor, exhausted by a hard campaign and with many patronage problems facing him, hardly has "an opportunity to take the initiative in the most encompassing set of policy decisions that a legislative session makes...Budget decisions are, on a more general level, decisions on tax rates and tax policy and on the general scale of state activity." Of course, the governor of a one party state would have more time to engage in budget decisions before the legislative session convenes." (p. 196)

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
November 13, 1973

Section 7, Article V
Convention Delegates - the Bedsheet Ballot

Section 7 of Article V of the Ohio Constitution requires, concerning presidential nominations, that all delegates to the national conventions of political parties be chosen by direct vote of the electors. Each candidate for delegate must state his first and second choices for the presidency, which preferences are to be printed on the primary ballot below the name of the candidate for delegate. The section also provides that the name of no candidate is to be so used without his written authority.

Prior to the primary election of May, 1972, it had been traditional for the two major parties in Ohio each to bring one slate of delegates and alternates before the voters at the party primary, pledged to a "favorite son". Considerable factionalism developed among Democrats in 1972, resulting in numerous slates of delegates being placed on the primary ballot. Voting machines could not accommodate all the names; in some places paper ballots were used in place of machines, and in others paper ballots were used in addition to machines.

Secretary of State Brown offered a bill in the General Assembly, to apply to that election only, to allow boards of election to provide for "slate" voting, wherein a vote for a candidate would elect his slate--rather than offering the voter the entire list of delegates and alternates for each candidate.

Representatives of the Attorney General, the Governor, and the Ohio AFL-CIO were quoted as telling the Senate Elections Committee that the proposal was unconstitutional, and the Committee voted to indefinitely postpone the bill. (Columbus Dispatch, March 1, 1972.)

The Secretary of State thereupon instructed the 28 counties which used voting machines to use paper ballots in conducting the election of Democratic delegates to the national convention.

The Board of Elections of Franklin County estimated that this would cost it an additional $280,000.

The Cincinnati Enquirer noted that the county's multimillion dollar Coleman electronic ballot-counters would not be used, because there were too many names of delegates for the Democratic presidential primary (258) for the machine to handle. (Cincinnati Enquirer, May 2, 1972.) Names of delegates appeared in columns on the ballot, under each presidential candidate's name. The voter could mark a large box beside the name of the presidential candidate, or pick and choose from among the delegates. The Enquirer cautioned that if the voter marked a box and the name of one or more delegates or alternates, his ballot would be invalidated. Also, marking of more than 38 delegates or 19 alternates would invalidate the ballot.

The Enquirer also pointed out that some leading Democrats had recently announced a switch of allegiance from Muskie to another candidate, cautioning that if a voter voted for one of these delegates who had switched allegiance, his vote would still be counted for Muskie.

In Cleveland, an historic mess occurred as voting machines did not arrive in

time, keys were missing so that machines could not be activated, and machines were programmed incorrectly. In some 100 precincts the election was re-set for another day by the federal district court. While there was no report of the role of the "bedsheet ballot" in this mix-up, the Cleveland Plain Dealer editorialized the next day as follows (in excerpt), under the heading "Get Rid of Bedhseet Ballot":

> It is ridiculous to list as many as 578 names of convention delegates on ballots. Voting machines cannot be used with so many names. Election officials have to resort to bedsheet ballots. This was a contributing cause of yesterday's foulup.
>
> Voting in the future should be restricted to slates pledged to the various presidential candidates. The option of voting for individual convention delegates should be eliminated.

The editorial went on to note that Cuyahoga County election officials anticipating the same problem, some time earlier had sought a change in procedures from the Ohio General Assembly, but were told that a law simplifying this procedure might be unconstitutional. The editorial concluded: "It should be possible to do that before the next presidential election rolls around four years from now."

The Secretary of State has proposed adoption of S.J.R. 5 by the 110th General Assembly (Aronoff-Gillmor). This would amend Section 7 of Article V to allow voting for a slate of delegates and alternates whose names would not appear on the ballot, but who would be identified only by the name of the first choice of such delegates for the presidency. This proposal does not appear to offend any federal constitutional requirement.

The Constitutional Debates

Section 7 had no predecessor in the Ohio constitutions prior to 1912. In the Proceedings and Debates of the Constitutional Convention of 1912, there is considerable discussion of the evils of the state convention method of nominating candidates, and the need for a direct primary.

Theodore Roosevelt, addressing the Convention, said:

> I believe in providing for direct nominations by the people, including therein direct preferential primaries for the election of delegates to the national nominating conventions. Not as a matter of theory, but as a matter of plain and proved experience, we find that the convention system, while it often records the popular will, is also often used by adroit politicians as a method of thwarting the popular will. In other words, the existing machinery for nominations is cumbrous, and is not designed to secure the real expression of the popular desire.(p.382)

Franklin J. Stalter, of Wyandot County, observed:

> The convention method of nominating candidates has been in general use throughout the Union. It has within the past few years been superseded by the primary system in many of the states and in fact in this state. This demand for a primary system has come from the feeling that the delegate convention has become corrupt; that deals are made and delegates are bought and sold; that the rank and file of the party, who do not make politics their business and will not indulge in dishonorable practices, can not make their influence felt. (p. 973).

Mr. Stalter also predicted: "It is likely that ere long the convention that

nominates the president will only register the voice of the people as heard at their primaries."

J. W. Tannehill, of Morgan County, admonished:

> The chief cause of the frequent failure of representative government lies in the corrupt, boss-controlled, drunken, debauched and often hysterical nominating convention. The convention must go. (p. 1239)

Mr. Tannehill made the motion to adopt what is now the first half of Section 7. Following is that part in its present form, which is very close to the language of Mr. Tannehill's motion except that the reference to vote for United States senator was added by subsequent amendment:

> All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality.

Mr. Tannehill called attention to the reference to petitions:

> You will notice that I have made a change permitting nominations by petition. The object of that is to permit nominations for school boards and judges, if you want to, by petitions, to keep them out of politics.

Concerning relief of township officers and officers of small towns, he made the following observation:

> We have been reversing the rule. We have been nominating justices of the peace by the direct primary and nominating governors and "little" officers like that at corrupt conventions. Now let us make a change. The direct primary is useful where there is an office worth while. Nobody wants a township office. I was on an election board two years ago and when we printed the ballots half of the township places were blank. Nobody wanted them. Why go to that expense when nobody wants the office? They can be nominated by a petition. I hope no one will offer an amendment on that. The country people are demanding it. This feature will save every county every other year $1000. It will save the state of Ohio next year $100,000 that is absolutely thrown away. I trust that no one will offer an amendment taking this provision out because it means two hundred thousand farmer votes for this proposal.

John D. Fackler of Cuyahoga County then moved to amend the proposal to add the following, which is the present language of that part, verbatim:

> All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

This feature of Section 7 was not discussed nor explained. Neither has it been the subject of any court cases or Attorney General's opinions that we have been able to discover. Apparently, the amendment was made in response to Mr. Roosevelt's statement of his beliefs.

An interesting reference occurs earlier in the Proceedings. Henry W. Elson, of Athens County, arguing for fewer elective offices (the "short ballot") said that political bossism is fostered by the long ballot, because people don't know who they are voting for, and people can't select minor officials as well as the Governor can. The word "bedsheet" evidently des not appear in the Proceedings, but Mr. Elson referred to the long ballot as the "blanket ticket". (p. 382)

Recent cases and legislation

Recent federal cases and resultant action by the Ohio General Assembly may have some bearing on this discussion, although playing no part in the "bedsheet ballot" problem of 1972. Under the Ohio election law before it was amended to its present form (effective March 23, 1972), primary elections were available, as a practical matter, only to the major parties. A "political party" was a group of voters which, at the last preceding regular state election, polled for its candidate for Governor at least 10 per cent of the entire vote cast for Governor, or, if it did not qualify in that respect, filed with the Secretary of State 90 days before an election a petition signed by qualified electors equal in number to at least 15 per cent of the total vote for Governor at the last preceding election. If a group of voters could not thus qualify as a "political party", it could not have a primary election--and thus by requirement of Section 7, Article V, could not send delegates to a national convention.

A federal district court in 1970 held this and related provisions of the Revised Code unconstitutional . (Socialist Labor Party v. Rhodes, U.S.D.C Southern District, Ohio, 318 F. Supp. 1262) It based this holding on the holding of the U.S. Supreme Court in Williams v. Rhodes, 393 U.S. 5 (1968), in which the Court had said:

> Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group (a third party) from ever getting on the ballot and the Ohio system thus denies the "disaffected" not only a choice of leadership but a choice on the issues as well.

The court found this to be invidious discrimination in violation of the Equal Protection Clause of the 14th Amendment.

In response to the Socialist Labor Party case theGeneral Assembly amended the election laws so that a party's candidate for Governor need have received only 5 per cent of the vote in order that it retain its status as a "political party", or in the alternative, that instead of filing a petition with signatures equal to 15 per cent of the total vote for Governor, that the petition need have signatures equal to only 1 per cent of that number. At the same time, the General Assembly authorized smaller political parties to place their candidates' names on the general election ballot without a primary, whether they are chosen by a national or state convention, or by other means in accordance with party rules. (Sec. 3505.10, R.C.)

The court in the Socialist Labor Party case said specifically that Ohio

could not require a party to hold a national convention. Reference to Section 7, Article V reveals that the Ohio constitution does not require a national convention--it only states that all delegates from Ohio to the national conventions of political parties shall be chosen by direct vote of the electors. However, the recent amendment to Sec. 3505.10 raises a question--it allows a party to get its candidates on the general election ballot without having held a primary, even though these candidates were chosen in a national convention. If Ohio delegates participated in such a convention, and they were not chosen in a primary, would not the party's candidate be disqualified from running in the general election by the provision of Section7 requiring direct election? The answer would appear to be "yes", and it would also appear that the answer would be the same if S.J.R. 5 were adopted. The federal cases do not appear to cast any doubt on the validity of either Section 7 or S.J.R. 5.

A home rule case

Not related to the foregoing discussion, but nonetheless an interpretation of Section 7, is the opinion of the Ohio Supreme Court in Fitzgerald v. Cleveland, 88 OS 338 (1913). The court in that case held that the City of Cleveland may adopt a charter which abolishes nomination by direct primary election, and that its election provisions need not comply with the requirements of Section 7. The court found that Section 7 and Article XVIII (the "home rule" amendment) were adopted at the same time, and that thus it was apparent that it was not the intent of the General Assembly or the electors to take away the power of a charter city to provide its own election procedures.

Some conclusions

The provisions of Section 7, Article V of the Ohio Constitution requiring all delegates from Ohio to the national conventions of political parties to be chosen by direct vote of the electors caused a problem in the May, 1972 primary because Democratic Party candidates were so numerous that voting machines could not contain all the delegates' names. S.J.R. 5, proposed by the Secretary of State to allow voting for a slate of delegates who are not named on the ballot, but are identified only by name of their first choice for the presidency, would eliminate this problem of the "bedsheet" ballot.

Any party that selects candidates through a national convention must hold a primary election to be on the general election ballot in Ohio--thus the primary election in Ohio must be held prior to the national conventions, which are traditionally held in the summer. I.e., the primary election may not feasibly be moved forward to bring it closer to the November election, at least, not in presidential years.

Section 7 requires a primary only if a party holds a national convention. If a party selected its candidates in some other manner, the primary would not be required. Sec. 3505.10 allows smaller parties to omit the primary, and have their candidates placed directly on the November ballot.

It is evident from the Proceedings and Debates of the Constitutional Convention of 1912 that the main purpose of Section 7, Article V was to eliminate the convention system of choosing candidates, and to allow voters maximum freedom of choice, by requiring a direct primary. While the Secretary of State's proposal to keep delegates' names from the polls would appear to be a step away from popular choice, the experience of May, 1972 is evidence that (1) having a choice of many names is not the same as having an effective choice, (a subject which was also

discussed at length in the 1912 convention), and (2) under the present system the"bedsheet ballot" problem aside, it is reasonably simple to give the voters a wide choice of candidates for a party's presidential nomination in a primary election.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
November 26, 1973

Article III, Section 18 - What vacancies Governor to fill;
Article XVII, Sections 1, 2 - Time for holding elections, and Terms of officers, vacancies, etc.

Article III, Section 18. Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Article XVII, Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Article XVII, Section 2. The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.

And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

With the adoption of a new constitution in 1851, the elective offices were expanded in both the executive and judicial departments. The auditor, treasurer, secretary of state and attorney general became elected officers of the executive branch. Judicial officers, who had formerly been appointed by joint vote of the General Assembly, were recognized as elected officials. With this expansion was created a need to define the terms of office, the time of election, and what procedure would be followed if any of these elected offices became vacant before the incumbent had completed his term.

The judicial and executive articles, as adopted in 1851, provided for these officers to be elected at a general election, and specified the length of time these officers would serve. The powers of the Governor to fill vacancies was expanded in 1851.

> Article III, Section 18. Should the office of auditor, treasurer, secretary, or attorney general, become vacant, for any of the causes specified in the fifteenth section of this article, the governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election, at the first general election that occurs more than thirty days after it shall have happened; and the person chosen shall hold the office for the full term fixed in the second section of this article.
>
> Article IV, Section 13. In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened.

The provisions of these sections of the 1851 constitution have been amended since their adoption, and half a century later, in 1905, Article XVII was adopted which expanded upon several features of these as well as other articles, in which officials of one branch or level of government were elected. Since Article XVII contains subject matter dealt with in other articles, amendments to that article required amendments to the related sections of other articles, and vice versa. The result is that the constitution is, in several places, repititious. The cause of this problem can best be seen by tracing the development of Section 18 of Article III, and Sections 1 and 2 of Article XVII.

The executive officers had two-year terms, except the auditor who held the office for four years, as provided by Section 2 of Article III as adopted in 1851. Should a vacancy occur in any one of these offices, Section 18 of Article III empowered the governor to temporarily fill the vacancy until the next general election which occured more than 30 days after the vacancy occured.

The office of lieutenant governor is not specified as one of the offices in which the governor has the power to fill a vacancy. A vacancy in this office is created, (1) if the governor can no longer hold office, the lieutenant governor is next in line of succession - Article III, Section 15; (2) if the lieutenant governor becomes disabled or is impeached, resigns or dies. Although provisions to fill a vacancy in the president of the senate's and governor's office are contained in Article III, that Article does not contain a provision to fill the vacant office of lieutenant governor.

Section 16. The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided; and in the case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president pro tempore.

Section 17. If the lieutenant governor, while executing the office of governor, shall be impeached, displaced, resign or die, or otherwise become incapable of performing the duties of the office, the president of the senate shall act as governor, until the vacancy is filled, or the disability removed, and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.

Article XVII of the Constitution was adopted in 1905. Its original provisions were:

Section 1. Elections for the state and county offices shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective offices shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Section 2. The office of governor, lieutenant governor, attorney general, secretary of state and treasurer of state shall be two years, and that of the auditor of state shall be four years. The terms of office of judges of the supreme court and circuit courts shall be such number of even years not less than six (6) years as may be prescribed by the general assembly; that of the judges of the common pleas court six (6) years and of the judges of the probate court, four (4) years, and that of other judges shall be such even number of years not exceeding six (6) years as may be prescribed by the general assembly. The term of offices of justices of the peace shall be such even number of years not exceeding four (4) years, as may be prescribed by the general assembly. The terms of office of the members of the board of public works shall be such even number of years not exceeding six (6) years as may be so prescribed; and the term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four (4) years as may be so prescribed.

And the general assembly shall have power to do extend existing terms of office as to effect the purpose of section 1 of this article.

Any vacancy which may occur in any elective state office other than that of a member of the general assembly or of governor, shall be filled by appointment by the governor until the disability is removed or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term in such manner as may be prescribed by law.

Although the officers of the executive branch were elected for terms of an even number of years, and could fit in with the scheme presented by Article XVII, such was not the case with judicial officers. Probate judges had terms of three years, common pleas judges were elected for five years, supreme court judges were elected for not less than five years, etc. The judicial article was not amended to reflect the change in terms of office described in Section 2 of Article XVII until 1912. Perhaps this was due to a clause in Article XVII, Section 2, granting

the General Assembly the power to extend the existing terms of office in order to carry put the purpose of Section 1.

As adopted in 1905, Section 2 of Article XVII repeated many of the provisions contained in Sections 2 and 18 of Article III, and Section 13 of Article IV.

Article XVII was amended in 1947, changing reference to circuit courts to the new words "courts of appeals". The term of office of probate court judges was increased to 6 years. Reference to members of the board of public works and their terms of office was omitted from the 1947 version. It was not until 1954, that a complete overhaul of Article XVII and related sections of other articles took place.. The cause of this revision was a change in the terms of officers of the executive branch, which were increased from two to four years, with the office of auditor remaining at four years.

Section 1 of Article XVII was amended to remove the word "the" before "even numbered years". This change was the only one recommended in that section, and the reason for it was presumably that "the even numbered years" implied all even numbered years, whereas, officials with four year terms would not be elected all even numbered years, but rather every other even numbered year.

Section 2 was amended as follows:

> The term of office of the governor, lieutenant governor, attorney general, secretary of state and auditor of state shall be four years commencing on the second Monday of January, 1959. The auditor of state shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963, and thereafter shall hold this office for a four year term...

Section 2 of Article III was also amended in 1954 to reflect the change in Article XVII with the added wording that, "No person shall hold the office of governor for a period longer than two successive terms of four years."

<u>The short-term vacancy</u>

One situation which the constitution was later amended to avoid was the problem of the short-term vacancy. If an official with a four-year term vacated his office in his fourth year at least 30 days before the November election, a replacement would be elected for 2 months at most. In addition, two candidates for the same office would be running from the same party, one for the two month term, and one for the four-year term commencing the following January. In addition to being confusing to the voter, and problematic to the political parties, the wisdom of campaigning for, and being elected to, a responsible office for such a short period of time, was questioned. The first move to eliminate the problem was made in the judicial article, which, in 1942 was amended in Section 13 as follows:

> In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following

the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Article XVII, Section 2 was not amended until 1970 to prevent filling a short-term vacancy by an election. The last paragraph was changed to say:

> .....Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

The same words were added to Section 18 of Article III in place of the former requirement that a vacancy must be filled by election if it occurs more than thirty days before the next general election.

Conclusion and Recommendations

Article XVII, Section 2, contains provisions that are repeated in other articles of the Constitution. In several places, that Article is inconsistent with the provisions of the judicial and executive articles.

Article XVII, Section 2 specifies the terms of office for judges of the common pleas and probate court as six years. In Article IV, Section 6, the terms of office of judges of the common pleas court are set at "not less than six years". In addition, Article IV recognizes the probate court as a division of the common pleas court. The distinction between the two courts in Article XVII is obsolete. Article XVII also contains a reference to the terms of office of justices of the peace, when in fact, justices of the peace no longer exist.

Paragraph 3 of Section 2 of Article XVII appears to be inconsistent with Section 18 of Article III. As was noted earlier, the lieutenant governor is not one of the offices which the governor has the power to fill should a vacancy arise, according to Sections 15-18, inclusive, of Article III. In paragraph 3 of Section 2, Article XVII, however, it says, "Any vacancy which may occur in an elective state office other than that of a member of the general assembly or of governor shall be filled by appointment by the governor until the disability is removed, or a successor elected and qualified." Those words seem to make a replacement for a vacancy in the lieutenant governor's office a gubernatorial appointee.

If the language creating these two inconsistencies were remedied, the problem of redundancy would remain. The question that must be dealt with is whether it is better to deal with the time of election, terms of office, and vacancies of all elected officials in one article, or whether it is better to treat these matters in each article having to do with elected officials. In either case, dual reference to the same provisions should be eliminated.

In the event that it was decided to treat these subjects in the respective articles, the following changes should be made in Article XVII: Those parts of paragraph 1 of Section 2 dealing with terms of office of members of the executive branch and judges should be deleted, since they are dealt with elsewhere. The last sentence of paragraph 1 should be retained, because it is not provided for elsewhere in the constitution. That sentence reads,

"The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed."

Paragraph 3, giving the General Assembly the power to extend the terms of existing offices to effect the purpose of Section 1 of Article XVII might still be a valuable power since Section 1 deals with municipal officers as well as state and county officers. In the event that the terms of office of municipal officers or other persons whose election is provided by statute, should be changed, the General Assembly's power would provide useful. Paragraph 3, with amended language to remove the inconsistency, should be retained. Although some of its provisions are redundant, it does allow for the filling of vacancies of elected officials whose election is provided by statute, such as board of education officials.

The Secretary of State has proposed additional language for Section 1 of Article XVII.

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years. AN ELECTION FOR A CANDIDACY OR ISSUE MAY BE HELD IN A MUNICIPAL CORPORATION ON A DAY OF A DIRECT PRIMARY ELECTION FOR MUNICIPAL OFFICES WHEN SUCH ELECTION DAY IS PROVIDED BY MUNICIPAL CHARTER. NO OTHER ELECTION SHALL BE HELD ON ANY OTHER DAY THAN THE FIRST TUESDAY AFTER THE FIRST MONDAY IN MAY OR THE DAYS AFORESAID.

The intent of the Secretary of State's proposal seems to be to fix the date of the primary election in May in the constitution, although allowing charter cities some variation. Some people say that this amount of time is necessary if the candidate is to have adequate time before the general election to organize his campaign. However, it may not be a good idea to lock a fixed date into the constitution. Some arguments relating to the question of using other methods of voter registration assert that timing of the primary is an important factor. If a reasonable date could be provided for by statute, it may be a preferable method.

The language of the Secretary of State's proposal seems to preclude the possibility of calling a special election at any time other than May or November. Although the liberty to hold special elections sometimes results in an excessive number of such elections, the power to call a special election when it is of vital importance should not be eliminated.

Initiative and Referendum
Article II, Section 1g

Research Study No. 26A set forth sections 1-1f, inclusive, of Article II of the Ohio Constitution with comment and explanation. This study discusses in similar detail the provisions of section 1g, which contains a number of requirements which apply to all types of initiative and referendum petitions in Ohio.

Section 1g.

Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of the signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed the same on the date stated opposite his name; and no other affidavit thereto shall be required. The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each shall be published once a week for five consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the

constitution. The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

History: Section 1g was adopted in 1912 and amended in 1971, effective January 1, 1972. The 1971 amendment deleted a requirement that the Secretary of State have the initiated or referred law, proposed law, or proposed constitutional amendment together with the pro and con arguments printed and mail or otherwise distribute a copy of the printed information to each electors, as far as reasonably possible. In its place is the requirement that such information shall be published once a week for five consecutive weeks preceding the election in a newspaper of general circulation in each county. Also deleted by the 1971 amendment was a requirement that a petition signer who is a resident of a municipality must place on the petition his ward and precinct.

Explanation:

Section 1g sets forth most of the procedural details for proceeding from idea to ballot. The section is long and involved; if any changes are to be made in it, it would be advisable to consider rearrangement and either breaking the section into paragraphs (it is presently written as one long paragraph and one sentence contains 130 words) or into several sections.

It was, of course, the intention of the framers of the initiative and referendum to write as many details as possible into the Constitution. The convention was marked by sharp debate between those favoring I & R and those opposed, but both groups agreed on one matter, and that was that the legislature was not to be left with the task of filling in the details by law. Those who favored I & R believed that the people's rights would be eroded and the procedures would be made too difficult if left to the legislature. Those who opposed I & R fought to get as many restrictions as possible into the Constitution; otherwise, they believed, the entire legislative process itself would become a shambles because of the great number of petitions filed.

In spite of the desire of the drafters to make the initiative and referendum provisions self-executing, it was apparent that some details would have to be filled in by the legislature. Tacked on at the end of section 1g are two significant sentences: "The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."

The General Assembly has enacted statutes, most of which are presently found in Chapter 3519. of the Revised Code, to "facilitate" the operation of the initiative and referendum. The first was enacted in 1913, as part of the election corrupt practices act, and prohibited paying money or anything of value to a person for signing an initiative, supplementary, or referendum petition. Opinions differ as to whether any of the requirements imposed by statute but not mentioned in the

Constitution are unconstitutional limitations or restrictions on the use of the initiative and referendum. The following discussion will note which requirements imposed by statutes are in addition to those found in the Constitution and in which instances the courts have been asked to judge whether they are too burdensome. However, two general comments are offered:

> "Even this tiny loophole (referring to the last sentence quoted above) has been used by the Assembly to provide additional restrictions which make the exercise of popular law-making much more difficult, under the guise of facilitation. Perhaps the amendment needs clarification to make such usurpation impossible." Harvey Walker in "An Analysis and Appraisal of the Ohio State Constitution, 1851-1951" p. 33.

> "The question whether these are all true implementing provisions or constitute restrictions on the powers reserved to the voters by the constitution has not been adjudicated. It is hardly cause for serious concern. The requirement of 100 signatures is not onerous . . . ." Jefferson Fordham, "The Initiative and Referendum in Ohio", Ohio State Law Journal 495 (1950) p. 502.

Application of Section. The rules of Section 1g generally apply to any "initiative, supplementary, or referendum" petition. The General Assembly has also given the term "supplementary" to a fourth type of petition, and it may be advisable to review the meaning of the various terms to assist in understanding the processes.

An initiative petition is one which proposes either a law or a constitutional amendment. If it proposes a constitutional amendment, it goes directly on the ballot and is not submitted to the General Assembly first.

If an initiative petition proposes a law, it must first be submitted to the General Assembly. If the General Assembly fails to act or acts in a manner unsatisfactory to the initiators, a supplementary petition must then be filed to have the law placed on the ballot for voter approval or disapproval.

A referendum petition challenges a law already enacted by the General Assembly.

If any of the three types of petitions suffers from an insufficiency of signatures, an additional ten days is allowed for securing additional signatures and filing with the secretary of state. Unfortunately, the statute (section 3519.16 of the Revised Code) refers to the part-petitions on which the additional signatures are secured as "supplementary". "Supplementary" thus refers to two different types of petitions.

Every petition--initiative, supplementary, or referendum--is presented in separate parts, each known as a part-petition.

The Preliminary--Presentation to the Attorney General. A preliminary step to the entire process of getting an initiated or referred measure to the ballot is provided for by statute and not mentioned at all in the Constitution. Section 3519.01 of the Revised Code provides as follows:

> "Whoever seeks to propose a law or constitutional amendment by initiative petition or to file a referendum petition against any law, section, or

item in any law shall by a written petition signed by one hundred qualified electors submit such proposed law, constitutional amendment, or measure to be referred and a summary of it to the attorney general for examination. If in the opinion of the attorney general the summary if a fair and truthful statement of the proposed law, constitutional amendment, or measure to be referred, he shall so certify. A verified copy . . . ."

The above provision requiring submission to the Attorney General before filing with the Secretary of State is the provision to which Jefferson Fordham was referring when he commented that 100 signatures did not appear to be an onerous burden. He went on to note that 100 signatures would be only a small portion of the total number required in order to submit the proposal, eventually, to the electors.

There are, however, matters in section 3519.01 which are challengable as restricting the constitutional right to initiative or referendum beyond the purpose and intent of the constitutional provisions. The person proposing by initiative petition or referendum petition a matter to go to the ballot is required to submit to the General Assembly not only the copy of the proposed law, constitutional amendment or measure to be referred, but a summary of it. The Attorney General is required to certify that the summary is a fair and truthful statement of the proposed law or constitutional amendment or measure to be referred. The Secretary of State will not proceed to issue the petitions necessary unless the Attorney General's certification is attached to the summary filed with the Secretary of State.

The purpose of the summary is fairly clear. In 1931, the Ohio Supreme Court in Hubbell vs. Bettman, 124 Ohio St. 24, stated that the summary should be a "short concise summing up which will properly advise those who are asked either to sign the petition or to support the amendment at the polls of the character and purpose of the amendments without the necessity of perusing them at length." In that case the Attorney General had refused to certify the summary and the court upheld this refusal on the grounds that the summary itself was longer than the proposed constitutional amendment. However, it would appear that if, in fact, the Attorney General abuses his discretion in refusing to certify a summary, an action of mandamus will lie to certify the summary. The proponents of the measure will be able to get through the barrier of the Attorney General's required approval if the barrier turns out to be an improper one.

The question may still be raised, however, as to whether or not the entire requirement of submission to the Attorney General might not be unconstitutional because it is an additional burden placed upon the proponents which is not found in the Constitution. Although the question was not raised by the parties to the issue, it was discussed in the Supreme Court's opinion in the recent case of State ex rel. Tulley et al vs. Brown, 29 Ohio St. 2d, 235, March 1972 in conjunction with the recent initiated proposal to amend the Constitution with respect to the income tax. In the Tulley case, Justice Schneider dissented because he finds the requirement of the summary to be unconstitutional. He stated as follows: "Initiative petitions in a statewide matter are to be self-executing and any meddling therewith by the General Assembly should be viewed with distrust unless unmistakably supportive and expeditious." Justice Brown joined in the dissent.

An additional question which may be raised with respect to the requirement of a summary is what is the effect of the summary once it has been prepared and found to be fair and truthful by the Attorney General. Further sections of the Revised Code

require that the summary be printed upon the petitions and the part petitions which people are asked to sign. Also in connection with the income tax initiated constitutional amendment, the question arose as to the effect of the summary because one provision which was contained in the amendment and which was also referred to in the summary was not, for some reason, printed on the petitions. That was the question of the effective date of the initiated measure if approved by the voters. This question was directly before the Supreme Court in the case of State ex rel. Schwartz vs. Brown 32 Ohio St. 4 decided on October 20, 1972, shortly before the matter was voted on in November of that year. An initiated constitutional amendment pursuant to section 1b of Article II takes effect 30 days after approval by the electors. However, in the income tax matter, a special effective date was provided for within the terms of the amendment itself. It was intended to take effect, if approved, on January 1, 1973. The summary submitted to and approved by the Attorney General indicated that the effective date would be January 1, 1973. In the printing of the part petitions, however, the effective date was not mentioned, neither in the summary nor in the text itself. The Supreme Court held that this defect would not be sufficient to remove the matter from the ballot. Justice Leach, writing the majority opinion of the court, stated that the petitions met all of the constitutional requirements and that an effective date of December 8 was compelled by a reading of section 1b of Article II. The opinion states "The terms of such a proposed constitutional amendment are determined under the Constitution, not by the language of the petition submitted for preliminary examination to the Attorney General nor . . . with the Secretary of State."

That decision, also, did not reach the question of whether section 3519.01 conflicts with the Constitution. It referred to the Tulley case, indicating that two members of the court did believe that section 3519.01 was unconstitutional. The court also held that even if the inconsistency between the summary and the text would render the petitions legally deficient, such deficiency must be raised 40 days before the election.

The petition; filing with the Secretary of State. After securing the approval of the Attorney General, section 3519.01 requires that "a verified copy of the proposed law, constitutional amendment, or the law, section, or item to be referred, together with the summary and the Attorney General's certification, shall then be filed with the Secretary of State, who shall forthwith designate a convenient size for the sheets of paper, the color and weight of paper to be used, and general order or arrangement of such petition, the form of which shall be substantially as set forth in section 3519.05 of the Revised Code."

Section 3519.05 sets forth the form of the petition and section 3519.02 contains an additional requirement to be placed upon the petition and each part petition which is as follows: "The petitioner shall designate in any initiative, referendum, or supplementary petition and on each of the several parts of such petition a committee of not less than three nor more than five of their number who shall represent them in all matters relating to such petitions. Notice of all matters or proceedings pertaining to such petitions may be served on said committee, or any of them, either personally or by registered mail, or by leaving such notice at the usual place of residence of each of them."

Although the constitutional provisions themselves do not designate that the committee named in the petition shall be the persons to be served with all notices and proceedings pertaining to such petition, the Constitution does require or at least permit that there may be named in the petition the person or persons who

prepare the arguments or explanations on behalf of the petitioners and it does seem a logical extension of that constitutional provision to the provisions of section 3519.02. This section has never been challenged as being unconstitutional and it does not appear likely that this does constitute any additional burden other than in addition to the Constitution and would appear certainly to facilitate the proceedings on any petition.

The requirements, however, of section 3519.04 are in addition to the constitutional requirements. Section 3519.04 requires the Secretary of State to submit a request to the Tax Commissioner in any instance when the Secretary of State receives petitions for a proposed state law or constitutional amendment proposing the levy of any tax or involving a matter which will necessitate the expenditure of any funds of the state or any political subdivision. The Secretary of State is required to request the Tax Commissioner to prepare an estimate of any additional expenditures of public funds proposed and the annual yield of any proposed taxes. The Tax Commissioner is required to prepare such estimate and file it in the office of the Secretary of State. The Secretary of State is required to distribute copies of such estimates with the information pamphlets which, prior to 1972, were required to be prepared for any initiated matter or any referred matter and distributed to electors. Since the pamphlets are no longer required, and since the tax information is not required to be included in the advertising which replaced the pamphlets, it is no longer clear what use should be made of the tax and expenditure information.

Section 1g states that any petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the Constitution. It further provides as follows: "The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it resolved by the people of Ohio." Section 3519.05 of the Revised Code, setting forth the form of the petition, contains these requirements and additional requirements as well, in the form of the petition. Among other things section 3519.05 specifies what shall be in capital letters and what words shall be printed in what point type. The requirement of section 3519.01 of the Revised Code that the Secretary of State must designate the convenient size for the sheets of paper or the color and weight of paper to be used are in addition to any constitutional requirements.

The Secretary of State has introduced into the 110th General Assembly a bill to change some of the sections in Chapter 3519., and among these requirements which the bill would remove are these provisions of section 3519.01 which require him to designate a convenient size for the sheets of paper, the color and weight of the paper and the general order of arrangement. The general order of arrangements is of course already set forth in section 3519.05 and it is apparently the Secretary of State's opinion that it is not necessary for him to designate a convenient size of the sheets of paper or the color or weight of paper to be used.

Part petitions serve the obvious purpose of enabling the gathering of signatures by different persons, called solicitors, throughout the state at the same time. It is quite clear that it would be impossible to have a petition on which many thousands of signatures could be placed. Each part petition is required to contain all of the information designated for a petition. One requirement of part petitions and that is a statutory requirement that a part petition may not contain signatures from more than one county is not required by the Constitution but by law and will be discussed under another heading.

Section 3519.07 of the Revised Code requires the petitioners' committee to advise the Secretary of State from time to time in writing of the number of part petitions required by the committee. The committee is required to pay for the cost of printing the petitions and part petitions. Part petitions are to be numbered serially and when printed are delivered to and remain in the possession of the Secretary of State until issued by him as requested by the committee. The committee is required to pay for the cost of printing the part petitions before they may be issued to them. This section would be repealed by S. B. 238 and the printing of petitions would presumably be left to the petitioners. The Secretary of State would no longer monitor the process.

Solicitors. Section 1g of Article II contains some provisions regarding persons who solicit signatures on petitions; these provisions are expanded and added to by the statutes. The Constitution provides as follows: "To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signed signed the same on the date stated opposite his name; and no other affidavit thereto shall be required."

Although the statutes do not require additional information in the affidavit itself the statutes do make additional requirements with respect to the solicitors and the information that the solicitor must put on the petition. Section 3519.08 of the Revised Code requires that the committee of petitioners list the names and addresses of all solicitors who will circulate part petitions, and the number of part petitions to be issued to or for the use of each. The Secretary of State is required to indicate on each part petition issued the name of the solicitor. Further, the Secretary of State is required to keep a record of the number of each part petition charged to each solicitor and the date of issuance of each part petition. No person whose name is not listed with the Secretary of State is permitted to solicit signatures.

S. B. 238 would repeal section 3519.08, thus removing the Secretary of State from the business of keeping a record of solicitors and petitions.

A second requirement with respect to the solicitor is the statutory requirement contained in section 3519.05 of the Revised Code which requires the petition to state that "In consideration of his services in soliciting signatures to this petition the solicitor has received or expects to receive . . . . . from . . . . . whose address is . . . . . " Before any elector signs the part petition, the solicitor is required to have completely filled in the above blanks. If the solicitor is not being paid for his services, he must insert the word "nothing" in the first blank. The Constitution itself is silent as to the question of payment of solicitors for securing signatures to petitions. Justice Schneider, in his dissent in the Tulley case, found this requirement also to be unconstitutional.

Section 3519.09 of the Revised Code requires solicitors to retain possession or custody of all petitions and part petitions. The board of elections is required to seize any petition or part petition found otherwise than in the presence of the solicitor whose name appears thereon. This section would also be repealed by S.B. 238.

Neither the Constitution nor the statutes specify the qualifications of a person who may solicit signatures on a petition, nor prohibit any person from soliciting. The right of public employees to solicit signatures has, however, been challenged as a violation of statutes prohibiting public employees from engaging in certain types of political activity. Court suits have challenged the right of a liquor officer and certain city employees to circulate petitions; in the first instance, for an initiated measure having to do with prohibition and in the second, for an initiated ordinance for a three-platoon fire department. In both cases (Nolan vs. ClenDening 93 Oh. St. 264, 1915 and Heidtman et al vs. City of Shaker Heights 163 Ohio St. 109, 1955) the Supreme Court held that there is nothing improper about the public employees involved engaged in soliciting signatures for initiative petitions.

Signatures. Section 1g of Article II provides as follows with respect to signers of petitions: "Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence. The names of all signers to such petitions shall be written in ink, each signer for himself." Section 1g also provides "Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this Article, it shall be necessary to file from each of one-half of the counties of the state petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county." Still further, the Constitution provides "The basis on which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor."

The Constitution, as noted above, requires that signers be "electors." Other constitutional provisions and provisions of the statutes must be referred to in order to determine who is an elector. Article V, section 1 of the Constitution presently defines an elector as "a citizen of the United States of the age of 21 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." However, an amendment to the federal constitution had effectively reduced the age of 21 to 18, and court decisions have held that six months is too long a required residency period. Therefore, an "elector" is an 18 year old person who has been resident such period of time as may be provided by law, approved by the courts as not unconstitutionally depriving a person of his right to vote. The General Assembly had, however, added a qualification to enable persons to sign petitions. Section 3503.06 of the Revised Code, which provides for registration of persons in order to qualify as electors, provides that registration, when adopted, shall become effective at the time of the first general election thereafter. "No person residing in any registration precinct shall be entitled to vote at any election, or to sign any declaration of candidacy or any nominating, initiative, or referendum, or recall petition, unless he is registered as an elector." Section 3519.15 requires boards of elections when they receive part petitions from the Secretary of State to ascertain "whether the names on each part petition on the registration lists of a registration city or the polling lists of such county or whether the persons whose names appear on each part petition are eligible to vote in such county . . ." Thus, in order to sign an initiative supplementary or referendum petition the statutes require not only that the person have the qualifications of an elector but that the person actually have fulfilled whatever the requirements are to make himself eligible to vote. Even though a signer may be an elector when he signs, his name will be invalidated if he is not

an elector when the county board checks the petitions (section 3519.15).

Numerous Attorney General opinions and court decisions over the years have dealt with problems concerning the information about the signer required on petitions in addition to the actual signature. Generally speaking, it can be said that the law is that the signature is the only portion of the required information which must be placed on the petition by the person himself. The rest of the information, including the date of signing and the residence, may be placed on the petition by another person under the direction of the signer. Prior to the 1972 amendment, a signer who lived in a city was required to place his ward and precinct number on the petition. This requirement has now been eliminated.

An early court decision held that, although the Constitution requires that the signature be written in ink, it would be satisfactory if the signer used an indelible pencil. This provision has not been incorporated into the statutes (section 3519.05). However, anything other than ink or indelible pencil is unacceptable. No Attorney General's opinion nor court decision has been located which discusses the problem of voluntary withdrawal of signatures from petitions.

Although the information other than the signer's name may be filled in on the petition by someone else, it must be filled in. Omission of required information will invalidate the signature.

One of the provisions quoted above from the Constitution provides that all petitions must contain signatures from one-half of the counties of the state bearing the signatures of not less than one-half the designated percentage of the electors of such county. The number of signatures needed on any petition is determined by the vote for governor at the preceding gubernatorial election. This has been construed to mean the election preceding the initial filing of the petition with the Secretary of State even though another gubernatorial election may intervene between the time of the initial filing and the time of the filing of the additional signatures needed to correct an insufficiency of valid signatures in the original filing. The provision requiring signatures from 44 counties was one of the triumphs of the anti-I & R delegates at the 1912 constitutional convention. They felt that this requirement would slow up the process of filing petitions to a great extent. It would make more difficult the use of the initiative and referendum by the people in the large urban counties, by requiring signatures from a substantial number of smaller counties. Professor Harvey Walker has suggested that new laws and amendments desired by rural residents may be easily proposed under this provision, whereas greater difficulty is placed upon the proposal of new laws and amendments by urban residents.

One requirement of the statutes may be questioned as being of doubtful constitutionality in that it imposes an additional burden. This is the requirement presently found in section 3519.10 of the Revised Code that "each part petition which is filed shall contain signatures of electors of only one county." The Attorney General ruled in 1949 that a part petition which contains signatures of persons from more than one county is completely invalid; that is, no signatures may be counted from such a petition. One of the proposals in S. B. 238 would change this ruling by adding a provision to section 3519.10 as follows: "Petitions containing signatures of electors of more than one county shall not thereby be declared invalid. In case petitions containing signatures of electors of more than one county are filed, the Secretary of State shall determine the county from which the majority of signatures came and only signatures from such counties shall be counted. Signatures from any

other county shall be invalid." This would at least permit the counting of valid signatures from the county which contained the majority of the signatures on any part petition. The provisions requiring all signatures on a part petition to be from one county obviously makes the checking of signatures for their validity much easier, since the Secretary of State is required by the statute to send the part petitions to the boards of elections of every county in order to have the signatures checked. The checking of signatures is a time-consuming process and there would not be sufficient time to send part petitions from one county to another. However, it is perhaps unreasonable to discount an entire part petition because, perhaps by error, the signature of one person from another county is included. S. B. 238 appears to offer a reasonable solution to this problem.

After the Signatures are Gathered. The time which the proponents have to gather signatures on their petitions differs according to whether it is an initiative petition for a constitutional amendment, an initiative or supplementary petition for a law, or a referendum petition. These time limits are discussed under the appropriate sections, and it was also noted in the earlier discussions that the time limits cannot be reconciled with the amount of time required before the election if the interpretation of the Attorney General that the election must be held in the same year that the petitions are filed is upheld.

Section 3519.13 of the Revised Code requires that all part-petitions of an initiative or referendum petition must be filed at the same time. Although this section would be repealed if S. B. 238 is enacted, the same result, insofar as a minimum number of signatures is concerned, is reached by a reading of section 3519.14, which would not be repealed, which provides that "The secretary of state shall not accept for filing any initiative or referendum petition which does not purport to contain at least the minimum number of signatures required for the submission of the amendment, proposed law, or law to be submitted under the initiative or referendum power."

The early history of initiative and referendum petitions in Ohio is replete with charges of fraud on the part of the petitioners, counter-fraud on the part of the opponents, and highhanded denial of the petitioners' rights by the Secretary of State. Statutes have been enacted in the intervening years to specify the procedures which must be followed upon the filing of the petitions in order to determine their validity. Section 3519.14 requires the Secretary of State to reject a petition which does not contain at least the minimum number of signatures required. In addition to counting signatures, he may, according to the Tulley case, reject any part-petition which is not verified. According to a 1939 Attorney General opinion, he may reject a part-petition or an individual signature which on its face does not meet the constitutional requirements. He may not, however, determine the validity of a signature which on its face appears to conform with the requirements. Instead, section 3519.15 requires him, "forthwith", whenever a petition has been filed, to separate the part-petitions according to county and transmit them to the various county boards of elections where the process of checking signatures takes place.

The only constitutional provision, found in section 1g, respecting the validity of petitions is as follows: "The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. No law or amendment to the Constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the

votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency."

Forty days before the election, therefore, is the cutoff date for determining whether any signature is invalid. The statute (section 3519.16) requires the county boards of elections to return the part-petitions to the Secretary of State at least 50 days before the election. The Secretary of State thus has 10 days in which to determine whether there is an insufficiency of signatures and how many signatures are needed, and to notify the petitioners' committee. Section 3519.15 sets forth the duty of the county board of elections to check the validity of the signatures and section 3519.16 a procedure by which any elector can challenge the findings of the board. Prompt court action is required on challenges. The Secretary of State does not have to wait until 40 days before the election in order to notify the petitioners of an insufficiency of signatures, but it would seem necessary for him to wait until all county boards of elections have returned their part-petitions, otherwise he could not ascertain the extent of the insufficiency.

An Attorney General's opinion in 1950 held that the petitioners were only entitled to secure and file additional signatures in the ten day period to replace signatures that were held to be invalid, not to make up signatures which were rejected because of some defect in the petition--such as failure of the solicitor to sign the afficavit or failure to fill in the amount of compensation he was to receive. This ruling is of doubtful constitutionality because the constitutional language itself appears to place a defect in the petition and a defect in a signature on the same level--both are presumed sufficient unless otherwise proved and "in such event ten additional days shall be allowed for the filing of additional signatures to such petition."

Voter Information and the Ballot. Section 1g provides for two final steps in the process of the initiative or referendum: (1) preparation of arguments and explanations and distribution to the voters; (2) preparation of the ballot.

The initiative or referendum petition "may" name the persons who will prepare the arguments or explanations for the proposed law or constitutional amendment or against the referred law, as the case may be. The statutes (section 3519.02) require that a committee of not less than three nor more than five persons be named in the petition and that such committee may (section 3519.03) prepare the argument or explanation. Persons to prepare the argument or explanation upholding the referred law or against a proposed initiated law (to which the statutes add a proposed constitutional amendment) are to be named by the General Assembly if in session or by the Governor if the General Assembly is not in session. Until the 1972 amendment to section 1g, the Secretary of State was required to have the proposal together with the arguments and explanations, not exceeding 300 words for each side, printed and mailed or otherwise distributed to each elector, as far as may be reasonably possible. Now, however, the proposal, and arguments and explanations not exceeding 300 words for each side, are to be advertised once a week for five consecutive weeks preceding the election in at least one newspaper of general circulation in each county where a newspaper is published.

In the absence of a contrary law, the Secretary of State is required to place upon the ballot the "title" of any "such" law (apparently referring to a referendum), proposed law, or proposed constitutional amendment. If what is being referred is

not the entire law passed by the General Assembly, but only a section or an item in an appropriation act, the Secretary of State would presumably have to write a "title." However, section 3505.06 may constitute a law otherwise providing, since it requires the Secretary of State to prepare a "condensed text that will properly describe the question, issue, or amendment" for all statewide questions and issues.

Section 1g further requires the Secretary of State to cause ballots to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money (all apparently referring to a referendum), or proposed law, or proposed amendment to the Constitution. If a proposed amendment to the Constitution is deemed to be more than one amendment, is the Secretary of State entitled to separate the amendments into single amendments? Are amendments proposed by the initiative subject to the provision of Section 1 of Article XVI: "When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately"? Is a law proposed by initiative petition subject to the requirement of section 15 of Article II that "No bill shall contain more than one subject, which shall be clearly expressed in its title"? If so, who determines the separation on the ballot?

The questions of the ballot language and voter information have been considered by the committee in connection with constitutional amendments submitted by the General Assembly. A proposal reported by the committee and adopted by the Commission included the creation of a Ballot Board to prepare ballot language and to prepare arguments. Consideration might be given as to how much, if any, of that proposal should be incorporated into section 1g.

A final matter of interest is the liability of the persons who prepare arguments and explanations for false or misleading statements. Opponents to a proposed constitution amendment wrote, as part of their allotment of 300 words: "This 310-million-dollar pension amendment is sponsored by Herbert Bigelow, of Cincinnati, paid lobbyist for the Single Tax Movement." Mr. Bigelow claimed that he had been slandered by this statement. The Supreme Court held, in Bigelow v. Brumley, 138 Ohio State 574 (1941) that public officials named to prepare the arguments are privileged to say whatever they wish, as long as it is appropriate to the occasion, but that the privilege would not extend to a person who was not one of the three official appointees if it could be shown that he wrote the language. However, the Court held that this language was not per se defamatory, and since Mr. Bigelow did not prove any special damages, he could not collect.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
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Campaign Financing

Many people have concluded that there exists an urgent need to regulate the financing of political campaigns. In Ohio, the methods by which such regulation might be accomplished have been recently considered, without resolution, by the General Assembly. Questions regarding campaign financing deal with very basic constitutional rights: freedom of speech, freedom of the press, freedom of association, equal protection and due process. Campaign financing laws seeking to equalize, to some extent, the monetary and influential weaponry with which candidates enter the political arena must balance constitutionally protected interests. These interests are the subject of an article by Albert J. Rosenthal, Campaign Financing and the Constitution, which appears in the Harvard Journal of Legislation, March, 1972. The article concerns itself primarily with the federal constitution and national elections. However, the study offers much in the way of educational material for any state, because the general objectives of campaign finance laws will be similar, and most state constitutions guarantee the basic rights of expression and association that are at issue in federal campaign finance laws. The following is a brief summary of the constitutional problems discussed in Mr. Rosenthal's article.

Proposals in the area of campaign financing concern themselves with: (a) restricting the size of contributions; (b) limiting expenditures of candidates; (c) requiring disclosure of contributions; (d) using government subsidies; (e) special controls on use of certain media. According to the article, the general objectives of these proposals are three: an electorate informed on qualities and views of candidates; competition among candidates to be determined by these qualities and views in a manner undistorted by unequal opportunity to communicate with voters; reduction of the dependency on small numbers of large, wealthy contributors resulting in a reduction of "influence peddling" and the need to have a personal or family fortune in order to run for office.

I. Limitations on Contributions

One way to limit campaign contributions is to establish a ceiling on the amount of money one may contribute. According to Mr. Rosenthal, Article I, section 4 of the federal constitution grants this power to Congress for congressional elections, by saying, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations..." Regulation of who may contribute and how much is arguably part of "Manner". Smiley v. Holm, 285 U.S. 355,(1932), affirmed the breadth of congressional authority to control corrupt practices in elections. According to the article, states have the plenary power to regulate campaign contributions, subject only to limitations such as those on freedom of speech. Another basis of authority for congressional control of the amount of contributions for its members is thought to reside in Article I, section 8, clause 18 of the federal constitution, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or offices thereof."

Mr. Rosenthal states:

> "If one of the reasons for limitations on contributions is to reduce the likelihood of improper influence of large contributors upon office holders, it might be contended that such laws were necessary and proper to enable each House to "be the Judge of the Elections...of its own Members" Article I, Section 5, clause 1" (p.365)

The Ohio Constitution contains a similar provision (Article II, section 6) that each House shall be the judge of the elections, returns, and qualifications of its own members, and the power to make laws to enable each House to do this might fall within the plenary powers of the legislature to carry out its constitutional mandate.

The article discusses restricting campaign contributions for federal elections, and Burroughs v. United States, 290 U.S. 534 (1934), is cited as the authority by which Congress is seen to have power, extending not only to selecting the time for choosing electors and when voters will cast their ballots, but also to control expenditures of money to influence election results. Burroughs said:

> "To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress undoubtedly has that power....The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."

The author feels that, in addition to applying to disclosure laws, with which Burroughs was concerned, the reasoning in that case seems to extend to a wider range of techniques for control of financing presidential campaigns including restrictions on size of individual contributions.

The authority of Congress to limit contributions for state elections is not specifically granted in the constitution, but Mr. Rosenthal argues that in almost all states, elections of federal and state officials occur on the same day. Most political activity goes toward supporting candidates at both levels, and perhaps in order to control contributions for federal elections, the law must extend to state elections as well, such authority probably residing in the "necessary and proper clause" of Article I. The interference of federal regulation in state elections may be thought to be interference with the functioning of the state as a governmental entity; hence, the authority of Congress regarding state elections is not all that clear.

Another general area under which control of the amount of campaign contributions may be authorized is the area of equal protection and due process, under the theory that large campaign contributions impair the political equality of the less affluent.

In response to the authority of government to impose such restrictions stands the rights of the citizen to contribute under the first amendment. (Provisions for freedom of speech and press are found in Section 11 of Article I of the Ohio Constitution.) First amendment arguments usually concern the right of the supporter to speak (and spend) in favor of the candidate whose view he favors.

Rights of association also come into the arguments, because these rights having been recognized by the courts as allowing association for political purposes, not only grant a right to belong to an organization, but to play a meaningful role in that organization. It is not difficult to see how one may argue that meaningful involves spending as much money as one wants to.

Mr. Rosenthal reiterates the need to balance constitutionally protected interests and notes that first amendment rights are not absolute. The court will decide when restrictions on them are legitimate restrictions in view of the purpose and goals originally intended by the framers of the constitution. One of the goals cited by the article is the integrity of government, and the preservation of that integrity may be just cause for restriction of first amendment rights. The author notes, as well, that if financial barriers to the right to vote are constitutionally forbidden, there is a legitimate argument that reduction of financial barriers to the right to influence voters is constitutionally permitted. This argument is not developed in the article.

Campaign contribution limitation laws concern not only amounts but types of contributors. For example, corporations and unions are forbidden to make campaign contributions to political campaigns for federal officers. (18 U.S.C. § 610 (1970)). There are also prohibitions against certain types of businesses making contributions: public utility holding companies, national banks, federally incorporated companies, government contractors, etc. Mr. Rosenthal notes that although first amendment rights arguments may come into play for these businesses, the outweighing interest in maintaining the integrity of elections is obvious. And, of course, individual members of these businesses are still free to contribute.

Regarding corporate and union contributions, the case is not quite so clear. U.S. v. C.I.O., 335 U.S. 106, 121 (1948), shows that there is some doubt as to the constitutionality of such prohibition.

> "If this law were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interest from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."

Corporations and unions may have rights under due process or first amendment guarantees to communicate their views on matters pertaining to their rights -including election campaigns.

Regarding unions, questions about freedom of association become relevant. In two cases, U.S. v. C.I.O., and U.S. v. U.A.W., 352 U.S. 567 (1957), four and three justices respectively disagreed with the disposition of the cases and would have held the statute unconstitutional as applied.

II. Limits on Expenditures

The same sources of federal authority are thought to apply to these limits as do to campaign contribution limitations, especially the Burroughs case. The same constitutional arguments concerning equal protection and free speech and press arguments also come into play. For example, a candidate could argue that a limitation on expenditures is a violation of the right of a candidate to

pursuade the voters to support him.

Mr. Rosenthal feels that the validity of limitations on expenditures hinges on the size of the limitation. One too low would be indefensible and would give undue advantage to the incumbent who already has some popularity. One too high or no ceiling at all would enable a candidate with large financial backing to "overload the channels of communication so as to render his opponent's right to speak virtually worthless". (p. 388).

One method of accounting for, and limiting campaign expenditures is through the use of campaign finance committees. In order for these groups to be effective, expenses by such groups must be applied to the candidate's expense limit, otherwise the candidate can exceed the limit. The combination of an expense limit and the campaign finance committee may create many problems. For example, if the committee is not responsive to the campaign manager, or is headed by unscrupulous rascals or generally counter-productive, can the candidate be empowered to forbid the committee to make further expenditures on his behalf? Mr. Rosenthal cites the humorous case where the campaign slogan is "We know he's terrible, but he's the best of a bad lot." Common sense dictates that the candidate shouldn't have to pay for that kind of advertising, but a move to prevent it may be construed as interfering with freedom of speech. The article notes that even though the silencing would be done by a private citizen rather than by the government, the problem is not solved because Congress or the legislature "cannot validly silence people by delegating to private citizens the power to do so." (p. 390) One solution is having a single person, like a campaign treasurer and channel through and approve all expenditures through him. This is done in Great Britain,where there is no first amendment, and also in Florida,which practice was upheld by the Supreme Court. The author says in a footnote,

> "At the time of the state Supreme Court decision the Florida statute, FLA, ANN 99.161 (4)(a) 1960, required, among other things, that all campaign contributions, expenditures, and obligations therefor, including those of the candidate and his family, go through the candidate's campaign treasurer or deputy treasurers. The statute had elaborate provisions for disclosure and publicity, but it did not prescribe any limit on campaign expenditures. The statute was upheld when a citizen and a radio station owner challenged its interference with the right of the citizen to pay to broadcast his views in support of a candidate without the consent of the candidate's campaign treasurer. Smith v. Ervin, 64 S. 2d, 166 (Fla 1953)."

Some practical problems with campaign finance committees which are not really constitutional problems, have to do with allocation of funds. When a campaign committee supports several candidates for several offices, this would be true especially of party committees, the problem of allocation may be very great. No small thorn in the side of committees will be the question of when advocacy of an issue ends and support of a candidate begins. Sometimes, public endorsement of an item on a candidate's platform is like an endorsement of the candidate himself. Should the party committee be charged for this?

If there are going to be statutes setting expenditure limitations, there are going to have to be some sort of sanctions for breaking the law. The article discusses possible constitutional implications of the statutes. Denial of office would be in violation of Article I, section 5, clause 1 of the constitution, which

states, "each House, shall be the Judge of the Elections, Returns, and Qualifications of its own Members." (Note the similar provision in Article II, section 6 of the Ohio Constitution.)

Section 3517.08 to 3517.13, inclusive, of the Ohio Revised Code concern campaign expenditures. Section 3517.08 sets forth the limitations on campaign expenditures for candidates to public office; Section 3517.10 requires a statement of expenditures and specifies the information to be contained in the statement, who must file a statement and the deadline for filing. Section 3517.11 provides that persons whose candidacy or nomination was for a state-wide office must file their statements with the secretary of state, if not for a state-wide office,it must be filed with the board of elections of that county "or part of a county within the district which had a population greater than that of any other county ...etc". That section also states

> "In the event of a failure to file a statement with the secretary of state or in the event a statement filed with the secretary of state appears to disclose a violation of law, the secretary of state shall promptly report such facts to the attorney general who shall forthwith institute such civil or criminal proceedings as are appropriate." (The same applies to boards of elections in non-state-wide elections). ....Failure of any candidate to file a statement within the time prescribed by Section 3517.10 of the Revised Code shall disqualify said person from becoming a candidate in any future election for a period of five years, except candidates for an elected office having a six year term who shall be disqualified from becoming a candidate in any future election for a period of seven years."

The recent disqualification to office of Senator Donald Lukens was upheld by the Ohio Supreme Court in State ex rel Lukens v. Brown, 34 Ohio St. 2d. 275 (1973). Senator Lukens failed to file an expense report until almost two months past the deadline for filing. The Court upheld Section 3517.11 requiring disqualification for failure to file, as not in violation of the constitution. The Court cited two cases upholding the constitutionality of the statute, State ex rel Jedlicka v. Bd. of Elections (1969), 20 Ohio St. 2d. 13, and In re Coppola, (1951) 155 Ohio St. 329.

In addition to suggesting a general limit on expenditures, some suggest specific limitations, for example, limiting the amount spent on broadcasting, or newspapers. The equal time provision (47 U.S.C. § 315 (1970)) requires broadcast networks to give equal time either at no cost or at equal cost to all candidates running for the same office. The statute was suspended for the 1960 presidential race, and the suspension was not challenged in court. The question of whether the statute is a violation of due process or equal protection has not been raised, and remains an unanswered question since the printed media is not similarly constrained.

Repeal of equal time provisions may raise problems if it leads to discrimination against minor candidates. Although discrimination would be at the hands of private citizens rather than networks, the author notes that Congress has assumed the power to regulate network broadcasting, and it would seem that the obligation would lie with Congress to prevent discrimination in its regulations.

Specific limitations on newspaper, magazine and other media expenditures are discussed. In 1971, the House of Representatives proposed an amendment to the Federal Election Campaign Act of 1971 that would have required equal space on equal (cost) basis to any candidate and his opponent(s). This proposal was dropped by the conference committee. The author justifies the greater regulation of broadcast media as proportionate to its increased use. He notes that surveys show that the expense of broadcasting accounts for the largest portion of campaign expense for a single purpose.

III. Reporting Requirements

The justification of disclosure laws has been upheld by Burroughs v. U.S. as preventing undue influence. In United States v. Harisa, 347 U.S. 612, 625-26 (1954), the Supreme Court upheld the validity of the Federal Lobbying Act (2 U.S.C. § 261-70 (1970) on the grounds that the judgment of Congress would be improved from knowing the financial backing of lobbyists trying to influence their votes. In that case, first amendment rights were raised and specifically rejected.

What rights, if any, conflict with disclosure laws? The right to associate might be endangered, say, for a member of a group like the Ku Klux Klan, or even for a Democratic employee of a strictly Republican corporation. According to the author, under certain conditions, the values enhanced by disclosure would outweigh the inhibitory effect disclosure laws might have if they discouraged contributions from the "little guy". The best chance of defeating a constitutional challenge, according to Mr. Rosenthal, would be to make requirements that facilitate the timely publicity of disclosure of sufficiently large amounts. In that way, the person making small donations wouldn't have to deal with disclosure, rich men don't have to worry about who sneers at them, and yet, the public would know who was supporting a candidate before the election, whether that knowledge had a positive or negative effect. Presumably, arguments based on rights of privacy would receive the same response from Mr. Rosenthal, that the integrity of the knowledgable electorate outweighs that right.

The privilege against self-incrimination occurs if there is a criminal sanction for violation of statutory limitations on donations. If there were requirements for disclosure and criminal sanctions for contributions in excessive amounts, the contributor is compelled to admit having broken the law. Several statutes have been held invalid on the grounds that compliance created the risk of conviction for violating state or federal law. Cf. Marchetti v. U.S., 390 U.S. 39 (1968) and Grosso v. U.S., 390 U.S. 62 (1968). In the Marchetti case the court distinguished between that case and U.S. v. Sullivan, 274 U.S. 259 (1927). In the Sullivan case, the conviction of a bootlegger for failure to file an income tax return had been upheld. The Court noted that in Sullivan, most if the information on the tax return would not have been incriminating, and the failure of the bootlegger to file was unwarranted. In the Marchetti case, however, the case concerned a statute requiring those engaged in certain gambling activities to register and pay taxes. The statute was judged invalid because every element of the gambling tax and registration would have been incriminating. The possibility of partial compliance is a test which the author says will validate statutes requiring disclosure of campaign contributions. Criminally excessive contributions just would not be reported, or perhaps statutory immunity from criminal process could be granted for such declarations. The decision would rest with the legislature as to whether its priority lay with disclosure or criminal prosecution.

Section 3517.11 and 3517. 13 of the Ohio Revised Code state that criminal proceedings may lie against a candidate for filing a false campaign expense report, or a report which fails to comply with Sections 3517.08 to 3517.12, inclusive, of the Code. Section 3517.13 states, "Any candidate nominated or elected to an office who is found guilty of violating the provision of Title XXXV (35) of the Revised Code relating to expenditures for campaign purposes shall forfeit his nomination or election to such office." The candidate is prohibited from holding office for the same lengths of time as the statutory prohibition for failing to file the report.

The question has apparently not been raised, in Ohio, of whether the statutory requirement that criminal proceedings be commenced against a candidate whose expense statement appears to be in violation of the law, and that conviction of such offense results in forfeiture of office, is in fact a violation of the fifth amendment to the federal constitution. This is the kind of situation Mr. Rosenthal examines in his article, and he notes that the constitutionality of such statutes are dubious.

IV. Public Financing of Elections - Subsidies and Incentives

If elections were paid for out of public money, or the public could be encouraged on a large scale to each contribute a small share, many of the evils of present campaign financing procedures could be cured. In his statement to the Subcommittee on Communications of the Senate Committee on Commerce, Herbert E. Alexander said:

> "To counteract the advantages of incumbency or wealth, we need not enact questionable ceilings, but rather look toward establishing floors. By floors are meant minimal levels of access to the electorate for all legally qualified candidates. This shifts concern to guarantees of free broadcast time or free mailing privileges or subsidies that assure that candidates will get exposure to potential voters. Tax incentives, while not assuring minimal access for any candidate, are desirable in that they may help develop alternative sources of funds so that candidates can reduce their reliance upon large contributions from self, family, special interests, or others."

One method of subsidizing elections is by direct appropriations of state funds. At least two attempts by state governments to pay expenses out of state funds were invalidated by the state courts in People ex rel State Chairman v. Galligan, (Colo. Sup. Ct. 1910) (unreported) and Opinion of the Justices, 347 Mass. 797, 197, N.E. 2d. 691 (1964), although the article reports that Puerto Rico has had a subsidy program since 1957 with partial success. There was no opinion in the Colorado case. The Massachusetts opinion said that subsidization of political parties was not a legitimate "public purpose" for expenditure of state funds.

The problem with subsidy concerns minor parties, and the possibility of government discrimination in allocating campaign funds. If appropriations are based on past performance at the polls, money could be given to a party that no longer had any following, and new parties with a large following would not be provided for. A suggestion of refunding appropriated money if the showing at the polls is not at least a certain number of votes would certainly discourage minor

parties from participation, and the article notes that these minor parties are a major source of new ideas.

The Presidential Election Campaign Fund Act of 1966, also known as the Long Act, would have allowed each tax payer who elected to accept it an option of placing $1.00 of his taxes in the presidential campaign fund. The problem of allocation still remained in the Long Act, but under a new provision, Title VIII of the Internal Revenue Code amended in 1971, a tax payer may earmark $1.00 of his tax money for the political party of his choice in a presidential election year. Under this plan, minor parties are assured the amount designated by the tax payers and may get even larger subsidies from funds that are not specified for any particular party. Assuredly, if the government is charged with formulating schemes to allocate the moneys, there will be cries of "foul play".

Another method suggested is for the governemnt to match, dollar for dollar, or in corresponding proportion, the tax contributions. That way, public funds would be appropriated in a way reflecting the voters' pattern of support. If the Republicans got more individual dollar contributions, they would get a proportionately larger portion of the public funds.

Tax incentives are considered by Mr. Rosenthal to be one of the few proposals that does not seem to give rise to serious constitutional difficulties. In Title VII of the Revenue Act of 1971, which went into effect May of 1972, taxpayers were credited with up to $12.50 or up to half of their political individual contributions, or could deduct up to $50.00 from their tax return. It is suggested that arguments stating the invalidity of such delegation to the taxpayers of the congressional authority to determine how public money is to be spent, are countered by a long range of history of this kind of delegation, to religious organizations, or credit for private business investments. The author says, "The advantage of the tax incentive, from the standpoint of constitutionality, is that it permits the realities of the campaign - in relative importance of the major versus the minor candidates - to be reflected through the separate decisions of millions of taxpayers, thus relieving the government of the necessity and onus of making those decisions itself." (p. 417)

Conclusion

There is some question as to the constitutionality of any of the alternatives suggested. The greatest problems are felt to be in the area of placing limitations on campaign expenditures. The imposition of reasonable limits on contributions, limitation of personal expenditures by candidates and family, effective disclosure laws, and tax credits and deductions taken together create a balance, which in the opinion of Mr. Rosenthal, validates the possibly doubtful constitutionality of any one of those methods alone.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
December 14, 1973

A Model Election System

The development of the Model Election System was made possible by the assistance of both political leaders, academic experts, and the League of Women Voters. Of great assistance to the National Municipal League's study was a LWV study, "Administrative Obstacles to Voting". The Model Election System attempts to provide legal reforms to overcome these obstacles and provide a system convenient for the voter and one which safeguards against fraudulent practices.

The recommendations of the National Municipal League regarding the administration of an election system fall into two main classes: (1) providing a clear cut chain of responsibility beginning with a Chief Electoral Officer and extending down to the precinct official; and (2) separating partisanship from administration of the election system.

The report recommends that a Chief Electoral Officer be the head of the State Office of Elections, which office would be in charge of the entire administration of election matters. The model notes that whether the Chief Electoral Officer is elected or appointed will "be governed by the constitutional and political imperatives of each state." The model recommends in accordance with the concept of the Model State Constitution, the Chief Electoral Officer should be appointed by the Governor, subject to the advice and consent of the Senate. The Chief Electoral Officer should be someone other than the Secretary of State, because the duties of this person should concern elections only. In fact, the report suggests that the Secretary of State be required by law to appoint a special individual to head the State Office of Elections if it is to be under the Secretary of State's sphere of government.

The Chief Electoral Officer's responsibilities should include: dissemination of voter information, budgeting and reporting of elections expenditures, providing written standards and directions to county administrators for registration and voting, accounting and budgeting standards, establishing training programs for poll workers and local elections administrators. "The Chief Electoral Officer should have the authority to implement laws, to establish procedures and supervise the state elections system."

The main idea seems to be to make the office and chief officer a very visible beacon of direction with the consequence that it is public knowledge who is in charge where, that uniform standards are created and enforced, and that the public is involved in and made aware of the state of the elections process by regular reports to it by the Chief Electoral Officer. The model notes that whether the Chief Electoral Officer is elected or appointed, there will always be political overtones. The importance is not in the manner of selecting the man, but in the execution of the office. The visibility of the office, longer terms, better funding for better staffs, the report suggests, would promote professional standards that offset partisan considerations. It is the rationale of the National Municipal League that the public's participation in elections will flow from its confidence in the elections system which in turn will flow from a properly administered system under the direction of one man, whose sole duty is to run the elections - the Chief Electoral Officer.

There would be a single county official responsible to the Chief Electoral Officer for local administration, and a single official in each precinct should be handling the conduct of local elections.

The report suggests a method of handling the problem of partisanship in the State Elections Office. The goal is to effectively blend the administration of elections with the political nature of the elections system. The suggested method is the creation of an Election Council. The council would, in effect, represent the political factor in the system. The National Municipal League recommends that the council be comprised of not more than 7 members, representing the major political parties in the state. (In case of a two-party state, each party should have at least 2 members on the Council). Members should have four-year overlapping terms to provide continuity in leadership. They may be either elected at party conventions or appointed by party chairmen or state party committees. The National Municipal League feels that the Chief Electoral Officer should not have duties which would involve his making decisions "likely to impair his credibility as an impartial administrator," hence, the need for an Election Council, because some decisions regarding elections are going to be, naturally, political.

The Election Council may be either advisory or a policy making body, depending on whether the public's confidence in the Chief Electoral Officer to be purely impartial is great or small. In either case, the existence of an Election Council would assure the public that each political party is acting as a check on each other. The policy making role of the Council would be needed if the public did not feel confident in the impartiality of the Chief Electoral Officer, and would be solely advisory if that officer had the public trust.

Conclusion

There appears to be nothing in the Ohio Constitution that would prevent adoption of the recommendations of the National Municipal League in our election system, if they were deemed desirable. It is the present practice of the Secretary of State's office to appoint one person to supervise election matters, although he is not designated as "chief electoral officer". Local boards of election are not a part of the Model Election System, but their existence is statutory, not constitutional, in Ohio. The Secretary of State is an elected official, but this is not incompatible with the Model.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
December 17, 1973

Research Study No. 26C

Initiative and Referendum: Suggestions for Change

Prior memoranda discussing the history and details of the Ohio Initiative and Referendum provisions (Sections 1-1g, inclusive, of Article II of the Ohio Constitution) noted two basic questions for discussion before consideration of the details:

1. Should the Constitution contain initiative and referendum provisions (that is should the people have the right to initiate legislation and constitutional amendments and to veto legislation adopted by the General Assembly)?

2. Should the details of the initiative and referendum be spelled out in the Constitution or left to the General Assembly?

The pros and cons of the initiative and referendum can be summarized as follows:

Pro

1. The people should be able to by-pass an unresponsive or corrupt legislative body.

2. The initiative and referendum represent true democracy, and the fact of a representative system should not interfere with the exercise of true democracy in an appropriate case.

3. The initiative and referendum not only offer the people an opportunity to act in their own best interests, but afford an opportunity to educate the people in matters affecting the public good and the operations of government.

Con

1. Direct legislation, by removing some of the burden of responsiveness in the legislative body, leads only to greater irresponsibility on the part of the legislature and will ultimately destroy the legislative process.

2. Direct legislation is generally poorly drafted, much too complex for people to understand, and lacks the greatest advantage of the legislative process--the deliberations which afford all sides an opportunity to be heard and the issues to be thoroughly debated.

3. Direct legislation violates the principle of the short ballot.

4. Direct legislation is simply an opportunity for a vocal minority, if it has sufficient money, to foist bad legislation on the public. It seldom comes from the majority, and the majority may actually be indifferent.

Most of the arguments and debates about the initiative and referendum reflect basic, philosophical differences between those favoring and those opposed to direct legislation. Of all the arguments against, the only one which could be resolved absolutely is the one which objects to the poor quality of the drafting involved in initiated laws or constitutional amendments; it would be possible to provide that the same or similar drafting services be made available to initiators as are available to legislators.

With respect to the second question, two states which have the initiative and referendum have recently amended their constitutions to remove from them some of the petition details and leave these to the legislature. On the other hand, it should be noted that in the state--Idaho--which has the shortest I & R constitutional provision, stating, essentially, that there shall be provisions for I & R enacted by the legislature, the legislature has never acted so the people of that state are not able to exercise these constitutionally protected rights.

A number of studies of the initiative and referendum have pointed out what, in the author's opinion, are the major defects and contained recommendations for changes. Some changes have been made in constitutional provisions in a few states. Following is a summary of articles discussing the initiative and referendum in California, Michigan, Oregon, and Ohio. All were written in the late 1940's or early 1950's.

The California State Chamber of Commerce studied the initiative and referendum in that state in 1950, when ithad been in existence for 39 years. The publication is entitled "Initiative Legislation in California". One hundred twenty-one proposals had been submitted through direct legislation and 49% of those had been approved. The most successful had been constitutional amendments, followed, respectively, by legislative proposals (bond issues, e.g.) referenda, and initiative statutory measures.

One year before the report, a law was passed requiring the legislative counsel to prepare an analysis of all measures that will appear on the ballot, showing effects on existing laws and their operation, to be printed in a voter information pamphlet preceding arguments for and against the measure. The analysis was limited to 500 words except with the approval of the State Board of Control. The effects of this law could not be significantly measured at the time of the report.

California voters had been plagued with the repeated submission of outlandish pension bills, called "Ham and Eggs" proposals, and this practice received much criticism. The study's major objections include:

a) the huge waste of energy and money to combat unsound proposals, which may appear on the ballot if a small group has enough funds.

b) having to combat the same bad proposals year after year, even though rejected by the voters at previous elections.

c) the conflict between the increasing responsibility of the legislature and the tendency of direct legislation to restrict or circumvent legislative power.

d) the increasing complexity of many subjects, resulting in electors voting on things that are too complex for them to understand.

The Chamber of Commerce study offered 14 changes to the initiative and referendum provisions, which are briefly described.

1. Increase the number of signatures necessary to qualify an initiative for the ballot, or require a higher percentage to qualify a constitutional amendment than is necessary for a statute. This would tend to insure that only matters of vital concern get on the ballot.

The pros and cons of this suggestion include the point that if the number of required signatures were increased, people would turn to professional circulators at an increased cost. This would place special interest groups with large financial resources at an advantage.

2. Prohibit the same subject matter from being submitted to the voters within a prescribed period of time, or only with an increased number of signatures.

3. Place general or specific limitations on subject matter. Give the Attorney General the power to refuse to certify petitions containing prohibited subject matter and set up court procedure for appeal of borderline cases.

4. Require higher vote than a mere majority of votes cast to adopt an initiative measure, or a 2/3 vote on bond issues or measures proposed by initiative which involve expenditures of state moneys.

An alternative to this suggested submission at a primary election. If the measure were not passed by a 2/3 majority at the primary (but passed by at least a majority) the initiative would be submitted at the general election and would only have to pass by a simple majority.

It is argued that more votes, or submission at two elections, would represent larger cross-sections or segments of public opinion, to insure that any bill passed would be widely supported.

5. Require that initiatives clear through the legislature before submission to the voters. (California has the direct statutory initiative.)

6. Create some geographical requirements that at least 1/2 of the counties must be represented in signatures on petitions, or that not more than 25% of signatures may come from any one county. This would insure that demand for the measure is statewide.

7. Limit the use of the initiative to statutes and prohibit the qualification of constitutional amendments for the ballot by this process.

8. Prohibit general circulation of petitions, and require people to sign petitions at office of the registrar or county clerk. This would eliminate the abuse of purely metropolitan circulation by professional circulators.

9. Prohibit any professional circulation of petitions. (Costs are estimated to be anywhere from $.50 to $2.00 per signature.)

10. Provide some method for securing a determination in advance of circulation as to the constitutionality of a proposed initiative.

A discussion of this recommendation mentioned that the constitutionality of initiated constitutional amendments could not be determined, since these were additions to the state constitution itself. Speculation as to whether initiated constitutional amendments were consistent with the federal constitution would not be valuable, because such testimony would be inadmissable and not binding in any federal hearing on the question of constitutionality.

11. Prohibit the submission of initiatives at special elections. It has been argued that few voters turning out at special elections making initiative measures adopted at special elections not truly representative of the majority of voters. Such arguments are countered by the fact that at the only two special elections held in California since the passage of the initiative provision, 83% of the registered voters turned out for the special election in 1939, and 61% turned out for the 1949 vote.

12. Provide more voter information. The change in the election code previously explained may act to provide adequate information.

13. Repeal of initiative procedure. This is, by far, the most drastic recommendation, and is one that has received support by other political figures, with an additional suggestion that the direct initiative be exchanged for the indirect initiative.

14. Create a state agency to pass upon proposed initiatives in the same way the Legislative Counsel advises the legislature on proposed measures.

Such advice would help to correct some of the poor drafting of initiated measures, but the agency would not decide on questions of legality.

Michigan

"The Initiative and Referendum" by James K. Pollack, assesses the use of the initiative and referendum in Michigan. At the time of the study, 1940, Mr. Pollack felt that there were no serious abuses regarding circulation of petitions, and felt that any prohibition of petition pushers would be unnecessary. What he took to be a major abuse of the referendum was the use of the emergency provision by the legislature.

The Constitution said that no act of the legislature shall go into effect until 90 days after adjournment of the legislature except appropriations, and acts necessary for the public safety. The author says:

> "This provision seemed to be intended to protect the processes of government against undue delay in cases of emergencies and to withhold from popular vote acts making appropriations. It appeared to limit the power of the legislature quite clearly and at the same time to protect the public. In practice, however, the provision has been of the utmost importance in impeding the proper operation of the referendum."

He notes that from 1901-1939, between half and one-third of all public acts passed by the Michigan legislature have had immediate effect clauses. The little use of the referendum for statutory measures is revealing. In the 5 times that such measures have come before the voters, none has passed, although 40% of 84 initiated measures have been approved by the electorate.

Several attempts to change the initiative and referendum had been proposed in the legislature, but none were approved. These include:

1. Increasing number of signatures necessary to qualify a petition.

2. Require that the signatures be from a minimum of 20% of the counties.

3. Provide that not more than 10% of signatures come from any one county.

4. Prevent submission of a proposal more than once in 5 years.
(Out of the 84 items submitted by initiative, at least 40 had come before the voters more than once.)

5. Require both houses of the legislature to pass on given proposals before submission to the voters.

The author's conclusion and recommendations call for greater restrictions on the use of the emergency clause by the legislature, and for greater public education on the issues to be voted on. In Michigan, newspaper publication of the issues and arguments pro and con are not state expenses. Mr. Pollack does not want the full text to appear on the ballot, as this would be unwarranted confusion and expense, but would like a short summary and title to be prepared by some designated state authority.

Oregon

"The Initiative and Referendum in Oregon 1938-1948" by Joseph G. LaPalombara offers a comprehensive evaluation of the direct legislation system in a state which was one of the first to adopt the initiative and referendum into its constitution. It was observed that where the initiative played the dominant role in the first two decades, the referendum is dominant in the 1940's. The author views this as evidence that the legislative assembly was taking increased interest in the use of the optional referendum in order to gauge public support of its measures. The referenda have dealt with sales tax, cigarette tax, removal of double liability from banking corporation stockholders, legislators' compensation and liquor and gambling proposals.

The study appraises some of the arguments most frequently offered against various features of the initiative and referendum laws.

1. It is often suggested that some law prohibiting repetition of an issue on the ballot for a specified number of years ought to be adopted. The study points out that such legislation would prevent a proposal that became desirable before the time limit had expired from being approved. It would simply result in the postponement of the proposals to be considered. The author offers an alternate plan of increasing the number of signatures on the proposal each time it is resubmitted within a given time period, but notes that this would not deter the legislature from resubmitting proposals as often as they wanted, and perhaps a time limit would be the only answer to curtail legislative resubmission of desired measures. (The optional legislative referendum does not exist in Ohio.)

2. The inability of the voter to decide intelligently on complex legal matters is considered a real problem by opponents of the initiative and referendum. In Oregon, many petition getters were able to obtain signatures without explaining issues to the voters. A law was passed requiring that the statement of the petition's purpose be printed on the petitions cover. The study suggests even greater diligence on the part of the state to educate the voter, and to discourage the voter from signing petitions about which they know nothing.

3. Petition hawking was employed in the early years the initiative and referendum was in use in Oregon, leading several times to the defeat of appropriations for the University of Oregon. After such fraudulent practices were discovered, a law was

passed (1914) to outlaw the paid circulation of petitions, but the author believes petition hawking is still going on and reform #2 below would solve this.

4. The complaint that direct legislation leads to government by the minority rather than by the majority is often heard. One of the solutions offered is to require a majority of all those voting at the election rather than just those voting on the measure for a proposal to pass. The study suggests that there are many proposals which do not lend themselves to yes or no answers, and that to count as no votes the failure of some persons to vote on the measure, would be a false interpretation of the popular will.

Some of the suggested reforms are:

1. Provide an agency to help people draft proposals.

2. Have petitions placed in offices of county clerks or elections registrars and then only people with a real interest would sign. The proposal, if passed, would be a real guage of public opinion.

3. Rectify the failure of Oregon requirements to distinguish between initiated statutes and initiated constitutional amendments (at the time of the report, the number of signatures needed for both was the same). If Oregon voters want to maintain a distinction between fundamental law and ordinary legislation, the process of amending the constitution by popular initiative should be made more difficult.

4. Adopt the indirect initiative, where popular proposals are first submitted to the legislature, and if the legislature fails to act, then the proposal could go to the voters.

5. One of the major problems is that initiative measures appropriating funds can be enacted without any indication as to how the appropriation will be supported. A 1948 pension bill sought to compel the legislature to invade reserve funds for the purpose of supporting an old-age pension plan. Any attempts by the legislature to raise funds through additional taxes are defeated by the people. An attempt was made by the 1949 legislature to require that every initiative measure proposing the expenditure of state funds include the means whereby the revenue was to be raised. The measure "met with decisive defeat" in the Senate.

6. "A survey of the types of proposals presented to the people over the period studied leads to the conclusion that there are those who must consider the electorate's ability to legislate to be infinite. It is difficult to understand how any one can demand that the electorate vote wisely on direct legislation or claim that the electorate is well informed regarding the proposals submitted. Some of the measures presented have been so complex as to tax the ingenuity of legislative experts and experienced jurists. In some cases the complexity of measures has been premeditated in an effort to confuse the voter. In other cases, the very nature of the proposals has necessitated the maze of legal and technical terminology. Regardless of the reason for it, the fact remains that many of the proposals simply do not lend themselves to a simple "yes" or "no" answer on the part of the electorate." (p. 124)

The study endorses the view of some political thinkers that direct legislative proposals be restricted to fundamental questions of public policy. The study further suggests that after the public approves or rejects a given policy, the implementation of the principles or policies would be left to the legislature. Provisions could be made for the submission of the enacted measure through an obligatory referendum, and if the legislature failed to act, the comprehensive statute or amendment would go to the people to vote on at a subsequent election. Some difficulties of this proposal are discussed.

Ohio

The use of initiative in Ohio is discussed in an article by Arthur Schwartz in 1950, "Initiative Held in Reserve". The Ohio Constitution provides for its amendment by direct initiative. Petitions seeking passage of a legislative act may be filed with the Secretary of State, and if the General Assembly fails to take favorable action on the proposed law, a supplemental petition will put the proposed law on the ballot. Laws passed by the General Assembly, excepting tax levies, appropriations, and emergency measures may be referred to the voters for their approval in a manner provided by law. Legislatively proposed constitutional amendments have been submitted to the voters for their approval as authorized by the 1851 constitution, while the use of initiative and referendum as means of direct legislation began in 1912.

The initiative and referendum, the author says, derives support from "the battle between population centers and the rural element (which) is ever present." For example, the rural block, known as the Cornstalk Club, of the House of Representatives, for many years prevented a proposed constitutional amendment for classification of property for taxation purposes from being submitted to the electorate. Finally, the measure was brought to the voters by initiative petition. In 1948, Senate Bill 6, authorizing the manufacture and sale of colored oleomargarine was sent to the General Assembly, and on its failure to act, the bill was on the 1949 ballot. Its passage again marked the defeat of the rural block. The initiative has been used as a vehicle for the expression of the popular will in areas including prohibition, workmen's compensation, old age pensions, debt limitations, etc.

The author notes that the number of times the initiative and referendum have been used have declined steadily, and that an average of the 38 year period the I & R were in use at the writing of the article, indicate that 72% of the electorate voted for these proposals, although in 1914-1927, sometimes the percentages went as high as 101% of those voting for governor in the preceding year's election. The author concludes that the use of the initiative and referendum in Ohio should not be expected to change radically from its historical use, but that it will be kept in reserve to satisfy an aroused public will.

Constitutional Changes in I & R in Other States

Six states have made changes in their initiative and referendum systems affecting the number of signatures required on petitions or the voter base for determining the number of signatures required or both. In Maryland, the number of signatures needed on a referendum petition (Maryland has no initiative) was changed from 10,000 to 3% while in North Dakota the number needed on an initiative petition was changed from 10% to 10,000. In Missouri, the base was changed from the total number voting for Justice of the Supreme Court to the total number voting for Governor. In three states, changes were made in both the numbers and the base. In Oregon, percentages were reduced while the base was changed from Supreme Court Justice to Governor--for

statutory initiative, from 8% to 6%, and for constitutional initiative, from 10% to 8%. In Montana, the base was changed from Justice to Governor; the referendum percentage was changed from 5% to 4% and the initiative from 8% in 2/5 of the legislative districts to 5% in 1/3. In Washington, signatures on initiative petitions needed were changed from 10% but not more than 50,000 to 8%, and on a referendum petition from 6% but not more than 30,000 to 4%; the base was changed from "legal voters" to those voting for governor at the last election.

Two states have changed prohibitions against the legislature amending or repealing an initiated statute. In Washington, where the prohibition extended for two years and was absolute, legislative amendment of an initiated measure is now permitted if agreed to by 2/3 of the legislature. In California, the legislature may amend or repeal an initiated measure but only if submitted to the voters and approved by them, unless the measure itself contains a provision authorizing legislative amendment.

In Nevada, the constitution has been amended to add details to be contained in petitions; in both California and Michigan some details have been omitted and left to the legislature. Changes in the effective date of initiated measures have been made in several states. In California, an initiated measure may now contain only one subject, and there is a specific prohibition written into the constitution by amendment that forbids the naming of official officeholders by the initiative. In North Dakota (and Ohio) provisions for mailing publicity on initiated measures were eliminated from the Constitution; in Washington, the duty to provide information to voters was changed from the legislature to the Secretary of State.

Montana has added to its constitution provisions for initiating constitutional amendments (initiated laws were in the prior constitution) and for the people to petition for a constitutional convention. The new Montana constitution also eliminates reference to emergency laws in spelling out details about the referendum.

Proposals for Changing I & R Relevant to Ohio

In the prior memoranda which discuss the specific provisions for initiative and referendum in Ohio, particular problems were noted arising out of court or attorney general interpretations of the provisions, gaps in the provisions, or obscure language. Suggestions for changes made previously are not repeated here.

Studies made of the initiative and referendum in other states have offered suggestions for improvements. Insofar as these suggestions are relevant in Ohio, they are listed below:

1. Prohibit payment of compensation to solicitors. (Professional solicitation of signatures does not, however, appear to be the problem in Ohio that it is in California, where it may cost several hundred thousand dollars to acquire enough signatures to get a measure on the ballot.)

2. Require the filing of reports even though the petitions are never filed. Section 3517.12 of the Revised Code requires that the committee for an initiative or referendum petition file a report of expenditures and contributions within 30 days after the petitions are filed with the Secretary of State, but there is no reporting requirement if the petitions are never filed.

3. Provide drafting service for persons wishing to initiate measures.

4. Require that proposed constitutional amendments being initiated be submitted first to the legislature as are proposed laws. One purpose to be served by this procedure would be improvement in the drafting and technical aspects of the amendment.

5. Improve the information given to the public on initiated and referred measures.

6. Restrict the number of times a particular proposal can be placed on the ballot within a given number of years or require a lapse of time between petitions for the same subject.

7. Restrict the ability of the legislature to repeal or amend an initiated law.

8. Eliminate "petition hawking" by requiring petitions to be placed in a public office such as that of Clerk of Courts and require persons wishing to sign to go there to do so.

9. Restrict the people's right to initiate laws or constitutional amendments which interfere with the civil rights of any person or group.

10. Increase the laws to which the right of referendum applies by eliminating emergency laws.

Selection of Delegates to National Conventions and Presidential Preference Primaries -- A Survey of the States

A study of the constitutional provisions of other states regarding the selection of delegates to national conventions and presidential preference primaries indicates that only 2 states, Ohio and California, have provisions in their constitutions governing these two aspects of the primaries. The following study is of the statutory provisions of the states. It appears that most regulation of primaries is statutory, although, as the survey will reveal, in some states, the statutes are silent on these issues, and the political parties are, to a great extent, autonomous. Information for the survey was taken from Nomination and Election of the President and Vice President of the United States, published by the U. S. Government Printing Office in 1972.

Alabama - The use of a primary for the selection of delegates and alternates to national conventions is optional, and may be used only by a party casting more than 20% of the vote at the general election for state officers. At party discretion, a candidate for delegate may indicate his preference for a presidential nominee. There is no statutory provision for a presidential preference primary. (*)

Alaska - Delegates to national conventions are selected at state conventions of the political parties. There is no provision for a presidential preference primary.

Arizona - There are no statutory provisions governing the selection of delegates by the political parties to their national conventions. Selection is customarily made by the party's state committee in a state convention held in mid-spring. There is no presidential preference primary.

Arkansas - Delegates to national conventions are elected from districts established by central committees of the political parties. One delegate is elected from each district. Party pledges are optional. Alternates and the number of delegates required to make up the total party delegation are chosen by the state central committee of each party. Presidential preference primaries are held only if a presidential candidate requests that one be held, but the practice is not customary.

California - The constitutional provision reads -

> Section 2.5. The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by

(*) Presidential preference primary, as used in the reference source means "primary elections in which voters may indicate a preference for a potential nominee either by voting for delegates whose preference for a nominee is indicated on the ballot or where the names of the potential nominees are offered for voters' selection".

electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election.

Delegates to national conventions are selected at a presidential primary held in June. Delegates for the primary may be nominated as slates committed to a particular candidate or uncommitted. Nominations of delegates may be made by any three or more voters who are registered as intending to affiliate with the same political party. Candidates file with the Secretary of State a pledge to support a particular party candidate or an expression of no preference. Every group of pledged delegates must have the endorsement of the presidential nominee, filed with the Secretary of State. On the primary ballot, the names of the presidential nominees preferred by a particular group of candidates or the chairman of each group of uncommitted candidates for delegate are arranged in order on the left side of the ballot. Names of delegates do not appear on the ballot. Voter preference is indicated by marking boxes appearing to the right of the various presidential nominees or group chairmen.

Colorado - Delegates to national conventions are chosen at state conventions or by party committees authorized by such conventions. There is no presidential preference primary.

Connecticut - Selection of delegates to national conventions are regulated by party rules, not by statute. There is no presidential preference primary.

Delaware - Delegates to the national conventions are selected at state conventions. If a political party holds a primary to elect delegates to the state convention, the political party must pay all expenses. Elected delegates who are committed to a presidential nominee are bound for two ballots at the national convention. There is no presidential preference primary.

District of Columbia - Delegates and alternates to national conventions are elected at the May primary. Candidates must file a petition with the board of elections on behalf of a slate of candidates or an individual's candidacy. If a petition supports the nomination of a candidate for President, the petition must be signed by such candidate. The presidential preference primary is held on the same day as delegates and alternates are elected. Presidential candidates must file petitions with the board of elections bearing a certain number of signatures of party members. Delegates and alternates attending the national convention are bound to vote for their party's candidate who received at least a plurality of votes in the presidential preference primary for the first and second ballot or until the candidate withdraws from the race.

Florida - Delegates and alternates are elected at presidential preference primaries. They run as slates committed to a candidate for presidential nominee in the primary. Petitions containing delegates names are submitted by presidential candidates to the Secretary of State. Selection of delegates and alternates from among each candidate's supporters is done by the state executive committee of each party by procedures established 90 days before the presidential preference primary. Each political party which had more than 10% of the total vote for President and Vice President at the last presidential election, and which had more than 10% of electors registered with them, shall elect one person to be a candidate for presidential nominee. Submission of a list of delegates and alternates to the Secretary of State by the candidate is optional. Delegates and alternates attending the national convention are pledged to that party's candidate until he receives less than 35% of the vote.

Georgia - In the absence of specific statutory provisions concerning the selection of delegates and alternates, such selection is regulated by state party rules. There is no presidential preference primary.

Hawaii - There are no state laws governing the choosing of delegates to party conventions. Delegates to national party conventions are elected at state conventions. There is no presidential preference primary.

Idaho - At state conventions, political parties mat elect delegates to national party conventions according to party rules. There is no presidential preference primary.

Illinois - Delegates and alternates to national conventions are selected in two ways - All but 10 are elected from congressional districts at the March primary. The remaining 10 may be either : elected at the primary from the state at-large; selected by state convention; chosen by a combination of the first two methods at the option of the party central committee. Candidates must state their preference for presidential nominee or state that they have no preference at the time of filing petitions with the Secretary of State. The presidential preference primary is held on the same day as delegates are elected. Candidates for presidential nominee may have their name printed on the March primary ballot. Delegates and alternates having the highest number of votes are duly elected. The vote for presidential nominee is advisory only, according to statute. The vote of the state at-large shall be considered by delegates and alternates at-large; the district votes shall be considered by district delegates and alternates.

Indiana - Delegates are selected at state conventions and at congressional district conventions. Presidential preference primaries are held in May. Any candidate for the office may request the Secretary of State to place his name on the ballot under the party label of his choice, such request must be accompanied by a certain number of signatures distributed as provided by law. The results of the presidential preference vote are certified to state party conventions but they are not directly connected with the selection of delegates at the state convention. A statutory duty is imposed on the delegates chosen to support the people's preference as expressed in the primary. Delegates from congressional districts are bound for the first ballot to the winning candidate in their congressional district. Delegates at-large are bound to the winner in the state at-large for the first ballot.

Iowa - The state presidential convention, not governed by statute, is distinct from the party regular state convention which is governed by statute. Delegates are selected, by custom, at state conventions of political parties according to party rules. There is no presidential preference primary.

Kansas - Delegates to the national conventions are selected by congressional district and by state convention of the political parties. There is no presidential preference primary.

Kentucky - There are no statutory provisions concerning the selection of delegates and alternates. Delegates are chosen at state conventions, and district delegates are chosen at district conventions held in the spring or early summer. These conventions are governed by party rules. There is no presidential preference primary.

Louisiana - No statutory provisions regarding selection of delegates. Delegates may be selected by state central committees of the political parties or committees may determine that delegates shall be selected at primaries or by convention. There is no presidential preference primary.

Maine - Delegates and alternates are elected at state conventions of the political parties. There is no presidential preference primary.

Maryland - Delegates and alternates are elected at presidential preference primaries in May, by congressional district. Delegates may have their presidential preference indicated on the ballot ofter their name, provided that said candidate grants permission to the delegate. Delegates at-large are elected by district delegates. Delegates attending the national convention are bound to vote for presidential candidates in the following way: congressional district delegates are bound to vote for the winner of the presidential preference primary in their district for two ballots or until the candidate receives less than 35% of the vote. At-large delegates are bound to the winner in the state at-large for 2 ballots or until less than 35% of the vote is cast for the nominee.

Massachusetts - Congressional district delegates and alternates are selected at the April primary. Delegates and alternates at-large may be named by the state party committees in February. Nominating petitions for delegates and alternates (both district and at-large) may contain a statement indicating presidential preference, but no such preference may appear on the primary ballot without the consent of the presidential candidate. The presidential preference primary is held in April, and all candidates who petition or are nationally acclaimed by the news media appear on the ballot. Delegates and alternates are bound to the person receiving the plurality of votes at the presidential preference primary for the first ballot, or until released by the candidate.

Michigan - Delegates and alternates to national conventions are elected by congressional district caucuses and state conventions. Each congressional district elects two district delegates. Delegates at-large are elected by the state convention. There is no presidential preference primary.

Minnesota - Delegates are selected according to party rules. The statutes provide for a state convention to be held once every general election year, and for the congressional district conventions and county conventions once every general election year as well as for precinct caucuses. There is no presidential preference primary.

Mississippi - Delegates to national conventions are selected at party conventions by the party state committee. Delegates to the state convention are selected according to party rules. There is no presidential preference primary.

Missouri - Delegates and alternates are selected at state party conventions called by the party state committees. Nominees may give presidential preference at the conventions or give a short talk on election issues. There is no presidential preference primary.

Montana - Each political party is authorized by statute to provide for the selection of delegates to national conventions. There is no presidential preference primary.

Nebraska - Delegates and alternates to national conventions are elected at the May primary, at the same time as the presidential preference primary is held. Delegates indicate their presidential preference at the time of filing their petition with the Secretary of State. The petition contains a pledge to support the winning candidate for two ballots or until he receives less than 35% of the vote. The candidate preferred by the delegate appears directly below his name on the ballot. Presidential candidates are listed separately and voters may write in candidates' names.

Nevada - Delegates and alternates are selected by state conventions of political parties. Delegates to state conventions are elected at county conventions. There is no presidential preference primary.

New Hampshire - Delegates and alternates (district and at-large) are elected at the March presidential preference primary. At the time of filing, a candidate for delegate may indicate his preference for presidential candidate or pledge himself to a candidate. If preference is indicated, it will appear on the ballot. A pledge will appear on the ballot provided the presidential candidate gives consent. New Hampshire Election Laws provide that the results of the presidential preference primary shall be advisory in nature for the delegates elected at the primary.

New Jersey - District delegates and delegates at-large are elected at the primary. Candidates for delegate may request in their petition to be grouped together on the ballot with their preference for presidential candidate if the written consent of the candidate endorses the petition. A vote for the group shall be tallied as a separate vote for each delegate or alternate listed in the group. The presidential preference primary is advisory only, and is held the same day as delegates and alternates are elected.

New Mexico - Each political party, after completion of a state canvass of the results of the presidential preference primary, selects delegates and alternates according to party rules. "Such delegates and each alternate for such delegates shall be alloted to the two candidates, or to the one candidate and the unpledged category, as the case may be, in the same proportion that the total vote such candidate or category received bears to the total combined vote of both candidates, or of one candidate and the unpledged category, as the case may be. New Mexico Statutes Annotated § 3-8-40." Candidates for the presidential primary are either nominated by petition or selected by a committee of state officials. Delegates bind themselves to the candidate for the first ballot when they sign a declaration of acceptance as required by law.

New York -Delegates are elected from congressional districts or partly from the state at-large and partly from congressional districts as the party rules may provide. Although delegate candidates may state preference for presidential candidate during their campaign, they are not legally bound. There is no presidential preference primary.

North Carolina - Delegates and alternates to national conventions are selected at state and district conventions of the political parties. A presidential preference primary is held in May. The State Board of Elections nominates generally advocated and nationally recognized candidates. Other nominees may appear on the ballot if nominated by petition bearing at least 10,000 signatures. The four candidates receiving the highest number of votes, (or all candidates if there are fewer than 4) provided that each of the four receives at least 15% of the total vote cast by his party, shall be awarded a pro rata portion of the authorized delegate vote of his party.

North Dakota - Delegates are chosen at state political party conventions. Statutes require that no delegate to a national convention shall be recognized unless his party received at least %5 of the total votes cast for President and Vice President at the last election. There is no presidential preference primary.

Ohio - Delegates and alternates are elected at the May primary. Delegates must file a petition with the Secretary of State indicating their first and second choices for the presidency. Such choices are to be printed below the candidate's name on the ballot, provided that the presidential candidates give their consent. Presidential preference is expressed at the primary by votes cast for delegates' preferences.

Oklahoma - There are no statutes governing state party conventions or selection of delegates and alternates. Party rules provide for congressional district and state conventions. There is no presidential preference primary.

Oregon - Delegates are elected at the May primary. The law appears to apply only to major parties: "In the year when a President and Vice President of the United States are to be nominated and elected, the major political parties shall elect delegates to their national conventions and select candidates for presidential electors. (Oregon Rev. Stat. § 248.310)". Delegates are elected by congressional districts. Petitions for nomination of delegates contain a pledge to support the presidential candidate for two ballots or until he receives less than 35% of the vote. The names of candidates for president (and v.p.) are listed on the same ballot as that on which candidates for delegate appear.

Pennsylvania - District delegates and alternates are elected at a general primary in April. An optional presidential preference primary, advisory in nature, is held at that time. District delegates elect 15% of the national convention delegates. The remaining 10% is selected by the state party committee. Indication of preference in the nominating petition is optional for delegates, but preference is binding, if their presidential candidate wins in their district.

Rhode Island - The primary election for the election of delegates to nationa conventions is held in April. Candidates for delegate indicate their preference or state that they have no preference when filing for candidacy with the Secretary of State. Delegates are bound to vote for the candidate of his party "so long as he shall be a candidate before said convention". A presidential preference primary is held on the same day in April, but the results are only advisory to the respective parties, although the results of the election of delegates is binding.

South Carolina - Delegates to national conventions are selected at state conventions, but this practice is not required by statute. The state convention is held in March. Delegates are bound to the party's nominee for president by party instruction. There is no presidential preference primary.

South Dakota - Delegates and alternates are elected at the June primary. Candidates or groups of candidates receiving the highest vote are declared elected. The presidential preference primary, on the same day in June, involves voters expressing their choice for presidential candidate by voting for a group of delegates who have expressed their preference for a particular candidate. Nominating petitions, except where there is no preference stated, contain a pledge for 3 ballots, or until the party's candidate receives less than 35% of the vote.

Tennessee - Delegates and alternates to national conventions are chosen at state and district conventions. A presidential preference primary is held in May. Delegates elected from congressional districts are bound by the election results of the presidential preference primary within their district, and must cast 2 ballots for the winning candidate. Delegates at-large are bound for only one ballot to the state winner in the presidential primary.

Texas - Parties holding primary elections in a presidential year shall hold state conventions for selection of delegates. There is no presidential preference primary.

Utah - Delegates and altnerates are selected by state convention in June or July. Representatives to state conventions are selected at county primary conventions in June. There is no presidential preference primary.

Vermont - Delegates and alternates are chosen at state party conventions in May. There is no presidential preference primary.

Virginia - Delegates are chosen at state party conventions. This is not a statutory

requirement. Statutes give the parties complete power as to how delegates and alternates are to be selected. There is no presidential preference primary.

Washington - Delegates are chosen at state conventions, however, this method of selection is not mandated by statute, but according to party rules. Statutory power is granted to each political party to call conventions and elect delegates to state and national conventions and provide for the nomination of presidential electors. There is no presidential preference primary.

West Virginia - Delegates are chosen at the May primary. Delegates at-large are elected state wide and congressional district delegates are elected by district party voters. Delegates receiving the highest number of votes are elected. Alternates are appointed by delegates after the primary. Delegates do not pledge themselves to presidential nominees. The presidential preference primary is held in May. Aspirants for President and Vice President appear on the ballot. There is no statutory instruction to delegates on the basis of the presidential preference primary results.

Wisconsin - Delegates and alternates at-large and district delegates and alternates are selected by one of two methods:

1- Candidates for presidential primary file with the Secretary of State a list of district and at-large delegates and alternates according to the number permitted the party. The primary is held in April, and the name of the presidential nominee is printed on the ballot along with the names of delegates designated by him. If the presidential candidate wins in each congressional district and in the entire state as a whole, his delegates and alternates will automatically become the convention delegates and alternates. The declaration of acceptance which must be signed by the delegate contains a pledge to vote for the presidential candidate until he receives less than 1/3 of the votes.

2- If the presidential preference vote in any district or in the state at-large is won by a write-in candidate or by a candidate who did not file a list of delegates, or, if the plurality in any district is for "none of the names shown", the state executive committee selects delegates and alternates. The presidential preference primary is held in April.

Wyoming - Selection of delegates is made at state party conventions in May according to party rules. Delegates to state conventions are selected in county conventions held in March. There is no presidential preference primary.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
February 27, 1974

Committee Report

Primary Elections (Section 7 of Article V)

In order to remove from the Ohio Constitution the provisions requiring the designation of all candidates for delegate to national party conventions on the primary ballot, and to remove the unnecessary provisions for the election of United States Senators, the committee recommends the following amendments to Section 7 and to Section 2a of Article V.

Article V

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law; ~~and provision shall be made by law for a preferential vote for United States senator;~~ but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. ~~All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.~~ THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE OPPORTUNITY FOR THE ELECTORS TO VOTE FOR THEIR CHOICE OF CANDIDATES FOR NOMINATION FOR THE PRESIDENCY, AND SUCH VOTE MAY BE EITHER DIRECTLY FOR SUCH CANDIDATE OR FOR DELEGATES TO A NATIONAL CONVENTION WHO MAY BE IDENTIFIED ON THE PRIMARY BALLOT SOLELY BY THEIR CHOICE OF CANDIDATE.

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States AND OTHER THAN CANDIDATES FOR DELEGATE TO A NATIONAL PARTY CONVENTION IF SUCH DELEGATES ARE ELECTED) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Note: The committee has other recommendations for Section 2a, dealing with ballot rotation, which will be presented at a later time.

History and Background of Section 7

Section 7 was added to the Ohio Constitution in 1912. The Proceedings and Debates of the Constitutional Convention of 1912 reveal that there was widespread distrust and dissatisfaction with the method of nominating candidates that obtained at that time, namely the state convention.

Theodore Roosevelt, addressing the Convention, said:

> I believe in providing for direct nomination by the people, including therein direct preferential primaries for the election of delegates to the national nominating conventions. Not as a matter of theory, but as a matter of plain and proved experience, we find that the convention system, while it often records the popular will, is also often used by adroit politicians as a method of thwarting the popular will. In other words, the existing machinery for nominations is cumbrous, and is not designed to secure the real expression of the popular desire. (Debates, p. 382)

J. W. Tannehill, of Morgan County, the author of what is now the first half

of Section 7, admonished the Convention:

> The chief cause of the frequent failure of representative government lies in the corrupt, boss-controlled, drunken, debauched, and often hysterical nominating convention. The convention must go. (Debates, p. 1239)

The Debates report that many other persons concurred with Mr. Tannehill in his proposal to exchange the state convention method of nominating candidates for a primary system. In his original proposal, Mr. Tannehill's language permitted nomination by direct primary elections or by petition as provided by law. His thought in including petitions was to permit nominations of schools boards and judges by petition if it was desired to keep those offices out of politics. Concerning relief of township officers and officers of small towns, he suggested that the direct primary is useful only where the office is sought after and nobody wants a township office. A primary in those instances would be a needless expense.

John D. Fackler of Cuyahoga County offered an amendment to the proposal concerning delegates to national conventions. The language of the amendment, is, verbatim, the last part of the present Section 7: "All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate shall be so used without his written authority."

The amending language was neither explained nor discussed in the Debates. Apparently, the amendment was made in response to President Roosevelt's remarks.

Prior to 1913, United States Senators were selected by the state legislatures, pursuant to Article I, Section 3 of the United States Constitution which read as follows:

> The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years, and each Senator shall have one vote.

In his address to the 1912 Convention, President Roosevelt stated that he

favored the election of United States Senators by direct vote of the people. One delegate to the Convention observed:

> For a great many years there has been a continuous scandal in the congress of the United States over the manner in which some senators have been elected. I believe it was simply because they were elected by the bosses and cliques within the parties, and not because the people had any voice in it at all. (Debates, p. 1245)

Mr. Thomas offered an amendment to the original language of Mr. Tannehill's proposal to include U.S. Senators among the offices for which nominations shall be made at direct primary elections. Apparently a movement had been underfoot for some years before the convention, as one senator alluded to the failure of his amendments to the Bronson Primary Bill to provide for the nomination of U.S. senators and congressmen as well as other officials below the governor by the primary method. He observed that the legislature was unwilling to take positive action on the matter, and added:

> You cannot get any matter in the senate that affects their own standing. We have been standing for a good many things that were purely legislative and this is one of them, but if you cannot reach a thing through the legislature, you will have to reach it here. (Debates, p. 1243)

Arguments were heard on the inconsistency of Mr. Thomas' proposal with Article I, Section 3 of the federal Constitution. Others expressed the view that although the U.S. Constitution provided for the manner of electing U.S. Senators, the manner of nominating them was an open question. One gentleman offered the view that "the amendment simply provides that we have senatorial primaries for nomination, and then when the people express their choice the legislature will obey the will of the people and elect the senator thus designated."

Mr. Thomas changed the wording of his amendment to the present language of the Ohio Constitution, "and provision shall be made by law for a preferential vote for United States senator."

Problems and Suggested Solutions

The provision in Section 7 that all delegates to national political party con-

ventions be chosen by direct vote of the electors has resulted in the unwieldy "bedsheet" ballot, which is an expensive method and one that is fraught with problems. One such problem occurred in the May, 1972 primary when, as a result of the names of Democratic Party candidates for delegate being so numerous, voting machines could not contain all the delegates' names. Paper ballots had to be used many places where they are not ordinarily used, and both time and expense were serious problems.

In addition, Section 7 requires a primary only if a party holds a national convention. If a party selects its candidates in some other manner, the primary is not required. Section 3505.10 permits smaller parties to omit the primary, and have their candidates placed directly on the November ballot. As a result of a recent decision, the restrictive definition of "political party" which prevented qualification by a group of voters to hold a primary election, and, by Section 7, send delegates to a national convention, was declared in violation of the Equal Protection Clause of the 14th amendment.

It is the thought of the committee that the primary election process is an adequate safeguard against the corruption and bossism of state political conventions. However, the framers of the constitutional language seem to have included needlessly complicated requirements for that safeguard. The primary election method may be retained without leading to the bedsheet ballot or discriminating against smaller political parties.

The Secretary of State has suggested a solution to the complicated mechanism of Section 7 in S.J.R. 5. This proposal would eliminate the listing of delegates' names on the primary ballot, and would require, instead, that the delegates be identified only by the name of their first choice for the presidency.

The committee believes, however, that S.J.R. 5 is not flexible enough to accommodate all possible methods of selecting delegates and that it would write into the Constitution provisions which are essentially statutory in nature. One example

of a method which would not fall within the terms of S.J.R. 5 is the election of a certain percentage of the delegates and the selection of the remainder according to party rules. S.J.R. 5, like present Section 7, specifies the manner of selecting all delegates.

The most flexible procedure, and that is one of the major goals of the committee in writing constitutional language, would be to permit the General Assembly to provide the means by which electors express their presidential preferences. The suggested language incorporates this flexible procedure, and in addition permits a choice of means to that end. "The General Assembly shall provide by law the opportunity for the electors to vote for their choice of candidates for nomination for the presidency, and such vote may be either directly for such candidate or for delegates to a national convention who may be identified on the primary ballot solely by their choice of candidate."

The suggested language: (1) eliminates the requirement of the bedsheet ballot; (2) permits either a presidential preference primary or a primary to select delegates; (3) leaves to the General Assembly the flexibility to change procedures as needs change; (4) does not tie the hands of the political parties to run essential party business.

The constitutional requirement for laws to be made to provide a preferential vote for U.S. Senator appears to be no longer needed. U.S. Senators are now elected in November by the people and nominated at the primary, just as are congressmen and all elected state officials. The 17th amendment to the U.S. Constitution ratified in 1913, states:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.

The amending language to Section 2a of Article V is for the purpose of excepting elected delegates to the national party conventions from the requirements of that section that "An elector may vote for candidates (other than candidates for electors of President and Vice- President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate." If the primary ballot indicated delegates solely by their choice for president, the elector would be unable to indicate his vote for each candidate separately, and would, therefore, be unable to do what Section 2a indicates must be done.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
April 22, 1974

R E P O R T

The committee on Elections and Suffrage hereby submits its recommendations on the following present sections of Article V of the Ohio Constitution:

Section	Subject	Recommendation
Section 1	Who may vote	Amend
Section 2	Election by ballot	No change
Section 2a	Type of ballot	Amend
Section 3	Voters privilege from arrest	Repeal
Section 4	Forfeiture of elective franchise	Amend
Section 5	Vote of military persons	Repeal
Section 6	Vote of idiots, insane persons	Repeal

Article XVII concerns the time for holding elections, terms of elective officers, and manner of filling vacancies. The following changes are recommended:

Section 1	Time for holding elections	Amend
Section 2	Terms of officers, vacancies	Amend

Several sections of the Constitution were referred to the Elections and Suffrage committee by the Legislative-Executive Committee for consideration. The following recommendations are made:

Article II, section 21	Contest elections	No change
Article III, section 3	Election returns	Repeal
Article III, section 4	Election returns	Repeal
Article III, section 18	Vacancies to be filled by Governor	Repeal

The committee has prepared special studies recommending amendment of section 1 of Article XVI and section 7 of Article V, which have already been presented to the Commission.

Introduction

The elective process, by the very nature of our government, is the cornerstone of the democratic process. State constitutions tend to safeguard this process by setting forth certain minimum requirements--age and residence--concerning who may vote or hold public office. Constitutions may also deal with who may not vote--such as the mentally incompetent.

It has been the purpose of the Elections and Suffrage committee, in reviewing the constitutional provisions governing the franchise and elections, to construct the most flexible framework possible consistent with safeguarding the elective process. Through extensive research and interaction with other agencies, the committee has learned that overly restrictive laws result in the disfranchisement and discouragement of many potential voters.

The elective process is not immune to changes in society. A short time ago, the age for voting was lowered to 18 years, and the number of potential voters was increased by millions. The use of new forms of communication has rendered the newspaper no longer the prime means of informing voters about elections, and machine voting devices have replaced paper ballots in many areas. The population is more mobile today than it was in 1851; consequently, the residence requirements for voting are unrealistic. The Constitution, ideally, should be flexible enough to accommodate inevitable changes, while continuing to state basic principles.

The Elections and Suffrage committee has found much in the nature of statutory material in the sections of the Ohio Constitution it has studied. The committee considers that such matters should be removed from the constitution, wherever possible, to provide needed flexibility.

Article V

Elective Franchise
Recommendations

Section 1. Who may vote

Present Constitution

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.

Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.

Committee Recommendation

The committee recommends the amendment of Section 1 as follows:

Section 1. Who may vote.

Every citizen of the United States, of the age of ~~twenty-one~~ EIGHTEEN years, who ~~shall have~~ HAS 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~~ HAS the qualifications of an elector, and he IS entitled to vote at all elections.

~~Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.~~

Comment

The provision of section 1 that sets twenty-one as the minimum age to vote has been rendered unconstitutional by the 26th Amendment to the U. S. Constitution, which was ratified in 1971. It provides:

"The right of citizens who are 18 years of age or older to vote shall not be denied or abridged by the United States or any state on account of age."

Durational residence requirements for voting were held unconstitutional as violating the equal protection clause of the 14th Amendment by the Supreme Court in Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995 (1972). In that case, the Court invalidated a Tennessee statute requiring a one-year residency in the state and three-month in the county before being qualified to vote. The ruling of unconstitutionality was specifically applied to Ohio's 6-month state residence requirement on August 7, 1972 in Schwartz v. Brown, by the United States District Court for the Southern District, in Civil Action 72-113.

The committee considered two alternative recommendations made by Secretary of State Ted W. Brown. One entailed the repeal of section 1 entirely. The committee decided that, although it was likely that the provisions of section 1 granted no power to the legislature it didn't already have, the section should be retained because of the importance of stating the basic right to vote in the constitution. In addition, inasmuch as the qualifications of an elector are referred to elsewhere in the Constitution as a prerequisite to holding public office, the committee considerd it necessary to retain the statement defining such qualifications in section 1. The committee agreed that the second alternative proposed by the Secretary of State's office, which suggested lowering the voting age to eighteen and removing reference to the durational residency requirement was more desirable.

The second paragraph of section 1 provides that if an elector does not qualify to vote for state and local officials, he may be qualified to vote for President and Vice President in Ohio if he has been a resident the length of time prescribed by law. Since durational residence requirements have been declared unconstitutional, different residency requirements for voting in state, local, and federal elections are no longer permitted. At most, a state may impose a reasonable length of time for registration--perhaps 30 days. A person who is registered would be qualified to vote in all elections, state, local and federal. Hence, the provision for a vote in federal elections by persons who are not qualified to vote in state and local

elections is no longer needed.

Section 2. Elections by ballot

Present Constitution

All elections shall be by ballot.

Committee Recommendation

No change.

Comment

The provision for elections to be by ballot is a statement of the fundamental principle of the secret ballot, which allows persons to express their views on election matters without fear of retaliation. The Ohio Supreme Court has held that the provision permits machine voting, its purpose being to protect the secrecy of voting. The committee considered that the provision should be retained.

Section 2a. Office type ballot

Present Constitution

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Committee Recommendation

Section ~~2a.~~ 3. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office~~, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.~~ THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE MEANS BY WHICH BALLOTS SHALL GIVE EACH CANDIDATE, WHEREVER POSSIBLE, REASONABLY EQUAL TREATMENT BY ROTATION OR OTHER COMPARABLE TECHNIQUES APPROPRIATE TO THE VOTING METHOD USED. ~~Except at a Party Primary or in a non-partisan election,~~ AT ANY ELECTION IN WHICH A CANDIDATE'S PARTY DESIGNATION APPEARS ON THE BALLOT, the name or designation of each candidate's party, if any, shall be ~~printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed~~ LESS PROMINENT THAN THE CANDIDATE'S NAME. An elector may vote for candidates (other than candidates for electors of President and Vice President of the United States, OTHER THAN CANDIDATES FOR GOVERNOR AND LIEUTENANT GOVERNOR, AND OTHER THAN CANDIDATES FOR DELEGATE TO A NATIONAL PARTY CONVENTION IF SUCH DELEGATES ARE ELECTED) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Background of Section

Section 2a was added to the Ohio Constitution in 1949. Most state constitutions contain a provision for a secret ballot, but Ohio is the only state which provides for ballot rotation in its constitution.

The present language of section 2a has been interpreted to require perfect rotation of names on the ballot, in so far as may be reasonably possible. A case is now pending in the Ohio Supreme Court questioning whether the use of voting

machines meets the constitutional requirement for rotation. (State of Ohio ex rel. John L. Roof vs. The Board of Commissioners of Hardin County). The names of candidates cannot be rotated on a voting machine. Once the order of names is established for an individual machine, that order is locked into place and remains unchanged throughout the election. The use of voting machines might be controlled to meet the requirements of section 2a by rotating the machines so that a different order of names appears on each machine, and an unreasonable number of electors do not vote on a given machine. The Court of Appeals stated that the constitutional requirement could be met by equalizing precinct size. Equalizing precinct population, however, is difficult. Boards of Elections, in aligning precincts, attempt to combine voters who are voting on the same issues. They take into account school boundaries, representative districts, and municipal and township lines, among other considerations. A requirement that precincts be of equal size may negate the possibility of such "communities of interest". Some precincts are, by nature, transitional. This is especially true of college towns, where precincts may vary in size by several thousand within the space of a few months. Hence, the task before the Board of Elections is at best extremely difficult, if not impossible in some situations. Further, because of the requirement for perfect rotation, an occasional printing error on the ballot could cause an entire election to be invalidated when paper ballots are used.

Comment

The committee considered several alternative ways of dealing with the rotation language of section 2a, including repeal. The committee decided, however, that repeal was undesirable because it would leave open the possibility of enactment of a law like one in California which places an incumbent's name first on the ballot. It favored retention of the principle that no candidate should have an undue advantage or disadvantage by virtue of ballot position.

The committee nevertheless considered the current provision too restrictive, preventing the use of new voting methods the state should be free to explore. Various

electronic methods are being discussed and tested in other states. A recent Florida election employed telephonic voice prints, and cable television holds out the possibility of voting by means of digital return systems. These and other methods could offer advantages outweighing the values of perfect rotation.

The committee concluded that the General Assembly should be fair to candidates, but should be free to alter voting procedures. It therefore recommends a doctrine of fairness in relative, rather than absolute, terms, leaving implementation to the General Assembly. The General Assembly is mandated to provide legislation granting candidates reasonably equal treatment appropriate to the voting method employed.

The deletion of the words "except at a Party Primary or in a non-partisan election", removes a misleading clause which suggests that at a Party Primary or in a non-partisan election the designation of party can be printed in larger and darker type face than the candidate's name. The committee's language requires the printing of the candidate's party designation in a less prominent fashion than the candidate's name, and also removes reference to the print media, so as not to exclude new technology.

A change in section 2a was recommended by the Commission in its first report to the General Assembly. The proposal was that the words governor and lieutenant governor be added to the words in parentheses, in order to cohere with a recommendation for the joint election of governor and lieutenant governor. That proposal is still pending in the General Assembly.

The recommended additional language "and other than candidates for delegate to a national party convention if such delegates are elected" is explained in the commentary to the committee's previous recommendation on section 7 of Article V. That proposal is pending before the Commission.

A change in the number of this section of the Constitution is being recommended, changing the section number from 2a to 3, as the committee is simultaneously recommending repeal of section 3 of Article V.

Section 3. Voters, when privileged from arrest

Present Constitution

> Sec. 3. Electors during their attendance at elections, and in going to, and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony and breach of the peace.

Committee Recommendation

Repeal

History

The language of this section appeared in the 1802 Constitution and was included in the 1851 Constitution without debate. Extensive research on the matter revealed no discussion of why such a provision should be included in the Constitution. A similar privilege for Senators and Representatives appears in Article II, section 12.

The privilege is very narrow since it does not apply to arrest in criminal cases, only arrest in civil cases. A recent case, Akron v. Mingo, 169 Ohio St. 511 (1969) confirmed the narrow class of cases to which the privilege applies by its holding that "breach of the peace" includes all criminal offenses. The instances where arrest in civil cases is permitted are very rare and include only arrest of a defendant in a civil action before judgment on grounds including his absconding with property out of the court's jurisdiction or attempting to defraud his creditors, and arrest of a judgment debtor on similar grounds, since Section 15 of the Bill of Rights (Article I) of the Ohio Constitution says that "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." Civil arrest may also occur in the rare case in which a person is found guilty of civil contempt, defined as "that which exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposite party therein" 11 O. Jur. 2d Contempt 95. Hence, this section in reality has no practical significance.

Furthermore, the legislature has extended this privilege from arrest, however narrow its application, to other groups of persons without benefit of constitutional

provision. Section 2331.11 of the Ohio Revised Code contains an extensive listing of such additional persons including: judges while holding court and traveling to and from court; attorneys, clerks of courts, sheriffs, coroners, criers, suitors, jurors, and witnesses traveling to and from court and in attendance in court, members of the militia while attending or traveling to or from a parade, to name a few.

The committee recommends repeal of section 3 of Article V. It considers the provision archaic and that, in any event, the General Assembly has ample authority without this provision to legislate such exemptions.

Section 4. Forfeiture of elective franchise

Present Constitution

Section 4. 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.

Committee Recommendation

Section 4. 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, AND ANY PERSON MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING.

History of the present section

Ohio's provision for taking away the vote from a person convicted of a crime is substantially unchanged from the version in the 1802 Constitution. All but three state constitutions contain similar provisions, although interpretation of "infamous crimes" varies among the states. The General Assembly has interpreted its authority under the constitutional provision to extend to any felony, defined in the Ohio statutes as any offense which may be punished by death or imprisonment in the penitentiary. (Sec. 1.06 R. C.)

Under the new Ohio Criminal Code, effective January 1, 1974, a person convicted of a felony would lose his right to vote only while actually imprisoned, since the statute provides that probation, parole, and pardon, during the time such disposition is in effect, and final discharge of the convicted person, restore the right to be an elector. (Section 2961.01 of the Revised Code.)

Whether denial of the right to vote to persons convicted of felonies violates the equal protection clause of the 14th Amendment has not yet been decided by the United States Supreme Court, although there are now cases pending in which this question is raised. The California Supreme Court, in Richardson v. Ramirez, Gill & Lee, in March, 1973, held invalid provisions of that state's constitution and election laws

denying voting rights to ex-felons whose terms of incarceration and parole had expired. The Court held the provisions in violation of the Equal Protection Clause of the 14th Amendment.

Comment

The committee observed that the state's interest in disfranchising criminals might not be as great as its interest in keeping those persons from holding public office. In any event, the constitutional language is merely permissive in nature. It empowers the General Assembly to exclude from voting or public office persons convicted of bribery, perjury, or other infamous crimes. Since the new Ohio statute appears to deny voting rights to felons only while actually imprisoned, and since such a provision does not appear, at this time, to be unconstitutional, the committee could see no reason to recommend a change in the constitutional provisions. The committee considered writing a more restrictive definition of "infamous crimes", but felt that changing attitudes toward incarceration and rehabilitation should be reflected through the legislative process. Section 4 clearly places this responsibility on the legislature.

Comment on New Language

History

Article V, section 6 of the Ohio Constitution states that "No idiot, or insane person, shall be entitled to the privileges of an elector." The language has remained unchanged since first adopted in 1851. The Ohio Constitution, like many other state constitutions, still uses the words "idiot" and "insane", words which have fallen into disfavor and are replaced in some of the newer state constitutions by terms more narrowly defined.

The Ohio Revised Code contains provisions regarding hospitalization of the mentally ill in Chapters 5122., 5123., and 5125. A distinction is made between

voluntary and involuntary patients. The involuntary commitment process begins when appearance is requested before the probate court, and results in the loss of certain rights, among them the right to vote, after a finding of legal incompetency. Due process requires that only those individuals appearing before a probate court and adjudged mentally ill subject to hospitalization by court order will lose their civil rights.

The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in section 5122.15, dealing with legal incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is "insane" or an "idiot" could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.

In addition, the United States Supreme Court has ruled that a state must have "a necessary and compelling interest" that would be promoted by the disfranchisement of certain persons in Kramer v. Union Free School District 395 U. S. 627 (1969). It is unclear how the state would support such a claim, other than by the kinds of arguments used to justify literacy tests. A recent study in a Cleveland state hospital involved questioning the patients and the employees on political and social matters. The report indicated that both groups showed the same voting tendencies. Although the results of the survey do not justify the conclusion that all inmates of mental institutions should vote, they do call into question the opinion that inmates of mental institutions cannot function as part of a knowledgeable electorate.

Comment

The committee concluded that large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote. Accordingly, the committee agreed that the words "idiot" and "insane" ought to be removed from the Constitution, in favor of a more acceptable term, "mentally incompetent." The language recommended by the committee, "mentally incompetent for the purpose of voting" is a term with a narrower application than "mentally incompetent", and the proposed language is intended to exclude only those persons who should not participate in the electoral process. The committee considered that a person should not be denied the right to vote because he is "incompetent," but only if he is incompetent for the purpose of voting. The suggested language allows the legislature to draft legislation excluding from the franchise persons mentally incompetent for the purpose of voting and safeguarding the rights of other persons who can lose their rights under the present constitutional language.

Section 5. Persons not considered residents of the state

Present Constitution

> Section 5. No person in the Military, Naval, or Marine service of the United States shall, by being stationed in any garrison, or military, or naval station, within the State, be considered a resident of this State.

Committee Recommendation

Repeal.

Comment

States have attempted to declare that a person living in a federal enclave cannot establish voting residence in that state. The reason for such a provision was perhaps suggested in Carrington v. Rash, 380 U. S. 89 (1965), where the state had argued that it was proper to prohibit servicemen stationed in Texas from voting because of the state's need to immunize its elections from the concentrated balloting of military personnel whose collective voice may overwhelm a small local civilian community, and to protect the franchise from infiltration by transients. The court rejected this argument saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." In a more recent case, Evans v. Cornman, 398 U. S. 49, 90 S. Ct. 1752 (1970) the Supreme Court held that such restrictions were in violation of the 14th Amendment Equal Protection Clause. Section 5 of Article V of the Ohio Constitution was declared unconstitutional on June 4, 1973, insofar as it denies a person the right to register because he lives on the grounds of a federal enclave in Stencel v. Brown, (U.S.D.C., Southern District, #72-331).

The committee felt the unconstitutional language should be removed from the Constitution.

Section 6. Idiots or insane persons

Present Constitution

Section 6. No idiot, or insane person, shall be entitled to the privileges of an elector.

Committee Recommendation

Repeal.

Comment

The committee recommends repeal of this section, and inclusion of related material in section 4 of Article V. For explanation, refer to section 4.

Article II, section 21. Contested Elections

Present Constitution

> Section 21. The General Assembly shall determine by law, before what authority, and in what manner, the trial of contested elections shall be conducted.

Comment

The committee suggests no change in the language of the section. The provision makes it clear that the General Assembly may determine how contested elections should be resolved. If this section were not in the Constitution, possibly the courts would determine that resolving such elections is an inherent judicial prerogative.

Article III section 3. Election returns

Present Constitution

Section 3. The returns of every election for the officers, named in the foregoing section shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by joint vote of both houses.

Committee Recommendation

Repeal.

History of section

The language of this section has remained unchanged since adopted in 1851. A similar provision, concerning returns of the election for governor, was included in the 1802 Constitution. Prior to 1851, the members of the executive branch were not constitutional officers, or, as in the case of the secretary of state, were appointed rather than elected. The 1851 Constitution speaks of an executive branch rather than just a supreme executive office. The lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general became constitutional officers, all elected at a general election. These officers are those "named in the foregoing section" in Article III.

Comment

The committee studied the present provision in light of Ohio history and present statutes. Although the Secretary of State is designated chief elections officer by statute, at the time section 3 of Article III was drafted, there was no state elections officer. The General Assembly was a body with continued existence, and so it was natural to give the duty of opening and publishing state wide election returns to the General Assembly. Ohio statutes now contain a detailed description of how the

Secretary of State shall declare election results. The requirement that election results be transmitted in a sealed envelope to the President of the Senate who shall declare the results in January following an election appears to be an anomaly, given the present statutory powers of the Secretary of State. The results of an election are known long before January.

The Secretary of State is empowered by statute to decide who is elected in the case of tie votes for all officers other than officers of the executive branch. In the event that the selection of a winner by the Secretary of State is thought improper, statutory provision exists for resolution of the matter by the courts. Repeal of this section would require the legislature to provide for the rare case of a tie vote in a state wide election for an officer of the executive branch.

Article III, section 4. Election returns

Present Constitution

> Section 4. Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Committee Recommendation

Repeal.

History of section

The language of section 4, adopted in 1851, had no predecessor in the 1802 Constitution. The original proposal was an amendment to section 16 of the executive article which provided that all members of the executive branch would be elected for 2-year terms, and that the governor would fill any vacancies for the remainder of the term or until the disability was removed which created the vacancy. The language of section 4 was separated from section 16 by the committee on revision of the 1851 constitutional convention. According to another provision of the 1851 Constitution, Article II, section 25, the legislature would commence on the first Monday of January, biennially, beginning in 1852. Hence, the problem arose of an election being held in the November before a January when the legislature was not in session, and the President of the Senate being unavailable to declare the results. The language of section 4 was adopted as a solution.

Comment

Section 4 of Article III permits the legislature to provide the manner in which election returns shall be made to the Secretary of State and declared by the Governor in the event that the General Assembly is not in session the January next following an election for any of the state offices. The manner in which election returns are made to the Secretary of State is specified in Sections 3505.33 to 3505.35, inclusive, of the Ohio Revised Code.

The approval of a constitutional amendment by the voters in 1972 requiring the General Assembly to meet in January of every year renders section 4 of Article III no longer necessary, since the General Assembly would be in session the January next following an election. Another reason in favor of repealing section 4 is the committee recommendation to repeal section 3. If it is no longer required that the results of elections for state officials be declared to the General Assembly, it no longer matters whether the General Assembly is in session in the January next preceding an election for state wide offices.

Article XVII, section 1. Time for holding elections

Present Constitution

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Committee Recommendation

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years. THE TERM OF OFFICE OF ALL ELECTIVE COUNTY, TOWNSHIP, MUNICIPAL, AND SCHOOL OFFICERS SHALL BE SUCH EVEN NUMBER OF YEARS NOT EXCEEDING FOUR AS MAY BE SO PRESCRIBED. THE GENERAL ASSEMBLY MAY EXTEND EXISTING TERMS OF OFFICE SO AS TO EFFECT THE PURPOSE OF THIS SECTION.

Comment

See discussion following Section 18 of Article III.

Article XVII, section 2

Present Constitution

Section 2. The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of offices of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.

And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Committee Recommendation

Section 2. ~~The term of office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.~~

~~And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.~~

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, OR LIEUTENANT GOVERNOR, shall be filled by appointment by the Governor until the disability is removed or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Comment

See discussion following Section 18 of Article III.

Article III, section 18. Vacancies to be filled by the Governor

Present Constitution

> Section 18. Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Committee Recommendation

Repeal.

Article XVII, sections 1 and 2, and Article III, section 18 should be discussed together because they are inter-related.

History of Sections

With the adoption of a new constitution in 1851, the elective offices were expanded in both the executive and judicial departments. The auditor, treasurer, secretary of state, attorney general and lieutenant governor became elective officers of the executive branch. Judicial officers, formerly appointed by joint vote of the General Assembly, were made elected officials. With this expansion was created a need to define the terms of office, the time of election, and what procedure would be followed if any of these elected offices became vacant before the incumbent had completed his term.

The judicial and executive articles, as adopted in 1851, provided for these officers to be elected at a general election and specified the length of time they would serve. The power of the Governor to fill vacancies was expanded in 1851. Article III, section 18 provided that the Governor shall fill vacancies in the office of auditor, treasurer, secretary, or attorney general. Every vacancy was to be filled at the first general election occurring more than 30 days after the vacancy occurred, but the Governor was empowered to fill such vacancy until the disability

was removed or a successor elected and qualified. Similarly, under Article IV, section 13, in the event a judicial office became vacant, the vacancy was to be filled by the Governor until a successor was elected and qualified at the first annual election occurring more than 30 days after the vacancy occurred.

In 1905, Article XVII was adopted, which expanded upon several features of these and other articles which dealt with elected officials. Since Article XVII contains subject matter contained in other articles, amendments to that article required amendments to the related sections of other articles, and vice versa.

Article XVII, as adopted in 1905, provided for the elections for state and county officers to be held in the even numbered years. Officers of the executive branch were elected for terms of an even number of years, and could fit in with the scheme presented by Article XVII. Judicial officers were elected for terms of an odd number of years, and in 1912, the judicial article was amended to provide for terms of an even number of years.

Some minor amendments to Article XVII were made in 1947, but a complete overhaul of that Article as well as related sections of the Constitution occurred in 1954 as a result of a change in the terms of officers of the executive branch which were increased from two to four years, with the office of auditor remaining at four years. Section 1 of Article XVII was amended to remove the word "the" before "even numbered years". Presumably, "the even numbered years" implied all even numbered years, whereas, officials with four year terms would not be elected all even numbered years, but rather every other even numbered year.

Section 2 was amended to read as follows: "The term of office of the governor, lieutenant governor, attorney general, secretary of state, treasurer of state, and auditor of state shall be four years commencing on the second Monday of January, 1959. The auditor of state shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963, and thereafter shall hold this office for a four year term. . . ." Section 2 of Article

III was also amended in 1954 to reflect the change in Article XVII, with the added wording that; "No person shall hold the office of governor for a period longer than two successive terms of four years."

One situation which the constitution was amended to avoid was the problem of the short-term vacancy. If an official with a four-year term vacated his office in his fourth year at least 30 days before the November election, a replacement would be elected for two months at most. In addition, two candidates for the same office would be running from the same party, one for the two-month term, and one for the four-year term commencing the following January. This source of confusion was removed from the judicial article in 1942. An amendment to Article IV, section 13, provided, " . . . that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term." Section 2 of Article XVII was amended in 1970 to prevent the filling of a short-term vacancy.

Comment

Most of the problems inherent in Article XVII and Article III, section 18, were not viewed by committee members to be substantive problems, but certain changes were deemed advisable. Following are problems considered by the committee in reviewing these sections.

Article XVII, section 2, specifies the terms of office for judges of the common pleas and probate court as six years. In Article IV, section 6, the terms of office of judges of the common pleas court are set at "not less than six years." In addition, Article IV recognizes the probate court as a division of the common pleas court. The distinction between the two courts in Article XVII is obsolete. Article XVII also contains a reference to the terms of office of justices of the peace, when, in fact, justices of the peace no longer exist. The committee, therefore,

recommends the removal from section 2 of Article XVII of all judicial language.

Paragraph 3 of section 2 of Article XVII appears to be inconsistent with section 18 of Article III. According to sections 15-18 of Article III, the lieutenant governor is not one of the offices which the governor has the power to fill should a vacancy arise. The Executive Committee studied section 18 and concluded that in the event the office of lieutenant governor became vacant, it would not be necessary to fill the office. However, paragraph 3 of Article XVII, section 2 states, "Any vacancy which may occur in an elective state office other than that of a member of the general assembly or of governor shall be filled by appointment by the governor until the disability is removed, or a successor elected and qualified." Those words seem to make a replacement for a vacancy in the lieutenant governor's office a gubernatorial appointee.

Article XVII and section 18 of Article III are repetitious with respect to filling vacancies of executive officials. The repeal of Article III, section 18 is recommended because its subject matter is covered in Article XVII, which provides, more generally, for "any elected state officer". The committee recommends adding "or lieutenant governor" to Article XVII, section 2, in order to make it clear that the office of lieutenant governor is one that shall not be filled by appointment by the governor.

The sentence in Article XVII, section 2, "The terms of office of all elective, county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed." has been moved to section 1 of that Article. The committee favored retaining this sentence because it is not provided for elsewhere in the Constitution. In the interest of good draftsmanship, and in view of the suggested revision of Article XVII, the sentence was more germane to the subject of section 1 of that article.

The decision to retain the provision in Article XVII, section 2, giving the General Assembly the power to extend the existing offices to effect the purpose of section 1 of Article XVII was made because the power was felt to be needed. Section 1 deals with municipal officers and other persons whose election is provided by statute. In the event the terms of those officers should be changed, the General Assembly's power to extend terms of office would be useful.

Additional Matters Considered by the Committee

Two subjects considered by the committee for possible inclusion in the Constitution were voter registration and campaign finance. The committee considered research that had been done in both these areas.

The consensus of committee members was that both of these topics were legislative in character and that inclusion of governing constitutional language was unnecessary.

The committee discussed the recommendations of the National Municipal League in its publication "Model Election System". The committee considered that the elections article of the Ohio Constitution, together with the amendments recommended by the committee, were consistent with the aims of the Model Election System. One such aim was the creation of a separate state office of elections administered by a chief elections officer. The committee viewed the Secretary of State's office as having the basic structure suggested by the National Municipal League.

lab

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
April 26,1974

Initiative and Referendum
Constitutional Signature Requirements in Other States

Alaska - Article XI, Section 3.

Certified petitions for initiative or referendum must be signed by qualified voters, not less than 10% of those who voted in the last preceding general election and residents of at least 2/3 of the election districts in the state.

Arizona - Article XXI, Section 1; Article IV, Sections 2,3

Constitutional amendments - qualified electors equal to 15% of total vote for governor at last preceding gubernatorial election.
Laws - 10% of total vote for governor at last preceding gubernatorial election.
Referendum - 5% of total vote for governor at last preceding gubernatorial election.

Arkansas - Amendment #7 to Article V, Section 1

Constitutional amendment - 10% of total vote for governor from at least 15 counties in the state, petitions must bear not less than half of the designated percentage of electors from such counties.
Laws - 8% of total vote for governor, etc.
Referendum - 6% of total vote for governor, etc.

California - Article IV, Sections 1,1b

Direct Initiative or Constitutional Amendment - 8% of total vote for governor at last preceding gubernatorial election. (520,806 signatures)
Indirect initiative - 5% of vote for governor, etc.
Referendum - 5% of vote for governor, etc. (325,504 signatures)

Population: 27,227,000 (*)

Colorado - Article V, Section 1

Initiative for law or constitutional amendment - 8% of vote for secretary of state at general election. (50,410 signatures)
Referendum - 5% of vote for secretary of state, etc. (31,501 signatures)

Population: 2,357,000

Florida - Article XI, Section 3

Constitutional amendments - 8% of votes cast for presidential electors at last succeeding such election, from 1/2 congressional districts. (210,537 signatures)
Population: 7,259,000

Illinois - Article XIV, Section 3

Constitutional amendments (legislative article only)- 8% of total votes for governor at last preceding gubernatorial election (375,000 signatures)

Population: 11,251,000

(*) Figures taken from Statistical Abstracts of U.S., 1973, U.S. Department of Commerce. Estimated as of July 1, 1972 and including Armed Forces stationed in area.

Maine - Article IV, Part 3, Sections 17, 18

Direct initiative - 10% of total vote for governor at last preceding gubernatorial election.
Referendum - 10% of total vote for governor at last preceding gubernatorial election.

Maryland - Article XVI, Section 3

Referendum - 10,000 qualified voters, not more than half from Baltimore or any one county.

Massachusetts - Article LXXXI, Amended Article 48

Constitutional amendments and indirect initiative - 3% of vote for governor at preceding biennial state election. (37,360 signatures)
Referendum - 2% of vote for governor, if suspension of law requested, 1½% of suspension not requested. (40,864;30,648 sig.)
last year
(According to the elections office, the legislature/reduced the number of signatures required for constitutional amendments and indirect law to 2%. 37,360 is the number required if one wished to file a petition this year.)

Population: 5,787,000

Michigan - Article XII, Section 2

Constitutional amendments - 10% of total vote for governor at last preceding gubernatorial election.

Missouri - Article III, Section 50,52(a)

Constitutional amendments - 8% of total vote for governor from 2/3 congressional districts
Laws - (Direct) - 5% " " " "
Referendum - 5% " " " "

Montana - Article V, Section 1

Initiative for laws- 8% of total vote for governor from 2/5 counties
Referendum - 5% " " " " "

Nebraska - Article III, Sections 2,3

Constitutional amendments - 10% of total vote for governor from 2/5 counties
Initiative for laws - 7% " " " " "
Referendum - not less than 5% of total vote for governor from 2/5 counties.

Nevada - Article XIX, Sections 1,3

Constitutional amendments and laws - 10% of qualified electors from each of 3/4 of state's counties, but not less than 10% of all of state's qualified electors.
Referendum - 10% of voters at last general election.

North Dakota - Article II, Section 25

Initiative - 10,000 electors at large
Referendum - 7,000 electors at large

New Mexico - Article IV, Section 1

Referendum - not less than 3% of qualified electors of each of 3/4 counties, and by not less than 10% of aggregate of state's qualified electors.

Oklahoma - Article V, Section 2

Constitutional amendments -	15% of total votes cast at last general election for state-wide office receiving the highest number of votes	(approx. 15,000 signatures)
Initiative for laws -	8% of total votes cast, etc.	(approx. 8,000 signatures)
Referendum -	5% of total votes cast, etc.	(approx. 5,000 signatures)

Population: 2,634,000

Oregon - Article IV, Section 1

Note: According to the constitutional provision, the number of signatures is figured on the basis of total vote for justice of the Supreme Court. The elections office said the number is figured on the basis of the total vote for governor, and presumably the following figures are on the latter basis.

Constitutional amendments-	10%	(53,312 signatures)
Initiative for laws -	8%	(39,984 signatures)
Referendum -	5%	(26,656 signatures)

Population: 2,182,000

South Dakota - Article III, Section 1

Initiative for laws or referendum - 5% of voters

Washington - Article II, Section 1 (a),(b)

Initiative for laws -	8% of registered voters at last gubernatorial election
Referendum -	4% of registered voters at last gubernatorial election

ohio council of churches
89 East Wilson Bridge Road, Columbus, Ohio 43085
a weaving of cooperation
fabric of ecumenism

TESTIMONY BEFORE THE OHIO
CONSTITUTIONAL REVISION COMMISSION
Concerning the Report of the
Elections and Suffrage Committee

May 13, 1974

I would like to commend the members of the committee and their staff on the excellent work done in preparing this report. The Ohio Council of Churches is appreciative of the responsible and thoughtful processes which have generated this and earlier recommendations for amendments to the Ohio Constitution.

Specifically, the Ohio Council of Churches would like to express its support for the committee's recommendations concerning Article V of the Constitution. We do so based on our conviction that an open and responsive electoral process best serves the interests of the people. In the past, complexities in the electoral process have disenfranchised voters. A flexible constitutional framework is necessary if the electoral process is to meet the requirements of a changing society.

The amendment to Section I, Article V is particularly significant in the light of recent legislative action regarding the residency requirement for voters. The General Assembly was confronted with the option of retaining existing law, which sets a six month residency requirement, or setting a reasonable length of time prior to elections for voter registration. The former violates the decision of the Supreme Court in Schwartz v. Brown; the latter is, on its face, in violation of the Ohio Constitution. The deletion of a durational residency requirement will greatly assist legislative efforts to correct Ohio election law.

The requirement for ballot rotation found in Section 2a, Article V, seriously jeopardizes the use of voting machines. With large numbers of people voting, a return to paper ballots could wreak havoc in our major metropolitan areas. We believe that the General Assembly can adequately protect the rights of candidates, while keeping in mind the technology available for the simplification of voting.

In the same section, we endorse the language change which would do away with the bedsheet ballot in presidential primaries. Most recently, in the Democratic primary of 1972, a number of voters were effectively

disenfranchised because of the confusing ballot. The rights of voters will be adequately protected if the bedsheet ballot is rendered unnecessary.

As an aside, we commend your perseverance in seeking the joint election of the governor and lt. governor.

Finally, we applaud deletion of the language depriving "idiots and insane persons" of the vote. The language is not only offensive, but open to abuse. Application of the stricter standard - "mentally incompetent for the purpose of voting" - both avoids the blanket restriction of the existing language and suggests a judicial determination following due process of law. We recommend, however, that this implication be clarified by revising the new language in Section 4, Article V to read "AND ANY PERSON ADJUDGED MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING".

Catherine L. Harper
Research Associate

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
June 7, 1974

REPORT

Initiative and Referendum

The Elections and Suffrage Committee hereby submits its recommendations on the following sections of Article II of the Constitution, providing for the initiative and referendum:

Present Constitution	Subject	Recommendation
Article II		
Section 1	Legislative Power	Amend Article XIV Section 1
Section 1a	Initiative: Constitutional Amendments	Repeal and reenact as changed
Section 1b	Initiative: Laws	Section 2 Repeal and reenact as changed
Section 1c	Referendum	Section 3 Repeal and reenact as changed
Section 1d	Laws not subject to the referendum	Section 4 Repeal and reenact as changed
Section 1e	Limitation on statutory initiative and referendum	Section 5 Repeal; enact new section
Section 1f	Municipal initiative and referendum	Refer to Local Government Committee
Section 1g	Initiative and Referendum Procedures	Section 6 Repeal and reenact as changed

Introduction

Initiative and referendum have been part of Ohio's Constitution since the 1912 convention proposed and the people adopted the provisions found in Sections 1 through 1g of of Article II. The progressive movement of the early 1900's, which was reflected in the 1912 constitutional convention, placed great stress on the initiative, referendum, and recall. Most of the delegates elected to the 1912 convention had taken a position on the initiative and referendum prior to their election, and substantially more than a majority were recorded in favor of these direct people-legislation provisions. In spite of this, controversy about the specific provisions occupied the greatest amount of convention time of any single subject, with the more radical members of the convention attempting to make the provisions completely self-executing and as easy as possible for petitioners to reach the ballot, and the more conservative members attempting to write "safeguards" in the process to increase the difficulty of achieving success. Both sides of the controversy had some successes and some failures, and the resulting provisions in the Ohio Constitution are a compromise between two extremes.

The present Ohio provisions allow the people to propose and adopt amendments to the Constitution directly - that is, without first affording the General Assembly an opportunity to act - but laws may be proposed only indirectly - a proposed law must first be presented to the General Assembly. Initiative and referendum provisions vary considerably among those states which have adopted them. In some states, the power to initiate laws or constitutional amendments is very restricted, such as the new Illinois provision which permits initiated constitutional amendments applying only to one Article of the Constitution - the legislative article.

The first state to adopt direct legislative provisions was South Dakota which, in 1898, amended its constitution to permit initiative and referendum for laws. Between 1900 and 1909, six states added initiative and referendum provisions to their constitutions; four of these six permitting the constitution itself to be amended by the initiative process. The great initiative and referendum movement took place between 1910 and 1915, when 12 states were added to the list. Since then, only Massachusetts, Alaska, and Illinois have adopted any initiative or referendum provisions and the one added to the new Illinois Constitution, noted above, is very limited.

Since adoption in 1912, the initiative has been used in Ohio to place 32 proposed constitutional amendments on the ballot, of which 9 were adopted by the voters. Ten laws enacted by the General Assembly have been placed before the voters by the referendum process since 1912, and of these only one was approved. The last time a law was on the ballot by referendum petition was in 1939; there is some evidence that the time restrictions on the referendum process make it nearly impossible to obtain the required number of signatures within the given amount of time. The most recent referendum effort was in 1973 but the petitioners lacked sufficient signatures to go to the voters. Only six laws, proposed by the initiative, have been placed before the voters (2 passed and 4 lost) but the process has been used considerably more frequently than the referendum process to the extent of placing laws before the General Assembly. The last law placed before the General Assembly by initiative was in 1971; the last time an initiated law was on the ballot was in 1965.

Before the Elections and Suffrage Committtee considered the details of the

initiative and referendum provisions and the problems that have occurred over the years in implementing and using them, members discussed the basic question of whether the Ohio Constitution should contain initiative and referendum provisions at all. The committee conclusion was that it should, and that they should be, as far as possible, self-executing. Initiative and referendum have not been a panacea for the solution of all societal and governmental problems, but neither have they resulted in the destruction of representative government as their opponents, 60 years ago, argued they would. These processes have been used with restraint by Ohioans in the past, and there seemed to be no reason why they should not continue to be available in the future.

Article II

Section 1. The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as hereinafter provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

The committee recommends amendment of Section 1 to read as follows:

Section 1. The legislative power of the state shall be vested in a General Assembly consisting of a senate and a house of representatives but the people reserve to themselves the power of INITIATIVE AND REFERENDUM AS PROVIDED IN ARTICLE XIV OF THIS CONSTITUTION ~~to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as hereinafter provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.~~

Comment

Section 1 of Article II sets forth the basic legislative power of the state and vests it in the General Assembly. It was amended in 1912 to provide for a reserved legislative power in the people to propose constitutional amendments to be adopted or rejected at the polls, to propose laws to the General Assembly which could subsequently be taken to the people if the General Assembly failed to act, and to refer to the people laws passed by the General Assembly for the voters' approval or rejection. Although the language of the section appears to authorize the people to propose constitutional amendments to the General Assembly, subsequent provisions in the Constitution do not so provide. The section contains one limitation on the power of the people to enact laws - that the people cannot enact laws contrary to constitutional limitations on the power of the General Assembly to enact laws.

The specific sections relating to the initiative and referendum appear as supplemental to this section and are numbered sections 1a through 1g. The committee felt that they should be re-enacted, with changes the committee is proposing, in a separate Article in the Constitution, and chose Article XIV since all sections in Article XIV were repealed in 1953. Thus, the sequence of sections in Article II, which is intended to deal with the Legislature, will not be interrupted and the initiative and referendum sections will be clearly set forth as a separate topic.

The final sentence of this section, deleted in the proposed amendment, relates only to the power to initiate laws, and has been transferred to the proposed new section 2 of Article XIV, replacing section 1b of Article II, where the power to initiate laws is set forth.

Section 1a. The first aforestated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors."

The committee recommends repeal of Section 1a and enactment of a new section with parallel provisions as Section 1 of Article XIV as follows:

Article XIV

Section 1. THE SUBMISSION OF A PROPOSED AMENDMENT TO THIS CONSTITUTION DIRECTLY TO THE ELECTORS MAY BE DEMANDED BY AN INITIATIVE PETITION HAVING PRINTED ACROSS THE TOP "PETITION FOR AN AMENDMENT TO THE CONSTITUTION TO BE SUBMITTED DIRECTLY TO THE VOTERS", SIGNED BY TWO HUNDRED FIFTY THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE. THE SECRETARY SHALL SUBMIT THE PROPOSED AMENDMENT TO THE ELECTORS AT THE NEXT SUCCEEDING GENERAL ELECTION, OR AT A SPECIAL ELECTION ON THE DATE FIXED BY LAW FOR HOLDING THE PRIMARY ELECTION, WHICHEVER IS EARLIER, OCCURRING SUBSEQUENT TO ONE HUNDRED TWENTY DAYS AFTER THE FILING OF THE PETITION. IF THE AMENDMENT IS ADOPTED BY A MAJORITY OF THE ELECTORS VOTING ON IT, IT BECOMES A PART OF THE CONSTITUTION AND SHALL BE PUBLISHED BY THE SECRETARY OF STATE.

Comment:

This section states the basic right to place a proposed constitutional amendment before the voters, and contains the essential conditions for exercising that right.

This section, and the following sections, have been reworded and rearranged. The committee believes that by simplifying the language and the order within the sections, it will be easier for persons wishing to use the initiative or referendum to find out precisely what they must do; it will also make the administrative process simpler and will lessen the necessity for Attorney General or court rulings on various aspects of the procedures. The committee has attempted to place all provisions respecting a particular process (constitutional amendment, initiative, statutory initiative, referendum) in a single section, with certain rules of construction applicable to all processes in one section, and all procedural provisions applicable to all processes in one section.

Substantively, there are several changes proposed in this section which are common to all three processes. The most important, because the committee views it as a tentative recommendation and one on which it solicits full Commission discussion, is the question of the number of signatures required on a petition in order to accomplish the petition's objective - placing a matter before the voters or before the General Assembly, as the case may be. In this case (constitutional amendments), the committee proposes to change the required number from 10% of the number of electors who voted for governor in the preceding gubernatorial

election to 250,000 signatures.

This problem was one of the most controversial in the initiative and referendum debates in 1912. The major elements of the controversy are: should the required number of signatures be a fixed number or should it be a percentage and, if a percentage, a percentage of what?

Those who favor a percentage of something as the required number of signatures argue that the number of signatures will then be related to growth (or decline) in the population, or in the number of voters, or whatever base is used to compute the number. The relationship between the number of advocates of a proposal and the population, or voting population, as a whole, will remain unchanged over the years.

Those who favor a fixed number argue that if a substantial number of electors wish to have a matter placed before the General Assembly or on the ballot, they should be able to do so - since this is only the first step in the process, and all the voters will make the ultimate decision. They also note that if the percentage is tied into the number of persons who voted in a particular previous election (as is the case in Ohio and all states which use a percentage), the actual number of required signatures will vary arbitrarily depending on the issues and personalities involved in that particular election. It is also pointed out that fixing the number of required signatures at a percentage of something requires a person wishing to initiate one of the initiative or referendum processes to learn from sources outside the Constitution how many signatures he needs on his petition; if the number is fixed in the Constitution, it is not necessary to look elsewhere for information.

Most states with initiative and referendum procedures use percentages to express the required number of signatures, and generally the percentage is fixed on the number who voted for governor in the preceding gubernatorial election. This is presently the case in Ohio. Only Maryland and North Dakota have a fixed number of signatures provided for in the Constitutional provision.

Most writers on the initiative and referendum agree that it should be more difficult to place a constitutional amendment on the ballot than to place an initiated or referred law before the voters, and this concept is reflected in the fact that nearly all states require more signatures for a constitutional amendment petition than for a statute. Not all states, of course, have all three processes. Of those states which permit constitutional amendment by initiative, the highest percentage required is 15% (in Arizona and Oklahoma) while the lowest percentage required is 3% (Massachusetts). Percentage requirements for statutory initiative and referendum vary from a high of 10% (Alaska) to a low of 2% (Massachusetts). Of course, the actual number of signatures required varies more widely than is suggested by the percentages because of the extreme variations in the size of the states. A referendum in North Dakota takes only 7,000 signatures (a fixed number, not a percentage) whereas it takes 325,504 signatures for a referendum in California (5% of the vote for governor in the preceding gubernatorial election). And yet California, in spite of the large number of signatures required, is known for the large number of initiated measures on the ballot each year.

The present Ohio requirements are as follows:

Constitutional amendments - 10%

Indirect Statutory Initiative - 3% initially; 3% on supplementary petition

Referendum - 6%

Translated into an actual number of signatures based on the vote for governot in the 1970 gubernatorial election, the requirements become:

Constitutional Amendments - 318,413

Indirect Statutory Initiative - 95,524; 95,524

Referendum - 191,048

The committee believes that, if a percentage is to be retained, it should not be based on a single election because an extraordinarily high interest in a particular election would place a greater burden upon those seeking to use the initiative or referendum process in the ensuing four years than they would otherwise bear. The total vote for governor in the last 13 gubernatorial elections was secured. These went back to 1940, and included some elections which were also presidential elections before Ohio went from a two to a four year gubernatorial term. The highest vote for governor in that period was in 1952 (3,605,168) and the lowest, in 1942, was 1,796,536. The average of these 13 elections is approximately 2,970,000. Based on this figure, the following would be the results of applying the present Ohio percentages:

Constitutional Amendments - 297,000

Indirect Statutory Initiative - 89,100; 89,100

Referendum - 178,200

The committee recommends that, if the Commission determines that a percentage of the vote for governor is to be preferred to a fixed number, the percentage be a percentage of an average of the last three gubernatorial elections rather than of a single one. The specific language would be included in section 6 (presently 1g) because all the procedural matters common to all processes are in that section.

Other changes in this section which are common to all the processes are:

1. Requiring petitions to be certified rather than verified (explained in Section 6).

2. Permitting initiated and referred measures, to be placed on the ballot at a primary election as well as at a general election. Presently, such matters can only be placed on the general election ballot.

Because legislative sessions are, today, longer than they were in 1912 and because the committee is also recommending that the length of time before the election for filing petitions be increased, it would be impossible, under certain circumstances, ever to reach the ballot with a referendum or a supplementary petition. Although these time pressures are not applicable to initiated constitutional amendments, which do not have to be presented first to the General Assembly, the committee nevertheless felt that the procedures should be kept consistent and that there is no reason why matters could not go on the ballot at the primary election, especially since the General Assembly can propose constitutional amend-

ments to be placed on the ballot at the primary election (or any other time it chooses).

3. The present section provides for placing a constitutional amendment on the ballot at the general election "in any year". The proposal eliminates "in any year". This language has been construed by the Attorney General to mean "in the year in which the petition is filed" and this, also, becomes increasingly difficult as the legislative sessions increase in length and the time before the election for filing is increased. The committee recommends that the matter be placed on the ballot at the next general or primary election occurring subsequent to 120 days after filing, without regard to whether or not the election occurs in the following year.

4. Presently, petitions for an initiated constitutional amendment must be filed at least 90 days before the election. Consistent with the newly -adopted provisions of section 1 of Article XVI (legislatively-proposed constitutional amendments), the committee recommends that the 90 days be extended to 120 days before the election. Assuring time for proper challenges, for preparation of ballot language and arguments, and for an opportunity for the timely printing of ballots so that absent voters will be enabled to vote on all issues are the reasons for the extension of time.

5. The elimination of the requirement for the "full text" of the proposal to appear in the petition is explained in section 6.

Article II

Section 1b. When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes. If said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the referendum. If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the general assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection at the next regular or general election, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months, if no action has been taken thereon, of after the law as passed by the general assembly shall have been filed by the governor in the office of the secretary of state. The proposed law shall be submitted in the form demanded by such supplementary petition, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly. If a proposed law so submitted is approved by a majority of the electors voting thereon, it shall be the law and shall go into effect as herein provided in lieu of any amended form of said law which may have been passed by the general assembly, and such amended law passed by the general assembly shall not go into effect until and unless the law proposed by supplementary petition shall have been rejected by the electors. All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in 1a and 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. If conflicting proposed laws or conflicting proposed amendments to the constitution shall be approved at the same election by a majority of the total number of votes cast for and against the same, the one receiving the highest number of affirmative votes shall be the law, or in the case of amendments to the constitution shall be the amendment to the constitution. No law proposed by initiative petition and approved by the electors shall be subject to the veto of the governor.

The committee recommends repeal of section 1b and enactment of a new section with parallel provisions as Section 2 of Article XIV as follows:

Article XIV

Section 2. (A) THE SUBMISSION OF A PROPOSED LAW TO THE GENERAL ASSEMBLY MAY BE DEMANDED BY AN INITIATIVE PETITION HAVING PRINTED ACROSS THE TOP "PETITION FOR A LAW TO BE SUBMITTED TO THE GENERAL ASSEMBLY", SIGNED BY ONE HUNDRED THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE. THE SECRETARY SHALL TRANSMIT THE PETITION AND THE FULL TEXT

OF THE PROPOSED LAW FORTHWITH TO THE GENERAL ASSEMBLY.

A LAW PROPOSED BY INITIATIVE PETITION SHALL NOT BE PROPOSED NOR ENACTED BY THE GENERAL ASSEMBLY AS AN EMERGENCY MEASURE. IF A LAW PROPOSED BY INITIATIVE PETITION BECOMES LAW, EITHER AS PROPOSED OR IN AMENDED FORM, IT SHALL BE TREATED AS A LAW ORIGINATING IN THE GENERAL ASSEMBLY, EXCEPT THAT, IF THE PROPOSED LAW IS AMENDED BY THE GENERAL ASSEMBLY AND BECOMES LAW, AND IF A SUPPLEMENTARY PETITION IS FILED AS PROVIDED IN THIS SECTION, THE LAW ENACTED BY THE GENERAL ASSEMBLY SHALL TAKE EFFECT ONLY IF THE LAW PROPOSED BY A SUPPLEMENTARY PETITION IS REJECTED BY A MAJORITY OF THE ELECTORS VOTING THEREON.

IF, WITHIN SIX MONTHS FROM THE TIME THE PETITION IS RECEIVED BY THE GENERAL ASSEMBLY, THE PROPOSED LAW HAS NOT BECOME LAW AS PROPOSED, ITS SUBMISSION TO THE ELECTORS MAY BE DEMANDED BY ONE OR MORE SUPPLEMENTARY PETITIONS HAVING PRINTED ACROSS THE TOP "SUPPLEMENTARY PETITION FOR A LAW FIRST CONSIDERED BY THE GENERAL ASSEMBLY", SIGNED BY SEVENTY-FIVE THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE WITHIN NINETY DAYS AFTER THE EXPIRATION OF THE SIX MONTHS EXCEPT THAT IF THE PROPOSED LAW HAS BECOME LAW IN AMENDED FORM, THE SUPPLEMENTARY PETITION SHALL BE FILED WITHIN NINETY DAYS AFTER THE AMENDED LAW HAS BEEN FILED WITH THE SECRETARY OF STATE. A SUPPLEMENTARY PETITION MAY DEMAND SUBMISSION OF THE PROPOSED LAW EITHER AS FIRST PROPOSED OR WITH ANY ONE OR MORE OF THE AMENDMENTS WHICH HAVE BEEN INCORPORATED THEREIN BY EITHER OR BOTH HOUSES OF THE GENERAL ASSEMBLY.

(B) THE SUBMISSION OF A PROPOSED LAW DIRECTLY TO THE ELECTORS MAY BE DEMANDED BY AN INITIATIVE PETITION HAVING PRINTED ACROSS THE TOP "PETITION FOR A LAW TO BE SUBMITTED DIRECTLY TO THE VOTERS", SIGNED BY ONE HUNDRED SEVENTY-FIVE THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE.

(C) UPON THE FILING OF A SUPPLEMENTARY PETITION UNDER DIVISION (A) OR A PETITION UNDER DIVISION (B) OF THIS SECTION, THE SECRETARY OF STATE SHALL SUBMIT THE LAW PROPOSED THEREIN TO THE ELECTORS AT THE NEXT SUCCEEDING GENERAL ELECTION, OR AT A SPECIAL ELECTION ON THE DATE FIXED BY LAW FOR HOLDING THE PRIMARY ELECTION, WHICHEVER IS EARLIER, OCCURRING SUBSEQUENT TO ONE HUNDRED TWENTY DAYS AFTER THE FILING OF THE PETITION. IF SUCH LAW IS APPROVED BY A MAJORITY OF THE ELECTORS VOTING THEREON, IT TAKES EFFECT THIRTY DAYS AFTER THE ELECTION.

(D) NO LAW PROPOSED BY INITIATIVE OR SUPPLEMENTARY PETITION SHALL CONTAIN MORE THAN ONE SUBJECT, WHICH SHALL BE CLEARLY EXPRESSED IN ITS TITLE. NO SUCH LAW APPROVED BY THE VOTERS IS SUBJECT TO VETO BY THE GOVERNOR. THE LIMITATIONS EXPRESSED ON THIS CONSTITUTION ON THE POWER OF THE GENERAL ASSEMBLY TO ENACT LAWS SHALL BE DEEMED LIMITATIONS ON THE POWER OF THE PEOPLE TO ENACT LAWS.

Comment:

Section 1b of Article II presently sets forth the provisions for the indirect statutory initiative - the right to petition, first, the legislature to enact a law and, failing that and by securing additional signatures on another petition, to take the matter to the voters.

Although the number of laws which have actually reached the ballot over the years since the adoption of the initiative and referendum has been small, interest has been great, and the section, as presently written, contains a number of ambiguities and problems, particularly with timing, which have caused problems for

the Secretary of State and for persons wishing to use the procedures.

The Secretary of State, therefore, originally recommended to the committee that the indirect initiative be eliminated, and the statutory initiative be converted to a direct initiative similar to that employed for constitutional amendments, only requiring fewer signatures to reach the voters. That is, the requirement that the law be presented first to the General Assembly would be removed.

After considerable discussion, however, the committee agreed to recommend that both types of statutory initiative be made available to Ohio citizens. The committee believes that there are good arguments for presenting a proposed law to the General Assembly first - even if the law is not enacted, it may be subjected to the legislative hearing process, which will bring to light aspects of the legislation of which the sponsors themselves may originally have been unaware. In addition, the form of the law may be improved by exposure to the legislative process and the amendment procedure. Thus, the sponsors may be able to go to the voters with a better bill than the one they originally proposed. The committee therefore felt that the indirect initiative should be retained, and have reworded the section substantially in order to remove many of the problems which previously existed.

However, the committee also desired to offer the maximum opportunities within the possible range of the initiative and referendum to Ohio citizens, without making it so easy to place a matter on the ballot that the legislative process is likely to be bypassed frequently. Therefore, the committee has added to this section a procedure for a direct statutory initiative, requiring as many signatures as the two parts of the indirect initiative added together, but fewer signatures than a constitutional amendment initiative.

As with the constitutional amendment initiative, the committee is recommending that the number of required signatures be expressed in fixed numbers rather than percentages of the number who voted for governor. Again, however, the committee solicits full commission discussion on this point. For the indirect initiative, present provisions require 3% to place the law before the General Assembly and an additional 3%, if the General Assembly fails to act satisfactorily, to place the law before the voters. The committee recommendation is 100,000 signatures and 75,000 signatures. For the direct initiative, the committee recommends 175,000 signatures.

The changes noted in the discussion about the constitutional amendment initiative as being common to all processes have been made here. For discussion about these changes, please refer to the previous section. These changes are: requiring petitions to be certified rather than verified, permitting questions on the ballot at primary elections, eliminating the restrictive "in any year", requiring filing 120 days before the election, and eliminating the "full text" requirement.

Other changes made in the indirect initiative provisions (Division A) include:

1. Requiring the secretary of state to transmit a petition to the General Assembly whenever it is filed. Presently, a petition filed at least 10 days before the beginning of the session is transmitted when the session begins; if filed later than that, it presumably must wait until the next session. Since the General Assembly now meets annually, and since the term "session" is somewhat ambi-

guous (since it is used to mean different things in different contexts), the committee felt that this provision no longer served a useful purpose. The committee is extending the time for General Assembly consideration of an initiated law from 4 to 6 months, and felt that, under present circumstances, the General Assembly will nearly always be in session sometime during six months after a petition is filed. Moreover, the General Assembly can now call itself (through leadership action) into special session; if an initiated law is filed and no meeting of the General Assembly appears likely within six months, the leaders can, if they feel the matter is of sufficient importance, call the members into session for the purpose of considering the legislation.

2. Under the present provisions, an initiated law, if passed by the General Assembly, is specifically made subject to the referendum. However, there are two unresolved questions in this respect. One, could the General Assembly, by attaching an emergency clause as an amendment to an initiated law, effectively prohibit a referendum? Two, since laws which are not otherwise subject to the referendum (tax levies, appropriations for current expenses) can, nevertheless,, be initiated, if initiated and enacted by the General Assembly, would they be subject to the referendum? The committee seeks to solve both these problems by specifically prohibiting an initiated law from being initiated or enacted as an emergency measure, and by stating that if an initiated law is enacted by the General Assembly, either as proposed or as amended, it shall be treated as any other law enacted by the General Assembly - subject, to gubernatorial action and subject to the referendum if it would be subject to the referendum as a legislatively - initiated law.

3. The present provisions contain some confusing language about "rejection" of the proposed law by the General Assembly, and trigger certain action by the petitioners on the basis of "no action" or "rejection". Both of these concepts require interpretation. The committee recommendation requires the petitioners to wait six months after the petition has been received by the General Assembly and then, if the law has not become law as proposed, whoever wishes to take the matter to the voters can begin the supplementary petition procedure. More than one supplementary petition on a particular law would be permitted. A law "becomes law" when it has been enacted by the General Assembly; presented to the Governor and either signed by him, vetoed, or permitted to become law without his signature; if vetoed, passed by the General Assembly over a veto; and filed with the secretary of state. The law proposed by supplementary petition or petitions must be the law originally proposed or with one or more amendments adopted by the legislature. This is the same requirement as in the present provisions.

4. The requirement of waiting six months would not apply if the General Assembly enacts the law and it becomes law before the expiration of six months. If enacted as proposed, of course, there is no right to file a supplementary petition- since the petitioners have presumably reached their goal. If, however, the General Assembly amends the law, a supplementary petition or petitions could be filed.

5. Supplementary petitions must be filed within 90 days after the date the law is filed with the secretary of state, if it has been amended and enacted, or within 90 days after the expiration of the six months, if it has not become law. The 90-day period is unchanged from the present provisions. It was retained by the committee in order to keep the supplementary petition provisions parallel with the referendum provisions. Thus, the effective dates of laws will not differ according to whether they are proposed by initiative or by the general assembly,

and if a supplementary petition and a referendum petition are both filed with respect to the same law, both versions will be on the ballot at the same time.

Division (B) of the proposed new section is entirely new, since it provides for the direct statutory initiative.

Division (C) contains provisions about submitting a law to the voters and the effective date of the law if approved by the voters. These are the same as in the present provisions, except for the addition of the primary election.

Division (D) contains certain rules about initiated legislation. The second and third sentences are the same, with minor language changes, as in the present provisions. The first sentence, restricting an initiated law to "one subject" has been added by the committee. This is presently the rule with respect to laws enacted by the General Assembly and it appeared to the committee to be a desirable addition to the rules of drafting initiated laws.

Certain provisions in the present section 1b have been transferred elsewhere, since they are applicable to other matters. Provisions for resolving conflicts between two or more laws appearing on the ballot at the same time have been placed in a separate section. A provision postponing the effective date of an initiated constitutional amendment to 30 days after the election at which it is approved has been eliminated. The committee believed that, since a constitutional amendment proposed by the General Assembly takes effect immediately, there was no reason why a constitutional amendment proposed by the people should not also take effect immediately.

Article II

Section 1c. The second aforestated power reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law, or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect.

The committee recommends repeal of section 1c and enactment of a new section with parallel provisions as Section 3 of Article XIV as follows:

Article XIV

Section 3. NO LAW PASSED BY THE GENERAL ASSEMBLY SHALL GO INTO EFFECT UNTIL NINETY DAYS AFTER IT IS FILED WITH THE SECRETARY OF STATE, EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, OR SECTION 2, OR SECTION 4 OF THIS ARTICLE. DURING SUCH NINETY-DAY PERIOD, THE SUBMISSION TO THE ELECTORS OF SUCH LAW, SECTION OF SUCH LAW, OR ITEM IN ANY SUCH LAW APPROPRIATING MONEY MAY BE DEMANDED BY A REFERENDUM PETITION HAVING PRINTED ACROSS THE TOP "REFERENDUM PETITION FOR VOTER CONSIDERATION OF LAW ENACTED BY THE GENERAL ASSEMBLY", SIGNED BY ONE HUNDRED THOUSAND ELECTORS, CERTIFIED AS PROVIDED IN SECTION 6 OF THIS ARTICLE, AND FILED WITH THE SECRETARY OF STATE. THE SECRETARY SHALL SUBMIT SUCH LAW, SECTION, OR ITEM TO THE ELECTORS AT THE NEXT SUCCEDING GENERAL ELECTION, OR AT A SPECIAL ELECTION ON THE DATE FIXED BY LAW FOR HOLDING THE PRIMARY ELECTION, WHICHEVER IS EARLIER, OCCURRING SUBSEQUENT TO ONE HUNDRED TWENTY DAYS AFTER THE FILING OF THE PETITION. NO SUCH LAW, SECTION, OR ITEM SHALL GO INTO EFFECT UNLESS APPROVED BY A MAJORITY OF THE ELECTORS VOTING ON IT. IF SO APPROVED, IT SHALL GO INTO EFFECT THIRTY DAYS AFTER THE ELECTION. THE FILING OF A REFERENDUM PETITION PROPOSING THE SUBMISSION OF A SECTION OR ITEM DOES NOT THEREBY PREVENT THE REMAINDER OF THE LAW FROM GOING INTO EFFECT.

Comment:

This section contains the basic provisions for the referendum, with the statement of which types of laws are not subject to the referendum in the following section. In Ohio, the right to petition to place before the voters a matter passed by the General Assembly includes a "law, section of law, or item in a law appropriating money." Although no instances have been found where a petition was filed to refer a section or item, the committee could see no reason to change this provision.

The changes common to all processes have been made in this section also. The number of signatures required for a referendum would be 100,000. Presently, the requirement is 6% of the number who voted for governor, which is the same as that presently required on, totally, for the indirect initiative. The committee's recommendation for the indirect initiative is 175,000 - 100,000 to place the matter before the general assembly and 75,000 to be gathered in the 90 day period after general assembly action or inaction, as the case may be. By requiring only 100,000 for a referendum petition, the committee recognizes the substantial problems involved in obtaining a large number of signatures in an extremely limited period of time - since those promoting the matter must necessarily consume a portion of that time in securing a summary of the law from the Ballot Board (presently the Attorney General) and having petitions printed.

The only other major change made in this section is the addition of a 30-day effective date to a law placed on the ballot by referendum. This was done to make the provisions parallel to the initiative provisions.

Article II

Section 1d. Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum.

The committee recommends repeal of Section 1d and enactment of a new section with parallel provisions as Section 4 of Article XIV as follows:

Article XIV

Section 4. LAWS PROVIDING FOR TAX LEVIES, APPROPRIATIONS FOR THE CURRENT EXPENSES OF THE STATE GOVERNMENT AND STATE INSTITUTIONS, AND EMERGENCY LAWS NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC PEACE, HEALTH, OR SAFETY, SHALL GO INTO IMMEDIATE EFFECT. SUCH EMERGENCY LAWS UPON A YEA AND NAY VOTE MUST RECEIVE THE VOTE OF TWO-THIRDS OF ALL THE MEMBERS ELECTED TO EACH HOUSE OF THE GENERAL ASSEMBLY, AND THE REASONS FOR SUCH NECESSITY SHALL BE SET FORTH IN ONE SECTION OF THE LAW, WHICH SECTION SHALL BE PASSED ONLY UPON A YEA AND NAY VOTE, UPON A SEPARATE ROLL CALL THEREON. THE LAWS INCLUDED IN THIS SECTION ARE NOT SUBJECT TO THE REFERENDUM.

Comment:

This section sets forth the types of laws which are not subject to the referendum and which go into effect as soon as they become law. The committee does not propose any changes in this section except changing the word "mentioned" to "included" in the last sentence, which the committee does not consider substantive.

The committee discussed whether any laws should be permitted which are not subject to the referendum, and concluded that it is appropriate that tax levy laws and current governmental expenses should be enacted by the General Assembly without interference by referendum. There is no prohibition against using the initiative to propose or repeal a tax levy, or to propose or repeal an appropriation law.

Once the General Assembly has properly enacted a law as an emergency, the courts in Ohio will not interfere to inquire into the fact of the emergency. It is therefore possible for the General Assembly to place any law beyond the reach of a referendum petition providing 2/3 of the members agree to do so. The committee considered whether any change should be made in this situation, and concluded that no change should be made. Political considerations will frequently prevent an abuse of this power by the legislature, since obtaining 2/3 consent to an emergency may be difficult if there are reasons to believe that a substantial number of constituents are opposed to it. Moreover, a law passed as an emergency can be repealed or altered by using the initiative process, so the people are not without remedy if the General Assembly enacts a law which is against the wishes of the majority. The committee studied the percentages of emergency laws enacted by the General Assembly over the last 25 years, and concluded that the device is not used in Ohio to as great an extent as in some other states, although it is obvious

that the General Assembly does use "emergency" clauses to accomplish objectives other than securing the public peace, health, and safety.

Article II

Section 1e. The powers defined herein as the "initiative" and "referendum" shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

The committee recommends repeal of Section 1e. The committee also recommends enacting Section 5 of Article XIV, as follows, but calls to the Commission's attention that the provisions of the new section are not parallel to Section 1e.

Article XIV

Section 5. IF CONFLICTING AMENDMENTS TO THE CONSTITUTION ARE APPROVED AT THE SAME ELECTION BY A MAJORITY OF THE ELECTORS VOTING THEREON, THE ONE RECEIVING THE HIGHEST NUMBER OF AFFIRMATIVE VOTES IS THE AMENDMENT TO THE CONSTITUTION.

IF CONFLICTING MATTERS OF LAW ARE APPROVED AT THE SAME ELECTION BY A MAJORITY OF THE ELECTORS VOTING THEREON, THE ONE RECEIVING THE HIGHEST NUMBER OF AFFIRMATIVE VOTES IS THE LAW.

Comment:

Repealing Section 1e. Section 1e was inserted by the initiative and referendum proponents at the 1912 convention as one of the compromises necessary to obtain approval of the provisions at the convention. Herbert Bigelow, the president of the Convention, was one of the strongest initiative and referendum proponents and was also well-known as a "single-taxer". Fears were expressed that the initiative would immediately be used to classify property or to enact a single "site-value" only tax on land. The initiative and referendum proponents noted, correctly, that this section only prohibits the use of the initiative to pass laws classifying property or levying a tax on land at a higher rate or by different rule than applicable to improvements or personal property. It does not prohibit the use of the initiative to amend the constitution to accomplish these objectives.

The committee recommends repeal of the section for two reasons. One, the Constitution has since been amended to permit the classification of personal property for tax purposes. Two, as long as section 2 of Article XII requires that land and improvements thereon be assessed and taxed by uniform rule, the committee does not believe it would be constitutionally possible for the General Assembly, or the people by initiative, to enact a law taxing land by a different rule than the improvements.

Enacting New Section 5. The new section places in one section the rules about conflicting amendments or conflicting laws appearing on the ballot at the same time. The rule of construction stated - that the one which will prevail, if more than one receives a majority, is the one which receives the greatest number of votes - is the present rule. However, by placing the rule in a separate section, the committee hopes to make clear that it will apply in all situations regardless of the origin of the conflicting provisions - whether the conflicting constitutional amendments are proposed by the general assembly or by the people, and whether the conflicting laws ("matters of law" is the expression since a referendum could apply to a section of a law or an item in an ap-

propriation act as well as to an entire law) have been initiated by the people or initiated by the general assembly and referred to the people by petition.

The present constitutional provisions do not attempt to solve the question of: what is a conflict? The committee discussed this question and determined that it was not possible to establish rules to enable this question to be resolved without resort to court action. Even though the same section of law or the constitution might be involved in two or more amendments or laws on the ballot at the same time, it does not necessarily follow that the provisions are conflicting. It might be possible to give effect to both or all. If there is a question of conflict, a court decision is necessary. A rule written into the constitution would necessarily be arbitrary.

Article II

Section 1f. The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

The committee recommends that this section be referred to the Local Government Committee with the following comments:

1. If the section is to be retained in the same Article as the remainder of the initiative and referendum sections, it should be placed at the end of the series, which would be section 7 of Article XIV.

2. Since the section applies only to municipal corporations, the Local Government Committee might wish to place it in Article XVIII.

3. Although the Elections and Suffrage Committee did not study in detail the operation of the initiative and referendum locally, and understands that some charter cities have charter provisions governing these processes while the rest of the cities follow statutory procedures, members of the committee believe that the statement of local issues on the ballot can be improved by some provisions which will make it clear to voters that "yes" means "yes" and "no" means "no". Confusion often results at local elections because issues are so worded that the voter must vote "no" if he is in favor of the proposal and vice versa.

Article II

Section 1g. Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of the signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed the same on the date stated opposite his name; and no other affidavit thereto shall be required. The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and shall mail, or otherwise distribute a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. Unless otherwise provided by law, the secretary of state shall cause to be placed

upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative add supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

The committee recommends repeal of Section 1g and enactment of a new section with parallel provisions, Section 6 of Article XIV, as follows:

Article XIV

Section 6. THE STYLE OF ALL CONSTITUTIONAL AMENDMENTS SUBMITTED TO THE ELECTORS BY PETITION SHALL BE: "BE IT RESOLVED BY THE PEOPLE OF THE STATE OF OHIO." THE STYLE OF ALL LAWS SUBMITTED TO THE GENERAL ASSEMBLY BY INITIATIVE PETITION SHALL BE: "BE IT ENACTED BY THE GENERAL ASSEMBLY IN RESPONSE TO AN INITIATIVE PETITION." THE STYLE OF ALL LAWS SUBMITTED TO THE ELECTORS BY INITIATIVE OR SUPPLEMENTARY PETITION SHALL BE: "BE IT ENACTED BY THE PEOPLE OF THE STATE OF OHIO."

WHOEVER SEEKS TO FILE AN INITIATIVE, SUPPLEMENTARY, OR REFERENDUM PETITION SHALL FIRST FILE WITH THE SECRETARY OF STATE AND THE OHIO BALLOT BOARD A COPY OF THE FULL TEXT OF THE PROPOSAL TO BE SUBMITTED, TOGETHER WITH THE NAMES, ADDRESSES, AND WRITTEN CONSENTS OF NOT FEWER THAN THREE NOR MORE THAN FIVE ELECTORS WHO HAVE AGREED TO SERVE ASMEMBERS OF A COMMITTEE, WITH A DESIGNATED CHAIRMAN THEREOF, TO REPRESENT THE PETITIONERS IN ALL MATTERS RELATING TO THE PETITION. THE BOARD SHALL, WITHIN FIFTEEN DAYS AFTER IT RECEIVES THE TEXT, PREPARE AN IDENTIFYING CAPTION AND A FAIR AND TRUTHFUL SUMMARY OF THE PROPOSAL AND SUBMIT THEM TO THE SECRETARY OF STATE AND TOTHE CHAIRMAN OF THE COMMITTEE. THE COMMITTEE SHALL THEN PREPARE THE PETITION, WHICH SHALL CONTAIN A TRUE COPY OF THE CAPTION AND THE SUMMARY PREPARED BY THE BOARD, AND SHALL FILE A COPY OF THE PETITION WITH THE SECRETARY OF STATE BEFORE SOLICITATION OF SIGNATURES TO THE PETITION. THE PETITION MAY BE CIRCULATED AND FILED IN PARTS BUT EACH PART SHALL BE IDENTICAL TO THE COPY FILED WITH THE SECRETARY OF STATE. THE PETITION NEED NOT CONTAIN THE FULL TEXT OF THE PROPOSAL, BUT IF IT DOES NOT, EACH SOLICITOR OF SIGNATURES TO THE PETITION SHALL CARRY A TRUE COPY OF THE FULL TEXT WHILE SOLICITING AND THE PETITION SHALL STATE, IMMEDIATELY FOLLOWING THE SUMMARY: "THE SOLICITOR OF YOUR SIGNATURE IS REQUIRED TO HAVE A TRUE COPY OF THE FULL TEXT OF THE PROPOSAL SUMMARIZED IN THIS PETITION. UPON REQUEST, HE MUST PRESENT IT TO YOU FOR EXAMINATION."

EACH SIGNER OF A PETITION MUST BE AN ELECTOR OF THE STATE AND SHALL SIGN HIS OWN NAME IDELIBLY ON THE PART PETITION. THE SIGNER'S ADDRESS AND THE DATE OF SIGNING SHALL BE PLACED ON THE PETITION AFTER THE NAME. SUCH ADDRESS SHALL INCLUDE THE TOWNSHIP AND COUNTY FOR A RESIDENT OUTSIDE A MUNICIPALITY AND THE NAME OF THE MUNICIPALITY AND THE STREET AND NUMBER, IF ANY, FOR A RESIDENT OF A MUNICIPALITY.

Article XIV, Section 6 (cont'd)

ON EACH PART PETITION SHALL APPEAR THE SOLICITOR'S CERTIFICATION, STATING THE NUMBER OF THE SIGNERS OF SUCH PART PETITION, THAT EACH OF THE SIGNATURES WAS MADE ON THE STATED DATE IN THE PRESENCE OF THE SOLICITOR, AND THAT AT ALL TIMES WHILE SOLICITING SIGNATURES HE CARRIED AND MADE AVAILABLE ON REQUEST A TRUE COPY OF THE FULL TEXT OF THE PROPOSAL; AND STATING THAT, TO THE BEST OF HIS KNOWLEDGE AND BELIEF, EACH SIGNATURE IS THE GENUINE SIGNATURE OF THE PERSON WHOSE NAME IT PURPORTS TO BE AND THAT SUCH PERSON IS AN ELECTOR RESIDING AT THE STATED ADDRESS WHO HAD KNOWLEDGE OF THE CONTENTS OF THE PETITION. NO AFFIDAVIT OR OTHER CERTIFICATION THERETO SHALL BE REQUIRED

AS SOON AS A CERTIFIED PETITION CONTAINING A PROPOSAL TO BE SUBMITTED TO THE ELECTORS IS FILED WITH THE SECRETARY OF STATE, THE SECRETARY SHALL TRANSMIT IT TO THE OHIO BALLOT BOARD, WHICH SHALL PRESCRIBE THE BALLOT LANGUAGE AND AN EXPLANATION OF THE PROPOSAL IN THE SAME MANNER AND SUBJECT TO THE SAME TERMS AND CONDITIONS AS APPLY TO ISSUES SUBMITTED BY THE GENERAL ASSEMBLY PURSUANT TO SECTION 1 OF ARTICLE XVI OF THIS CONSTITUTION. THE BALLOT LANGUAGE SHALL BE PRESCRIBED SO AS TO PERMIT AN AFFIRMATIVE OR NEGATIVE VOTE UPON EACH CONSTITUTIONAL AMENDMENT, LAW, SECTION, OR ITEM SUBMITTED.

THE COMMITTEE REPRESENTING THE PETITIONERS SHALL PREPARE AN ARGUMENT SUPPORTING THEIR POSITION. THE GENERAL ASSEMBLY MAY PROVIDE BY LAW FOR THE PREPARATION OF OPPOSING ARGUMENTS. THE EXPLANATION AND THE ARGUMENTS SHALL NOT EXCEED THREE HUNDRED WORDS EACH. THE PROPOSAL, THE BALLOT LANGUAGE, THE EXPLANATION, AND THE ARGUMENTS SHALL BE PUBLISHED ONCE A WEEK FOR THREE CONSECUTIVE WEEKS PRECEDING THE ELECTION, IN AT LEAST ONE NEWSPAPER OF GENERAL CIRCULATION IN EACH COUNTY OF THE STATE, WHERE A NEWSPAPER IS PUBLISHED.

WHEN PROPERLY CERTIFIED AND FILED WITH NOT LESS THAN THE REQUIRED NUMBER OF SIGNATURES, THE PETITION AND THE SIGNATURES SHALL BE CONCLUSIVELY PRESUMED TO BE IN ALL RESPECTS VALID AND SUFFICIENT, AND SHALL BE PLACED ON THE BALLOT BY THE SECRETARY OF STATE UNLESS NOT LATER THAN SEVENTY-FIVE DAYS BEFORE THE ELECTION THE PETITION OR SOME OF THE SIGNATURES ARE PROVED INVALID AND THE REMAINING NUMBER OF SIGNATURES IS INSUFFICIENT . THE SECRETARY SHALL CAUSE TO BE PLACED ON THE BALLOT THE CAPTION AND THE BALLOT LANGUAGE PREPARED BY THE BALLOT BOARD FOR EACH PROPOSAL TO BE SUBMITTED.

THE INITIATIVE AND REFERENDUM PROVISIONS OF THIS CONSTITUTION SHALL BE SELF-EXECUTING , EXCEPT AS OTHERWISE PROVIDED. LAWS MAY BE PASSED TO FACILITATE THEIR OPERATION, BUT IN NO WAY LIMITING OR RESTRICING EITHER SUCH PROVISIONS OR THE POWERS RESERVED TO THE PEOPLE.

Comment:

Section 1g sets forth the initiative andreferendum procedures that are common to all three processes - constitutional amendment initiative, statutory initiative, and referendum.

As presently written, the section is long and involved; part of the difficulty of reading it and understanding what must be done is the fact that it is poorly arranged and that it is written as one, long paragraph. the committee considered dividing the section into several sections, but decided that there are advantages to having all procedural matters in one section and that some of the section"s difficulties could be solved by making several paragraphs, rearranging the subject matter so that it flows in a longical time-sequence, and simplifying statements wherever possible. Some substantive changes are also recommended. The following discussion about the section follows the order in the proposed new Section 6 of Article XIV.

1. Presently, provisions for the style clause of laws and constitutional amendments submitted pursuant to initiative or supplementary petitions are found near the end of section 1g, and the committee recommends placing that material at the beginning of the section since the style clause appears before the amendment or the statute being proposed. The present section does not provide a style clause for a law being presented to the General Assembly by initiative petition; the committee is filling that gap.

2. The present constitutional provisions do not provide any preliminary steps to filing the petitions with the necessary signatures with the secretary of state, but the statutes insert an important preliminary step. A petition with 100 signatures must be filed with the Attorney General and his approval given to a summary of the proposal before the petitioners may proceed. Although some have questioned whether or not this requirement is unconstitutional as a limitation or restriction on the people's powers contrary to the last sentence of present section 1g, the Supreme Court of Ohio has not, so far, so held. The committee felt that there is value in having an official or an official body approve or prepare the summary of the proposal, since the summary should be as accurate as possible. The summary is all that many people will read when their signatures to a petition are solicited. It seemed to the committee that, rather than having the Attorney General perform this duty, with the potential for delay which presently exists, it would be better to use the newly-authorized Ballot Board, which will be required to write the summary and an identifying caption within 15 days after the full text of the proposal is submitted to it.

3. Persons wishing to instigate an initiative or referendum petition would file the full text of the proposal with the Secretary of State and the Ballot Board, and the full text would no longer be required to appear on every part petition. The solicitor, however, would be required to carry the full text with him when he solicits signatures and any person wishing to do so could ask for it and read it. In the case of an involved and complicated statute, with many sections, requiring the full text to appear on each part petition greatly increases the costs of printing. The committee felt that few people would take the time to read a long petition and that an accurate summary and caption would be sufficient as long as the full text is available for anyone wishing to read it.

4. The initial filing would consist of the full text of the proposal and the names and addresses of a committee of 3 to 5 persons, with their written consents, who will represent the petitioners in all matters relating to that petition. Presently, the constitution authorizes the petition to name persons to prepare the arguments and explanations on behalf of the proposal, and the statutes have converted this group of persons into a committee to represent the petitioners in all matters. It seemed to the committee that the concept of the statutes was a good one and should be written into the Constitution so that any person wishing to start an initiative or referendum procedure can ascertain immediately what he must do to get started. Under the language proposed by the committee, no one could be named to an initiative or referendum committee without giving his written consent.

5. Once the summary and the identifying caption have been prepared, the committee would proceed to have the petitions printed, a copy of which must be filed with the secretary of state before signatures are solicited. If the petition does not contain the full text of the proposal, a statement must be printed on it advising any person whose signature is solicited that the solicitor is required to have a true copy of the full text with him and present it to anyone wishing to read it.

6. Signatures must be affixed "indelibly" to petitions - the present provisions require that signatures be written in ink, but this has been interpreted by the courts to include indelible pencil. Signatures must be affixed by the person signing but his address and the date of signing may be filled in by someone else. As is presently required, a signer must be an elector.

7. Presently, the solicitor is required to sign an affidavit to each part petition, requiring him to secure a notary public's seal and signature on each petition. Although the committee believed that the requirement of the solicitor's statement on each petition with respect to the persons who signed the petition was a good one and should be continued, the committee felt that requiring each petition to be notarized was not necessary. Therefore, the solicitor would be required, under the proposal, to certify to certain facts, as far as he is able to ascertain them, rather than take an affidavit. The committee has added to the fact required to be in the solicitor's statement that he carried a true copy of the full text of the proposal and made it available on request.

8. Under the present provisions, petitions, for the most part, must be filed 90 days before the election and signatures can be proved invalid up to 40 days before the election and the petitioners are given 10 additional days for filing signatures if they do not have enough. The statutes provide procedures for the secretary of state to transmit petitions to county boards of elections, and the committee has not altered those provisions by any constitutional language. However, the committee's proposal, which, as noted previously, would require filing 120 days before the election, requires that any proof of invalid signatures be submitted 75 days before the election and eliminates the 10 extra days for filing signatures. Approximately the same amount of time (45 instead of 50 days) is thus allowed for proof of invalid signatures. Elimination of the 10 extra days was done on the recommendation of the secretary of state, and because the committee felt that certain other provisions being changed will make it easier for persons to obtain signatures and that there is no need to give petitioners additional time which will bring the deadline too close to the election. If signatures are not proved invalid in the time given, that question and defects in the petition itself cannot be raised after the election to invalidate the issue if adopted. The committee has altered the language of this rule by elimination of a sentence which seemed surplus, but intends that the rule remain the same.

9. Section 1g contains the rule for ascertaining the base upon which the percentage of required signatures is figured for all processes - the number of persons who voted for governor in the preceding gubernatorial election. As noted in the discussion in connection with the previous sections, the committee recommendation is for a fixed number, but with the realization that there are valid reasons to keep the percentage concept and the recommendation that, if percentages are used, the base be the average of the "total number of votes cast for the office of governor at the last three preceding elections therefor" rather than based simply on the last election.

One other important change is recommended in computing whether the correct number of signatures has been affixed to a petition. Presently, the required number must include from "each of one-half of the counties of the state the signatures of not less than one-half of the designated percentage of the electors of such county." This means that, if a constitutional amendment is being sought, requiring 10%, there must be filed petitions with at least 5% of the number voting for governor in the preceding gubernatorial election from at least 44 counties.

The committee, and the secretary of state, agreed that such a provision, which was inserted in 1912 as a part of the compromises made between those for and those against the initiative andreferendum, is a protection to the residents of less populated counties which amounts to giving signatures of electors from those counties greater value than signatures of electors from heavily-populated counties. Although no exact parallel has been found, the closest being holding invalid similar requirements for signatures to candidates' petitions, the committee felt that provision would very likely violate the one-man one-vote concept established by the U.S. Supreme Court under the equal protection clause of the 14th amendment and should be eliminated.

10. The committee has provided that the Ohio Ballot Board will prepare the ballot language and an explanation for issues to be placed on the ballot pursuant to initiative and referendum petitions. The time within which this would be done, and the possibility for court challenges, would be the same as under the new proposal for legislatively-adopted constitutional amendments, by reference to section 1 of Article XVI. The committee named in the petition would prepare the arguments for the constitutional amendment or statute being submitted by initiative petition and against the law passed by the General Assembly being submitted by referendum petition, as the case may be, and the General Assembly could provide for the preparation of opposing arguments. Publication would also be parallel to the new provisions for legislatively-adopted constitutional amendments. In the case of initiative and referendum, however, there is no authority for other dissemination of information as in the case of legislatively-adopted constitutional amendments. The committee reasoned that, in view of the great public interest clearly involved in voter-sponsored measures, such authority would not be needed as in the case of legislatively-proposed constitutional amendments, and that the expenditure of public funds toward this end was not warranted.

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Statement Before
THE OHIO CONSTITUTION REVISION COMMISSION
By Miriam Hilliker
June 17, 1974

It is the policy of the League of Women Voters to speak only to those subjects which the membership has studied and on which consensus has been reached. Therefore, this statement will deal only with the small but important part of proposed Article XIV, Section 1, which sets a fixed number of electors' signatures necessary to place a Constitutional Amendment on the ballot.

The League feels that keeping the percentage provision in the new Section 1 of Article XIV would be more in line with our goal of flexibility in this type of constitutional provision.

If the Commission decides to retain the percentage rather than the rigid 250,000, we believe the suggestion of the Elections and Suffrage Committee that it should not be based on a single election has merit, though we have not studied that particular point.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
June 27, 1974

Research Study No. 38

Article XIII: Corporations

This memorandum discusses each of the sections in Article XII of the Ohio Constitution except section 6. Section 6 is excluded because it deals with municipal corporations, its provisions are largely duplicated in Section 13 of Article XVIII, and it has been considered by the Local Government Committee in conjunction with that committee's study of Article XVIII.

The research contained in this memorandum may reasonably lead to the following conclusions:

1. It may be desirable to retain in the Constitution two provisions, found in sections 1 and 2 of Article XIII: that corporations may not be created by special act; and that the general assembly has the power to alter and repeal general laws pursuant to which corporations are formed.

2. The remaining provisions in Article XIII can probably be repealed without affecting the state's power to act, or depriving any individual or corporation of any right.

Section 1

Section 1. The general assembly shall pass no special act conferring corporate powers.

History

Section 1 of Article XIII originated in the 1851 constitutional convention. This section superceded the provision of the 1802 constitution, Article VIII, Section 27 which provided

> That every association of persons, when regularly formed, within this state, and having given themselves a name, may on application to the legislature, be entitled to receive letters of incorporation, to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and for other purposes.

This prior method of incorporation had proved to be impractical and undesirable because of the lack of uniformity and the abuse of special privilege in the grants, the burden of excess legislation it placed upon the legislature, and the political logrolling tactics that it engendered.

At the 1851 convention, the Committee on Corporations Other than Banking proposed the present Section 1 as a solution to these problems. At the time it was introduced the committee noted that similar provisions had been enacted into the newly revised Iowa, California, and New York constitutions. The debate on this provision reflected the novelty of the idea of general corporation laws to these nineteenth century delegates, as well as the delegates' distrust of corporations generally. Fears were expressed in the debates that the idea was impractical, that it would multiply corporations beyond public need, and that it would discourage capital investments.

Amendments were proposed to except banks and municipal corporations from the

operation of the section and to allow special charters at the legislature's discretion. However, all these proposed amendments were voted down and the section was enacted as originally introduced.

Comparative provisions - Approximately 3/4 of the states constitutionally forbid the formation of corporations by special acts. However, ten states have a "charitable, educational, penal or reformation" exception to the prohibition. The Model State Constitution is silent as to corporations but does have a general prohibition on special legislation. G. Braden and R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis 516 (1969).

Judicial Interpretation - Article XIII, Section 1 prohibits the conferring of corporate powers by special act. This prohibition applies to both private and municipal corporations. In State v. Cincinnati, 20 Ohio St. 18 (1870), the Ohio Supreme Court held that an act of the General Assembly extending the city limits of Cincinnati to include suburbs conferred upon that municipal corporation additional corporate powers by special act. The Act was thus unconstitutional under the provisions of section 1 of Article XIII which the court held apply to both public and private corporations. The holding in the above case was apparently unaffected by the addition of Article XVIII, the home rule article, to the constitution in 1912. Although no court case has decided whether section 1 of Article XIII is still applicable to municipal corporations, the possibility that the two articles might conflict was raised in Goebel v. Cleveland Railway Co.,17 Ohio N. P. (N.S.) 337 (1915). The discussion of this issue, however, was inconclusive and shed little light upon the subject. A current reference to the applicability of Article XIII, section 1 is found at Sections 3.03, 3.04 and3.06 of Crowley's Ohio Municipal Law (1962). These provisions imply that section 1 still applies to municipalities by their statement after an historical discussion of section 1, that since 1852 a municipality can be incorporated only under general law. This section 1 probably is still applicable to municipal corporations.

Some question also exists as to the applicability of section 1, Article XIII to school districts. The Ohio Supreme Court in State v. Powers, 38 Ohio St. 54 (1882), held that a school district did not have a life of its own but was a "mere agency of the state" for the purpose of providing public education. However, in a case decided by the Huron Circuit Court twelve years later, a special act conferring the power to issue bonds and borrow money on a school district was held to be an act conferring corporate powers in violation of Article XIII, section 1. Eckstein v. Bd. of Education, 10 Ohio Cir. Ct. R. 480, 4 Ohio Cir. Dec 149 (Huron 1894).

Boards of trustees of public universities are not within the provisions of section 1 under an analysis similar to that of the Powers case, supra. In Thomas v. Trustees, 195 U. S. 207, 49 L. Ed. 160, 25 S. Ct. 24 (1904), the United States Supreme Court, applying state law, held that the Ohio State University Board of Trustees was a division of state government and not a corporation. The issue of whether the board was a corporation arose in the course of determining whether diversity of citizenship existed. In State ex. rel. Atty Gen. v. Toledo, 3 Ohio Cir. Ct. R (N.S.) 468, 13 Ohio Cir. Dec. 327 (1904), the board of trustees of Toledo University was held to be a governmental agency rather than a corporation. Toledo cited the school board rationale of Powers as the basis of the decision.

A further extension of the governmental agency analysis, exempts townships and counties from the operations of section 1 of Article XIII. Townships and counties

are created as governmental units for the convenience of the state and they are not corporations nor do they exercise powers within the definition of section 1 of Article XIII. Atlas Nat'l Bank v. Trustees, 13 Ohio Dec. 472 (Hamilton Cm. Pl. 1872); Brattleboro Bank v. Trustees, 98 A.524, 13 Ohio F. Dec. 318 (Cir. Ct., N.D. Ohio, E. D. 1899).

Special acts which have been held to confer corporate power and thus violate section 1 include a statute which specifically granted to the Cincinnati City Council the power to approve or reject the regulations of the trustees of the Cincinnati hospital, State v. Cincinnati, 23 Ohio St. 445 (1872) and a statute granting Cincinnati the power to issue and repay bonds for the purpose of raising funds for a city hospital, Cincinnati v. Cincinnati Hospital Trustees, 66 Ohio St. 440, 64 N.E. 420 (1902).

Special acts which have been held not to constitute a grant of corporate power and not to be against the provisions of Article XIII, section 1 include an act authorizing the sale of state canal lands to a pre-existing railroad company, Vought v. Columbus H. U. & A.R., 58 Ohio St. 123, 50 N.E. 442 (1898) and an act granting permission to a street railway company to exercise its pre-existing corporate power of expansion granted under general law, Sims v. Brooklyn St. Railroad, 37 Ohio St. 556 (1882). Both of the above cases were decided upon the rationale that the corporate powers of the corporation already existed under prior general grants and thus these special acts could not be grants of corporate powers.

Special acts are defined as laws which are temporary and local in operation. State ex. rel. Kauer v. Defenbacher, 153 Ohio St. 268, 41 Ohio Op. 278, 91 N. E. 2d 513 (1950), in deciding that the Ohio Turnpike Act was a general law set forth the above definition. The Ohio Supreme Court in that case arrived at that definition by means of an analysis of the evils the law was designed to cure, i.e., log rolling legislation and special privileges. The court then concluded that the Turnpike Act was not special privilege or logrolling legislation, but was, instead, for the benefit of and in the interest of the whole state and thus was not special legislation. Defenbacher, by requiring that the act be both temporary and local to be special, seems to overrule Cincinnati St. Railroad v. Horstman, 72 Ohio St. 93, 73 N.E. 1075 (1905) by implication because that case held that an act could be temporary without being special and that it was possible to have a permanent special act.

Another example of a challenged law which was held to be general is found in Brooklyn Bldg. and Loan Ass'n v. Desnoyers, 4 Ohio Cir. Ct. R.(N.S.) 337, 16 Ohio Cir. Dec. 352 (Cuyahoga Co. Cir. Ct. 1904). The law challenged in that case exempted savings and loan association from provision on usury. The court in deciding the case held that because the exemption as to savings associations applied to all savings and loan associations throughout the state, this law was not special with the context of Section 1, Article XIII.

Current Question - Is a special section prohibiting special legislation conferring corporate powers necessary in light of section 26 of Article II of the Ohio Constitution which provides that general laws shall have a uniform operation throughout the state?

The Model State Constitution has no special section prohibiting the conferring by special act of corporate powers but instead relies upon a general prohibition against special acts at section 4.11. (National Municipal League - Committee on State Government, Model State Constitution, section 4.11 (1968)). However, the wording of section 4.11 is substantially different from that of Ohio section 26, Article II.

Section 4.11 of the Model State Constitution reads

> The legislature shall pass no special or local act when a general act is or can be made applicable and whether a general act is or can be made applicable shall be a matter for judicial determination.

The pertinent portion of Ohio section 26, Article II reads

> All laws, of a general nature, shall have a uniform operation throughout the state . . .

Thus, Ohio's provision, at least on its face, is not as broad as the Model State Constitution's provisions.

Section 26 of Article II is applicable to general laws requiring them to be uniform throughout the state, and does not forbid the enactment of special or local laws by the general assembly. Ohio Constitutional Requirement that Laws Shall Have a Uniform Operation Throughout the State, 3 Cin. L.R. 344 (1929). In the case of Welker v. Potter, 18 Ohio St. 85 (1875) involving the constitutionality of establishing a police commission in Cincinnati, the Ohio Supreme Court held that "the power of the general assembly to pass local and special laws is embraced in the general grant of legislative power . . . Section 26, Article II was not intended as a limitation on that power." Supra, 111. However, when the subject matter of the legislation involved is general in nature, in that it is capable of being achieved by general legislation, local or special laws cannot constitutionally be enacted as to that subject matter. For example, when the creation of new school districts may be provided for by general law, special legislation on the subject would be unconstitutional. Wirsch v. Spellmire, 67 Ohio St. 77, 65 N.E. 619 (1902); Ohio Constitutional Requirement . . ., supra. Thus section 26 of Article II has been expanded by judicial construction to prohibit special legislation in areas where general laws could be used.

It would, therefore, appear that section 26 of Article II standing alone does in fact prohibit special legislation conferring corporate power, since this is a subject matter which experience has shown is governable by general law.

However, section 26, Article II even with judicial interpretation is not as broad as the Model State Constitution section 4.11 because there is no provision for judicial determination of the applicability of a general act. In fact any law passed by the general assembly of Ohio is required to be construed by the court to be valid wherever possible. Butler County v. Primmer, 93 Ohio St. 42 (1915) declares the existence of a required presumption of validity in relation to section 26, Article II by holding that general laws must be construed as general whenever possible. A like presumption that a special law is valid would probably also arise. Thus judicial determination of the validity of the appropriateness of special law is not unfettered by presumptions in the Ohio provision as it is in the Model State Constitution provision.

Section 2

> Section 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.

> Corporations may be classified, and there may be conferred upon proper boards, commissions or officers such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

History - The current Section 2 of Article XIII is the work product of both the 1850 and the 1912 conventions. The first sentence, allowing corporations to be formed under alterable and repealable general laws, constituted the original section as enacted by the 1850 convention. The specific statement of the general assembly's power to enact general corporation laws was intended by the convention to be a further confirmation of the legislature's power to enact such laws under the legislative article of the constitution. The stipulation that these laws were subject to repeal and alteration was added to the section to counteract the restrictions which Dartmouth College v. Woodward, 17 U. S. 518 (1819) might place upon that power. In Dartmouth, the United States Supreme Court held that a corporate charter constituted a contract between the state and the corporation and that such a contract was not subject to unilateral change by the state, because such a change would be an unconstitutional impairment of contract rights. The insertion of the stipulation that all general corporation laws were amendable and repealable in the Constitution was intended to act as a condition on the granting of all subsequent corporate charter "contracts", thus making them subject by the terms thereof to repeal and amendment.

A review of the 1850 convention debates indicates that the modification and repeal of general corporation acts by the general assembly was viewed as a desirable method of checking corporate abuses, which would be more general in effect than quo warranto actions. However, some delegates feared that the chartering of corporations under repealable and amendable acts would discourage corporate investments, while other delegates thought that a general corporate law system would be unworkable. After much debate and several amendment proposals to guarantee corporate investments, the convention was evidently convinced that this system which had proved feasible for New York, Wisconsin, Iowa, Michigan, Missouri, and California could work for Ohio and the general corporate act provision was approved.

The second and third sentences of section 2 were the work products of the 1912 convention. These provisions were added to the Constitution to enable the legislature to enact laws regulating corporate and commercial transactions. At the time of the 1912 convention some doubt existed as to whether or not the legislature had the authority under the 1850 constitution, in light of the Ohio Supreme Court holdings in Miller et al v. Crawford et al., 70 Ohio St. 207, 71 N.E. 631 (1904) and Williams and Thomas Co. v. Freslo, 84 Ohio St. 320, 95 N.E. 900 (1911). These cases had held that prior corporate and commercial regulations were unwarranted restrictions on trade which violated the first article of the Constitution by restricting a person's right to hold property. The proposal to alter the Constitution to allow commercial and corporate regulation was readily accepted by the delegates as a needed change and approved with little opposition.

Comparative Provisions - Approximately three-fourths of the other states have constitutional provisions providing for the formation of corporations under general

corporation laws. G. Braden and R. Cohen, The Illinois Constitution: An Annotated and Comparative Analysis 516 (1969).

Judicial Interpretation - Article XIII, section 2 grants to the general assembly the full and complete authority to provide by general laws for the formation of corporations and changes in the organization or structure of existing corporations formed since 1851. Belden v. Union Century Life Insurance Co., 143 Ohio St. 329, 55 N.E. 2d 629 (1944) However, the reserved powers to amend or repeal conferred by this provision are subject to certain constitutional safeguards. These powers are limited by Article I, section 10 of the federal constitution and its state equivalent Article II, section 28 which forbad the state to impair the obligations of contracts; by Article I, section 10 of the federal constitution and Article II, section 28 of the state constitution forbidding ex post facto laws; by the 14th amendment of the federal constitution and Article I, section 19 of the state constitution forbidding the seizure of private property without adequate compensation; and by Article I, sections 1 and 2 of the state constitution guaranteeing the people the right to own and enjoy private property. Whestly v. A. L. Root Co., 147 Ohio St. 127, 69 N.E. 2d 187 (1946); P. Bickel, Scope of the Reserved Power to Amend Corporate Laws, 19 Ohio Bar (1947).

Section 2 is prospective in effect and therefore necessarily refers only to charters which were granted after the section became effective. Citizen's Bank v. Wright, 6 Ohio St. 318 (1856); Cleveland Gasling and Coke Co. v. Cleveland, 71 F. 610 (1891). A special charter granted by the general assembly prior to 1851 and which contains terms amounting to a contract and does not contain a reservation of power to repeal, cannot be repealed by the constitution of 1851 or by any legislation enacted thereunder. Cleveland v. Cleveland, Columbus and Cincinnati Railroad, 93 F. 113 (1861). However, exemption from legislative control must be pleaded and proved and will not be assumed. Zanesville v. Zanesville Gas-Light Co., 1 Ohio Cir. Ct. 123 (1886) Corporations created before September 1, 1851, may elect to be subject to the Constitution or laws enacted pursuant thereto, or may, as a matter of law, be subject to the corporation laws if it takes any action which it would not otherwise be authorized to take. (Section 1701.98 of the Revised Code)

The power to alter post 1851 charters is constitutionally permissible and its exercise does not violate the prohibition against laws impairing contract rights, because this reserved power to amend and repeal became a condition of all subsequently issued charters and a portion thereof. Allen v. Scott, 104 Ohio St. 436 (1922). Corporations organized since 1851 have no privileges of which the legislature may not deprive them. Charter changes effected which have been held to be constitutional include a law making changes in the railroad fencing law, a law permitting consolidation of existing corporations, a law imposing double liability on corporate shareholders, and a law revoking the regional exclusivity of a power company grant. Baltimore and Ohio Railroad v. Schultz, 43 Ohio St. 270, 1 N.E. 324 (1885); Dunham v. Kauffman, 10 Ohio N. P. (N. S.) 49, 20 Ohio Dec 274 (1910); Berg v. Putnam County Banking, 22 Ohio N. P. (N.S.) 201, 31 Ohio Dec. 70 (1919); Hamilton Gasling and Coke Co. v. Hamilton, 146 U. S. 258, 36 2 Ed. 963, 13 S. Ct. 90 (1892).

The reserved repeal and amendment power however may still be limited in that it cannot be used to impair vested contract rights between the corporation and its shareholders. For example, the state may not be able to legislatively excuse a corporation from paying an accumulated dividend on preferred stock. Drane v. Lawton Co., 141 N.E. 2d 253 (1956), Whestly v. A. L. Root Co., 147 Ohio St.127 (1946); P. Bickel,

The Scope of the Reserved Power to Amend Corporate Laws, 19 Ohio Bar 39 (1947).

The sale and conveyance provision for personal property found in section 2 is a qualification of the guarantee contained in the Ohio bill of rights, specifically in Article I, section 2, and section 19, to the extent that it specifically grants to the legislature the power to provide by law for the regulation, sale and conveyance of personal property. Steele, Hopkins and Co. v. Miller, 92 Ohio St. 115, 110 N.E. 648 (1915).

Section 2 by implication prohibits the formation of public or private corporations by special acts. Atkinson v. Marietta and Cincinnati Railroad Co., 15 Ohio St. 21 (1864). However, section 2's provisions do not make legislative enactments the only means of altering corporate laws, thus excluding the possibility of regulation by constitutional amendment. Allen v. Scott, 104 Ohio St. 436, 135 N.E. 683 (1922).

Section 2 applies to both public and private corporations. Although for the purposes of section 2 counties are considered to be political subdivisions rather than corporations. Atty. General v. Cincinnati, 20 Ohio St. 18 (1870).

Section 3

> Section 3. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank," "banker," or "banking," or words of similar meaning in any foreign language as a designation or name under which such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state.

History - Section 3 of Article XIII, amended into its present form in 1936, is the culmination of a series of constitutional amendments to the original 1851 section 3. The original section provided for additional liability of each corporate stockholder, over and above the stock owned by him and any unpaid amount due thereon, to a further sum at least equal to the worth of the stock. This form of additional liability is known as double or superadded liability.

The original superadded liability provision was deleted from the section by constitutional amendment in 1903, thus establishing liability limited to the unpaid subscription on the stock. The superadded liability provision was later reintroduced into the section for banking corporation shareholders by the 1912 constitutional convention, only to be again deleted by amendment in 1936.

The legislative intent of the 1851 framers of the constitution in providing for double liability was "to secure those /persons/ who labour and furnish materials /to corporations, while/ at the same time . . . not deter/ing/ men from subscribing stock in such companies."
Debates and Proceedings of the Convention, Vol. 1, 370, 1850-1851. The double liability provision represented a compromise between those delegates who wished

to eliminate limited liability corporations altogether and those who wished to encourage corporate investment. The corporate and liability issue split the convention along both party and sectional lines. The Whigs and less developed sections were for limited liability corporations as a means of encouraging corporate investment, while the more developed sections and the Democrats were against limited liability corporations as being unsound economic units and beneficiaries of special privilege. These two factions debated this issue long and hard. Finally the compromise superadded liability provision was agreed upon then in 1902, the superadded liability provision was repealed, apparently marking a change in public attitude toward limited liability corporations. However, no legislative history is available to explain the background of the 1902 amendment.

In the 1912 convention, the superadded liability provision was reintroduced into the Constitution for banking corporations. The reintroduction of this provision was largely the result of the bank panic of 1907, which demonstrated to the convention's satisfaction the need for tighter state controls on banks. In the 1912 convention debates, it was noted a majority of states at that time had a double liability provision for banks. In a further effort to achieve tighter controls on banks, the second sentence of the present section 3 was added to the Constitution. The second sentence provides for limiting the use of the words "bank," "banker," and banking to corporations which were willing to submit themselves to state jurisdiction and controls. This sentence was intended to assure the state the power to control banks not organized under Ohio or federal laws. The convention debates do not indicate that the convention had a particular model in mind, when they drafted this word usage limitation provision.

In 1936, a constitutional amendment deleted the double or superadded liability provision for banking corporations, thus limiting liability for all corporate stockholders in Ohio to the unpaid amounts due on their stock. Apparently the double liability provision for bank stockholders was deleted due to the havoc it had created in the bank crisis of 1933. Squire v. Abbott, 5 Ohio Op. 352 (1936).

Comparative Analysis - In most jurisdictions double or unlimited liability provisions have been eliminated from state constitutions and statutes, as they were from the Ohio Constitution in 1936. H. Henn, Law of Corporations section 72 (1970). The Ohio limitation of stockholder's liability to the unpaid portion of their stock, is consistent with the general rule of corporate liability, although this provision for limited liability is statutory rather than constitutional in a number of states. H. Henn, Law of Corporations section 17 (1970). Ohio has a statutory provision for limited liability at Ohio Revised Code section 1701.10 (A), in addition to its constitutional provision.

Some form of restriction on the use of the word "bank" and its derivatives by persons or corporations not subject to state control as found in the second sentence of section 3, is an "unauthorized banking" provision which is found in the banking statutes of most states. Bank Law Journal, Encyclopedia of Banking Laws (1964). These provisions generally provided for the bank to subject itself to state control in exchange for the privilege of the use of the word "bank" and its derivatives. Ohio also has a statutory provision although its statutory provision prohibiting the use of the term "bank" is not conditioned upon submission to state controls. Ohio Revised Code section 1101.02. However, even in the absence of a specific provision granting the state control over the banks, the state has inherent "police power" authority to regulate banks and banking within the state due to the bank's quasi-public nature. Squire v. National City Bank, 56 Ohio App. 401 (1936), Noble State

Bank v. Haskell, 219 U.S. 104, 55 L. Ed. 112, 31 S. Ct. 186 (1911).

Statutory Provisions - The provisions of section 3 have statutory parallels in sections 1701.18 and 1101.2 (A) of the Ohio Revised Code. Section 1701.18 provides for shareholder's liability for the unpaid consideration due on corporate shares, thus implementing the stockholder's liability provision of section 3. Although 1701.18 does not specifically prohibit further liability from attaching to the stockholders, no provision for liability beyond the unpaid portion of the stock is made. However, the absence of a specific provision for liability can be construed as limiting liability to the specific provision by implication. The Law of Corporations by Harry Henn thus construes a substantially identical section of the ABA-ALI Model Business Corporation Act. Henn, The Law of Corporations p. 403 (1970) Thus section 1701.18 standing alone would probably have the same effect as it now has in tandem with section 3 of Article XIII.

Section 1101.02 (A), a statutory provision prohibiting the use of the word "bank" and its derivatives as a designation or name, is a statute with parallel provisions to the restrictions on the use of the word "bank" in section 3. Although the statute does not condition the use of the word upon the submission to Ohio laws and regulations, Ohio has inherent police power to control banks and banking within the state, as was noted supra. Thus the statutory and constitutional provisions in effect accomplish the same ends.

Judicial Interpretation -The judicial comment on section 3 involves the former double or superadded liability provisions and is therefore inapplicable to the present section 3. It is still unresolved, however, whether or not liability under these former provisions is currently possible for stockholders in corporations which contracted debts during prior period of double liability and whose debt's collection have not been barred by the statute of limitation. Ohio Attorney General Op. 660 (1937). Such liability could theoretically be possible, if the 1937 amendment was prospective in effect as were the last two amendments. Lattner v. Osborn Bank, 25 Ohio Dec. 243 (1914) The prior obligations which, due to their contractual nature were previously protected from impairment by the Ohio and federal constitutions, would therefore still be in effect. However, after 37 years with no indexed litigation on the issue, the possibility of such liability is extremely remote.

Current Issues - Are the provisions of section 3 appropriate constitutional material in light of the Ohio statutes effecting the same results and the tendency nationally to include such provisions in statutes rather than the constitutions? If section 3 is retained, the phrase "or her" should be deleted from the end of the first sentence to make the wording of the section conform with the Ohio Bill Drafting Manual's style.

Section 4

> Section 4. The property of corporations, now existing or hereafter created, shall be forever subject to taxation, the same as the property of individuals.

History - Prior to the 1851 constitutional convention, the Ohio General Assembly had granted some corporations exemptions from taxation in order to encourage capital investments in public improvements, such as railroads, plank roads, and canals. However, by the time the 1851 convention met, this practice was viewed as an undemocratic special grant of privilege. Therefore, Section 4 of this article was designed to eliminate this special privilege. This provision was agreed to with

little debate.

Comparative Analyses - The power of the legislature to grant exemptions varies widely among the states. At least 21 other state constitutions limit exemptions either to those made under general law or to those specifically listed as permissible in the Constitution, most commonly charities, religious purposes and educational purposes. The Model State Constitution, in keeping with its policy of allowing the widest possible freedom for legislative action in fiscal affairs, is silent on the subject on permissible exemptions. G. Braden and R. Cohen, The Illinois Constitution: An Annotated and Comparative Analysis 465 (1969

Interpretation - There is no absolute necessity for this section, because without it, section 2 of Article XII would have covered existing and future corporations and would have prohibited a double tax on corporate real property. Cleveland Trust v. Longler, 62 Ohio St. 266. Its presence in the Constitution merely indicates the strength of the delegates' feelings on this subject. Treasurer v. Peoples Bank, 47 Ohio St. 503, 25 N.E. 697 (1890); Exchange Bank v. Hines, 3 Ohio St. 1 (1853). This section enables the legislature to tax both corporate property and to tax corporate shares. Bank v. Miller, 19 F. 372, 5 Ohio F. Dec. 247 (1887).

The legislature cannot constitutionally under section 4 lay a double tax upon corporate property. Cleveland Trust Co. v. Lander, 62 Ohio St. 266, 56 N.E. 1036 (1900). However, the legislature is under no such constitutional restrictions as to corporate franchises or privileges. Southern Sum Co. v. Laylin, 66 Ohio St. 578, 64 N.E. 564 (1902).

Current Problem - A current question exists as to the importance of having section 4 of Article XIII in the Constitution, in light of the fact that section 2 of Article XII also covers existing and future corporations and double property taxation. If this provision is to be retained, a further question exists as to the possibility of relocating this provision in Article XII dealing with taxation.

Section 5

> Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first paid in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record as shall be prescribed by law.

History - The current section 5 of Article XIII was adopted in its present form by the 1851 convention. The 1851 convention adopted this provision to curb the abuses of the commission system of assessing the value of condemned land then in use. Under this prior system the value of land to be condemned was fixed by three commissioners appointed by the court and there was no means of appeal available. Many landowners felt that they had been cheated by pro-railroad commissioners appointed by pro-railroad courts and that they were left completely without recourse.

Section 5 was designed to alleviate these problems by providing for the determination of property values by a twelve man jury in a court of record and

payment of the value prior to the taking. The convention debates indicate that the delegates intended the phrase "in a court of record" to provide for a hearing in accordance with due process and accompanied by the right of appeal. Some discussion was heard in the floor debates that section 5 might be too pro-property owner and would thus impede capital improvements. Nevertheless, with the final floor vote of 49 to 37, section 5 was adopted.

Comparative Analysis - Almost all of the states have an eminent domain provision in their constitutions. These provisions usually require that "just", "adequate," "reasonable," or "full" compensation be paid for the condemnation of private property for public use. Sixteen other state constitutions require that the value of the property condemned be determined by a jury. G. Braden and R. Cohen, The Illinois Constitution: An Annotated and Comparative Analysis 64 (1969). The Ohio provision that the payment of money must be made or secured prior to the taking is consistent with the majority rule that compensation must be secured prior to the taking of the property. 29 A Corpus Juris Secundum Eminent Domain section 99 (1965).

However, state provisions requiring the payment of just compensation for the taking of private property are superfluous in light of the federal requirement to the same effect found in the fifth amendment of the United States Constitution. The Model State Constitution contains no eminent domain provision. G. Braden and R. Cohen The Illinois Constitution. An Annotated and Comparative Analysis 64 (1969).

Statutory Provisions - The statutory provisions implementing the safeguards of section 5 are found in Chapter 163. of the Ohio Revised Code.

Judicial Interpretation - Eminent domain is an inherent sovereign power of the state. Section 5 of Article XIII therefore merely sets forth the method of exercising the eminent domain power, rather than creating it. Glasy v. Cincinnati, Wilmington and Zanesville Railroad, 4 Ohio St. 308 (1854). The power to grant rights of way to private corporations also would exist even in the absence of the implied grant of power found in section 5.

Section 19 of Article I of the Ohio Constitution reiterates and sets forth the inherent eminent domain powers of the state. The majority interpretation of the power of eminent domain allows the state to take private property for anything of public benefit, even if a private person or corporation will also benefit incidentally Berman v. Parker, 348 U. S. 26 (1954); J. Cribett, Principles of the Law of Property 324 (1962). The Ohio Supreme Court has adopted the majority rule and has interpreted Article I, section 19 in conformity therewith. In the case of Bruestle v.Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953), the Ohio Supreme Court held that private property in "blighted" areas could be taken by the city and then turned over to private individuals and corporations for redevelopment. The court noted in Bruestle that the phrase "public use", found in section 19 was the equivalent of public benefit and that the redevelopment of the blighted areas was for the public benefit although private individuals did benefit from it incidentally.

The above public benefit analysis has also been applied to the taking of private land for rights of way given to private individuals and corporations. Clearly when the taking is a right of way for a road or public utility open to or for the benefit of the public, the taking is a valid public use or benefit. Shaver v. Starrett, 4 Ohio St. 495 (1855); 19 O. Jur. 2d sections 23 and 24. Further land may be taken for private uses such as the locating of ditches or roads which will assist individuals in the cultivation of their land and thus indirectly enhance the public

welfare, " Pontiac Company v. Commissioners, 104 Ohio St. 447, 461 (1922). However, when land is taken to facilitate the development of land, it must be shown that the public will benefit from such a taking. 19 O. Jur. 2d 241 ( ).

The adoption of section 5 of Article XIII invalidated all prior Ohio laws inconsistent with it, Perrysburg Canal and Hydraulic Co. v. Fitzgerald, 10 Ohio St. 514 (1874). Its adoption enabled the legislature to enact subsequent eminent domain laws consistent with its provisions and to establish these as the exclusive methods of compensation for injuries to private property. The Little Miami Railroad Co. v. Whitacre, 8 Ohio St. 590 (1858).

The section 5 requirement that a jury consist of twelve men uses the word "men" in the generic sense and does not exclude women from sitting on condemnation juries. Thatcher v. Pennsylvania, Ohio and Detroit Road Co., 121 Ohio St. 205 (1929).

The right to obtain property under a judgment of condemnation is contingent upon the payment of the judgment Wagner v. Railroad Co., 38 Ohio St. 32 (1882). However, the company has no obligation to pay the judgment if it abandons its right of way. Hayes v. Cincinnati and Indiana Railroad Co., 17 Ohio St. 103 (1866).

A judgment of condemnation under section 5 is obtainable by a corporation only upon a showing of properly derived power from the sovereign in the form of a corporate charter and a grant of eminent domain power and of substantial compliance with the terms conditioning the grant. Atkinson v. Marietta and Cincinnati Railroad, 15 Ohio St. 21 (1864).

Because a delegation of the eminent domain power is a delegation of sovereign power and contravenes the rights of property owner, such delegations are strictly limited to their stated purposes and terms. Currier v. Marietta and Cincinnati Railroad Co., 11 Ohio St. 228 (1860). For example, in Iron Railroad Co. v. Ironton 19 Ohio St. 299 (1869), the Ohio Supreme Court held that the wharf owned by the railroad was not within the specific purpose of its grant of eminent domain and not entitled to the special exemptions which it granted. In Currier, supra, the court held that a grant of eminent domain to build a railroad did not, without special provisions to that effect, permit the company to condemn land for temporary tracks. In Little Miami Railroad v. Naylor, 2 Ohio St. 235 (1853) the court, again narrowly construing a delegation of eminent domain, held that a grant to build a railroad between two named points did not give the railroad the right to relocate the tracks once they had been initially located.

Further, the Ohio Supreme Court has held that the purchase of the property of a corporation does not carry with it the franchise of the corporation and its right of eminent domain, absent a legislative grant of specific authority for such a transfer. Coe v. Columbus, Piqua and Indiana Railroad Co., 10 Ohio St. 372 (1859); Atkinson v. Marietta and Cincinnati Railroad Co., 15 Ohio St. 21 (1864).

The compensation required by Article XIII, section 5 is the fair market value of the real estate taken, at the time it was taken, without any deductions for benefits as a result of the proposed improvement. Gersy v. Cincinnati, Wilmington and Zanesville Railroad Co., 4 Ohio St. 303 (1854). Additional damages, known as incidental damages, may be payable for injury done to the residue of the land by the taking. Cleveland and Pittsburg Railroad Co. v. Ball, 5 Ohio St. 568 (1856).

Traditionally, section 5 has been read in conjunction with Article I, Section 19 so as to require that no "deduction for benefits to any property of the owner" be made. A long recognized exception to the rule, however, is that a benefit in direct mitigation of an incidental damage could be considered in determining the amount of incidental damage done. For example, when the construction of a limited access highway cuts off a landowner's former means of entrance and exits from his land giving rise to incidental damages, the construction of an access road giving the owner a new means of entrance onto his land via the limited access road must be taken in mitigation of the incidental damages. Richley v. Bowling, 299 N.E. 2d 288 (1972). Another example of a benefit in mitigation of an incidental injury would occur when in the construction of a railroad, a ditch or excavation is made, which drains a swamp and renders a part of the owner's land valuable, which had been previously of little or no value, but the same ditch in draining the swamp, destroys a valuable spring of water, the injury and benefit may be so blended that they must necessarily be taken into consideration is estimating the compensation to be made. Cleveland and Pittsburg Railroad Co. v. Ball, 5 Ohio St. 568, 578 (1856).

The Ohio Supreme Court, in Richley v. Bowling, 299 N.E. 2d 288 (1972) seems to indicate that another exception to the "no benefits" rule may be recognizable in the Ohio courts, that being the allowance of deductions for special benefits. However, the court only expresses this as a possibility and does not decide that this is the case. Special damages are defined as those that accrue directly and solely to the owner, rather than to the community as a whole.

The provisions of section 5 do not apply to the taking of a right of way by a municipality or a county for a road open to the general public without charge. Toledo v. Peeston, 50 Ohio St. 361, 34 N.E. 353 (1903).

Section 7

> Section 7. No act of the general assembly, authorizing associations with banking powers, shall take effect until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of the electors, voting at such election.

History - Section 7 of Article XIII was enacted by the 1851 constitutional convention as a compromise provision designed to satisfy both the "gold standard" and the "easy money" factions of the convention. The split between these two factions was one of the most basic cleavages at the convention. This issue divided the convention along party lines and had been a controversial campaign issue on which delegates were defeated or elected to the convention.

Therefore, because of the highly sensitive nature of this issue, the convention was afraid to endanger the passage of the whole constitution by taking an "easy" or "hard money position" in the Constitution. Therefore,the convention, after much debate on the two alternative proposals of the banking committee,enacted the referendum provision which would allow the voters to control the policy decisions behind the enactment of bank legislation by the general assembly but at the same time avoid taking either a "hard" or "easy money" position.

Comparative Analysis - Two other states, Iowa and Kansas, require a referendum for the passage of banking acts in their constitutions. Illinois deleted a similar referendum

requirement from its constitution in 1970, on the rationale that such acts were too complex to be readily understood by the public. G. Braden and R. Cohen, The Illinois Constitution: An Annotated and Comparative Analysis 522 (1969).

Under the holding in Dearborn v. Northwestern Savings Bank(infra), Ohio's referendum requirement is limited to laws involving banks of issue. Most states have constitutional or statutory prohibitions or impediments to the issuance of bank notes. 9 Corpus Juris Secundum, Banks section 105 (1938) For example, five states as of 1970 had prohibitions in their constitutions against the suspension of payment on bank notes. However, Illinois deleted its prohibition to that effect, because it was viewed as obsolete in light of the prohibitively high federal tax on the issuance of bank notes. G. Braden and R. Cohen, The Illinois Constitution; An Annotated and Comparative Analysis 525 (1969).

Statutory References - There appear to be no banking laws currently in effect which were ratified by the electorate pursuant to section 7 of Article XIII.

Judicial Interpretation - Section 7 has been narrowed by the courts to apply only to laws governing the issuance of bank notes, Dearborn v. Northwestern Savings Bank 42 Ohio St. 617 (1885); Bates v. People's savings and Loan Ass'n, 42 Ohio St. 655 (1885), and only such laws as were enacted subsequent to 1851, Citizen's Bank v. Wright, 6 Ohio St. 310 (1859). The Ohio Supreme Court in Dearborn, supra, noted that the law's legislative history indicated that the law was intended to achieve just one goal, that is, to repress the unauthorized circulation of paper money, and therefore the court limited the law to that purpose.

Current Question - A substantial question exists as to whether or not section 4 is an obsolete provision of the Ohio Constitution, in light of the prohibitively high federal tax on the issuance of bank notes and the apparent lack of current legislation ratified pursuant to its provisions.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
August 6, 1974

Workmen's Compensation
Article II, Section 35

Among the constitutional amendments which came out of the 1912 Constitutional Convention was an amendment to the Legislative Article, enabling the Legislature to pass laws governing a program of workmen's compensation to be administered by the state. Proposal No. 24 was passed by the convention without debate, and adopted by the electors to become effective January 1, 1913. The language adopted read:

> Article II, Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto.

The absence of extensive discussion on the proposal at the 1912 Constitutional Convention should not be interpreted as indicating that the concept of workmen's compensation described in the amendment was not controversial. In fact, the resolution of cases involving industrial accidents by procedures established by the legislature was a radical departure from the existing method of resolving such cases. The early history of workmen's compensation laws included several challenges to the constitutionality of such laws. Constitutional arguments appear to have been laid to rest by the adoption of amendments to the constitution authorizing the legislature to enact workmen's compensation laws, and an examination of the arguments may serve as a guide in deciding whether or not the present constitutional provision should be retained, amended, or repealed.

History

The idea of workmen's compensation originated in Germany, under the government of Bismark, in 1884. Prior to that time, if a person was injured on the job, in order to collect compensation he had to prove in a lawsuit that the injury resulted from negligence on the part of the employer. The injured employee carried a heavy burden in proving that the employer was at fault, and that the accident did not result from some carelessness on the part of a fellow employee, or because of some oversight of the injured employee. Of course, the employees did not win too often, since the task of proving absolute negligence on the part of the employer was a difficult task. If the injured employee was able to trace the negligence directly back to the employer, the money awarded was often a large sum that either the employer did not have, or could not pay without hardship to his industry. The concept of workmen's compensation presented by Bismark appealed to the capitalists and the workers. To the employers, it offered an available fund to pay off compensation awards without jeopardizing the industry itself. To employees, it offered financial aid together with adequate medical

aid.

In the United States, the first comprehensive workmen's compensation law was adopted in New York in 1910, to overcome the inability of employees to recover damages for medical expenses and loss of income resulting from industrial accidents. The employee, prior to that time, had only one recourse available to him to collect damages on a job-related injury, and that involved time-consuming and costly litigation. The employer in the 19th century had three common law defenses: contributory negligence, the voluntary assumption of risk, and the fellow-servant doctrine. The voluntary assumption of risk defense was based on the individual's right of contract. The fellow-servant doctrine rendered the employee unable to recover if the injury resulted from negligence of a fellow employee.

Ohio History

In 1851, in the case of Little Miami v. Stevens, the court adopted an exception to the fellow-servant doctrine, the "vice-principal" exception, whereby a supervising or directing employee was not a fellow servant. Although the Ohio court decision was a step forward, the employee rarely emerged the victor from the costly litigation. In 1904, the assumption of risk doctrine was modified by the adoption, in Ohio, of the Williams Bill, which provided that the fact that an employee knew of his employer's negligence or omission to guard and protect his machinery and place of employment could not operate as a defense for the employer. Two laws passed in 1910, the Norris and Metzger bills, further modified the employers' common law defenses by abolishing the defense of contributory negligence and modifying the fellow servant and assumed risk defenses. The notion of "comparative negligence" was substituted and applied to certain dangerous employments, attempting to gauge whether the employer was guilty of gross negligence or the employee's negligence was only slight. These modifications still did not end the necessity of the employee's resorting to court action in order to obtain compensation.

The 1910 New York statute established the principle that the cost of industrial accidents should be charged to the industry rather than fall unevenly on individual employers. It specified eight classes of industries which were defined as hazardous, for which medical benefits and compensation were to be provided for injuries, regardless of the cause or fault, except where the injured party was guilty of serious, willful misconduct. The law was challenged on three grounds in Ives v. South Buffalo Ry. Co. 201 N.Y. 271 (1911): that it violated the due process clause of the federal and state constitutions, that it violated the right to trial by jury, and that it violated the equal protection clause of the 14th Amendment to the federal constitution. The Court of Appeals found no basis for violation of the equal protection clause, nor did it agree on the issue of the denial of the right to trial by jury. The Court, however, did sustain the contention that the law violated due process, by finding that the police powers were not broad enough to enable the state to require that an employer compensate an injured employee, when the injury or death occurred through no fault of the employer nor any violation of the employer's duty to the employee. Furthermore, the court said that to sustain an exercise of police power, the court "must be able to see that (the legislation) tends in some degree to prevent some offense or evil; or to preserve public health, morals, safety and welfare; (that) if it discloses no such purpose,...(it) is clearly calculated to invade the liberty and property of private citizens..." (1) In the storm of protest that surrounded the decision, a constitutional amendment permitting the legislature to enact laws protecting the health and safety of employees was drafted and adopted, which became part of Article I, Section 18 of the

New York Constitution.

> "Because of distrust of the courts, the section was drafted with a particularization better suited to legislation than to a constitution. The Legislature then enacted, and in an excess of caution, re-enacted, the forerunner of our present law. The new law was quickly challenged. With a minimal reference to the newly adopted amendment, the court reversed itself. It now found that federal constitutional due process was not infringed (relying on the very federal cases it had first rejected as not applicable) and that the reserve police power of the state was more than adequate to deal with the matter." (2)

The United States Supreme Court, in reviewing the constitutionality of the act, found no violation of due process, and said that the subject matter of the law bore so close a relation to the protection of the lives and safety of those it concerned, that it was properly within the police power of the state.

The first workmen's compensation law in Ohio was passed in May, 1911, and was elective in nature, applying to any employer who employed five or more workers. If an employer amenable to the law elected to participate, he was not liable to respond at common law for damages, injuries or death of employees. Failure to participate by employers amenable rendered them liable for damages, and denied to the employer the common law defenses of contributory negligence, voluntary assumption of risk, and fellow-servant relation. A challenge to the constitutionality of the law was made, reaching the Supreme Court in State, ex rel., v. Creamer, 85 O.S. 349 (1912). The points of argument raised embraced several issues: police power; taking private property without due process of law; due process of law - jury trial; interference with freedom of contract; impairment of existing contracts; arbitrary classification; conferring judicial powers; taxation for private purposes. The Court, emphasizing the voluntary nature of the act, upheld the constitutionality of the provision. Reference is made to the Court's decision in the 1912 Debates, by Mr. Cordes, the sponsor of the proposal, in his address to the Convention. He said:

> "Proposal No. 24 undertakes to write into the constitution of Ohio a constitutional provision making secure the workmen's compensation law passed by the last legislature, and declared constitutional by the Ohio supreme court by a vote of 4 to 2. Labor asks that this proposal be adopted, because we believe that by writing it into the constitution, it will make it possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter. It will also given an opportunity to still further improve the law to meet modern conditions of employment as they may arise." (3)

The 1912 constitutional amendment gave authority to the legislature to pass laws providing for a State Fund to be created by compulsory contribution from employers only. Under the terms of the 1911 law, employers contributed 90% and employees contributed 10%, voluntarily. Following the adoption of Article II, Section 35, the legislature passed a compulsory compensation act, and established the Industrial Commission to replace the Board of Awards charged with administering the fund under the 1911 act. Constitutionality of the amendatory law was challenged and upheld in Porter v. Hopkins, 91 Ohio St. 74 (1913). In an article entitled "the Ohio Compensation System" in the Ohio State Law Journal, vol. 19, pp. 541 (1958) James Young, former administrator of the Bureau of Workmen's Compensation, comments on the Supreme Court decision:

> "It is apparent, therefore, that the authorization for legislative enactment in

the field of workmen's compensation has a two-fold course. It flows from article II, section 35 of the Constitution and also from the inherent police power. The adoption of article II, section 35, did not, through specific grant of power, alter the fundamental source of authority. Rather, the constitutional grant is an implementation of the general and the validity of compensation legislation rests upon the authorization of the police power as well as the specific grant." (4)

What emerged from the constitutional provision was a workmen's compensation system where recovery is based upon the fact of injury, and not upon its cause, making fault and irrelevant consideration. The replacement of the common law system by the workmen's compensation system transferred the decision-making process from the courts to the legislature and administrative board appointed pursuant to law.

In 1921, a legislative act was passed consolidating state administrative functions into several departments directly responsible to the Governor. The Industrial Commission became part of the Department of Industrial Relations, with the primary function of acting as an administrative court on claims under the workmen's compensation act. The Commission was returned to its independent status in 1934, after an investigation of the Depression-related funding failure concluded that the Industrial Commission should be the sole administrative body for workmen's compensation.

In 1924, Article II, Section 35 was amended to take away the right of an employee to sue at law when injury or death resulted from failure to comply with lawful requirements for protecting health and safety. The amendment provided for the board to hear the case alleging failure to comply with such requirements, and upon finding that injury or death resulted from the employer's failure, the board shall add to the usual amount of compensation between fifteen and fifty percent of the maximum award established by law. The amended section expanded upon the powers of the board and required industry to pay a certain amount to a fund used for investigating industrial accidents.

The section, as amended in 1924, remains unchanged in our present constitution.

Article II, Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such portion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear

and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards, and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

From 1934 to 1955, the three-member industrial Commission retained all authority under the Workmen's Compensation Act.

In 1955, the Bureau of Workmen's Compensation was created by the General Assembly headed by an administrator, appointed by the Governor with the advice and consent of the Senate. The duties of the administrator are set forth in Section 4121.121 of the Ohio Revised Code.

"The administrator of the bureau of workmen's compensation shall be responsible for the discharge of all administrative duties imposed on the industrial commission in Chapter 4123. of the Revised Code,...
(A) The administrator shall do all acts and exercise all authorities and powers discretionary and otherwise, which are required of or vested in the industrial commission or in any of its employees or subordinates in Chapter 4123. of the Revised Code, except such acts and such exercise of authority and power as is required of and vested in the commission in section 4121.13 of the Revised Code..."

The powers and duties of the Industrial Commission, whose three members are appointed by the Governor with the advice and consent of the Senate, are set forth in 4121.13 R.C.

1- To investigate, ascertain, declare and prescribe hours of labor, safety devices, safeguards and reasonable means of protection for every place of employment.

2- To investigate, ascertain, and determine reasonable classification of persons, and employment.

3- To ascertain, and fix reasonable standards, and prescribe, modify and enforce such orders for the adoption of safety devices and other safeguards, including construction, maintenance and repair of places of employment.

4- To adopt rules governing the exercise of its powers, and rules to govern proceedings, investigations and hearings.

5- To "do all in its power" to promote voluntary arbitration and conciliation of disputes and avoid strikes, lockouts and similar tactics. The commission may appoint temporary boards of arbitration to help resolve disputes between employers and employees.

The powers and duties of the administrator of the Bureau of Workmen's Compensation, set forth in section 4121.121, include, in addition to duties relative to staffing and running the bureau itself:

1. preparing and submitting to the industrial commission information and recommendations for the classification of occupations or industries, premium rates and contributions, amounts to be credited to surplus fund.

"(E)...(to) prepare and submit to the commission such information as the administrator may deem pertinent or the commission may require, together with the administrator's recommendations, for the determination by the commission of classifications of occupations or industries, of premium rates and contributions, of the amount to be credited to the surplus fund, of rules and system of rating, rate revisions and merit rating and of contributions to the administrative costs of the commission, the bureau of workmen's compensation, and the regional boards of review..."

The workmen's compensation law, as of July, 1974, applies to all employers of one or more persons. Another point of note is that the money contributed by employers is divided into two funds, a public fund and a private fund, each independent of the other. The public fund receives money from the state, including state hospitals and municipal corporations, townships and school districts, as well as hospitals owned by a political subdivision other than the state. The private fund receives income from private corporations and public corporations, as well as persons and firms engaged in private industry.

Recommendations for change

The Temporary State Commission on the Constitutional Convention of New York considered the pros and cons of retaining a constitutional provision supporting workmen's compensation. The arguments reprinted below seem relevant to the work of the Ohio Constitutional Revision Commission, since the provisions of the two constitutions are similar, drafted about the same time, in the same climate of judicial decision.

"Arguments cited in favor of retention generally:
--The principle of assessing industry for the cost of industrial accidents, rather than having them fall on individual workmen, is of such vital importance to labor that its protection is of constitutional magnitude.

--The present constitutional provisions were adopted precisely because a court overturned the first legislative effort to establish the principle. The protection and perpetuation of the principle cannot be left to the vagaries of court decisions.

Arguments cited in favor of retention in its present form:
--The present workmen's compensation law operates in derogation of certain rights of constitutional dimension. For example, the right of an employee to sue his employer in negligence is abrogated, even if the injury causes death; so also is the right to trial by jury. Both of these rights are protected elsewhere in the Constitution. The present Article IX, Section 18, expressly authorizes the abrogation of these rights. Without such authorization, the workmen's compensation statute may become vulnerable to constitutional attack on the grounds mentioned.

Arguments in favor of retention in simplified form:
--There can be no question that Article IX, Section 18, is couched in language better

suited to legislation than to a Constitution. It is, therefore, unduly restrictive. The subject matter of workmen's compensation is highly complex. Granted that retention of the reference in the Constitution is desirable, the Legislature should nevertheless be free to experiment with remedies fashioned for new problems as they arise. When changing conditions require modification of treatment, change in statute law is relatively simple compared to the cumbersome mechanics of constitutional change.

Arguments against retention:

--Constitutional support of the workmen's compensation laws is unnecessary. The principles underlying such laws are now so interwoven in the fabric of modern industrial society that it is inconceivable that a modern Legislature would abolish the system, or that a present-day court would invalidate it. Since the present Convention has for one of its goals the simplification and reduction in size of the Constitution, Article I, Section 18, should be eliminated." (5)

Looking at Article II, Section 35, it appears that several details, possibly legislative in nature, are contained therein. For example, the section requires that of employers' contributions to the fund, an amount not to exceed 1% in any year, be set aside for the purpose of investigation and prevention of industrial accidents. The time may come when 1% of the fund is not sufficient to conduct such investigative and preventive studies, and perhaps the constitution should be more flexible with respect to allowing the necessary funding to be available. Another detail, which perhaps should be left to legislative descretion, is the mandate that when injury or death of an employee results from failure of the employer to comply with lawful requirements, the additional award shall be between 15% and 50% of the maximum award established by law.

The principle of workmen's compensation seems to be a vital concept, deeply ingrained in our economic system, and perhaps the detail and forcefulness of a constitutional provision that appeared necessary when the idea was new and not as popular need not be retained. By repealing the provision, as was observed by the New York Commission, there exists the possibility that judicial interpretation of workmen's compensation may restrict the system's operation by re-opening the constitutional questions that were laid to rest by adoption of a constitutional amendment clearly giving the state the required police power.

The present administrator of the Bureau of Workmen's Compensation, Anthony Stringer, noted a problem with the present constitutional provision. In his opinion, the Industrial Commission, created pursuant to the constitutional provision that "laws may be passed establishing a board which may be empowered to classify all occupations..." and the Bureau of Workmen's Compensation, created by law, share many of the same functions. The Industrial Commission, being composed of only three members, was too small to carry out all of the functions required to implement an effective workmen's compensation system-hence, the creation of the Bureau of Workmen's Compensation by the Legislature. Because of the residual power of the Industrial Commission, in several instances, it operates merely as a rubber stamp on the recommendations of the administrator. He suggested that the constitution be amended to allow the two organizations to have separate functions, with the Industrial Commission acting as the appellate body, and the Bureau responsible for all administrative duties.

FOOTNOTES

1. Ives v. South Buffalo Ry. Co., 201 N.Y. 271 (1911), cited in State of New York, Temporary State Commission on the Constitutional Convention, Housing, Labor Natural Resources, vol. 9, 1967. p. 74.

2. op. cit., p. 75

3. Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912. p. 1346

4. Ohio State Law Journal, vol. 19, "The Ohio Compensation System" by James L. Young. p. 542

5. op. cit., Housing, Labor, Natural Resources. pp. 76-77

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
September 19, 1974

Article V, Section 4
Revision of Committee Recommendation

Section 4 of Article V, dealing with the power to deny privileges to persons convicted of crime, presently reads as follows:

> Section 4. 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.

Section 2961.01 of the Revised Code implements this section. Under the new criminal code, a convicted felon is denied the privilege of voting until released on probation, parole, or a conditional pardon. The section reads as follows:

> Section 2961.01. A person convicted of a felony under the laws of this or any other state of the United States, 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. When any such person is granted probation, parole, or a conditional pardon, he is competent to be an elector during the period of probation or parole or until the conditions of his pardon have been performed or have transpired, and thereafter following his final discharge. The full pardon of a convict restores the rights and privileges so forfeited under this section, but a pardon shall not release a convict from the costs of his conviction in this state, unless so specified.

The original committee recommendation would have amended Section 4 of Article V to read as follows:

> Section 4. The General Assembly shall have the power to deny the privileges of an elector to any person convicted of a felony only during the period of incarceration.

At the July 23 meeting, in discussing this section, a consensus appeared to develop that the privilege of voting and the privilege of holding public office should be separated so that the General Assembly could continue to deny the privilege of holding office to a convicted felon even though he is not incarcerated. The committee proposes a substitute for its original recommendation to amend Section 4 of Article V so that it would read as follows:

> Section 4. The General Assembly shall have the power to deny the privilege of voting to any person convicted of a felony only during a period of incarceration and to deny the privilege of being eligible to office to any person convicted of a felony.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
October 23, 1974

Article III, Sections 3 and 4
Article XVII, Sections 1 and 2; Article III, Section 18

As part of its report on Elections and Suffrage, first presented to the Commission in April, 1974, the Elections and Suffrage Committee studied and included recommendations on Sections 3 and 4 of Article III; and Section 18 of Article III and Sections 1 and 2 of Article XVII. Following commission discussion of these recommendations, the committee has reconsidered its original recommendations and now presents the following as a substitute report.

Article III, Sections 3 and 4

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the NEXT REGULAR session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Comment:

The original committee recommendation was to repeal this section. However, some Commission members expressed the opinion that the ceremonial function of having the elections returns referred to in this section presented to the General Assembly should be retained. A second point raised was that removal of the expression "the person having the highest number of votes shall be declared duly elected" would permit the legislature to provide for run-off elections in the event no candidate for any of the offices covered received a majority of the votes cast.

The committee, therefore, recommends retention of the section but with modification of the time when election results would be presented to the General Assembly to specify that presentation would be during the first week of the "next regular" session. Section 8 of Article II provides that the General Assembly shall meet in "first regular" and in "second regular" session. By inserting the words "next regular" in this section, the committee intends to preclude the possibility of a special session being called in the event of a tie vote as well as the possibility of presenting the election results to a General Assembly already in session. Under normal circumstances, the election of the six elected state officials and the election of all members of the General Assembly except approximately one-half of the senators will occur at the same time. If the vote for any of the six elected officials should result in a tie, the committee believes that the General Assembly elected at the same election should be the General Assembly to resolve that tie vote.

Section 4. Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Comment:

The committee recommends that this section be repealed. It refers to an event that is no longer possible - that there will not be a session of the General Assembly in the January following an election for state offices. Section 8 of Article II now requires the General Assembly to be in session every January.

Article XVII, Sections 1 and 2
Article III, Section 18

Article XVII

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

THE TERM OF OFFICE OF ALL ELECTIVE COUNTY, TOWNSHIP, MUNICIPAL, AND SCHOOL OFFICERS SHALL BE SUCH EVEN NUMBER OF YEARS NOT EXCEEDING FOUR AS MAY BE PRESCRIBED BY THE GENERAL ASSEMBLY.

THE GENERAL ASSEMBLY MAY EXTEND EXISTING TERMS OF OFFICE SO AS TO EFFECT THE PURPOSE OF THIS SECTION.

Comment:

This recommendation differs from the original committee recommendation only in the substitution of "as may be prescribed by the general assembly" for "as may be so prescribed" at the end of the second paragraph.

All of the new language - paragraphs 2 and 3 - is removed from Section 2 of Article XVII and added to Section 1. It does not, therefore, represent any substantive change from existing constitutional provisions.

Section 2. ~~The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday of January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly, and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of the Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.~~

~~And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.~~

ANY VACANCY WHICH MAY OCCUR IN ANY ELECTIVE STATE OFFICE CREATED BY ARTICLE II or III OR CREATED BY OR PURSUANT TO ARTICLE IV OF THE CONSTITUTION SHALL BE FILLED ONLY IF PROVIDED IN SUCH ARTICLES. Any vacancy which may occur in any elective state office NOT SO CREATED ~~other than that of a member of the General Assembly or of Governor;~~ shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Comment:

This recommendation differs from the original committee recommendation in the proposed language of the final paragraph regarding filling vacancies. The committee offers the following reasons for the recommendation to repeal the first two paragraphs:

1. First paragraph, first and second sentences are duplicated, in every substantive particular, in Section 2 of Article III. Section 2 of Article III has already been considered by the Commission and no changes are being recommended.

2. First paragraph, third sentence - terms of Supreme Court and Court of Appeals Judges are covered by Section 6 of Article IV and the provisions do not differ substantively. Terms of Common Pleas (and Probate) judges are also covered by Section 6 of Article IV and there is a difference - this section specifies that such terms shall be six years and section 6 of Article IV says "not less than" six years. Terms of other judges are not covered elsewhere. The committee is of the opinion that judicial terms is a proper subject for the judiciary committee, and has been assured that the judiciary committee is, in fact, considering that subject. The Elections committee believes that, since terms of executive elected officials are covered by Article III and terms of legislators by Article II, terms of judges should be covered by Article IV.

3. First paragraph, fourth sentence - justices of the peace no longer exist in Ohio.

4. First paragraph, fifth sentence - transferred to Section 1.

5. Second paragraph - transferred to Section 1.

The final paragraph has been changed from the original committee recommendation but the change is not intended to accomplish a different result. The office of a member of the General Assembly is created in Article II, and filling of vacancies in that office is provided for in section 11 of Article II. The offices of governor, lt. governor, secretary of state, auditor of state, treasurer of state, and attorney general are created in Article III and filling of vacancies for all except the Lt. Governor is provided for in Section 18 of Article III. The commission has already made extensive recommendations with respect to the offices of Governor and Lt. Governor providing for succession to the office of governor in the event of vacancy. If the office of Lt. Governor were filled in the event of a vacancy, it would not be consistent with the prior recommendation. Vacancies in judicial offices are filled pursuant to section 13 of Article IV, which is presently before the Judiciary Committee for consideration. It is the opinion of the Elections committee that the

method of filling judicial vacancies is a matter for the judiciary article, and should not be duplicated here because of the possibility of conflicts in the future. As proposed, the second sentence of this paragraph would presently apply only to members of the state board of education, although there is the possibility that the General Assembly will create additional elective state offices in the future.

Article III

Section 18. Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Comment:

Originally, the commitee recommended repeal of Section 18 of Article III since its provisions would be covered by Section 2 of Article XVII with the addition of "Lt. Governor" to the persons excluded from Section 2 of Article XVII. However, the committee now recommends that Article III, Section 18 be retained without change, for reasons discussed in the comment to Section 2 of Article XVII.

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September 19, 1974

Mrs. Ann M. Eriksson, Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Re: Article XIII: Corporations

Dear Mrs. Eriksson:

Your inquiry to the Ohio State Bar Association concerning Article XIII of the Constitution dealing with Corporations was referred to me as Chairman of the Corporation Law Committee. As you know, I supplied the seventy-three members of our Committee with copies of Research Study No. 38 which you so helpfully furnished. The recommendations contained in Research Study No. 38 were discussed at the meeting of the Corporation Law Committee earlier this month, and I am writing to provide you with an informal report of the reaction of this group of lawyers. Incidentally, you might be interested to know that the Corporation Law Committee is composed primarily of lawyers from private practice with some representation, however, of corporate counsel and law teachers. I should also advise you that the views expressed here have not been reviewed by the Executive Committee or Council of Delegates of the Ohio State Bar Association and do not represent the official position of the State Bar Association. Finally, although all of our Committee members had an opportunity to review Reseach Study No. 38, we did not undertake any independent study of the proposals for constitutional revision.

With these disclaimers, I should like to advise you that our Committee was in agreement with the conclusion of Research Study No. 38 that the following provisions found in Sections 1 and 2 of Article XIII should be retained, namely that corporations may not be created by special act; and that the general assembly has the power to alter and repeal general laws pursuant to which

corporations are formed.

Contrary to the conclusions of Research Study No. 38, our Committee is of the opinion that the second clause of the first sentence in Section 3 should be retained also. This clause provides that in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her. Although the matter of stockholder liability might be dealt with either in the Constitution or in statutes, the matter is too fundamental to be left to implied statutory construction if it is not covered in the Constitution. Most publicly held stock of Ohio corporations has been issued on the basis of legal opinions rendered in part in reliance upon Section 3 of the Ohio Constitution. In view of the past history of variations in the extent of stockholder liability, we believe the retention of the constitutional provision is desirable and that the matter should not be relegated to statutory treatment regardless of whether such statutory treatment be explicit or implicit.

The remaining Sections 4, 5, and 7 dealing with taxation, appropriation, and banking do not involve the law of corporations, and accordingly, our Committee expressed no opinion concerning the conclusion that these provisions might be repealed.

We appreciate the opportunity you have given us to express these views informally at this stage of the constitutional revision process, and if we can be of further assistance, I hope you will let us know. I would also appreciate it if you would advise me of the action taken by the Elections and Suffrage Committee with regard to Article XIII.

Very truly yours,

Frank R. Morris, Jr.

FRM/rjs
Copy: Mr. Joseph B. Miller
Mr. Robert A. Manning

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
November 13, 1974

R E P O R T

Corporations

The Elections and Suffrage Committee hereby submits its recommendations on Article XIII of the Constitution, dealing with corporations:

Present Constitution	Article XIII Subject	Recommendation
Section 1	Special Act Conferring Corporate Powers	Repeal; enact similar provision in new section
Section 2	General Acts of Incorporation	Repeal; enact similar provision in part in new section
Section 3	Personal liability of stockholders; banking terms	Repeal; enact similar provision in part in new section
Section 4	Corporate property subject to taxation	Repeal; enact similar provision in part in new section
Section 5	Right of Way	Refer to Bill of Rights Committee
Section 7	Associations with Banking Powers	Repeal

Section 6 is not included in this report because it has already been studied by the Local Government Committee and included in that committee's report on municipal corporations. It will be repealed if that committee's recommendation is adopted by the Commission. It deals solely with municipal corporations.

Except for Section 5, which would be referred to the Bill of Rights Committee to be considered in conjunction with that committee's study of eminent domain (Section 19 of Article I), all sections in Article XIII would be repealed and replaced by a single section to be placed in Article XV, miscellaneous.

Article XV

Section 2	Corporations	Enact

Section 2. CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED, EMPOWERED, REGULATED, AND TAXED ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED. STOCK OWNERSHIP THEREIN SHALL NOT CREATE INDIVIDUAL LIABILITY FOR CORPORATE OBLIGATIONS IN EXCESS OF THE STOCKHOLDER'S UNPAID STOCK SUBSCRIPTION.

The Committee recommends the enactment of Section 2 in Article XV as set forth above. The present section 2 in Article XV (dealing with public printing) has already been recommended by the Commission for repeal. The above corporation section would replace those provisions of the first 4 sections of Article XIII which the committee believes should be retained in the Constitution, and the remainder of those sections, which are statutory in nature, would be repealed. The first 4 sections of Article XIII read as follows:

Article XIII

Section 1. The General Assembly shall pass no special act conferring corporate powers.

Section 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Section 3. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank', 'banker' or 'banking', or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state.

Section 4. The property of corporation, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals.

1. General Laws

Prior to 1851, all corporations in Ohio, including municipal corporations, were specially chartered by the legislature. Indeed, the 1802 Constitution specifically provided for applications to the legislature and granting of letters of incorporation to associations of persons "regularly formed....and having given themselves a name." Between 1802 and 1850, as Ohioans settled into communities and into various forms of business and industrial enterprises, the legislature saw an increasing amount of its time and energies consumed with the process of incorporating. Legislative abuses of the process - logrolling, special privileges, lack of uniformity - led to the adoption, in 1851, of many of the corporation provisions of the present Article XIII. Of these provisions, the most important would appear to be the provision requiring corporations to be formed under general laws and prohibiting the conferring of corporate powers by

special act. At the same time, a separate section was enacted (Section 6) requiring the General Assembly to provide for the organization of cities and incorporated villages by general laws.

The 1850 Convention added a "uniform" laws provision, also, to the Constitution. Section 26 of Article II reads, in part, as follows:

> "All laws, of a general nature, shall have a uniform operation throughout the State....."

The committee considered whether provisions requiring corporations to be formed only under general laws were necessary in light of the above language of section 26 of Article II. However, it is noted that section 26 of Article II does not prohibit special acts - it requires uniform operation of laws of a general nature; presumably laws which are not of a general nature may still be passed by the legislature and, in fact, are. Whether a law is "of a general nature" may be the subject of litigation. The committee believes, therefore, that the requirement of general laws governing the formation and granting of powers to corporations should be retained in the Constitution. The committee proposal would replace the following language found in section 1 and 2 of Article XIII:

> The General Assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws.....

with the following:

> CORPORATIONS.....MAY BE FORMED, EMPOWERED, ...ONLY UNDER GENERAL LAWS

2. Laws may be altered or repealed

An early decision of the U.S. Supreme Court, Dartmouth College v. Woodward, (17 U.S. 518, 1819) held that a corporate charter, once granted by the legislature, was a contract between the state and the corporation and could not be revoked or altered by subsequent legislative action unless the charter specifically reserved these rights to the state. The 1850 convention, therefore, in order to counteract the effect of this decision, added to the Ohio Constitution the provision in section 2 that the laws under which corporations may be formed may, from time to time, be altered or repealed. Such a provision could not affect corporations already in existence at the time the constitutional provision was enacted, but as to all corporations formed since 1851, the constitutional provision is a condition of the granting of the corporate charter. The committee found no evidence that the Dartmouth College case had ever been reversed or otherwise rendered inapplicable, and therefore believes that the constitutional language should be retained. The constitutional provision proposed by the committee now reads:

> CORPORATIONS.....MAY BE FORMED, EMPOWERED.....ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED.

These reserved powers to alter or repeal corporate laws are subject to certain other constitutional safeguards, which are not intended in any way to be modified by the committee recommendation. For example, Section 10 of Article I of the Federal Constitution and Section 28 of Article II of the Ohio Constitution prohibit ex post facto laws and prohibit laws impairing the obligation of contracts. Thus, although the

ability of the legislature to alter corporation laws becomes a part of the contract between the corporation and the state, the legislature cannot pass laws which impair the contract obligations which corporations have incurred between the corporation and other individuals or corporations.

3. Municipal Corporations

In 1851, when the corporation provisions were written into the Constitution, municipal corporations, as well as private or business corporations, were specially chartered by the legislature. Section 6 was written into Article XIII to restrict the General Assembly to providing for municipal corporations, also, by general laws. Moreover, section 1 of Article XIII (prohibiting the conferring of corporate powers by special act) has also been interpreted to apply to municipal corporations.

Between 1851 and 1912, in spite of the language of Article XIII, the General Assembly engaged in extensive classification of cities, to the extent that some classes were created with population categories so narrow that only 1 city fell within the class. Thus, the General Assembly was in fact passing special laws for cities under the guise of a classification system. The 1912 convention, in response to a Supreme Court decision holding the city classification system unconstitutional and in response to the demands of the cities for home rule powers, wrote Article XVIII dealing with municipal corporations. Although there was discussion at the convention about repealing section 6 of Article XIII, that action was not taken.

As noted earlier, Section 6 of Article XIII was studied by the Local Government Committee and will be repealed, if that committee's recommendations are adopted. In considering the relationship of the remainder of Article XIII to municipal corporations, the Elections and Suffrage Committee felt that it should be made clear that municipal corporations are dealt with exclusively by Article XVIII and that whatever language the constitution contains with respect to corporations generally should not be construed to apply to municipal corporations. Therefore, the committee recommends the addition of the phrase "not governed under Article XVIII of this Constitution" as a definition of the word "corporations." The sentence now reads:

> CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED, EMPOWERED.....ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED.

4. Regulation

The second sentence of section 2 of Article XIII was added by the 1912 convention. It reads: "Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law." The Committee proposes to replace this with the single word "REGULATED."

There was debate on the floor of the convention about this provision, with general agreement that the General Assembly should regulate and classify corporations (as it had, in fact, been doing) and, more particularly, that the legislature should enact a "blue sky" law similar to one already enacted in Kansas to prevent the sale of fraudulent

securities, whether issued by domestic or foreign corporations, to Ohio citizens.

The question would seem to be whether the language is necessary as constitutional language. A majority of the committee on corporations other than municipal corporations believed that it was; although, as worded by the committee, the provision would have required the General Assembly to pass laws regulating the sale of stocks and securities and was intended to be mandatory. Some delegates believed that the General Assembly already had the power prescribed. No cases were cited by any of the debaters in which the Ohio Supreme Court had held that the General Assembly lacked power, generally, to regulate corporations or to regulate the sale of securities so as to prevent fraud. If there is doubt about the legislature's power, the word "regulate" seems to the committee to be adequate to cover the needed authority.

The question of classification might be somewhat more questionable than other regulation, in light of the history of legislative municipal classification and its subsequent overthrow by the Supreme Court in Ohio. However, classification for valid legislative purposes is **not** unconstitutional just because it is classification; other constitutional provisions relating to equal protection of the laws and due process of law have led the courts to require that classifications be reasonable, related to the purpose for which made, and that all entities falling into the classification be treated fairly and equally.

The committee, therefore, has reached the conclusion that all the language of the second sentence is surplusage in that it does not confer on the general assembly any power it does not already possess by virtue of its general legislative power under section 1 of Article II. The committee recommends the repeal of this sentence.

The third sentence of Section 2 of Article XIII was also added by the 1912 convention. It reads: "Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual." Prior to the 1912 convention, the legislature had twice attempted to enact a law regulating bulk sales not in the regular course of the seller's business. Both times, the Supreme Court struck down the statutes as violating provisions of the Bill of Rights (specifically sections 1, 2, and 19) protecting the right to own and dispose of property. The 1912 convention added this sentence to the section, specifically to overcome the effect of those decisions. "Other" property obviously means other than stocks and securities.

Following the adoption of this provision, the general assembly again enacted a bulk sales act, and this time it was upheld by the Ohio Supreme Court. (Steele, Hopkins and Co. v. Miller, 92 Ohio St. 115, 1915). The court held, in the Steele case, that this sentence constituted an exception to the Bill of Rights guarantees.

Whether the sentence is useful today as a **basis** for commercial regulation seemed very doubtful to the committee. Even if it is still of constitutional validity, the committee believes that it is misplaced, since it relates to entities other than corporations. Therefore, the committee recommends that this sentence be referred, together with the entire section 5 of Article XIII, to the Committee studying the Bill of Rights. If that committee is of the opinion that it should be retained, it would appear appropriate to recommend placing it in Article I, the Bill of Rights, or in Article II, the legislature and legislative power.

5. Taxation

Section 4 of Article XIII states: "The property of corporations, now existing or

hereafter created, shall forever be subject to taxation, the same as the property of individuals."

The 1851 convention was distressed by prior legislative policies of specifically exempting the property of particular corporations or particular kinds of corporations from taxation. In reaction, it added section 4 to Article XIII. The section does not, of course, levy any taxes. It merely appears to state a general principle of equity - that property should be treated alike for taxation purposes, whether it is the property of corporations or of individuals. Section 2 of Article XII states this principle in more specific terms, by requiring uniform taxation of real property, permitting classification of personal property for taxation purposes (subject to the general rules with respect to classification of reasonableness etc.) and permitting the General Assembly to determine exemptions. With respect to corporate property and taxation, the committee believes that this section confers neither greater powers nor provides greater restrictions on the General Assembly than does section 2 of Article XII, and therefore recommends its repeal. However, the committee is also aware that repeal might tend to permit the argument that, since the section appears to confirm some power to tax corporation property, repeal might somehow diminish this power. Therefore, it recommends the addition of the word "taxation" to the first sentence of the proposed new section outlining in general terms legislative power over corporations. The committee's proposal now reads:

> CORPORATIONS NOT GOVERNED UNDER ARTICLE XVIII OF THIS CONSTITUTION MAY BE FORMED, EMPOWERED, REGULATED, AND TAXED ONLY UNDER GENERAL LAWS WHICH MAY, FROM TIME TO TIME, BE ALTERED OR REPEALED.

6. Stockholder Liability for Corporate Obligations

The first sentence of section 3 of Article XIII reads as follows:

> Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her.

This provision was last amended in 1936. The original 1851 section permitted additional liability of each corporate stockholder, over and above the stock owned by him and any unpaid amount due thereon, to a further sum at least equal to the worth of the stock. This last provision, the "double" or "superadded" liability, was deleted in 1903, added for banking corporation shareholders in 1912, and again deleted in 1936.

The debates reveal that the word "dues" was used as a synonum for "debts", and some discussion about securing the debts of profit-making corporations as opposed to municipal or public service corporations led to the inclusion of the word "private". In any event, the first part of this sentence appears to the committee to be surplusage and clearly within the powers of the general assembly to provide under the general authority to regulate corporations. The committee recommends its deletion.

Because of the varying shifts in public opinion regarding whether corporate shareholders should be held liable for corporate debts beyond the amount due from their unpaid stock subscription, the committee recommends the retention in the Constitution of the present provision which prohibits "double" or "superadded" liability. The committee recommendation for a second sentence to the proposed new section is as follows:

> STOCK OWNERSHIP THEREIN SHALL NOT CREATE INDIVIDUAL LIABILITY FOR CORPORATE OBLIGATIONS IN EXCESS OF THE STOCKHOLDER'S UNPAID STOCK SUBSCRIPTION.

7. Right of Way

Section 5 of Article XIII reads as follows:

> Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

This section, also, was added to the Constitution in 1851 and has not been altered. When read together with section 19 of Article I, the eminent domain provision of the Bill of Rights, many parallels in language may be found, and a few differences. Some of the specific provisions, such as that requiring a jury to determine compensation, were added to the Constitution for the same reasons that similar provisions in Section 19 of Article I were added - to prevent the abuses of the power that had occurred prior to 1851, depriving landowners of their property without just or adequate compensation.

The committee recommends that this section be referred to the Committee studying the Bill of Rights for its review and recommendations in conjunction with its study of Section 19 of Article I.

8. Banks

The second sentence of Section 3 and all of Section 7 deals with banks. The second sentence of Section 3 reads as follows:

> No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank", "banker" or "banking", or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state.

This sentence permits the General Assembly to regulate foreign banking corporations wishing to do business in Ohio. The committee is of the opinion that this power is within the plenary legislative power of the General Assembly even without this sentence; if the General Assembly regulates in such a way as to violate the interstate commerce clause of the Federal Constitution or some other provision of the Federal Constitution or Federal law, this provision of the Ohio Constitution will not render such a statute constitutional. Therefore, the committee recommends the repeal of this sentence.

Section 7 reads as follows:

> Section 7. No act of the General Assembly authorizing associations with banking powers, shall take effect, until it shall be submitted to the people, at the general election next succeeding the passage thereof, and be approved by a majority of all the electors, voting at such election.

This section was added in 1851 and was designated as a compromise between advocates of the gold standard and advocates of an easy money policy. The compromise was to require submission to the people of acts authorizing associations with banking powers, and let the people decide. Although in its terms "acts authorizing associations with banking powers" sounds very broad, it was apparently intended to apply only to authorizing banks of issue, and was so construed by the Ohio Supreme Court. There are currently no laws

in effect in Ohio submitted to the people in accord with this provision.

Nor is it likely that the state will enter the business of authorizing banks of issue, in light of federal dominance in this field. A similar provision was deleted from the recent Illinois Constitution, since it was viewed as obsolete in light of the prohibitively high federal tax on the issuance of bank notes.

The committee recommends repeal of this section.

GEORGE L. FORREST
Judge

Seneca County
Probate Division
Common Pleas Court
Tiffin, Ohio 44883

Phone
419-447-3121

May 1, 1975

Re: Proposed Article IV
Ohio Constitutional
Revision Commission

Senator, take another look at the constitutional revision you are suggesting for the courts...Please.

First...The amendment would not make the Courts more flexible, but would remove the responsibility from each Judge to maintain a current docket and to supervise what is taking place in his Court.

Second...It is very important for the general public to be able to identify with the Judges of the respective Courts. If the amendment should be passed, it will make it much more difficult for the people to select a Judge that they believe has the qualities necessary in each respective Court. I believe it is important that the people have the confidence, so far as either the General Division, Probate or Juvenile Division of the Courts.

Third...The supervision of each Court is an intricate and sometimes difficult matter. The expertise gained on being able to preside and administer is of greater value than being able to move a Judge from one Court to the other at the will of those in charge.

So Senator, in summary, I do not think this recommendation is in the interest of justice or the people.

Sincerely,

George L. Forrest

GLF/jk
cc: Ann M. Erickson, Director
Julius J. Nemeth, Research Attorney

Local Government Committee

Chairman, Mrs. Alexander Orfirer

First Meeting, May 10, 1971

Last Meeting, May 18, 1975

Minutes begin on page 2603

Research begins on page 3267

Ohio Constitutional Revision Commission
Local Government Committee
May 19, 1971

Summary of May 10 Meeting

The Local Government Committee met on May 10 in the Commission offices. Present were Messrs. Duffey, Leedy, Fry, Russo, Brockman, Heminger, and Ingler.

The Honorable Alba Whiteside, of the Tenth District Court of Appeals, met with the committee for the purpose of reviewing the provisions of Article XVIII of the Ohio Constitution and pointing out the interpretation of these provisions and the problems which have resulted from the application of the constitutional language.

The following is a summary of the discussion at that meeting.

Duffey: Local government and local government problems are one of the greatest domestic problems in the country today and in Ohio and also one of the vastest in subject matter and information. One of our difficulties is to sort out carefully those kinds of local government problems which are appropriate for constitutional consideration as opposed to just social problems, legislative problems, legal problems, and practical political problems involving local government. We have at this meeting someone who will bring us a thumbnail view of particularly where we stand in Ohio today in this difficult area of municipal law and perhaps also put the municipal law in the context of local government and of government structures in general. Judge Whiteside not only has had an eminent career in the last four years on the bench but from our viewpoint, more importantly, he spent a number of years in the city attorney's office in Columbus and spent quite a few of those years as chief counsel. He spoke frequently at bar association meetings and elsewhere on the problems of local government, particularly in the field of annexation and has litigated many of the local government problems in Ohio on behalf of Columbus.

Whiteside: Thank you, John. Actually before I start I want to allay any false apprehensions as to expertise. Probably the man who has done more studying in this area as to the meaning of the various constitutional provisions concerning municipal law is John Duffey. I'm not going to attempt to tell you all the meaning of all the terms in the various sections of the constitution. What I'm going to attempt to do is point out the problem areas in Article XVIII of the constitution adopted in 1912. Of course the first thing they did was divide the municipal corporations into two types--the cities and villages, with a 5,000 population being the dividing line. Soon after that the Supreme Court held this was the only division that could be made of municipal corporations by the state legislature.

Brockman: There is no penalty being a village?

Whiteside: It's a different form of government--the statutory form. Other than that you can have a charter the same as a city. If you have a charter you have a lot of leeway. Prior to 1912 there were many divisions of cities--first, second and third class, many divisions of municipal corporations. In other words, prior to 1912, the various types of powers under the state statutes depended on population differences. The two sections I like to look at together are sections 2 and 7 because they are talking about the same thing. Section 2 provides that the state legislature can pass laws for the government of cities and villages. Section 7 provides that a municipal corporation may frame and adopt a charter for its own government. So basically we're talking about charter and noncharter cities. We are talking about the area of "government," whatever that means, and this has been one of the areas of

confusion and concern. Apparently it includes the type of organization that governments have, number of council, whether you have a council form or whatever form you may have. At one stage there was some confusion as over whether or not appointment of certain employees, especially police and firemen, was controlled by the state law or the charter. In the case of a charter city, and they adopted a theory called statewide concern that they--the police--were governed by the state statutes irrespective of charter provisions. More recently this was abolished and those cases overruled. Apparently, this falls within the area of "government" because on an occasion which, I believe, Judge Duffey criticizes in his article, they held that the state law provisions to apply to charter municipalities. So again we have got the problem of what does government mean. How broad is it? It's a procedure to some degree but again it's never been completely set down and clarified.

Civil service in general has been held to be under that aspect controlled by charter if the municipality adopts a charter and governed by the state law otherwise.

Another portion of section 2 which refers to additional laws which may be passed by the legislature are effective only to the extent they are adopted by the municipalities. They are in certain sections of the code and are called "optional" forms of government. They have to be voted upon and adopted by the municipality, which they may do by single vote. The people adopt a specific statutory plan of government--federal plan, mayor, council plan, a manager plan, a commission plan.

When a charter has been adopted, to what extent has the charter actually abrogated the state statutes? In Columbus, the charter had provisions on how the councilmen were elected and how vacancies could be filled by council. The state statute says that if vacancies exist more than 30 days, the vacancy can be filled by the mayor. The charter had no language concerning what to do when the council were split on a vote and could not agree on appointment. The Supreme Court held by a very close vote that the language of the charter would still prevail and covered all of this. Basically it was a matter of interpretation of charter rather than state law. But again having a charter doesn't eliminate all the problems concerning the state law because if it doesn't cover something, what happens?

But the most essential part and the vague part to me is what is meant by government. "Government" can mean everything or it can be very limited to form of government and basic procedures. It's a very broad term and has not been clearly defined by courts through the years. Very few of the cases have taken the word itself and tried to define it as such. Basically they have talked in terms of what controls rather than what does this language really mean.

The whole basic part of home rule as it is called, by municipalities, is contained in section 3 of Article XVIII. This has two parts and the first refers to the power of municipalities to exercise all power of local self government. This has been held, very early to apply to charter and noncharter municipalities. In other words, all municipalities have the power of local self government. The problem which obviously arises is what is meant by this power. What is local self government? And this is not a clear thing yet today. Earlier there was a statewide concern theory. This was apparently rejected as such but more recently, the Supreme Court in a decision referred to matters which are purely local in nature, and matters which affect not only the local community but also adjacent communities or the state as a whole.

Brockman: I don't understand something here. It goes on giving them local self government adopted and enforced within limits--police, sanitary, etc. as are not

in conflict with general law. Is what it is saying that the legislature may define what the powers of local self government are? Or is that a matter for the courts?

Whiteside: The Supreme Court has held that "as are not in conflict with general laws" modifies only the second portion of the section which is "to adopt such local police and sanitary and other similar regulations" and that those words "are not in conflict with general laws" do not modify the authority to exercise all powers of local self government. It would have been possible, as you indicate, to have read it differently.

Ingler: I suppose you couldn't dissolve a local corporation, a chartered one, by statutory law.

Duffey: You probably can dissolve them, wipe them out.

Ingler: Could you, by act of the legislature?

Brockman: When a charter is drafted, it has to be accepted by the legislature, doesn't it?

Whiteside: No, it does not. It has to be accepted by the people who vote and simply registered with the Secretary of State, and it is then, so to speak, the constitution of the municipal corporation.

Russo: How far was a test case taken on section 3?

Whiteside: This was a Supreme Court decision in Canada vs. Phillips about 1958 which very thoroughly made that statement. The conflict portion modifies only the second portion of section 3, not the first portion. The theory behind it is simply this. If it modified "all powers of local self government" there would be no powers of self government except those which the state legislature granted. If you go back to the constitutional debates it is very clear that they meant to grant certain powers to the municipal corporation to operate beyond the power of the general assembly to control. If a "not in conflict" provision were applicable, it would be legislative control and there would be no change in the situation which existed prior to the adoption of section 3 because they had the power to exercise local self government to the extent that the general assembly saw fit prior to 1912.

Fry: Those states where the legislature does get into local government are really cluttered. It's fortunate that they did interpret that way.

Whiteside: You will find that in many legislatures somebody is asking the state government to authorize the municipalities to do something. The real question is what do these words mean? There have been various interpretations through the years, particularly in the area of statewide-local concern doctrine of the 30's and 40's. There they held that the matter of police and fire are so important that they were matters of statewide concern and the statutes regulating the salary, the hours, the appointment and discharge of police were so important that they were matters of statewide concern.

Brockman: How do we justify matters such as mandatory police officers training council? These are administrative regulations growing out of an enabling act.

Whiteside: This is one of the problem areas which may or may not be valid depending on the interpretation.

Fry: As for police and firemen, the hours of work, that is simply a device for a group, a special group, to enforce. In other words they can get a law passed in the state and they don't have to go to each municipality itself.

Brockman: If someone wants to fight it, you don't know if the constitutionality would stand. Is that what you are saying?

Fry: I think that, as a matter of practice, a lot of the provisions we make as applying to police and firemen, for example, are subject to question because what happens within that particular district is the same as happened with the sanitation workers, or the income tax question or anything else.

Whiteside: If you deal with a noncharter municipality and those areas are interpreted as being part of government then of course section 2 would be applicable, but as to charter cities which have adopted a charter they would not be applicable. On the other hand, if those areas are looked upon as being part of local self government all municipalities would have the right to do what they wanted to. They can decide for themselves in those areas. And this is some of the problem area, what do these words mean? Where are the dividing lines between the government and local self government? You can use the same word but they have to have a different meaning, and where the dividing line between one and the other is has never been clearly defined. Most frequently in the cases where they talk about Section 2 or Section 7 or Section 3 they use them conjunctively and say "sections 3 and 7." The problem is the delineation between these two basic things, laws pertaining to government which, for a noncharter city, are passed by the legislature; for a charter city they are determined by the charter except to the extent they may have adopted the state statutes by the charter. And it seems to me that that word "government" and the powers of local self government there is no clean delineation as to where one begins and the other ends.

Brockman: My feeling is that so long as we don't have any serious problems our best bet is to leave well enough alone. Is there any value to this committee getting into the question of constitutional language?

Whiteside: Well, there's no question that any time you get into this area you may open a can of worms. On the other hand, in the revision of a constitution, you have to decide where you want to go, not where you are, and you really are not in an area of clarity. If you try to clarify it, obviously you're going to make some people unhappy and some people happy. You can't move in this area without having some people who may not agree. Some will think it should be more restrictive and some will think more powers should be given to local government. There are real problems existing today--police and fire pension plans, the fluoridation law, the solid waste disposal law, police training. These things don't end up in court usually if the legislature provides money or the subject is popular like the pension plan was originally. As a basic proposition nobody wants to fight them.

Brockman: Or if one or two large cities decide not to pay to the pension fund. They may take it to court so they can balance the budget this year.

Whiteside: The same problem existed all these years with PERS and the cities have chosen, through the years, not to raise that issue. So there are some areas where there might be a question but no one raises it because they really like what exists.

Fry: I would hope, Mr. Chairman, that as we go through this area we might be able to find language that would identify those areas where there is a common interest

state-wide so that we might clear up the language. I think this is the very basis of what we're trying to do.

Whiteside: Two areas where there have been problems are in the regulation of new power lines, high powered power lines, and liquor establishments. Now where a state permits these or permits them to go through how far can a municipality go in saying that they can't be in this location or that location? Both issues are the same problem. The state statute has fairly recently been upheld in the area of power lines. Does local government decide where the location should be? It seems to be application of zoning. How far do the municipalities have by zoning or other means to say we won't have a liquor establishment here or to say you can't put a high powered power line here even though they may have gone to the PUCO and gotten a permit. These are areas and the types of problem we frequently get into. It may be that the power line is serving not only that municipality but trying to go through to serve another area. To what extent should one municipality control the location of a power line to serve another area? On the other hand, in the area of streets in the matter of maintenance and limiting vehicular traffic, the courts almost uniformly through the years have held that this is a matter of local concern and the local authority may make weight limits, designate thru streets and streets which even though the traffic is going thru they cannot use in that city. But these are types of conflict of local interests and those of the state. And they can exist and do exist. Many of these are in the area of the exercise of the second part of section 3 dealing with local police, sanitary and other regulations.

Duffey: What the judge is pointing out is that, by virtue of the present constitution, we have made the Ohio Supreme Court the arbitrator between the local bodies and the legislature. The Supreme Court is literally acting as the final determination as to whether the municipality or the legislature has the power to do it, and as the membership of the Court has shifted, those answers have shifted, because they are political questions.

Whiteside: Also between adjacent municipalities you can have problems, and between the municipality and a township or other regulatory body. You had a case before the Supreme Court where the City of Columbus wanted to put a trailer camp in one of its parks in an area where county zoning was such that it would not be permissible. The city did not ask the county. The lawsuit was brought. The Court of Appeals held that the county had no power to regulate the city. The city exercised other governmental functions because it exercised, by grant of the legislature, certain powers outside the municipality on property it owned. So now to what extent--not clearly answered in the Constitution--does this power of local self government to operate outside its city and to control the land in its park system, if outside the municipality.

Fry: And the direction that is taking we're going to have more and more of this, instead of less, i.e. pollution control. You just can't have a single municipality taking care of pollution control.

Ingler: Keeping in mind the main legislative article of the Constitution what really would be the results if you repealed, 1, 2, 3, and 7 of Article XVIII?

Duffey: Essentially it would put you right back where you were before 1912, when the power was in the legislature.

Ingler: Let's pursue that. Where were we? Was it all that bad?

Russo: But there was no focus on the problems at the time.

Duffey: That was the era of log rolling, which was a complete mess and led to a popular revision of local government in 1911 by fiat of the people and declaring much of the statutory law of Ohio unconstitutional by the Supreme Court. Basically what happened, even with the limitations of so called general laws and prohibitions against special laws, was that if a particular community was interested in something the legislative delegation of that community literally controlled because the rest of the legislature didn't have that much interest or concern. Representatives will recognize this sort of thing like the fight a couple of years ago on the deaf school, where they wanted to put a road through up there. Most of the legislators felt if they weren't from Franklin County they had plenty to worry about as opposed to this.

Ingler: Did these sections eliminate that or did the prohibitions on special laws?

Whiteside: The limitations on special laws were in existence before 1912. As I indicated earlier, the legislature devised classes of cities--fictitious classification--and oftentimes there would be one city in that class. So while a general law applied to all cities in that class, there was only one city in that class, so it became special. It was passed under the guise of general law.

Fry: I think, Bill, that if we could draw a general line and then let local government operate within those lines, it is to be desired to taking care of these things in the legislature.

Russo: I think you brought up a very fundamental question which is "are we going to be saddled with local government forever?" Or are we going to the regional concept? If we're giving the local government better methods to work with we may, at the same time, hamstring the legislature with the particular problems that are coming up state-wide.

Fry: I think you have these areas of general interest that the legislature will have to get into, but maybe we can come up with language that will describe those.

Ingler: Right now can they get into? I am somewhat confused about the effects of this vague demarcation.

Whiteside: This is a vague area and as new things have developed, especially recently, it has become more important.

Ingler: To go to a historical case. In the region of Toronto it got so bad with that multiplicity of jurisdictions, the bonds began to go sour. And they tried and tried and tried with the exercise of all these local government powers and never got anywhere. Everybody was for it except the public. Finally, with that inverted federalism they have in Canada, the provincial legislature wrote a charter and shoved it down the throat of the voters. The bonds came back and they are getting the place straightened up.

Fry: Indianapolis did the same thing. They adopted a special form of government for whatever the county is that Indianapolis is in.

Ingler: In Indianapolis they merged the city government with that of the county.

There are several and perhaps all of the cities in Ohio where you can't even do this with a county charter even if you can get a charter adopted. In the Dayton area we have a bona fide multi-county arrangement. You can't get a charter adopted in the Dayton area because one third of the metropolis lives in the next county.

Whiteside: This is in the area of regional government, rather than municipal. Where you do have municipal government, we're talking about what should you have? Whether you should have some type of county or regional government as opposed to our present system or expand the municipal corporation to a larger area I think is not a problem existing within a municipal corporation area but in the broad picture of what kind of governmental arrangements to you want?

Duffey: There are two very basic subjects which we are inadvertently mixing up here. One is the question of: assuming you have a governmental unit and for the moment concentrating on municipalities, as opposed to counties or townships, what kind of powers should that governmental unit have that are constitutionally granted to it, if any; how much authority should the legislature have to be able to control what this local community wants to do and how independent can it act of the legislature? The other question that I think Bill is raising is what should be the governmental units? As you point out, you are now stretching into three counties. Columbus, according to the federal census, covers four counties now. Now getting into the question of the governmental structure not powers now, but what is the governmental unit? The third area of discussion that at one point or another we're going to have to get into. I want to make two observations and then let's get back to the subject matter. So far as what are the governmental units and what are their boundaries, I think you will agree that this is strictly a matter for the legislature. The only thing they are required to do is to adopt a general law for incorporation of municipalities. Article XVIII presupposes that you are a municipal corporation but there is nothing to prevent the legislature from unincorporating you, abolishing you. They could abolish all the municipalities in Cuyahoga County by classification.

Ingler: They couldn't do it except by abolishing all of them, could they?

Whiteside: It would have to be a general law assuming that the power to abolish municipalities or merge them or something of that nature--it is probably one of the general legislative powers because it isn't mentioned in the Constitution. I'm trying to avoid giving specific answers to questions that aren't going to be resolved. The legislature has some power under the constitution expressly to change counties and townships. This has been sparingly if at all exercised by the legislature. This is an area they have not gotten into; however, to some degree, that power clearly exists.

Duffey: On the issue of creation of municipalities and governmental bodies, the present constitution clearly leads us up to the legislature. I think that most of us would agree that dissolution would also be a legislative power. The problem is, assuming that you've got the governmental body, how do you determine the structure of the government? In any area except municipal government, (counties, townships) it's up to the legislature. In the area of municipal government we have an option created by Article XVIII, section 7, local government, that the people may by vote through charters create their own form of government. The third and controversial area that he has been talking about is assume you have a municipality and whatever organization it may have, legislatively created or charter created, what are the powers that that body has?

Brockman: Let's tie your question with Bill's original question about lopping off

several sections of the Constitution. What's the value of keeping section 1 in the Constitution? It causes villages to do silly things around census time. It causes friction and from what you say it seems to have no significance legally between villages and cities.

Whiteside: There is a difference. The difference is in the form of government the legislature has enacted. Section 1 was enacted to prevent widespread overclassification and had the effect at least of limiting the number of classes of governmental structure as well as powers. It was felt that smaller villages should have less complex governmental structure, than cities which were more complex. Whether or not the 5,000 differential is still valid - - -

Duffey: On the one hand they wanted to make it clear that the legislature could not classify into more than villages and cities. I don't know that the Court will buy it that way but I think they were shooting at it, because of the history. The other thing was they recognized that small villages are so small in many instances that their governmental structure problems have as a practical political matter no relationship to the bigger areas. Government almost had to run itself because nobody wants to be mayor or councilman. In little towns, particularly out in the rural areas, government is a problem there and the people who operate are very part time. If you don't give them a detailed code telling them what to do, and when and how, they wouldn't know how to do it.

Brockman: Then doing this would not affect the power of the legislature to offer an alternative.

Whiteside: If you wanted to make more classifications it would be better to say so than repeal a section of the Constitution.

Ingler: Just for a little further interpretation on section 7. Suppose all of the charter municipalities legally, pursuant to their charters, found themselves exercising a particular kind of governmental power. At some future time for some reason, I've no idea what, the legislature chose to exercise that same power, at all levels in Ohio, pursuant to state law, rather than allowing it to be exercised by charter municipalities, pursuant to their charters, is there any guideline right now as to whether the legislature has the power to do that?

Whiteside: There's probably no question about the power of the legislature to exercise such a power. One area where it has been done is health. The legislature a few years ago established health districts, and the Supreme Court upheld that. A more recent decision has referred to this as being that health districts are state agencies not part of the municipal government. However, in the Canada case, which is the one I referred to earlier, there was an indication that if this happens you may end up with parallel operations. In other words, while the general assembly may adopt and establish a state police to operate everywhere that doesn't mean they can regulate the municipal police force insofar as who you hire and what the qualifications are, and how they are appointed and the question of whether or not they had to appoint the top man on a list or whether they could appoint one of the top three. And that case overruled some of the prior cases which adopted the statewide concern theory. So there is some indication that the state legislature may in all these various areas adopt a state agency to operate and while that state agency is operating there is a question of to what extent may a municipality operate. To the extent that it is part of local self government they may operate but to the extent, if any, that what they are doing constitutes a local police, sanitary or other regulation, then the municipality, while it may operate co-existently, it may not

conflict with the state statutes.

Ingler: But the state may not withdraw in that case a power of a chartered municipality that is being exercised under its charter and by that municipality?

Whiteside: The early case indicated that the state could--that the language used was when the state withdraws from a municipality the power to do something and takes it over, but Canada v. Phillips more recently indicated that the state can take it over but can't prevent the municipality from operating in the same field. So it's not a clear area and no clear answer. It is a very definite problem area where you might want to give some study.

Duffey: If you mean, can they prevent the city from acting on their own in that area, the answer is, if it's so-called local self government and not police and not sanitary, probably not. If you mean, might the statute operate to make it clear that charter and noncharter cities may act as the legislature has authorized, clearly yes. This is where it starts getting pretty sticky. One example might be urban renewal. The Court came along and said urban renewal was not a police power nor is it a health power. It's not a problem of conflict between local law and state law. They said it's a power of local self government, and a charter city has it by virtue of the constitution. The Court held the state law unconstitutional. On the other side of the coin let's suppose the city of Columbus just went ahead and chose to appropriate property by virtue of the state law on urban renewal. I think probably all, including the Court, would rear back and say "Well, that's perfectly all right, if you want to act under state law that's fine."

Whiteside: Not only the charter cities but the noncharter cities also have constitutional power that cannot be withdrawn. I guess I didn't state that at the outset. What we're talking about is a constitutional power that all municipalities have.

Duffey: Even there I have to draw a distinction. When the legislature acts, we'll say regulating urban renewal, the legal fight then turns around the question of whether this matter is something that is more than local self government--what the judge has referred to as statewide concern. If the Court said "Urban renewal here has become such an important and overwhelming problem that it is overlapping boundaries. What you do in Columbus is going to affect Arlington and what you do in Cleveland is going to affect Shaker Heights," then they'll say, "Well, we think this is of general concern and the legislature may validly act on it." There is still hanging in the air, which way is the court going to come out when you ask them the question "Is this local self government?" What I can't really answer for you very clearly is what is X power and is it local self government, or is it a matter for the legislature under Article II. Even if the courts answered it once, changing conditions put us in a position where the court might change its decision next time around.

Ingler: I don't want to delay any longer on this point. But back to the Chairman's question, I'd like to leave in the record, if I may, a suggestion that before we try among us to resolve particular fundamental questions with respect to charters and home rule that we at least defer those until we have looked at other ramifications of the same subject, such as county charters, regionalism, highways, legislative article, etc. Because they do have a powerful bearing on each other. Time and again we're running into such problems as getting a water system for a newly developed area. What you've got to do is negotiate with three or four jurisdictions, sometimes all of them having powers from the constitution directly and therefore they can't be reached by legislation. And the point comes in at the top of the development that it's not big enough to support the distribution lines at the bottom

of the development than another jurisdiction, usually a special district, has to pick up the sewage and you've got an infinitely complicated matter. What people used to think it made flexible by adopting home rule, the fact is that home rule may be intervening in people's attempts to be flexible right now and this is a de facto condition which is coming on very very fast. In view of that I am not specifically raising questions of regionalism. But we may reach a time where we want to put a function on a regional basis to make it work. It may be transportation or it may be water and sewers but I would not want to be party to any judgment of the home rule article either as it is or by particular amendment or by repealing the whole thing without reference to these matters.

Whiteside: It's not because of the home rule charter because the charter doesn't give a municipality any additional power to exercise. The municipality has as much power to exercise government whether it has a charter or it doesn't have a charter and as much power in the field of utilities which we haven't gotten to yet. All the charter does is tie in with section 2. The government is controlled by the charter--to some degree your civil service provisions; to some degree your organization, how far it goes down the line, whether you control hours of employees has not ever been clearly defined. This is the kind of thing you're talking about between charter and noncharter.

Ingler: Theoretically speaking, doesn't a legislature have more power of withdrawal and consolidation of powers in the case of statutory governments than in the case of charter governments?

Whiteside: Only in the form of government. Organizational and structural matters are the only differences. How far this goes, I won't try to draw a line. Government is a very broad word and what it means, I don't know. When we get down to local self government, local police regulations, those are the same whether you have a charter or noncharter. So most of the things you are talking about a charter would make no difference.

Duffey: Perhaps it would be wise for this first real meeting to go on and let the judge discuss other areas within Article XVIII. We have in Article XVIII also sections 4 and 6 which deal with public utilities, municipal utilities and which have created some horrendous battles and arguments inside and outside the legislature. We also have, looking ahead, section 13 which is getting into the field of taxation and while we have put this aside temporarily, we'll never be able to get away from the question of tax because it's fundamental to government and to local government, but there is a thing called the pre-emption doctrine which says if the legislature passes a tax any similar tax by the municipalities is wiped out, unless the legislature chooses to specifically say "You may do this." These are some of the additional problems I'd like to have the judge bring to your attention so we can get a whole panorama of Article XVIII.

Whiteside: I want to say one thing more about section 3. In the latter part of it, police, sanitary and similar regulations not in conflict with general law. Usually the courts have interpreted this provision to mean a general law which is regulatory in nature, a law which regulates activities of citizens generally. It has been held that while municipalities may not adopt local regulations in conflict with general laws they may adopt the identical regulation or may adopt regulations which differ from state law so long as they don't conflict with state law. At first we had a theory that this conflict was determined upon whether or not an ordinance permitted that which state law prohibited or prohibited that which a state law permitted.

That was the early test of conflict. That was not entirely satisfactory and in a recent case it came down to a problem of a city ordinance which made an offense which was a felony under state law, a misdemeanor. The Court held this was a conflict. We're talking about charter as well as noncharter cities, all of which have the power to adopt local police, sanitary and similar regulations unless they conflict with general law. The other aspect of this is that we have certain regulatory state agencies which have regulatory powers such as liquor, PUCO, and certain other departments of state which have the power to adopt rules. To what extent, if any, do the regulations adopted by that agency pursuant to the authority of a statute make municipal ordinances in conflict with those regulations invalid? This has never been squarely or clearly decided. In some of the liquor cases, a state regulation prevailed over a conflicting municipal ordinance, where the board had the power by statute to adopt regulations. These are some of the additional areas that you get into.

I am going to skip section 4 and go directly to section 13 which says "laws may be passed to limit the power of the municipalities to levy taxes and incur debts for local purposes." This has had an interesting history because it has been interpreted many ways. It has to be read in conjunction with section 6 of Article XIII because that section provides that the general assembly shall provide for the organization of cities and villages by general laws and restrict the power of taxation, borrowing money and incurring debts and loaning their credit so as to prevent the abuse of such power. So we have two constitutional provisions in the same general area. Some years ago it was held that state statutes regulating the manner in which contracts were entered into constituted an exercise of this power, limiting the power to incur debts. About a month ago, the Supreme Court overruled that decision and now have held that how you enter contracts, the power to contract, and entering the contract is not incurring debt in the constitutional sense. So we even have a problem of what is a debt. That's to be limited by the state legislature. As a matter of fact the language of that case opened some questions because it said it may limit the amount of incurring a debt but it doesn't mean they can control the procedure for incurring debt. It may open some new areas of concern and some other statutes may have some question attached to them because of this decision. There is constant litigation and constant change of interpretations or new areas opened up as new interpretations are made. It is an area you have to think about, levying taxes and incurring debts--does that include the procedure as well as the amounts?

Sections 4, 5, and 6 deal with utilities. Basically they give complete power to municipalities to acquire, construct, own, lease and operate a public utility or to contract with any person or company. As far as contracting, the procedure is set forth. The ordinance cannot take effect for 30 days and there may be a referendum upon the ordinance by the people of the municipality. The Supreme Court also has held municipalities operating a public utility are not subject to regulation by the General Assembly as to their own operating utility including that portion of it which is operated for the purpose of supplying service outside the municipality. It is probably this area that causes the area of concern because municipal utilities are not limited to the particular municipality. The transportation service that you mentioned earlier is one instance where it will extend beyond. Larger cities provide sewer and water service not only to their own municipality but to surrounding municipalities and unincorporated areas.

Duffey: Tell about that interesting case in Columbus that you can tack utility and police laws together, so that if we build a reservoir in Delaware County we can police the reservoir and Delaware can't. Columbus has water lines and sewer lines through other unincorporated areas, even through other municipalities, and nobody has any legal right to tie into those lines unless Columbus gives permission. The legislature cannot give the right. I think it's fair to say that they are not public utilities

once they leave the city boundaries, at least they are not controlled by the legislature.

Whiteside: A recent case held that, and there were other statutes which the Supreme Court declared unconstitutional. A statute attempting to control the price to be charged to purchasers outside the municipal corporation was declared unconstitutional.

Whiteside: There is a statute which permits the city to provide for complete regulation, presumably including police powers, in an area outside its corporate limits where it owns the property. It provides that violations should be prosecuted in the municipal court and that creates a very interesting question.

Duffey: In an airport like Blue Ash one of the interesting legal questions that comes up is who has the power to police the airport, Blue Ash or Cincinnati? And can Cincinnati exclude Blue Ash policemen? There is litigation going on right now on the question of whether a city can take its sewer lines outside the city and patrol the property under the Constitution without the legislature having any power to control.

Ingler: I feel very strongly that as we think of illustrative cases like the ones that have just been mentioned, our first reaction ought to be to ask not whether we can solve them but to find out rather is the Constitution in the way of solution and if so how do we get the constitution out of the way? This is my psychology. I think more confusion arises because of constitutional language than because of the absence of it.

Duffey: If we find a problem, the first question is who ought to be working on the problem and is the constitution preventing their doing it? For instance I'm inclined to think that this problem of metropolitan government is more a legislative than a constitutional problem simply because the legislature hasn't done anything about it. They've got the power.

Ingler: I will also be looking very carefully to see where if at all the constitution is in the way of solution.

Duffey: Are we going to create constitutional revisions that affirmatively solve the problem as opposed to eliminating the provision blocking the problem?

Brockman: Why does the Constitution have to give the municipality authority to set up and operate a public utility? Would there be anything to stop them if it weren't in the Constitution? This seems very clearly these three provisions and the one about bond issues all seem to be here because you have the implication that if they weren't there, something would forbid it.

Whiteside: I think that the reason these provisions are in the Constitution is not because the municipality might not have the power but a fear that it wouldn't and secondly a fear that it would be subject to regulation by the General Assembly and they wanted the municipalities to have this power on their own. There's no legal reason, purely a matter of philosophy, what powers do you want to clearly give to municipalities? If you repeal those sections you then have the problem--is that part of local self government? If it's not, they they would only have the power insofar as it is given by the General Assembly, and if it is, it would not be subject to regulation by the General Assembly. You might have another area of regulation laws which are applicable to everybody, not aimed at municipal corporations but general police laws and the courts have held that those are applicable

to every municipal corporation because they are a general law applicable to everybody.

Duffey: Sections 4 through 6 are the result of three things: one is that if you assume the constitutional interpretation that the court has more or less adopted over the years they seem superfluous but you ought to remember that in 1911 it wasn't clear in everyone's mind and I don't think it's really clear in anybody's mind yet today that the local self government powers were beyond the power of the legislature to take away or whether the conflict clause meant that the legislature could do anything. One thing that was really clear in 1911 was that municipalities had a time getting their utilities built, their water lines and their sewer lines. There were many private water companies. I think the point was to make it clear that private water companies could be taken over--they had high rates, high costs, inefficiency; a lot of municipalities wanted to buy them out. If you notice, this is self operating. You may go out and buy, lease, condemn, purchase of anything else. Also you had the problem that is extraterritorial. Local self government of municipalities is basically within the city and the utility provision is explicitly extraterritorial as well as within a municipality. Finally you had the financing thing as the judge has already pointed out to you, Article XVIII, section 13 and section 13 of Article VIII on fiscal controls. This one sets up a method of financing which is revenue bond law, traditionally outside of debt controls and in 1911 they wanted to make it clear that there was an independent method of financing which was not dependent on legislative approval or disapproval or limitation or control. It's structured financing. It's revenue bonds with a mortgage in the background, which is ordinarily debt and controlled by the other provision of the Constitution. Here's an explicit provision that says you may incur a debt which is revenue in nature but which is backed up by a mortgage. For very technical reasons of bond law, that is a very peculiar animal.

Whiteside: In 1912 it was not as common and there was not the litigation upholding this type of thing as much as there is today. In addition you had some possible problems with the "lending your credit" provisions of the Constitution and section 12 has made it very clear that this was a proper method of financing the utilities.

Duffey: Revenue bond law means that the creditor has only the revenue and general bond law means backed up by taxes. There's a third intermediate thing. Suppose you lend me the money in the City of Columbus here and the City of Columbus says we'll back that up not with our taxes but with our property. We'll turn City Hall over to you or we'll turn the water plant or the sewer system. Obviously that's public property. It's ordinarily interpreted as throwing the public credit in the picture because theoretically the creditor can foreclose and acquire ownership of the property. These bonds are peculiar bonds. They're revenue bonds that have an operating mortgage at least in the background. Private interests can come in and foreclose and acquire a right to operate the publicly owned facility.

Ingler: You know this question raises an underlying question applicable to all the sections we've been looking at. As an underlying doctrine, are the state and local governments of Ohio, governments of delegated powers meaning that the only powers that they have come directly or indirectly from provisions of the written Constitution?

Whiteside: The Constitution has usually been interpreted as being a limitation on power rather than a delegation of power.

Ingler: These basic powers are inherent, so to speak?

Whiteside: The inherent powers are in the state.

Ingler: As a matter of doctrine, do you have to find the utility power in the Constitution? These powers were adopted for historical reasons, but as a matter of constitutional doctrine, the absence of these sections wouldn't mean that municipalities couldn't get in the utility business.

Whiteside: Municipalities have no inherent powers. The inherent powers are in the state, the General Assembly.

Ingler: But assuming they got them from the state.

Whiteside: Assuming the legislature delegated them, they might exercise them. The whole purpose of Article XVIII was to give direct powers to municipal corporations. In effect, in 1912 they gave a part of the sovereignty of the state to the municipalities and it could not be done other than by constitutional provision. Also the delegation is so broad it says "all powers of local self government." The effect of it is probably like the state legislative powers.

Duffey: Underlying Article XVIII in 1911 and permeating many of its provisions is not an enabling grant but actually a limitation on state legislative powers. Many of the provisions were designed to prevent the legislature taking power away or preventing the legislature from stopping municipalities from doing certain things.

Duffey: By way of summarizing: One, Article XVIII was an effort to give power to municipalities, free them from what most people thought at that time was the very bad and very narrow restraints of the legislature--the restraints the legislature had put upon the ability of municipalities to respond to their problems and they inadvertently threw the deciding power as to who has legal authority to the courts. I think the courts are very ill equipped to make these kinds of decisions as to who should deal with these problems, the local government to the exclusion of the legislature or the legislature to the exclusion of local government, or cooperatively, concurrently, or what. I personally think the courts are badly organized and structured to answer these what I consider very basic political questions. I think inadvertently that's what we have done in Article XVIII. I don't necessarily intend to suggest that we ought to be fiddling to any great extent with it, but it's a very difficult problem and I think a fundamental one. After 1912 until say the late 1930s the emphasis of the court was to implement those constitutional revisions reforms by being very much on the local government side and pretty much restrictive on the legislature. Then comes the 1940s to the mid '50s, and the pendulum swung very heavily in the opposite direction; makeup of the courts had changed, World War II was here and without making a big sociological analysis I think most attorneys would agree that the shift in the opinions is very apparent when you start reading through them. Then I would say that in the 1960's the courts became very concerned with the problems of small municipalities, small villages, who need state law and they got concerned, I think, about this problem of giving to a lot of little small part-time mayors too much power and I think they took a crack at that in a couple of cases and came around to a narrower construction of "local self government."

Finally, I'd say right now I think the court is in a real state of flux over the modern problems. The judge has pointed out a couple of decisions here where they are getting testy about legislative efforts to restrict local government

action. On the other hand, they have been quite broad in upholding legislative acts of a broad nature which cover a lot of areas. They upheld, for instance, the pension program although the lines of attack on it were not as well directed as they might have been.

Would you talk about the areas of annexation and incorporation and extension of governmental power, because I think it's hard for a lot of people here to understand.

Who can deal with these problems if they want to?

Whiteside: The legislature has the power to deal with annexation and incorporation. For a long time annexation and incorporation laws stayed the same, but more recently they have been changed. This deals with creation of new municipal corporations and extension of boundaries of municipal corporations and transfer of territory between municipal corporations. These are statutory, not constitutional, procedures.

These areas create a lot of problems. When a municipality annexes a portion of an unincorporated area, a township area, or incorporates newly out of that township area, that does not under present laws eliminate the township. The township still exists, and presumably still functions. The only exception is where a township is completely included within a municipal corporation. Then there is a provision that the city officials perform the function of the township officials and more recently there are provisions for municipal corporations to be devoid of townships. There is a very real overlapping and some confusion in this area. There is provision for a transfer of territory from one township to another following annexation. Most major municipalities will follow this system to make the municipal corporation include anything they annex to the city. In one fashion or another they use this, which minimizes the problem. Some people say they see no further reason for township government in your metropolitan counties, whatever reason it may have in the more rural areas. What purpose does it serve in the metropolitan areas? Your township people feel very strongly that it serves a very real purpose. Of course you have the problem of what powers should townships have, and this is basically a problem of legislation today. The same thing is true of counties. It's primarily a problem of legislation. There's a constitutional provision for a change of boundaries which hasn't been exercised for a long time.

Fry: What we've done in the area of county government has always been subject to a vote of the people. Are you saying that the legislature could actually set up a different type of county government?

Whiteside: The legislature has the right to control the form of the county government, as I read the Constitution. However what happens to municipal corporations is very interesting if you were to provide for some means of merging the county and the municipal corporation.

Duffey: Suppose you get them to pass a law that says we'll have a Cuyahoga county government which shall have sewer and fire and water and police. What do you think happens? Is that constitutional?

Whiteside: There would be some problems because there is no clear dissolution of the municipal corporation. The procedure for merger is not referred to in the Constitution. What powers the legislature has saying "O.K. you're no longer a

municipal corporation" have never been decided.
Would that be a special law or a general law?

Ingler: Yet the people of a municipality are presently exercising their powers pursuant to the Constitution directly. You mean an act of the legislature can validly remove those powers from them?

Whiteside: That is one of the questions--can the legislature? In other words, we have provision for annexation of a village to a city. Assume that village had all the powers of local self government, whereas in the city it would still have the power of local self government on a different basis as part of a larger metropolitan government. They've lost it as this entity and gained it in another.

Duffey: Taking the example of making a Cuyahoga county government and giving it those four powers, it would be perfectly clear in my mind that that would be valid legislation in creating the governmental body providing there was a classification by metropolitan area and it didn't specify Cuyahoga County. If you said all counties having a population of over 400,000 who have these kinds of characteristics which are not arbitrary characteristics but describe metropolitan areas. Number two, it would be legal insofar as it was concurrent; that is, Cleveland has its police department. The metropolitan government also has its police. As long as they operate concurrently there would be no problem. This probably would get into severe constitutional questions if the City of Cleveland remains a municipality and therefore under Article XVIII has powers of local self government. The difficulty comes when you want to take away the Cleveland police department and put the police authority exclusively in some other body.

Ingler: To what extent constitutionally is concurrency guaranteed?

Whiteside: It's never been determined because it has never been tried. There is a provision you have to look at closely in thinking of this, Section 1 of Article X. This provides that municipalities and townships have authority with the consent of the county to transfer any of their powers or to revoke the transfer under regulation provided by general law. But the rights of initiative and referendum should be secured to the people of the municipality ot township in respect of every measure making or revoking such transfer. Whether this means that you can't take away any of the powers of the city is an open question. Look at it, study it and determine what you want to do with that language.

Duffey: As an example, the legislature provided for the creation of port authorities. In Lucas County, that authority is a county-wide governmental body. It deals only with port matters, both Lucas County territory and the City of Toledo territory but the question has never arisen as to whether the City of Toledo would be precluded or prohibited from also engaging in port authority operations, control, policing, regulation, etc. Toledo has never chosen to do so. They much prefer to have the port authority do it because it is supported county-wide by a county-wide tax, but the interesting legal question is that nobody quarreled with the right of the state to provide for a super-governmental body which dealt with a subject matter which was more than the City of Toledo. Nobody challenged, as yet anyway, as to whether the legislature has constitutionally the power to prevent Toledo from doing the same thing.

Leedy: Last session, a bill was proposed to give port authorities everything from soup to nuts. It did just exactly what you're talking about. It took powers away from Cleveland and made it county-wide and they had power to do everything. It never

got anywhere. The major newspapers jumped on it.

Whiteside: In the conservancy district act and the watershed act there are certain efforts to at least limit what municipalities may do in a watershed and they have provisions that nobody including municipalities may do anything in the district, like build dams without approval of the district.

Russo: Could you submit legislation creating the Cuyahoga county form of government? There may be no solution to greater Cleveland's problems unless it comes to the legislature in this way because we may not be able to vote it in the Greater Cleveland area. I'd like to make a test, and I see we've got plenty of brains here to cover all the questions between the concurrency and the absorbing powers. I'd like to see this legislation in the hopper, because this can go a great way for some of the solutions.

Whiteside: Section 1 of Article X provides the General Assembly shall provide by general law for the organization and government of counties and counties exercise only such power as given by the General Assembly. Again we have the general law provision, that it must be a general law. You may have alternative forms of county government which would take effect only by vote of the people. Of course, you could have a county charter which would have very broad powers. The power of the legislature is plenary, but in giving counties power, the question arises not whether you can give the county certain power but if you take it away from the cities are you in conflict with the various provisions of Article XVIII. If the power is one of those which the municipality has the right to exercise in Article XVIII, the legislature cannot take it away.

Russo: Well you can readily realize we're going to do just what you're talking about because all those things belong to the local government. Now if we have the right to abolish the municipality then can we go back to this concept of abolishing all the municipalities and forming a county government with the abolition of the municipalities.

Whiteside: It is very doubtful that the state legislature can, by act, say a city is dissolved. It would be special legislation. It would have to be by act with general provisions as opposed to special. As far as providing a means for this occurring, obviously this must be, if it exists at all, within the realm of the General Assembly because it's no place else. On a procedure or means for this occurring which is different from an act saying it happens instead of abolishing Cleveland and making one government out of the county, some states have provisions that annexation is by no more than the ordinance passed by the municipal corporation. And if that were true then the council of Cleveland could enact an ordinance saying Cuyahoga County is Cleveland. You may have alternatives, thinking in terms of general laws for functions of counties where you don't have an unincorporated area, if there are such in existence.

Question: Where in the Constitution does it prohibit the special laws?

Whiteside: Section 26, Article II, if I am right.

Ingler: Isn't it almost certain that an act would be constitutionally valid if it required the transfer of a unit of power of local government from a municipality or from municipalities over to some other jurisdiction?

Whiteside: It would be questionable. I mentioned earlier the situation of the health districts and the Supreme Court decision that this was a taking of the power in the area of health from municipalities and transferring it to a health district. The Court upheld the act indicating that at least that court apparently felt that something along this line could be done. The theory was that the health district was not a part of local government but a state agency. The health functions were taken away from the cities and transferred. At the next session of the legislature, those cities which had their own health department prior to the enactment of the Griswold Act, which was 1919, I believe, were excepted and so many of the charter cities still have health departments pursuant to their charters which they adopted previously because of a subsequently-enacted exemption.

Ingler: That explains Dayton, where the county health department and the city health department have tried to merge for more than ten years.

Whiteside: The law provided for health districts to take over health powers but they were separate districts. It did not have an express provision saying that a city cannot have a health department of its own but it did create this entity which in most areas has operated to the exclusion of any city health department.

Leedy: I believe that the only thing the county commissioners or the township trustees can do is what the statute says they have the right to do.

Whiteside: However, the question here is how far can the legislature go in giving them a broad power as opposed to specific powers? The question really goes back to section 26 of Article II which I referred to earlier as to laws of a general nature because that also provides that "nor shall any act except such as relate to public schools be passed to take effect upon approval of any other authority than the General Assembly except as otherwise provided in this Constitution."

Duffy: Let's suppose the legislature came along and passes a law along that nature--to grant to counties of the State of Ohio the power to do anything the legislature can do by virtue of Article II. This could be declared unconstitutional as an unconstitutional delegation of the legislature's authority. The traditional approach required the legislature to say reasonably specifically what it was the county or other government was going to do. The more modern cases, particularly in the 1960's and some of the cases the judge mentioned, such as zoning cases, have gotten pretty much to the point where in a number of areas the court is willing to say that if the legislature simply describes the subject matter, i.e. counties may enact zoning laws, it's all right. By and large the odds are that that would be upheld. But you see at least you have knocked out a specific identifiable subject matter and they don't require you to come in and be too detailed, but if you try to dump unnamed subject matters I doubt if you could do it. The constitutional provision for the transfer of powers to the county was a means of creating of a greater than municipal government that would have this kind of initiating power to create law that is not in conflict with anything the legislature has already done that could have legislative powers without having to find a statute to point to. The same thing that municipalities got in Article XVIII they wanted to give to county government, at least in some areas.

Ingler: A de facto difference in the substance of bodies of law between a city council and a county government is not as great as the legal doctrine would suggest.

We went through three or four county charter fights in the late 50's and early 60's and in the heat of these fights over these county charters to try to persuade the voters to adopt, the voters asked, "Well, why do you want the county charter in terms of powers? What would it be able to do if it were chartered that it doesn't now have power to do as a legislative body?" That's a very interesting question. By example I went back and looked at, in fact we have examined several years accumulation of the municipal ordinances and there was very little material in there of the character of substantive law, as I would call it. There were thousands of resolutions having to do with the rendering of services to the public but as far as law binding on a citizen was concerned there is very little law in that context enacted by city or county governments in Ohio. The people are governed by state law, when you get right down to it, local outfits are essentially service agencies. There are exceptions, of course. You can adopt a local zoning ordinance which requires that a certain piece of property can only be utilized in a certain manner and that can be enacted by a municipal city council. You have the same power in county commissioners.

Duffy: I think the difference is very real in narrow areas. That is when you run into the situation where you want to do something that is a newly developing thing, a new material, you want to change from linotype to another processing like the legislature wanted to do on its printing contracts a few years ago, plastic street markers or something and the state law says that street markers shall be painted, so if we are dealing with municipalities they can do this; if we're dealing with counties they're probably stuck with the exact wording and can't initiate much. I can think of very few substantive areas either, the one I think of is urban renewal. I know the City of Columbus and Toledo were enacting urban renewal ordinances and getting into the field of urban renewal long before the legislature of Ohio was willing to consider the adoption of urban renewal programs and the cities entered into contracts with the federal government without statutory authority. There were no statutes to say that you can go into this kind of contract or financing structure, or appropriate private land for the construction of housing to relocate people from condemned areas and all these things were going on without any enabling legislation by virtue of the Article XVIII doctrine that this was a field of local government law and there was no conflict problem. In that kind of a situation that the county government, being the legislative creature, couldn't step in unless we would define a statute. So that the county, as long as it didn't have the power to initiate it, a county type government is going to be in the political position that if the law isn't already on the books it must lobby one through successfully before it can act. And that is one of the disadvantages, I think, that Article XVIII avoids, which I personally would hate us not to avoid for the future.

Fry: It might be a direction we could look

Ingler: It does suggest, doesn't it, that if you ever go to a city-county consolidation device, either as a local decision or as a constitutional exercise it probably would be wiser and safer, wouldn't it, to see that the resultant consolidated entity is incorporated as a municipality.

Whiteside: I don't care what you call it. You say you make it a county government or you say you make it a township government if you give it these powers you have the concept of a municipal corporation. These are traditionally referred to as municipal corporations. A municipal corporation by definition has been basically

that agency which did have the power to make laws as opposed to townships and counties. You might not be able to abolish the structure of counties depending on whether the constitutional provision for county organization would require some kind of governmental structure for counties but as far as whether you could classify on this basis the powers of county governments would be questionable. At least this is an area that you could explore. The interesting aspect is that so far as I know there is no provision in the Constitution of granting the power to the counties to levy taxes, although there is a provision in the Constitution expressly providing that townships shall have the power of local taxation as provided by general law. I know of no provisions relating to counties.

Duffey: Perhaps you could abolish all the municipalities in Cuyahoga County other than Cleveland by providing for compulsory annexation by statutory action, annex them all to Cleveland that makes Cuyahoga County coextensive with Cleveland now, then Cleveland under its charter under the authority in Article XVIII to adopt any structure of government it wants. It could turn around and structure sub-cities, creating mayors, legislative bodies, etc. in each of these sub-cities. You could create metropolitan government from the opposite direction.

Russo: I have no objection to turning over the city's problems to county government. My argument is that the county can't cope with it unless we give it the powers to do so.

Whiteside: The county structure traditionally has not been designed to handle complex problems.

Fry: Sooner or later, as a committee, we've got to recognize that counties have those types of problems now. The power to determine the organization and powers of the county government rests with the General Assembly at present and there are provisions for charter; however, they have not been adopted anywhere in Ohio because of the cumbersome nature of the requirements. Everybody has to agree. Each majority has to agree.

Leedy: You have no idea as to what is going to happen to a piece of legislation until it gets tested. We've no idea of what the Supreme Court finally is going to say about our actions here, that we recommend here in the way of this constitutional revision. I don't think that we should get so deep that we are trying to guess what the court will do.

Whiteside: No, you cannot do that. There have been changes in interpretation. In the health district case I have no doubt they meant what they said, at that time. That was back in the days where they had the statewide concern doctrine. All the other cases in this area have been pretty much overruled, but this one still stands. If it meant what it said, there would be no question of the power of the legislature to withdraw powers from municipal corporations. You need a basic idea of what the law is. The law isn't that a, b, c simple and you can't make it that simple and anything you may draft never will be simple to interpret. More important is, are we at the right place? You can't be sure of all the details. Is this the direction we should be in and if you feel that we should be going off in some other direction, obviously you need some amendments to the Constitution. On the other hand you could eliminate the conflict provisions in section 3 completely and give complete power to municipalities in police regulations. Or is this kind of balance that was adopted in 1912 still

a good balance? Maybe some clarification is needed. Maybe it isn't.

Duffey: The article on home rule from the 1960 Ohio State Law Journal that you have been given gives you some of the historical background and some of the distinctions about initiative, power, and delegation and some of the problems that led to some of these provisions. There are some citations in there to some excellent articles that will give you some history and I think constitutional provisions in Ohio or anywhere else can be best understood if you see the context in which they arose. If any of you, or any of your constituents, local government officials, or anyone else have any specific constitutional proposals in this are I'd like to see them come in to us in the form of a proposal or at least identification of the problem. Going back to Mr. Ingler's remarks that what we're looking for is obstacles perhaps one way of finding obstacles is to identify--committee members and others--local government problems and then we can take a look at whether those problems have any origin in the constitutional provisions. But on the other hand I expect that some of these problems we're dealing with we will find that there are constitutional provisions which create the problems.

Fry: I would hope that we would get some way of representing the commissioners and township trustees and the other levels of government.

Duffey: Yes, we will invite these people, if this direction is agreeable to the committee, and likewise solicit in general from you and anyone else anything in the way of local government problems, not with the view that we are going to find constitutional problems but because if you don't look at the problems you won't find what the constitutional problems are.

Ingler: At some later stage when we come back into some legal questions could we hope that we could have the judge with us again?

Duffey: I'll be glad to try and draft him.

The next committee meeting was set for Monday, June 14, at 2:30 p.m. The meeting was adjourned.

Ohio Constitutional Revision Commission
Local Government Committee
June 14, 1971

Summary of Meeting
June 14, 1971

Committee members present were Chairman Duffey, Mrs. Orfirer, and Mr. Heminger. Mr. James Farrell, attorney from Cincinnati, met with the committee to discuss the municipal utility provisions of Article XVIII of the Constitution.

Duffey: We are seeking constitutional obstacles to solutions to governmental problems, so we must first understand what some of the metropolitan problems are, and then comes the more difficult step of sorting out the problems from those with constitutional implications. For example, the Blue Ash case, which dealt with the right to expand an airport and who controls the right to appropriate the necessary right of way, is one such problem with constitutional implications. The question is: are there obstacles in the constitution which prevent their solution or are there constitutional provisions which could be written to facilitate their solution?

Farrell: As I see the municipal utility provisions in the constitution, they pretty well take care of the municipalities and to some extent the areas outside except to the extent the constitution limits the amount of product or service available to people outside the municipality (section 6 of Article XVIII). You have to be a certain size to efficiently operate a utility. In 1959 an amendment was adopted to remove the 1/3 or 1/2, however you look at it, restriction with respect to water and sewage disposal so that took care of that problem, but the restriction on the sale of excess product or service still applies to such things as airport and transit.

Duffey: So long as you have a surplus, you may sell sewer and water services and products outside the municipality without restriction, but the restriction applies to other utilities. You can sell 1/3 of the total amount of capacity or 1/2 of the amount used within the municipality.

Farrell The Cleveland airport operation is probably unconstitutional; it seems to me that probably more than 50% of the people using the airport come from areas outside Cleveland.

Duffey: The same restriction would apply to a municipal electric system. What are some of the other examples?

Farrell: Transit. Electric may not be too important any more, because that has to be such a big operation anyway to be efficient. Gas -- although a municipality may have its own distribution system, it has to get its product from some pipeline company so it isn't too important whether gas goes beyond the municipal limits. But in transit, where your're going to have municipal or regional operation by some governmental authority, and in areas like airports where they're all losing propositions and you have to have some kind of public support, the limitation is significant.

Duffey: One solution is to put these functions under something like a Port Authority -- the traditional, piecemeal response to a governmental problem.

Farrell: I suppose any metropolitan problem can be handled that way, but if you do it that way, the home rule amendment becomes rather unimportant. By and large, case law has upheld the right of municipalities to operate utilities just as any private corporation could operate utilities, subject only to the limitations set forth in the Constitution. The legislature can't fix the rates for the product, whether sold inside or outside the operating utility, and municipalities have the power to acquire existing public utilities without limitation by state statute. The only adverse areas are: what can you do with a profit if you have a profit? The Supreme Court has said you can't do anything with it except what the statute permits you to do, which is a deviation from the position taken in other matters relating to municipal utilities.

Duffey: Are they relying on section 13, restrictions on taxing power?

Farrell: No, not really. The Roettinger case held that, to the extent you charged more than necessary to operate the utility, you were levying a tax and therefore came within the limitations of section 13. He (Justice Marshall) relied on a statute passed before the home rule amendment which said you could use up to 5% of the profit for purposes other than utility purposes, and construed this statute, which was an enabling statute when passed, as a limiting statute after the adoption of the home rule amendment. It was an unusual approach. Over the years, the court has changed back and forth in the philosophy as to what municipalities should be permitted to do and what they should not.

Orfirer: What do municipalities do with the extra revenue from utility operations?

Farrell: In most municipalities, they attempt to keep the charges down so there really isn't any incentive to have rates that would produce a profit.

Duffey: There may be a tendency in some cities to load up the water department with ancillary services, such as policing the reservoirs, so that these people can be paid out of the water department. In the days of surplus, Columbus did this, although they have now transferred the function of policing the parks back to the parks department.

Farrell: Excess revenues can also be used to give free water service to municipal functions such as playgrounds and municipal institutions. In addition, you can charge a pro rata portion of the expense of running the city government to the waterworks. They did this in Cincinnati for years and it wasn't questioned.

Comment: In Westerville, they use profit from the municipal electric plant to run city government.

Farrell: The statute containing the 5% limit applies only to water and sewer -- doesn't apply to electric.

Duffey: This distinction, which is a carryover in a statute enacted before the 1912 home rule amendment, doesn't make much sense.

Farrell: A municipal utility is in the same position vis-a-vis the consumer as a private utility was before the establishment of the PUCO -- that is, you always have a common law right to enforce the common law obligation of the utility to provide the service to the consumer on a reasonable basis which includes not charging excessive rates and a municipal utility, although not subject to the PUCO, has the same obligations under common law as any other utility. This includes not discriminating against consumers outside the supplying municipality, once the supplying municipality has dedicated itself, by contract, to supplying

consumers in an area outside its boundaries. But the municipality supplying the service or product can make its own conditions for selling, such as requiring annexation or petitioning to annex by the persons wanting the water. This is permissible as long as there is no contract for service in the area the consumer lives in that makes the municipal utility a utility in that area.

A consumer of a municipal utility product or service who has a complaint must go into court to enforce his rights, he has no recourse to the PUCO.

It is difficult to write a home rule amendment that will exclude the possibility of changes in court interpretation over the years, changing with the court's philosphy and what the court wants to do, unless you put a provision in that it is not subject to court interpretation.

Duffey: Is the Blue Ash case a barrier to expansion? It seems a peculiar result that you cannot appropriate property devoted to a public use inside another municipality.

Farrell: I believe the decision was wrong, but changing the constitution won't help unless you get very specific. Secondly, I suppose the court's philosphy there was that there wasn't any need for the airport to begin with, although that was not not an issue in the case.

Question: Will this be a problem in expansion of rapid transit systems which may depend upon appropriation of rights of way in existing streets?

Farrell: Yes.

Duffey: If you want to appropriate additional parking area for rapid transit or an additional widening point for transit system vehicles to pull off, you may end up appropriating within the existing right of way. Wouldn't Blue Ash be a problem?

Farrell: Yes, from the operating municipality's point of view, although I would assume that the transit system wouldn't be in the other municipality unless the people there wanted to be served. It wouldn't necessarily require a franchise to go through the second municipality, although it would need a franchise to make stops and provide service in an adjacent municipality. If there is area between the two municipalities, according to the statute, a PUCO permit is required.

Duffey: But if the municipalities can't agree and consent, there is no other authority to appeal to and the second municipality can successfully keep the transit system from operating. Is there a need for an enabling provision which states that the legislature could pass a statute establishing priorities?

Farrell: I don't believe there is such a thing as priority of one use over another. In Blue Ash, we contended for a doctrine of paramount public necessity. This can be determined by the courts or by some agency designated by the constitution or by legislature if the constitutional authority is present. At the present time, there is no authority to make a determination like that -- it can only be by agreement between the municipalities.

Duffey: Another solution is to by-pass both cities and create a regional authority establishing it by state law.

Farrell: If there had been a state statute, I suppose the Court in the Blue Ash case might have said, you can take it. In the case, the court went back to the governmental-proprietary distinction, which had no basis in Ohio decisions and wasn't even in existence at the time the home rule amendment was written. So you cannot say that the poeple, in voting on the home rule amendment, had in mind a distinction between governmental and proprietary functions and wanted to make governmental functions have priority over proprietary functions, and, even if they did, it would be difficult to understand which is which. When you construct a sewer it's a governmental function and when you maintain it, it's a proprietary function, although it is difficult to understand how you can be an agency of the state, which is the definition of governmental function, in constructing a sewer and not an agency of the state in maintaining it. Even if the constitutional provision were clear, you will still have some of the same problems you have now -- that is, the Court, depending on the facts and circumstances of the particular time and its philosphy of the particular matter, is going to search for ways to do what they want to do and if it means straining the language of the constitution, that's what's going to happen.

Duffey: I think that, in the areas of governmental law, the courts respond with more flexibility than in the areas of private law, where stare decisis plays a greater part. The courts respond to pressure and shift their view when you get into areas of governmental structure and authority and away from areas of due process and private rights. Looking to the solution of metropolitan areas problems, or intergovernmental problems, are there problems that you see, such as a suburban community blocking effectively the development of a transit system by refusing to grant franchises? As a practical matter, I think transit systems are like an electric utility -- you have to have a certain optimum size or it cannot run efficiently. As you increase usage, you drop costs.

Farrell: Yes, I think this would be a problem.

Duffey: They would block the appropriation right of way along or across an existing public road and could refuse to grant a franchise. Or could the legislature give the right to operate to a regional transit authority which would override the municipal home rule right?

Farrell: I think they can. There is no reason why a private water company could not go into Cincinnati with a PUCO permit and establish a water system in competition with the municipal water system -- nothing but the economics prevents this. You have a private electric company in Cleveland.

Duffey: Don't they have a franchise from the city?

Farrell: Yes, but I think that was because they started prior to the establishment of the PUCO. The older municipalities had their gas companies, electric companies franchised before there was any statewide agency to franchise -- it was a state statute, but authorized municipalities to franchise utilities. But now there are many cases which say that whatever authority municipalities had to control private utilities has all been withdrawn and vested in the PUCO by the state legislature.

Duffey: Then you see no problem of private utilities going into and through cities without a franchise? Here in Columbus, for example, the cable TV people have been trying for years to get city council permission to operate.

Farrell: That's because they are not a utility -- they don't fit the definition of a utility -- everything they do that falls within the definition of a utility is really handled by the telephone company.

Duffey: So the problem is if one municipality tries to operate a utility inside another municipality without consent.

Farrell: Even there, the Blue Ash case limited itself to a use which destroyed the existing public use, and if Cincinnati had wanted to appropriate the right to lay a pipe line under the street, I think the court would have permitted it. Again, the court made the distinction between the airport, a proprietary function, and the street, a governmental function but I think that if the court had wanted to reach that decision it could just have said that here are two equal rights of eminent domain, and the city within which the property is located has a prior right over the other city.

Question: Is an airport a proprietary function? Is it taxable? I notice that the parking lots are taxable.

Duffey: Public property devoted to public use is not taxable even if a proprietary function.

Farrell: That's a special statute that permits taxing of the parking lots. Passed when municipalities went into the parking lot business on a grand scale.

Duffey: Apart from franchises, appropriation, and the limitation on the sale of excess service or product from a municipal utility, looking at the problem the other way, is there a problem with compelling people to use the utility? I am thinking of the pollution problems -- such as small communities polluting the water reservoirs -- Hilliard, for example, a couple of years ago had grown to such an extent that the effluent from their sewage system was coming into our water reservoir. They couldn't afford to build their own tertiary system and Columbus agreed to build a trunk line sewer and bring them into the Columbus system. If Hilliard had refused to cooperate, I suppose the only solution would have been on the state level.

Farrell: Yes, and this is the proper solution. There would be common law actions against Hilliard, but that is all.

Duffey: Other than by state action, there would be no way Columbus could force them into the Columbus system?

Farrell: That cuts two ways, it also would require Columbus to take them.

Duffey: I'm looking at this from the point of view of a metropolitan area solution -- a metropolitan sewer system.

Farrell: You have to decide, from a constitutional point of view, what your approach is going to be. Are municipalities going to bear the brunt of solving these problems or are they going to be handled by counties or by a series of ad hoc agencies? Then you have to look at the constitution to see what changes need to be made.

Duffey: From a constitutional level, I don't think we should make the choice, but provide the capability in the legislature or some other body for a number of solutions to the problems and permit the legislature or other agencies to make the choices. Are there constitutional obstacles now that prevent these choices?

Farrell: There's certainly a constitutional inhibition against requiring Columbus to serve any area. The cases hold that a statute cannot, for example, authorize the municipality to extend its water line outside but restrict the amount that may be charged persons outside the municipality for service. It can't be done. State statutes can't tell you what rates you're going to charge nor who you're going to serve.

Duffey: If the state wanted to create some type of metropolitan area government and transfer to it, for example, the Cincinnati sewage system, it couldn't be done. Could it be appropriated for a reasonable compensation and taken over?

Comment: Under county home rule, if a county adopted a charter, it could be done.

Farrell: I believe it could be done only with the consent of the municipality -- there's nothing in Article X which would permit the county to do this. You can make the county a municipal corporation and thereby all municipal corporations and townships disappear and the county is the successor but you have to say specifically that you are ceding all municipal powers to the county.

Duffey: Relying only on the power of the legislature, and not considering the provisions of Article X, are you of the opinion that the legislature could not pass a law providing for the appropriation of municipal utilities by a county or regional authority?

Farrell: That's what I believe is a proper interpretation.

Duffey: In Canada v. Phillips, the court observed that the state can create its own police force to operate in municipalities but it can't simply take over the existing municipal police force.

Farrell: In the case of health districts, the state created health district which took over city health departments. This was litigated again in St. Bernard within the last year. The state has the authority to withdraw from municipalities their health functions and powers. I think the case involved the city of Bucyrus, and if you analyze the facts, the health employees of the city continued to be paid by the city but it was a state agency. That's equivalent of saying that the state can pass statutes saying how city police and fire departments can be run.

Duffey: Taft did observe, in the Canada v. Phillips case, however, that there's a difference between the state coming in an doing the job itself and the state taking over the city function, and the state prohibiting the city from doing it.

Farrell: With respect to utilities, though, it's hard to make some of the arguments that are made under sections 3 and 7 to justify state action because the utility powers are specifically given to municipalities in the Constitution. Municipalities could have done practically everything with respect to utilities without the addition of sections 4, 5, 6, and 12, but the language was specifically

written into the Constitution because the people who wrote the document wanted to make very sure that the municipalities had these powers without interference by the state legislature. I think the Court would have a hard time authorizing the state to take utilities away from a municipality. Of course, I think the same thing is true of local self-government under section 3.

Orfirer: Where does metropolitan federalism fit into this -- something like Toronto has?

Duffey: Our constitution contains no provisions for establishing metropolitan federalism. These are the questions I think we are pinpointing -- under our existing constitution, how far could we go toward creating something like Toronto? Could the General Assembly, by uniform law, dissolve municipalities?

Farrell: There's nothing in the Constitution about it. I would think the proper interpretation would be that they could not be dissolved by the state legislature without specific constitutional authority to do so. The constitution requires the legislature to provide for the incorporation of municipalities, and I think this constitutes a limitation which would prevent the legislature from dissolving them.

Duffey: I have always thought that the legislature might be able to do this; that the provisions of Article XVIII do not come into play unless you assume the existence of municipalities and this depends on legislative action. The legislature has this power under Article II.

Farrell: But you're going to have to create something which will, in effect, be a municipal corporation.

Duffey: Yes, but you could, perhaps, dissolve all municipal corporations under a uniform law establishing certain criteria on a reasonable classification basis and then create a new body and then Article XVIII would come into operation again if it were construed to be a municipal corporation.

Orfirer: How about Dade county -- the combination of Miami and Dade County?

Farrell: That was done by vote of the people -- the adoption of a county charter.

Comment: The combination of Indianapolis and Marion County into one unit by the state legislature is being challenged in the courts now.

Duffey: Shouldn't we clarify the question in the constitution as to whether the legislature can or cannot dissolve municipal corporations and create another unit of government, or take certain powers away, or form a federal form of government?

Orfirer: Under what authority has the state reduced the number of school districts?

Duffey: By statute. I think there is no doubt that, except for Article XVIII, the legislature can create and dissolve such structures of local government as it sees fit. It has delegated to the state board of education the power to merge school districts, under certain criteria.

Farrell: I am reluctant to see the state legislature have the power you are suggesting. I think the annexation policies adopted originally by the legislature set out to prevent the growth of metropolitan areas by setting up incorporation through the county commissioners where the citizens of the area could incorporate and prevent the growth of the city. In one instance in Hamilton county, 87 voters in an area of about 25 square miles with a tax duplicate, when they incorporated, which was by far the highest tax duplicate at that time of any municipality in Ohio, were able to incorporate and remove the tax duplicate and the area from the expansion of the city and the board of education. Some state legislators have advocated making it impossible for the central city to annex adjacent territory. In both Cincinnati and Cleveland, the only significant annexations took place under the old Cox law, which was a very simple proposition.

Duffey: If the legislature cannot solve the probelm -- such as in Cuyahoga county where the number of separate cities and villages creates a government monstrosity, do you think this commission should come up with some constitutional provision which enables the solution to this problem?

Farrell Yes, definitely.

Duffey: It would be quite valuable, if you have some ideas how this should be provided for in the Constitution, for you to submit your suggestions to us. We would appreciate having them. Not legally drafted, but just an outline of how you would approach the subject.

Orfirer: Do we have in the constitution a double problem -- one, because we have already permitted to be created all these municipalities which makes annexation in Cuyahoga county impossible so we need a solution to an existing problem and second, some provision to prevent it happening in other areas?

Farrell: I think that whatever device you use to correct the present situation could be used to prevent its occurrence in the future.

Politically, I think today the only way to solve problems is one at a time -- trying to make a metropolitan area out of separate governmental units may not be politically feasible.

Duffey: Yes, if you mean that the separate units will lose their identity to a metropolitan area. I'm not sure there is opposition to the creation of a central body with some degree of authority over them, as long as they do not lose their identity and can keep control over certain local issues.

Farrell: I think you have to recognize that issues such as housing are important -- a governmental unit can keep out low cost, government subsidized housing and to the extent thay they want to do this, and many of them do, they will not agree to a central government.

Orfirer: It works the other way, too. Cleveland has rejected metropolitan government because they don't want to lose the power they have acquired.

Duffey: My attitude about the function of this commission is that we are not attempting to solve the problems but to recognize the potential solutions and then make it possible for these solutions to be applied. We may want to rework the Article X approach -- giving a significant role to local consent in the restructuring process, or let the legislature restructure local government any way they want to. We may want to go both routes.

Farrell: There's a third possibility -- an amendment that would facilitate the expansion of the core city by expanding functions or at least permit the veto of certain functions in outlying areas, retaining, however, some local functions in those areas.

Duffey: I've advocated that we could create subcities within the city to control some very local functions, such as school zones, speed limits on some streets, and zoning. We should create a constitutional provision which will permit restructuring along the economic and social lines that accord with reality -- the way we are really living.

Ohio Constitutional Revision Commission
Committee to Study Local Government

Summary of Meeting

July 12, 1971

The Committee to Study Local Government met at 2:30 p.m., July 12, 1971, at the office of the Commission, 20 South Third Street, Columbus.

Present were Chairman Duffey and Messrs. Heminger and Ingler. The speaker for the meeting was Mr. John Gotherman of Dayton, of the Ohio Municipal Attorneys Association, and counsel for the Ohio Municipal League. However, Mr. Gotherman stated that he was expressing his own views at this meeting, based on his experience of working with the League and municipal officials, particularly municipal attorneys. He addressed himself primarily to issues relevant to home rule, and other issues in the area of local government.

In his view, Article XVIII of the Constitution has served municipal government well in the 59 years that the Article has existed. It has permitted most citizens of the state to adopt a form of municipal government of their own choosing through charters under Section 7, 8, and 9, it has enabled municipal governments to take the initiative to try to solve their own problems without having to ask permission from the General Assembly, through the portion of Section 3 conferring "all powers of local self-government", and it has enabled urban citizens to lead the way in some areas of police regulation where the state has either not acted, acted slowly, or simply has not shown a great deal of concern, such as planning and zoning regulations, and some minor criminal offenses which one finds in municipal codes but not in the state code.

One of the questions receiving much attention today is what impediments the home rule provisions of the Constitution impose on the state in trying to implement programs it feels are relevant in urban society. Mr. Gotherman stated that most complaints against the home rule provisions are based either on ignorance of what the provisions say, or a misunderstanding of the present relationship between the state and its municipalities.

One area of interest is the question of restructuring local governments in metropolitan areas. Mr. Gotherman expressed the feeling that the General Assembly has the power, at the present time, to prescribe the method of organizing, creating, merging or dissolving municipal corporations under Article XVIII, Section 2, under properly drawn general laws.

Chairman Duffey at this point referred to the opinion previously expressed by Mr. James Farrell before the Committee, to the effect that the Constitution provides only for classification as villages or cities, and that the Constitution provides for incorporation, but that it would be a negation of home rule to permit the General Assembly to consolidate and merge local governments. Mr. Gotherman pointed out that there has not been a case on the point simply because the Legislature has never chosen to act in these areas. Fundamentally, this is a political rather than a legal question, he said, involving such things as the vested interests of municipalities, caution on the part of political parties as to what happens to county government, and the reluctance of minority groups in center cities to possibly relinquish the political power they have gained.

Mr. Gotherman stated that if consolidation within a county is to take place, the effort ought to be directed toward a general governmental unit for the county rather than special districts, such as districts for police protection. Special districts and special authorities have not been adequately responsive to the needs of citizens, many of whom do not understand how such districts operate. "For example, they can not understand why a conservancy district is run by judges," he said. Even the functions of boards of education in regard to school financing are difficult to explain, and are one reason why city halls get so many questions on school tax rates. In Mr. Gotherman's view, if there is a need for a governmental unit larger than a city to provide a service, the power to do so should be lodged in the county, and if county boundaries need to be changed to meet a regional governmental need, then changes in boundaries ought to be made.

The meaning of home rule powers has changed substantially in the last ten years, he said. For example, the Police and Firemen's Pension Fund case, 12 Ohio St. 2d 105 (1967) was decided under Article II, Section 34, which provides that laws may be passed fixing and regulating the hours of labor, establishing minimum wages, and providing for the comfort, health, safety and welfare of all employees, and that no provision of the Constitution impairs or limits this power. This provision was interpreted to cover the employees of local government and, in effect, overrides the home rule amendment. As a result of the Pension Fund case, it is conceivable that if a statute were enacted establishing certain standards for a municipal police department, and providing that if these standards were not met the police function would be exercised by another unit of government, such as the county, the statute would be upheld as constitutional.

In response to a question by Mr. Ingler, Mr. Gotherman stated that the power of Ohio cities to grant franchises for transit systems, taxis and the like, does not derive from home rule power, but from an exception in the public utilities law. For that reason, the state is free to vest the power to grant such franchises exclusively in counties, if it chose to do so, by way of the "conflict clause" of Article XVIII, Section 3. Cities may regulate franchises of this type only because state law permits them to. Cable T.V. could also be regulated exclusively by the state, he said.

Mr. Gotherman continued, stating that as they are presently organized, counties are not equipped to handle many functions which municipalities handle. For one thing, counties do not have a strong executive branch. They don't really have one at all. But, he said, contemporaneiously with a reorganization of county government, the General Assembly should grant broad powers of local self-government to the counties, whether or not they have adopted charters.

Mr. Gotherman further stated that the home rule amendment is not the only grant of power or limitation of power on municipalities. Article II, Section 34

(heretofore mentioned) is a rather essential limitation. The sections of the Constitution dealing with taxation and debt, such as the ten mill limitation, are others. He felt that in several cities and counties, the ten mill limitation is an arbitrary restriction on the ability to finance capital improvements--for example, where it prevents the issuance of unvoted general obligation bonds which could be paid out of utility revenue. He advocated negating the constitutional debt limitation on local governments.

Mr. Gotherman also suggested a re-examination of the restrictions on the incurring of debt and the extension of credit which bind the state and its political subdivisions in the present Constitution. For example, the state can and does mandate water quality standards. However, the method most often used to finance the equipment necessary to meet these standards is, most often, the use of revenue bonds, which carry a higher interest rate than those backed by full faith and credit. However, under the present restrictions of the Constitution, the state could not build a water pollution control facility financed by full faith and credit bonds for a political subdivision, even though the subdivision agreed by contract to repay all or part of the debt service, and there was little likelihood that any tax money would have to be expended, since the utility rate could be set high enough to retire the bonds. "To impede the ability to have financing arrangements which involve the state and its political subdivisions doesn't make a lot of sense," he said.

Returning to the point of the possibility of consolidating existing political subdivisions, Mr. Gotherman expressed the view that, even though the General Assembly may have the power to do this, it would be preferable to accomplish consolidation on a local level, since people on a local level are much better able to judge local needs. To this end, he suggested present Article X, Section 3, which inter alia prescribes the four majorities necessary to adopt a county charter, ought to be amended. The four majorities now required are (1) in the county, (2) in the largest

municipality, (3) in the county outside of such municipality, and (4) in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality). In his view, we have to have the first of these, the second and third are designed to protect the county and the largest municipality from "swallowing each other", but the fourth should be removed. "Whoever drafted that Article obviously intended for county charters never to transfer municipal functions," he said.

Ohio Constitutional Revision Commission
Local Government Committee
November 23, 1971

Summary of Local Government Committee Meeting

Present at the meeting on November 23, held in the County Administration Building in Cleveland, were Chairman Orfirer, Mr. Heminger, Professor Schroeder, Mr. Ostrum, Mr. Carter, Mr. Pokorny, and staff members Kramer and Nemeth. This summary is not a verbatim record of the meeting.

Mrs. Orfirer pointed out that the committee was starting its study of local government and the constitution afresh, because of the reorganization of the committees of the Commission and the fact that few of the members of the prior committee are now members. She stated that she hoped the committee would not begin with any preconceived notions of changes needed in the Constitution, either minor or major, but would maintain an open attitude toward all suggestions.

The committee discussion began with the question:
What functions are local governmental units expected to perform? Are the present allocations of functions working effectively?

Functions include taxing power, legislative power, judicial power, general welfare, public safety, public utilities and sanitary facilities, transportation and highways, and others. A chart was distributed, prepared by the staff, showing various units of local government and the powers they have or services they perform.

The planning and zoning function was discussed first, and Mrs. Orfirer noted that this function is primarily to make plans and recommendations for public and private improvements and developments, including roadways, utilities and buildings, to review and pass upon plans for public and private improvements and developments, to preserve and care for historic landmarks, to divide an area into zones or districts and to limit and regulate the height, location, set back line, etc. of building and the uses of buildings and other structures in such zones or districts, and to hear and decide appeals from decisions of administrative officials enforcing such limitations and regulations. The chart (distributed to members) shows what units perform this function--counties, townships, municipalities, and regional planning commissions.

Schroeder: What is the authority of the regional planning commission?

Kramer: It has recommendatory powers. We have combined planning and zoning geared to some sort of rational development of an area, although the two functions are separate. Zoning should be in accord with some sort of plan.

Orfirer: Why do these particular units have this power? Is this the logical place for this power to remain? Is this a state function being carried out by a local unit or is it strictly a local government power?

Schroeder: Problems of planning and zoning never got started until we had urban problems--at least, we never recognized planning and zoning as problems until then. How far does county zoning extend in Ohio?

Kramer: It is an overlapping function and applies only in rural areas of counties. There are provisions both for county rural zoning and for township zoning. In the same county, the county may provide zoning for some of the unincorporated area and townships for some. So there is no one system for unincorporated area and some such

areas have no zoning. Zoning is almost universal in municipalities.

Ostrum: Is there any specific reference to planning and zoning in the Constitution? In the Model State Constitution? The Wilder Commission report?

Kramer: No. Zoning has a very short history as a governmental power. There had been some attempts in the early part of the century to provide land use planning by means of zoning, but it was not until 1925 that the matter was ever considered by the U.S. Supreme Court. The City of Euclid had an ordinance attempting to restrict certain uses to certain areas, and this was challenged. The Court ruled that this was a proper exercise of the police power to provide for public health, safety and welfare. This power has mushroomed since then. The Constitution does not specifically mention this function and I don't know of any Constitutions that do. It's not entirely clear whether it's a police power or a power of local self-government, although generally regarded as a police power but with many characteristics of a local self-government power.

Schroeder: It is not a question of changing something in the Constitution but a question of whether we want to put something in. There are a number of current controversies over the zoning power--including law suits at both federal and state levels. If we do anything, it would not be granting a power to local government to do something, but disciplining them not to do certain things, or to force the county in an urban metropolitan area to do the zoning and not local municipalities. Not a question of granting a power but of restricting or controlling local zoning at the state level.

Carter: At last week's seminar, several people commented that zoning started out as a local power but now, in metropolitan area, has larger effects than merely in the area where the decisions are made because of the ripple effect. Is there a need for constitutional support of the concept of regional zoning or statewide zoning or is this within the plenary powers of the state today?

Kramer: If zoning is a police power, then a municipality can act only to the extent not in conflict with general law. But this question is not yet really resolved--if the state attempted to enact a state zoning law or provide regional zoning which invaded the territory of municipalities, the question would be presented.

Carter: We are not trying to solve the zoning problems, but make sure our elected representatives can deal with it. This is, therefore, a valid question for the Commission to consider.

The committee considered a list of economic and political criteria for allocation of urban services prepared by the League of Women Voters.

Ostrum: What are the issues involved in the law suits Professor Schroeder alluded to?

Schroeder: These are not Supreme Court cases, but at the federal district court level. They are attacks against zoning in the suburban areas where you have a minimum one acre lot and you bar, by that device, a low income family from buying in that area. This is part of the problem of trying to figure out how white people and black people and rich people and poor people can live together in some kind of peace and harmony. And a federal court in Detroit has decreed that you can take children in Detroit and place them in another school district--not merely transfer them from one place to another within a district. This tears up local self-

government in the Detroit area for education. The zoning thing is not far behind.

Kramer: The court found de jure segregation, not merely de facto segregation based on housing patterns in the Detroit case.

Schroeder: That is correct. And the zoning is even clearer than the education, because at least the school in the suburbs is open, but zoning, by its one acre requirement, puts a burden by law on the fellow who can't afford to buy an acre.

Pokorny: Can this be handled by constitutional amendment? What effect do the municipal charters have on this problem as it relates to constitutional changes? From the point of view of one involved in county government, it seems to me we need a wider geographic approach to the multiplicity of problems which overlap city boundaries--the 62 separate municipal jurisdictions in Cuyahoga County--these are real problems for us; the overlapping of fire, police, sanitary services--sewers, air and water pollution etc. In several of these fields we've been twice to the electorate with guidelines laid down by the statutory authorities and we've not been able to comply with the guidelines because we cannot get electorate approval. As county officials, we see that there has to be a wider geographic approach to our problems here as they exist and these are most pointed problems which can only be solved by going to the electorate. There are many important areas--solid waste disposal, water pollution, sanitary sewers,--I think this committee should spend an appreciable amount of time to get rid of some of the hurdles before us in the constitutional structure and the legislative enactments. To make it easier for us to cope with the overlapping problems within the county. All urban counties share these problems. We need some easier method of solving these problems to attain the goals we are trying to attain. We're trying to do it by contractual agreement today and it is most difficult.

Orfirer: We started with planning and zoning as an example, and perhaps should now move on to some of the other areas and see whether these same problems exist. It's quite obvious that some of these other problems, such as air pollution, know no local barriers.

Heminger: What is the typical area included in regional planning?

Kramer: The regional planning commission can include part of a county, all of a county, several counties, parts of several counties--formed by agreement among political subdivisions. No boundaries set by statutes.

Pokorny: These regional planning groups exist in the metropolitan areas, perhaps there are about 15 of them in the state today. They are entirely by contractual arrangement among the units of government involved. The federal government recognizes them--some federal programs require consultation with the regional planning unit before federal funds can be used for a project. In law enforcement, a seven-county coordinating unit exists in northeastern Ohio, including Cuyahoga County. Air, water, open space, housing, urban development--all these programs require consultation with a regional planning unit or coordination with other groups in order to attract federal moneys.

Orfirer: We are in another area where the federal government is beginning to stop in--

Pokorny: They set standards and regulations and we have to conform in order to get federal money.

In Cuyahoga County, the regional planning does not go outside the county, but we have the areawide coordinating unit which has imput into the problems of the 7-county area.

Kramer: In Summit County, a regional planning commission includes part of Portage and Medina Counties.

Orfirer: Let us move on to air pollution. The function consists of establishing standards for emission, monitoring emissions to determine compliance, securing co-operation and enforcing compliance with these standards. The units of government that perform this function at the present time are municipalities and counties. Municipalities get authority through home rule and through the Revised Code.

Carter: Is a municipality limited to enforcing its air pollution control on residents of the municipality? Is there any extraterritorial control?

Orfirer: Just within the municipality.

Pokorny: Our county thought that a countywide or regional approach would be much better because air pollution transcends all geographic boundaries. What we don't like in the legislation as it presently exists is that, while the responsibility is vested in the county, true enforcement is placed with the attorney general. If we are to take the responsibility for pollution, we should have the power to enforce on the local level. Presently, air pollution regulations are enforced by the Air Pollution Control Board on petition to the attorney general.

Kramer: The statute giving the power to the Air Pollution Control Board to establish regional standards, issue permits, etc., has a section providing that nothing in the act restricts the powers of political subdivisions to provide for these same things. I don't know how that will work out. The Board has not done enough so far to determine how this is going to work. That section could nullify all actions taken by the Board, if political subdivisions have the overriding authority.

Carter: Is there a constitutional question involved?

Kramer: This is one area that could be classified as police and sanitary regulations. The best example where the state has overriding jurisdiction is health. Health districts are state agencies--not municipal or county--they are arms of the state. Although the funds come from municipalities, they operate under state law and, even under a charter, a municipality cannot create something different. The General Assembly can create and change health districts, and I think the General Assembly would have the same power with respect to air pollution, and could override municipalities in this function.

Orfirer: This area is not restricted by home rule provisions, then.

Pokorny: We have a health department and municipalities have their own, with some overlap, so they are working at cross purposes to some extent. The County Health District takes in those jurisdictions that cannot afford to set up their own health districts. Although it is called a county health district, it is in reality a state agency, not established by the county. Some of the health functions are handled separately by the various jurisdictions, but there is some overlap. I think it would be more economical to bring all within the county structure. But the municipalities wish to maintain their own autonomy.

Kramer: This is an example of an area where perhaps we don't have a constitutional problem--it's up to the legislature. The Constitution could, of course, require different ways of handling some problems.

Orfirer: Perhaps we should look not only at what is in the Constitution that needs to be changed, but at what is not there that should be there.

Pokorny: The problem is with home rule--the people think they are the best judge of how something should be done, and when an elected official tries to tell them how he thinks it should be done, they do not always agree. In some areas, things can be done best on the local level, but in other areas perhaps other authority can do the job better.

Carter: In those areas which go beyond political boundaries--air pollution, sewers, etc.--I would want to make sure that the Constitution does not place barriers in front of the people of the state to deal with these problems through their legislature. In the area of health departments, the question may be: who can do it best? But in some other areas, political subdivisions cannot do it effectively at all, even though they might wish to do so--and in zoning, with the ripple effect, what happens in one small area can affect all the surrounding area. It has to become more than a municipal concern. Does the legislature have the power to deal with this problem? Or does it require constitutional attention?

Kramer: We could ask these same questions for each of the powers listed.

Orfirer: What other ways are there of handling these various problems and are these ways permissible under the Constitution? Some functions might be handled on a county level, some on a regional. Could they be done this way or are these solutions stopped by some particular provision of the Constitution? Does the legislature have the power now to provide these solutions or doesn't it?

Pokorny: Everything we have tried to do has been by contractual agreement--I do not know what might be done under the Constitution otherwise.

Kramer: The legislature has gone out of its way to provide that almost anything can be done by agreement. A county can contract with just about any subdivision, can exercise powers jointly with other subdivisions and counties--almost any arrangement you can think of can be achieved under present laws. A Council of Governments, which is a voluntary council of political subdivisions, could, if the statute is read literally, contract with subdivisions to take over almost all their powers--schools, police and fire departments, etc. Counties can contract with municipalities to deal with sewer problems and others. But simple authorization to enter into agreements may not be the solution.

Orfirer: Is the fact that agreements are permitted sufficient? Couldn't some problems be solved only by mandatory legislation?

Pokorny: We are now involved in a sanitary sewer project in the county under orders from the Water Pollution Board and are trying to come up with a reasonable figure based on water consumption in order to amortize the cost of the sewers, but Cleveland controls the water and makes money from the sale of water, and charges different rates to different customers. We are trying to meet standards set down by the state, and need to have a meeting of the minds on how it's to be paid for. The city is reluctant to give up that authority. The suburban municipalities are willing to

enter a regional sewer system, but are reluctant because of the differential in the assessments charged by Cleveland for the water. We're not trying to reach some agreement on these differences in rates to be used to amortize the cost of the sewers. The city wants to be reimbursed for its investment, and that is understandable. I don't know whether we can spell something like this out in the Constitution--making it mandatory that people have to do something like this. This is just one of the problems--and we've been working on it for 18 months now--involving the city, the county, and 60 other municipalities.

Carter: If all but one municipality agreed, could the one municipality thwart the plans of the other 59?

Pokorny: No, the others could proceed under their contractual agreement, but the only club we can wield now is the building ban, imposed on the city of Cleveland and perhaps to be imposed on other municipalities soon.

Carter: Is this ban imposed by the county?

Pokorny: No, by the Water Pollution Control Board--a state authority. It's just a matter of time until it comes to that. We govern by crisis in the large urban areas. Cuyahoga County, and the other counties in Ohio, have been most derelict in facing these ecological problems. This is a hammer the state can use--prohibiting building until the sewer problems are solved by the City and the other municipalities involved in filtering their wastes through the city system. Presently, they've cut off Cleveland but everyone else is proceeding as they did before.

Carter: Isn't there any way to force a municipality to cooperate under a contract? Or could a municipality appropriate property outside its boundaries for utility purposes?

Kramer: There is no legal method to force cooperation. As for appropriation--there we have the Blue Ash case, in which the Supreme Court said that Cincinnati couldn't appropriate property for a utility in another municipality which was already devoted to a municipal public purpose. You could have situations where a municipality, by refusing to enter into an agreement, could preclude others from providing needed services.

Carter: This is not just an academic question, then. Suppose the major polluter in the area is located in Broadview Heights and if there is no power on behalf of the region to exercise some control over air pollution, it would be a serious problem in the whole area. Is the constitutional grant of authority sufficient for the public problems to be solved?

Ostrum: Could the legislature enact laws to permit these problems to be solved?

Schroeder: This is the conflict between home rule powers and the state. In trying to come to grips with problems, we've only given permissive legislation. We need to know whether the state would have the authority to provide solutions to these problems without this constant conflict.

Pokorny: It is difficult to go into a municipality even as a county official and try to sell them on what you think is right when they have such a wide range of alternatives, and city council is so close to the people. I may have experience on a broad geographic base but I cannot superimpose my experience on those officials

who are so much closer to the people in the municipality. That is the problem of this committee--the city councilman is so close to the people and he knows what they think about problems.

Carter: We want to make sure that we do not impose constitutional barriers to the solutions of these kinds of problems. There are always conflicts between the parochial interests of the smaller group and the problems of the larger, or regional, group. We cannot hope to resolve these problems within the framework of the constitution but it seems to me awfully important that the constitution be flexible enough so that the representatives of the people can do this job. I agree the solutions should be on a give and take basis, but the conflict has to be resolved somehow.

Orfirer: We should look again at the criteria. Some things, perhaps, should be mandatory on a regional basis but are there not other matters which need not be accomplished on a regional basis? Some matters Mr. Pokorny suggests--such as sidewalks and rubbish collection, could be handled locally. Where do the problems go beyond the municipal line?

Pokorny: We need more authority in those areas that go beyond municipal boundary lines, but there needs to be some balance between the local community and the wider geographical approach.

Orfirer: We can see this idea in the criteria--that the governmental unit carrying on a function should have a geographic area of jurisdiction adequate for effective performance, etc., and that the performance of functions by a unit of government should remain controllable by and accessible to its residents--that the unit chosen to perform a function should be that one which maximizes opportunities for citizen participation and permits adequate performance.

Orfirer: Perhaps we should look at all these functions and ask: where should they be handled? Then we can get to Mr. Carter's question, does the constitution now prohibit this?

Ostrum: In these criteria for allocation of urban services, I find it very helpful to see the separation between economic and political criteria. Perhaps another word for "political" criteria would be "practical" criteria. They are very realistic.

Kramer: We could take air pollution, for example, and apply the criteria to that area, because there are not a large number of vested interests so far in that field.

Orfirer: Looking at the first criterion, what are the boundaries of air pollution? How wide an area do you need to control it?

Ostrum: It's not only what you can see, but what you can measure, also. The area in which air pollution can be seen is much smaller than the area in which it can be measured scientifically.

Orfirer: Suppose that it goes beyond a county.

Ostrum: Or state.

Orfirer: Then we're beyond the state constitution.

Kramer: Looking at the units of government in Ohio, I think we can see that townships, villages, and most municipalities are too small a unit--because the pollution spills over.

Orfirer: Do we have a unit of government now existing that could handle this problem?

Schroeder: Although not entirely satisfactory, the county would be better than what we have now.

Orfirer: We come back continually, no matter which example we take, to the same issues of home rule.

Carter: What are the limitations of home rule under the present constitution?

Mrs. Orfirer read section 3 of Article XVIII and reviewed briefly the history of chartering municipal corporations prior to 1851; then by general law but the legislature made numerous classifications so it was still almost individually; the Ohio Supreme Court in 1902 held this system unconstitutional; then the legislature enacted municipal code with the same form of government for all cities and the same form for all villages; this was so unsatisfactory for the cities because of great differences in size; 1912, home rule amendment adopted. Is home rule accomplishing the purposes for which it was created?

Schroeder: For the people living within the municipality, it is probably fine--they are happy with it.

Orfirer: At least it accomplished its purpose of avoiding special legislation. But why were the municipalities created in the first place--to provide services. Does home rule help with that? Sometimes it does and sometimes it doesn't.

Schroeder: Some municipalities do a very good job of providing services for their people. If you have the money, you can do the job at the local level with home rule--such as providing good police services. It is often a question of money. That's an important aspect of this problem.

Orfirer: As noted in the criteria, one standard for allocation of urban services is that the unit of government should have financial resources to perform services assigned to it.

Pokorny: That's the crux of the whole thing. Over the years, we've taken over certain facilities that were in central cities here and each one is a losing proposition--we have to pay from general fund moneys. We've been assuming all the white elephants. Economically, they don't pay their way as far as the county is concerned. Solid waste is an example--there is no more landfill area in this county. We have to resolve the overall situation, but nothing is really done on a regional or countywide basis. The county only gets those facilities and functions that are losing propositions for the municipalities. If the county is to operate the airports, for example, that are not paying their way, we would like to be able to have Cleveland-Hopkins airport, also, which is paying its way, and perhaps we would have some money to subsidize the other airports. I think we should make it easier to adopt a countywide or regional approach to problems and find a way to make it easier for the people to adopt this approach.

Orfirer: Another thing to look at is whether the municipality includes most of the urban area within the county.

Ostrum: Referring to Dr. Schroeder's example of the police services, I'd like to observe that all the money in the world in Cleveland Heights or Shaker Heights wouldn't help solve the pollution problem because it cannot be confined to the boundaries of the city. So having enough money is not the only answer.

Orfirer: There's another point in connection with the police situation--there's a much different set of police problems in the Cleveland area than in Cleveland Heights.

Ostrum: There are many social problems--lack of jobs, opportunities--that cause people to commit certain crimes and these problems exist to a greater degree in Cleveland than in Cleveland Heights or Shaker Heights.

Pokorny: The county sheriff tried to create a communication network in the county, and bring together all the municipalities. The police chiefs of the municipalities were reluctant to deal with the chief law enforcement officer of the county. Subsequently, the police chiefs association of the county got together and are setting up a network now--there are personalities involved, and jurisdictional disputes. The original concept was not adopted because the county sheriff wanted it, but now it is moving forward through the police chiefs association, which will have control.

Carter: Does the last clause of section 3, the conflict clause, apply to the whole section or only to the portion relating to police, sanitary and similar regulations?

Orfirer: Only to the police, sanitary and similar regulations. The powers of local self-government are derived directly from the Constitution and the state legislature has no control. This is the stumbling block.

Kramer: This question was worked out on a case by case basis over many years and it was not until 1958 in the case of Canada v. Phillips that the Ohio Supreme Court finally clarified this matter and held that the last clause applies only to police, sanitary and other similar regulations.

Orfirer: Let us go back to the question of whether the municipality contains nearly all the urban area--if it does, then the constitution is not so much of a stumbling block to the performance of functions that extend over the whole area, but in a situation like Cuyahoga County, where there are many individual municipalities within the urban area, it does create problems. Perhaps we should not only question the concept of home rule, but also look at the area to which it is applied--who should have the power? What would happen if it were given to a wider area, not confined to municipalities? Is it more workable and feasible and more desirable to have?

Carter: We have focussed on home rule at the municipal level, but clearly will have to consider home rule at other governmental levels--, such as the county. The committee should also take a look at the basic structure of local government. One thing is the role of the township, which has little relevancy in many areas of the state today and may be an impediment to the performance of some services and functions. There was also discussion at the seminar on the role of the county and providing home rule powers for counties, changing the powers of counties for the larger counties, and classification of counties on a population basis.

Pokorny: It is most important that we examine the role of the county and county powers--again using this county as an example, no other county in the state resembles Cuyahoga. We have more people on welfare in this county than comprise the entire

population of about 65 other counties in the state. Our budget equals that of 17 other states. We have the sixth largest welfare department in the United States, and we're the sixth largest county in the United States. We have problems that some rural legislators--and I say this with respect because I served in the legislature with them for 10 years--cannot comprehend. Uniformity, as applied to county government, just doesn't make sense--even applying the same structure and powers to Hamilton and Franklin as to Cuyahoga doesn't make sense, because their situations are different. Many legislators only worry about their own locations and do not look at the problems of other areas of the state. A 4% increase in welfare may be insignificant to many legislators, but will create a crisis in our county. So give us a little more to work with, so that we can solve our problems.

Carter: This is a constitutional question.

Pokorny: That is correct. County government is the government of the future, and we must do what is necessary. It's got to come, whether municipal governments accept it or not. Realizing the urgency of the problems in the larger urban areas of the state, it's got to come.

Carter: Would you include in your thinking the structure of county government--such as providing for a county executive?

Pokorny: I have on two separate occasions voted for putting on the ballot an alternate form of county government which provided for an executive, and for three commissioners running at large and four from the congressional districts within the county. I believe it has to be done this way. But I don't think there's anything in form if there's nothing in the substance--that won't solve the county's problems unless we have more leeway--more flexibility within the framework of the constitution and the statutory powers.

Orfirer: What you are saying is that counties need more powers and it's going to have to be on some sort of a classified basis, so won't apply to all counties without all the problems of the big counties.

For future discussion: Concept of home rule and the level of government to which it is applied?

Which powers should be left to home rule?

How do we deal with the large number of independent municipalities--the fact that incorporation is easy and annexation difficult?

Kramer: The General Assembly provides the methods of incorporation and annexation, and can control them.

Orfirer: There is disagreement about whether the General Assembly presently has the power to mandate dissolving municipal corporations, or combining and merging them with each other, and if the constitution is not clear perhaps it should be made clear on this point.

Mr. Carter suggested a written outline of the various issues involved so that the committee can tackle them one by one on a systematic basis and review what needs changing and what needs to be put in the constitution.

Mrs. Orfirer stated that the discussion of the effects of home rule and questions just raised would be continued at the next meeting, and the committee would discuss when persons who want to be heard will be called to testify.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Local Government Committee

Summary of December 22, 1971 meeting

The meeting was called to order at 1:40 p.m. at the meeting room of the Board of County Commissioners of Cuyahoga County, County Administration Building, Cleveland. Present were the chairman, Mrs. Orfirer, and committee members Messrs. Russo, Schroeder, Heminger, Ostrum and Pokorny and consultant Mr. Kramer. Mr. Carter, the chairman of the full commission, arrived during the course of the meeting. Present also were Mrs. Marilyn Zack, councilman-elect of the City of Rocky River and former State board member of the League of Women Voters, and Mr. Edward M. Loewe, government affairs specialist of the Ohio Chamber of Commerce, and Mr. Joe Kelly of the Department of Development.

The first order of business was the fixing of the time and place of the next meeting of the committee, which was agreed upon as 9:30 a.m. on January 12, 1972 at the faculty lounge of Gund Hall of the College of Law of Case Western Reserve University, 11075 East Boulevard, Cleveland, Ohio. Professor Schroeder advised that parking would be available at the University Circle garage next to the Commodore Hotel on Ford Avenue between Euclid Avenue and Belleflower Road. (Subsequent to this meeting, the time of the next meeting was changed to 1:30 p.m. on January 10.)

Mrs. Orfirer proposed that the meeting be conducted on an informal discussion basis, using the discussion outline which had previously been supplied to the members of the committee. The topic first to be considered as a continuation from the preceding meeting, was municipal home rule. It was generally agreed, as stated by Mrs. Orfirer in response to the first question concerning the purposes which the framers of the municipal home rule amendment had in mind, that Article XVIII, which was proposed by the 1912 Constitutional Convention and approved by the voters of the state in that year, was intended to alter in a radical way the allocation of powers concerning local government by a direct grant of certain of such powers to municipalities. This was to be in distinction to the prior system under which all powers of municipalities were received by grant from the general assembly. The intention was to permit municipalities to act on their own, and without the necessity of looking to legislation of the General Assembly, in providing for matters of local self-government, with certain exceptions in the area of local police, sanitary and other similar regulations. Municipalities were also to be given express authority to own and operate public utilities and to provide for their own form of government by means of adoption of a charter, as an alternative to the general plan or organization or one of the optional plans which the General Assembly could provide.

Mr. Ostrum suggested that the purpose of the home rule amendment seems to have been to liberate municipalities from the legislature. Professor Schroeder indicated that in his view, under present circumstances, the problem is not so much to liberate municipalities from the legislature as it is to provide for greater cooperation between the state and the municipalities in the relationship between themselves and with the federal government. Mr. Russo said that problems have arisen because of confusion in the roles of the state and local governments resulting from the federal government's vacillation between funding of programs through the states and funding directly to local communities. Whether any change in the state constitution might alleviate this problem should at least be explored.

Mr. Russo also suggested that the best approach to solving the problems of the fragmentation of local government and any resulting difficulties in providing area-wide services, such as sewers, water and mass transportation, might be through the

type of constitutional amendment proposed several years ago for the creation of urban services districts. This type of district might facilitate cooperation, while still permitting existing local governments to retain their autonomy. It would also, according to Mr. Russo, overcome problems of area-wide cooperation which now result from demands such as those being made by the City of Cleveland for compensation for capital outlays in such things as sewer and water treatment systems and mass transportation facilities as part of the price of cooperation with the suburbs in regional service arrangements. Mr. Russo said that such demands are unreasonable, since a large percentage of the payment for such facilities was made by persons who are now dead or who have since moved to the suburbs. He also stated that, whether or not it is politically feasible, it may be that the only means of securing the necessary cooperation or unity of action needed to solve regional problems would be a constitutional provision mandating the surrender of municipal powers over at least some functions. Mr. Pokorny stated that his experience has been that the cities thus far have been willing to turn over to the county only their unprofitable "white elephant" enterprises, while being reluctant or opposed to doing the same with profitable or popular facilities.

Mr. Ostrum, with respect to the discussion outline questions concerning whether court interpretations of the home rule amendments are frustrating the purposes thereof, questioned whether the framers of the amendments intended that the courts should have such extensive power in the allocation of powers and duties between the state and the municipalities. Mr. Kramer responded that a reading of the portion of the debates of the 1912 Constitutional Convention dealing with the home rule amendments indicates an awareness on the part of the members who discussed the matter that the use of the term "local self-government" would require the courts to make final determinations as to the allocation of powers in particular cases. The framers seemed to feel that unless a listing of powers and their allocation was made in the constitution itself, it would be necessary for the courts to make the final determinations and, given the experience of the relationship between the legislature and the municipalities during the nineteenth century and prior to the convention, that this would be preferable to permitting the General Assembly to have the final word on the matter. It seems unlikely that the members of the local government committee of the 1912 Convention or the other members of the convention forsaw the extent and complexity of the problems that would have to be resolved by the courts in this area, but it seems clear that it was recognized that this function should belong to the courts. Despite complaints by the courts and criticism of the system by political scientists and others, therefore, the method of allocating powers and duties seems to be operating as intended.

From the discussion concerning the question whether a practicable alternative to the present system would be a listing in the constitution of the various powers concerning local government and their allocation to various levels of government, the consensus seemed to be that this would be impossible or impractical or both. Such a provision, even if suitable at the time adopted, might be outmoded in a relatively short time, but its presence in the constitution might cause it to be difficult to change as needed.

Mr. Ostrum suggested that the so-called "Fordham principle" as embodied in the Model State Constitution might be another solution to the problem of allocation of powers. Mr. Kramer pointed out that such a provision really would have the effect of making the General Assembly in most cases the final arbiter of the division of powers between the legislature and the municipalities and, in response to the suggestion that this might be leading again to the kind of situation which existed

prior to 1912, stated that there would be a fundamental difference from that system. Under the pre-1912 system municipalities had to look to enactments of the General Assembly for each of their powers, while under a provision such as that in the Model State Constitution based on the "Fordham principle," a municipality would presumptively be able to exercise any power which was not specifically denied to it. While such a provision would not eliminate all uncertainty and potential for litigation, these probably would be lessened substantially, but the General Assembly would clearly be given supremacy and the direct grant of all powers of local self-government to municipalities would no longer exist, a situation upon which many supporters of municipal home rule would not look favorably.

Professor Schroeder stated that some solution, possibly the approach just discussed, is necessary to solve the problems of lack of cooperation among municipalities in matters of area-wide importance and gave the problems of Cuyahoga County in securing the necessary agreements for sewage treatment facilities and rates as an example. He also indicated that it may be necessary to provide by constitutional amendment for the mandatory consolidation of some municipalities or some of their powers in order to meet regional needs. Mr. Kramer replied that many municipal attorneys, such as Sam Sonenfield and John Gotherman of the Ohio Municipal League, probably would dispute the contention that the present system is incapable of resolving the problems which arise. Mr. Sonenfield's contention is that home rule is not the problem so much as the failure of municipalities boldly to assert and act upon the power which they possess under the constitution. Instead, he asserts, they have been "forging their own chains" by going to the General Assembly with requests for grants of power.

Mr. Kramer also stated, referring again to the point raised earlier by Mr. Russo concerning the channelling of federal funds, that the matter is further confused by the fact that powers can be rendered meaningless if the financial resources to carry them out are not present, and the ability to finance certain functions can sometimes effectively work an alteration in the allocation of powers. As an example he cited the matter of the takeover by the state from the municipalities of the entire system of police and fire pensions. In that case the larger municipalities, which had deficits in their pension funds, were happy to be relieved of the burden and failed to oppose the legislation vigorously, as they might have done had a popular or profitable operation been involved. The supreme court did resolve the litigation which arose by upholding the action of the General Assembly, but no opposition came from the large cities.

Mr. Russo observed that some opposition to the measure came from some smaller cities which had solvent pension funds, but agreed that the question of powers in this instance was subordinated to the question of financial resources. Mr. Pokorny said that he was a member of the General Assembly at the time of the passage of the pension fund bill and that he regards it as another example of the willingness of the cities to rid themselves of "white elephants."

Mr. Kramer cited as a further example, from the viewpoint of supporters of municipal home rule, of progress in defining the relationship between the state and the municipalities under the present constitutional provisions the case of Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113 (1965), discussed at page 8 of the staff paper entitled "The Present Status of Municipal Home Rule in Ohio." In that case the supreme court upheld an ordinance which prohibited door-

to-door solicitation even though a statute which provided in some detail for municipal licensing and regulation of such activities probably would not permit under its terms a prohibition of such activity. The court held that the power of municipalities (including noncharter municipalities such as West Jefferson) to enact police regulations is derived directly from the constitution as a power of local self-government and is not dependent upon legislative grants of power. As a result, the General Assembly does not have the power, according to the court, to limit directly the exercise of the power of municipalities to enact police, sanitary and other similar regulations. The only instance in which the "conflict" provision found in the last clause of Article XVIII, Section 3 operates to limit the power of municipalities is when the General Assembly enacts legislation covering the same subject.

Following a short discussion concerning the provision of Article XVIII, Section 1 dividing all municipalities into two classifications, Mr. Russo suggested that the committee take up consideration of the possibility of placing on the ballot at the May or November 1972 election a proposal dealing with changes in county government. He expressed concern over the fact that the procedure for adoption of a county charter requires a significant period of time, so that if a constitutional change is required to permit adoption of such a charter, it should be done as soon as possible. Of particular concern to Mr. Russo is the provision in Article X, Section 3 requiring multiple majorities for the adoption of a county charter conferring certain types of powers on a county.

Mrs. Orfirer inquired of Mr. Carter whether sufficient time would be available for the Commission to give its full attention to and provide public hearings on any proposed amendments to be submitted in May or November of 1972. Mr. Carter replied that the full commission had at least tentatively decided upon not having any amendments suggested by it appear on the ballot in 1972 because of the shortness of time before the May election and the possibility of confusion of any such amendments with the question of calling a constitutional convention which is to appear on the November 1972 ballot. He also said that he did not think it would be possible for the Commission to act upon any amendments for the May election according to all of the procedures which it intends to follow with respect to all proposed amendments. Mrs. Orfirer stated that failure of any amendments proposed by the Commission to appear on the ballot by the end of 1972 might be construed by some persons as evidence of inaction on the part of the Commission. Mr. Ostrum suggested that Mr. Russo could, if he chooses, submit his own bill proposing an amendment and Mr. Russo agreed that this might be possible. Mr. Carter pointed out that other amendments might be on the ballot anyway and that the Commission had not taken an unalterable stand against making any recommendations for amendments to be submitted during 1972, and that the procedural requirements for hearings and other formalities are self-imposed and thus could be relaxed if the Commission so chooses.

Mrs. Orfirer asked the committee members if they wished to proceed at the next meeting with consideration of proposals for changes in county government and it was so agreed. The committee then proceeded to discuss some of the questions under Division F, G and H of the discussion outline pertaining to counties. Article II, Section 30 was discussed as its requirement of a popular vote on changes of county boundaries could limit or affect the ability of the General Assembly or other bodies to provide for governmental units which are of appropriate size or location to deal with problems which are widespread in their effects. It was pointed out that some counties have populations of as few as 10,000 people and that consideration might be given as to whether the General Assembly should be

authorized to provide for consolidation of counties or their territory.

Mr. Kramer was asked about the reason for the inability of the General Assembly to classify counties for various purposes and he referred to Article II, Section 26 which requires all laws of a general nature to have a uniform effect throughout the state. It was under this provision that the supreme court in 1902 in a series of cases struck down the scheme of classification by which all of the large cities in the state had each been placed in its own separate classification. The same rule has also been applied to counties, as in a case which arose in Cuyahoga County concerning a statute which permitted a certain number of signatures--different from that otherwise required--on petitions for the office of judge of the probate court in counties having a population of more than one million. The supreme court in that case held the statute invalid since it was not of uniform effect.

Mr. Pokorny pointed out that the statute governing the compensation of county commissioners provides for varying amounts of compensation depending upon the population of the county. Prof. Schroeder and Mr. Kramer said that this and the statutes providing similarly for the compensation of other county officers seem to be exceptions to the general rule, and exceptions which apparently have not been challenged in the courts. Mr. Kramer said that any attempt at classifying counties for the purpose of granting powers to some counties which differed from those granted to other counties, even if more than one or two counties were to be included in a classification, might well be challenged and would be of doubtful validity under Article II, Section 26.

Mrs. Orfirer and Mr. Kramer suggested that prior to the next meeting of the committee Mr. Kramer could prepare and provide to the members drafts of a number of possible constitutional amendments dealing with classification of counties, county charters, and forms of county government. The committee members agreed that this would facilitate their discussions and requested that materials of this type be prepared. Among the purposes for which classification might be permitted were discussed governmental structure, powers and grants of general legislative authority. If criteria or factors upon which such classifications might be based are to be provided for, the members listed as possible factors population, area, location, taxable value and the number of governmental units located in the county.

In connection with question H of the discussion outline, Mrs. Orfirer suggested that the words "without charters" be added at the end of the question, since it seems clear that a county charter may confer legislative power upon one or more county commissions, boards or agencies created by the charter. Mr. Kramer stated that this question is important with respect to proposals such as pending H. B. 435 which would give to the board of county commissioners of each county power to legislate on any matter as to which the county is not by the constitution or laws denied such power. It has been suggested that the second part of Article II, Section 26, along with the general principle limiting the power of the General Assembly to delegate to others the legislative power conferred upon it by the constitution, might render any such legislation invalid.

At the suggestion of the chairman, the meeting was adjourned at approximately 4:00 p.m.

Ohio Constitutional Revision Commission
Local Government Committee

Summary of Committee Meeting

January 10, 1972

Present at the meeting held in Cleveland on January 10 were Chairman Orfirer, Mr. Schroeder, Mr. Heminger, Mr. Ostrum and consultant Mr. Kramer. Mr. Russo was present for part of the meeting.

Minutes of the previous meeting were distributed, and a request made that members report any errors, or additions. Mrs. Orfirer read a letter from Miss Betsy Tarlin of the Department of Urban Affairs stating that the Governor was considering the establishment of a Local Government Task Force to consider the problems of local government and asking for suggestions for issues to be considered by such a task force as well as names of persons who might serve on it. The Task Force members could be suggested from five areas: Local Government officials, state officials, Local Government Organizations, the University Community and Citizen Organizations.

The members made various suggestions for persons and topics and the staff was asked to forward them to the Department.

As requested at the last meeting by one of the committee members, the committee considered some suggestions for amendments to the Constitution in the general area of county government. The overall goal of the committee, to consider all constitutional provisions relating to local government, has not changed, and the committee has made no commitment to proceed with amendments to the county government portions of the constitution, but did agree to consider several possibilities, for which drafts have been prepared by Mr. Kramer.

The first subject considered was classification of counties, and several methods of amending section 1 of Article X in order to classify or permit the classification of counties were placed before the committee. The first version would classify counties according to population but would permit the General Assembly to make use of the classifications in providing county organization and government as it saw fit. It would, however, mandate that the General Assembly provide for county organization and government according to classes. Mr. Kramer suggested that there could be as few as two or as many as 38 classes, but that keeping the number of classes low is desirable. He stated that the first question to be decided is, why should we have classes of counties? What purpose would classification serve? Mrs. Orfirer stated that the purpose would be to give certain powers to some counties but not to others--that a large, industrial county could be authorized to perform certain services or have powers that would not be given to smaller counties. Mr. Kramer noted that classifying the counties in the Constitution would permit mandating that there would be a certain number of classes, and to determine generally which counties would fall within the classes that were established. By placing the classes in the Constitution, the General Assembly would be more likely to provide the necessary governmental machinery and powers than if the Constitution merely authorized the creation of classes by the legislature, since the permission to provide alternative forms existed in the Constitution about 27 years before the General Assembly enacted enabling legislation. The disadvantage to placing the classes in the Constitution is the rigidity of the plan--when these classes outlive their usefulness, it will be difficult to change them.

Mr. Ostrum noted that the reason for considering the suggestion of classification

of counties is that every county does not face the same problems and classification would enable the legislature to provide for different counties in different ways. Mr. Kramer stated that different forms of government could be effected by adoption of a charter or alternative form, but both require the vote of the people; and under an alternative form the people cannot control the form of government except within the limits provided by the General Assembly. No county has yet adopted either a charter or an alternative form, although both have been tried several times. Mr. Kramer stated that the alternative form of county government provisions in the law most closely resemble the option forms of municipal government, which are provided for in the statutes and which constitute a "ready-made" city charter which can be adopted by the people of a city or village. This differs from a charter in that a charter is a distinctive form of government drawn for the particular city or village by a charter commission. The same general concept exists for county government--provision in the Constitution for adoption of a county charter by the people drawn up by a charter commission if the people of the county vote for a charter commission, and alternative forms of county government which may be adopted by the people but which are established by the statutes. Both provision for alternative forms of county government and the charter provisions were added to the Constitution at the same time--in 1934. The advantage to providing for classification in the Constitution is that the General Assembly might then do something about the particular problems of particular counties if they did not have to be concerned with the reaction of county officials in all 88 counties, some of which may not have the same problems. An alternative form requires only a simple majority for adoption, although a charter requires majorities in particular parts of the county, but neither has been adopted so far.

Mrs. Orfirer noted that there is a disadvantage to the first version of the classification proposal--that the General Assembly would not necessarily act to provide governments for different classes. However, Mr. Kramer stated that, since the classification proposal would not require the vote of the people in order that a particular form of government would be applicable--application of the forms and powers would be automatic if the county fell within the particular classification--it would have an advantage over the charter and alternative forms provisions. Mr. Kramer used as an example the power to hire a planning consultant, which could be given to certain classes of counties but not to all--because some counties might not need this power and perhaps would not want to have it. Mr. Kramer noted that a danger of classification, if done so finely that individual counties are placed in separate classes, is the additional burden on the General Assembly to legislate for only one county--as happened previously with respect to cities--and, as a result, increased "logrolling" and perhaps, finally, the failure of the General Assembly to act either because of lack of interest in one county's problems or lack of time. If the classifications were few in number and fixed in the Constitution, the danger of too many classifications would be eliminated. The constitution makers are then substituting their judgment for that of the General Assembly.

The committee then looked at version B of the classification proposals, which would simply permit the General Assembly to establish classifications and provide for the government and organization of the classes. Mr. Heminger asked whether this provision could not be made mandatory--which would require the General Assembly to establish classes but would not, as is done in Version A, place the class limits in the Constitution. He also stated that making the provision mandatory instead of permissive might not have much practical effect, because the legislature could still ignore the provision or could establish meaningless classifications by providing the same laws for the different classes.

Version C would enable the General Assembly to establish classes but would limit the number of classes.

Mr. Kramer noted that all versions so far could be circumvented by the General Assembly by the device of providing no meaningful differences among the classes, regardless of who establishes them. He also pointed out that if the Constitution is made so specific in this regard--by attempting to write into the Constitution specific guidelines for different governmental forms or powers to be given to different classes--this is poor constitution making because it then necessitates frequent amendment as conditions change, and amending the Constitution is often more difficult than securing changes in laws.

Mr. Ostrum asked what the difference would be between the alternative form provision and the classification proposal, and Mrs. Orfirer responded that the alternative form is applicable in a county only when voted by the people, whereas the classification provision would make the provisions automatically applicable to all counties within the class, without a vote of the people.

The committee discussed whether there was any way that the legislature could be forced into taking action to provide for classification or for the government of counties by classes. Mrs. Orfirer expressed the opinion that some initiative might come from the people, but Mr. Kramer noted that the people of the various counties have consistently voted against efforts to change their own county government. Mrs. Orfirer asked whether thought could be given to having a mandated opportunity to review county government at regular intervals, either by the legislature or by the people, such as is constitutionally provided for a review of the constitution itself every 20 years.

Version D of the classification proposals permits the General Assembly to establish classes but specifies the criteria to be considered: population, area, location, valuation of property, and number of governmental units located in the county. These factors, or others if determined relevant, would provide the General Assembly with guidelines for forming a reasonable basis for classification. Mr. Schroeder commented that he considered the listing of factors other than population very important--that numbers of people is not the only, and perhaps not the most important, basis for distinguishing one county from another. Mr. Kramer noted that the combination of location and property valuation would be a good way of distinguishing the counties in Appalachia from other groups of counties, and that a classification on the basis of population alone might not result in the same grouping. Mr. Kramer noted that "number of governmental units" might be used to provide special provisions for particular counties rather than to lump counties together, and that the legislature would have to define "governmental units." Whether it would be a good idea to include this standard should be carefully considered.

In response to a question from Mr. Ostrum, Mr. Kramer noted that he thought "organization and government" included both structure and powers, since this term is presently used in the first sentence of the same section.

Version E was examined, with the comment by Mrs. Orfirer that it was similar to Version D except that the number of classes would be limited in the Constitution.

Mrs. Orfirer asked how the power to classify was abused when the General Assembly had that power. Mr. Kramer responded that the abuses were (1) needs of

particular cities were not met because it was not possible to get enough votes in the legislature to pass the necessary legislation, or the legislature did not have sufficient time to consider the legislation; (2) extensive logrolling in the legislature resulted in poor legislation--delegations traded votes in order to obtain something they wanted, and often the legislature passed bills without considering the merits of the legislation; (3) the great amount of legislative time that is consumed with local legislation, especially when there are many classes so that few cities (or counties) fall into one class.

Mr. Kramer noted that the number of cities has greatly increased and the burden on the legislature would be much greater today if cities or even counties had to come to the General Assembly almost individually to obtain legislation to correct local problems. There are two inconsistent attitudes--one, that everyone will agree to legislation if it deals only with one county or one city; the other side of the argument is, why should the legislature bother if the legislation is intended to deal with only one county or city?

Mr. Kramer pointed out that several of the suggested versions of section 1 of Article X would limit the number of classes and, if the Constitution limited the number of classes to a few, the situation could not occur which resulted previously in an excessive number of classifications of cities. On the other hand, if classifications are established or are required by the Constitution to be established which result in grouping together counties which are near in size but which may have vastly different problems, the usefulness of the classification system may be impaired. He used as an example the grouping of the three largest counties--Cuyahoga, Franklin, and Hamilton--in one class, which might be satisfactory for some purposes but might not work well for others. He noted that classification could exist together with county charter provisions, and that classification might even encourage the adoption of a charter because the people of the county might not like the scheme of government or powers provided by the law for the particular class in which the county falls. Or they might like the provisions for the classification, and decide they could do even better under a charter. It has often happened that when a reorganized government is imposed upon an area, the people decide that they like it even though they would not have voted for it in the first place. Toronto is an example of this phenomenon--surveys show that the people would not have voted in favor of the metropolitan government had they been given the opportunity originally, but it appears, now that the people have been the benefits, they would approve it.

Mr. Kramer noted that the purpose of presenting and discussing these drafts of proposals for county classification is to make more meaningful other proposals relating to specific problems which are caused by the present constitutional provisions.

Mr. Ostrum noted the possibility that hypothetical classifications could be established by the General Assembly--classes into which no county fit.

The committee then discussed several proposals for amending section 3 of Article X, relating to county charters. The first proposal eliminates all the special majorities required for the adoption of a county charter which contains certain provisions, and would permit any charter or amendment to become effective if approved by a simple majority of those voting on the charter or amendment. The first effort at a charter in Cuyahoga County (1935) would have passed had the only requirement been a simple countywide majority.

The Supreme Court, however, held that the proposed charter attempted to vest municipal powers in the county, and therefore the charter needed the four majorities specified, and had not obtained approval by all the majorities No other county charter attempts have secured even a simple countywide majority, whether or not they attempted to vest municipal powers in the county. It is, of course, difficult to say what the effect would be if the Constitution authorized a "strong" county charter (the assumption of some or all municipal and township functions by the county) by a simple countywide majority. The idea of metropolitan government arouses opposition from people who oppose a county charter without even knowing what its provisions are.

Mrs. Orfirer noted that making the change suggested in the procedure for adoption of a county charter retains more power for the people in determining the form of government than the proposals to permit the legislature to classify or to mandate classification.

Mr. Kramer commented that, before going too far with either the classification proposal or the proposal to amend the section dealing with the adoption of county charters, some thought should be given to whether the county is the appropriate unit to work with. Do some problems cross county lines to such an extent that you wouldn't be solving enough of the problems by adopting a county charter? Mr. Heminger pointed out situations where communities straddle the county line and it would be difficult to isolate some problems as being appropriate to only one county. If a city lies in more than one county, a county charter in each of the counties would pose many problems for that city. Mr. Schroeder stated that he felt the concepts of regional government should be included in the Constitution so that there would be an opportunity to solve such problems on a regional or multi-county basis. Mr. Kramer noted that the only present constitutional provision which is relevant is section 30 of Article II which prohibits any change in county lines without a vote of the people affected.

Ohio Constitutional Revision Commission
Local Government Committee
February 14, 1972

Summary of Meeting

Present at the meeting of the Local Government Committee on February 14, at Theresa's Restaurant in Cleveland, were Chairman Orfirer, Mrs. Hessler, and Messrs. Fry, Heminger, Ostrum, Russo, and Schroeder. The committee began with a discussion of various functions and services performed by various local government units, and how the best unit of government could be chosen for a particular function. Mr. Russo noted that if Cleveland could obtain $200,000,000 for its water and sewer system, the city would be able to take advantage of some pending federal matching fund programs--for example, mounted police program, or urban renewal. How could we borrow money on this system and provide these services?

Mr. Fry: If we go on a regional basis for water control and water supply, establish the pattern of using user fees we could use the full faith and credit of the state to support bonds.

Mr. Kramer: Section 2i of Art. VIII permits this type of financing for several things--parks, pledging receipts of statewide park system for a facility, and it could be done for regional water and sewer if we had a series of districts and could pledge receipts from all, although you know that you will not need all that to pay for a particular facility.

Mr. Russo stated that revenue bonds are based on projected revenues, and experience is necessary to project revenues. A facility such as Cleveland's waterworks is valuable to the city because it produces revenue, and it should be possible to sell bonds on the basis of the revenues, not the value of the facility.

Mrs. Orfirer: Is your point that municipalities would not be willing to give up this function because it would result in loss of revenue?

Mr. Russo: Yes. If cities could obtain more in revenue, these functions could be taken over in the regional service concept without a vote of the people.

Mrs. Hessler noted that Cincinnati had just had an AG opinion that we could use payroll taxes to float bonds to borrow money in order to be able to pay the police and firemen pension fund payment.

Mr. Russo stated that people are reluctant to vote for money for capital improvements for services of this type, such as water and sewer. Most people don't care who gives them the service as long as they get the proper service, and they don't know how to get it. An example: police service. People don't want to know about the complicated systems, or Supreme Court decisions, or anything like that--only how they can get police service so that they feel safe going shopping or going to church. Perhaps we have to mandate a change in government, since people won't vote for it.

Mrs Orfirer stated that services directly affect the people. Some services are not accomplished properly on a municipal level. We need a new concept that does not strike people as being a new level of government and they want to know what it will

cost. People don't know, for example, what county government is or how it works. So perhaps a new concept--a regional service concept.

Mr. Fry asked whether these decisions should be taken away from the local voters.

Mrs. Hessler noted that some services have an effect beyond the established boundaries.

Mr. Fry: Cleveland might have its municipal water system made available to other communities--in Cuyahoga and maybe other adjoining counties. Who will make this decision?

Mr. Ostrum noted that the service area concept, to be established without a vote of even a majority in the entire area, was a new idea not previously discussed by the committee, although to solve some of these problems, we do need to go beyond the municipal level. Could the legislature mandate changes in services without even a simple majority?

Mrs. Orfirer: In the Constitution we might provide for the establishment of service areas--then we proceed from there to who does the establishing.

Mr. Ostrum: My thought would be that a simple majority of the people in the service area should be allowed to establish it.

It was noted that defining the area is the difficult part, and the legislature might have to make that decision.

Mr. Russo stated that he believed that the service areas should be mandated, not left optional for communities or voted upon.

Mr. Ostrum disagreed, stating that multiple majorities need not be required but that whatever are is defined for whatever service, the people in that area should be able to vote.

Mr. Kramer: Keep in mind that the present multiple majority requirement goes only to the adoption of a county charter--to give the county municipal powers or allow it to be created as a municipal corporation. If that happened, all the problems would be solved because you would have a legislative body able to make decisions for the whole county.

Mr. Fry stated that if it is a matter transcending local considerations, a body such as the water pollution control board or the air pollution control board could be authorized by the legislature. A plan could be drawn for the state such as water conservation areas. Members of the legislature respect the opinions of the people who have studied this matter. Other matters he still feels should be left to the people to decide.

Mr. Heminger noted that popular vote is a good idea, but you run into logjams on things, and can't get some things, such as air and water pollution, done that way. So you go back to the legislature, which is elected by the people, and let the legislature decide some issues.

Mr. Schroeder suggested that Ohio needs to move from territorial government to functional government--functions are defined by the needs of the people. What cannot the legislature draw functional lines just as the legislature originally drew territorial lines--the township lines, going back to the Northwest Ordinance and the original

territorial legislature. If the legislature determines the lines to meet the sewer function, for example, the people to be served by this function should have the right to vote, but they'll be voting as constituents of that function and not constituents of a territory--not as residents of a territorial line, but as residents of a functional line. Then you could have the sewer district power in the people as a single vote, which is an intelligent way to have a sewer district in the greater Cleveland area. Another possibility is represented by Metropolitan Toronto, which was created without a vote of the people--sometimes you have to foist such things on the people, because they would never vote for it although it is for their own best interests in the end. But we should think that through before going too far. But we should at least go as far as the functional approach--create the functional area, and then everyone in that area votes and if a majority of the total universe in that area votes for it, then everyone is in it--not each community voting to go in or stay out.

Mr. Fry: Suppose the people vote and say no, then what do we do?

Mr. Russo noted that so far, in the alternative forms of county government, which only need a simple majority, we haven't had any success.

Mrs. Orfirer commented that the alternative forms didn't mean anything to the people personally because they did not deal with services--those votes were voting only on something with form, not substance.

Mr. Russo: Even though you call it functional, you will still have the same problem--the people within the area who have their own sewer system which is already paid for won't vote for the service district. They will vote against the regional sewer concept because it's going to cost them money and they won't have as much control over it.

Mrs. Hessler agreed that bond issues often failed because people who already had a particular service voted against the issue. When the state came in and said you can't build another thing without expanded sewer services, the city and county made an agreement which didn't go to a vote, and nobody seems to care.

Mr. Fry noted that the legislature establishes guidelines for the air pollution control board and similar agencies. It was agreed that financing services is the most difficult problem. If the state pays for them, the state will be repaid through user fees.

Mr. Russo commented that Cuyahoga County could establish a transit authority, but it's not operating here because you can't get a levy passed. Laws already exist for county transit authorities, regional transit authorities, regional sewer and water districts--it's a matter of money.

Mr. Kramer: We're talking about functions, but are we talking about a different unit of government for each function?

Mrs. Orfirer: Perhaps we should have service areas for a number of functions. The legislature could create them as arms of the state for performing certain functions. Should the Constitution provide for the establishment of such units and what should they do?

Mr. Russo suggested providing in the Constitution only that the GA may establish service areas. If you limit the powers in the Constitution, then you're always in the courts--whereas the legislature can meet the demands of the times without changing the Constitution.

Mr. Kramer: In Maryland, intergovernmental units can be established either by the legislature or by the counties or by petititon of the people in the area, and these would cut across subdivision lines and would be a general unit of government with an elected legislative body. They would have whatever powers are conferred on them by the state, by the counties, by the people who establish it--all powers except taxing. It's an agency on which powers can be conferred and money given to run things--they can collect taxes but they cannot levy taxes.

The committee then returned to the discussion of classification of counties. It was agreed that classification is needed because urban counties need greater powers , or different ones, than smaller counties, and the legislature will find it easier to pass such laws apply only to counties that need them. New suggestions were discussed by the committee. Draft B1 requires the GA to establish classification, and provides a deadline.

Mrs. Hessler asked what happens if the legislature doesn't meet the deadline?

Mrs. Kramer: There is the possibility of mandamus action, but the theory is that it would be difficult for the GA to ignore such a provision if you put a requirement like that in the Constitution with a deadline.

Mr. Fry noted that it is difficult to get the GA to do something that hey don't want to do.

Mrs. Orfirer: This proposal grew out of our discussion last time that alternative forms were made permissive and took 20 or 25 years for the legislature to act. A deadline would provide psychological enforcement.

Draft B2 provides that each classification must include at least one county (to avoid meaningless classification). Draft B3 establishes a minimum number of classifications. Draft C1 establishes minimum number and criteria and comes from the Model State Constitution.Classification would be on the basis of population or any other reasonable basis related to the purpose of the classification. This is an attempt to limit the discretion of the legislature by providing that classification has to be related to the purpose.

Mr. Kramer noted that it may take a great deal of legislatuive ingenuity or draftsmanship to find some reasonable basis to divide the 88 counties into 6 or 7 classes. It could be a source of litigation, and it might be better to establish the classes on a certain basis and then write the legislation to fit the classes.

Mr. Schroeder remarked that he liked the idea of different classifications for different purposes. The counties along Lake Erie might be placed together and the counties along the Ohio River might be placed together for particular purposes. Classification could occur as often as necessary for different purposes. They purposes for which they were classified could be specified in the law instead of putting it in the Constitution. One local unit might fall into different classes for different purposes. The legislature would establish the classes. Local units of government would not have the right to be removed from a class for a purpose. The GA now has power to provide particular districts for particular purposes, but such laws must have uniform application. The port authority law, for example, is written so any county can create a port authority--the landlocked counties as well as those on Lake Erie or the Ohio river. The proposal would really institute an exception to the uniformity provision.

Mrs. Hessler noted that if we had a classification provision, the legislature could create port authorities be designating a class of counties as those along Lake Erie for that purpose.

Mr. Kramer: It would have to be done by general laws, of course--general laws would apply to all within a class. You could classify counties one way for port authority law , and another way, maybe by population, for ability to reorganize or to get more legislative powers, and another way for water purposes. Only in one classification at a time for one purpose.

Mr. Ostrum questioned whether that was clear from this draft. It was agreed that a particular classification would not be a permanent classification for all purposes--for the legislature, it would be the ability to pass a law for those counties affected by it. Mr. Ostrum asked whether any state constitutions now provide for classification on bases other than population. Mrs. Hessler replied that some provide for classification on the basis of the tax duplicate.

Mr. Russo noted that Draft D gives a much broader base, and would give the legislature enough options that it would be difficult for the legislature not to create some plans that will be useful for the future.

Mrs. Orfirer: We have several basic decisions to make. Should counties be classified for purpose? Would they be in more than one classification? Do we want to spell out some of the criteria or should criteria be left entirely to the GA?

Mr. Fry suggested not spelling out criteria in the Constitution but to specify the basis on which the classifications are made. This would take care of the future when we might have to classify counties on the basis of communications or public transit, or some other standard, which we would not include today.

Mrs. Orfirer noted that the legislature might take the easy way out and just classify on the basis of population, if left entirely up to the legislature. This is what is normally done, and this is why we wanted to plant an idea of needing classifications on different factors--such as location, economics, or other factors which might apply to an area such as Appalachia. This would be a good reason for spelling out some of the criteria and then saying "and others". It would serve to suggest to the legislature what we have in mind.

Mr. Kramer: Since we do not have a tradition of creating legislative history in Ohio to determine legislative or constitutional intent, it is important to put in the text any such ideas; the courts will not usually look beyond the text of the statute or constitution for legislative intent.

Mr. Fry: Requiring the legislature to show their intent at the time they pass laws classifying counties for different purposes would be a new concept in Ohio.

Mr. Russo noted that spelling out these factors broadens the Constitution rather than narrowing it in this instance. You want to make it broad enough so that the legislature is not restricted in any way--so that, as factors develop in the future not presently thought of, the legislature will still be able to deal with the problems.

The committee reached general agreement to the principle that counties should be classified and, tentatively that classification should be mandated in the Constitution,

but the actual classificatioh left to the General Assembly. There was also general agreement that the Constitution should mention some factors but add "or others related to the purpose of classification".

Mr. Kramer: There is always the possibility of a challenge to a classification on the basis that it is arbitrary or capricious.

Cuyahoga County Commissioner Seth Taft commented that he questioned "location" as one of the criteria. It was explained that it was explained that it was included because all counties in a particular location might have a common problem--such as all counties on Lake Erie might have water pollution control problems which differ from those of counties not on Lake Erie. Mr. Taft replied that there could be abuses of that concept, though, such as a classification of all counties located within 10 miles of the State House, and that also seems too specific.

Mrs. Orfirer: Most states have used population as the sole criteria, and we would hope that the GA would take other factors into account.

Mr. Fry: We could say "population or other reasonable basis" and then specify that the GA spell out in the legislation the criteria uses, and this might encourage the GA to use other criteria than population for creating classification for different purposes.

Mr. Kramer: It is difficult to convey the idea that you want different classifications for different purposes.

Mr. Russo: Can you give powers to counties without taking them away from cities? Is the vote of the people in the city necessary?

Mr. Kramer: You can give counties powers now without the vote of the people--for example, you could give the health function to the county if you wanted to and you could change all the provisions of the organization of county government by classes without needing a vote of the people in the cities--for example, if you could classify counties, you could provide that all the counties in a particular class will have a county manager form of government. If we're talking about alternative forms, then the people have a chance to vote, but not if we simply provide a particular form of government for a particular class of counties.

Mrs. Orfirer: We agreed that we would list several factors for classification and provide for others, and also "which shall be related to the purpose" should be included. How about the minimum and maximum number of counties in a class, or providing that the GA shall establish at least 2 but not more than ... classes.

Mr. Taft commented that good argument can be made for limiting the number of classes so that the legislature is not beseiged by requests for changes in laws for a very small number of counties, or almost individually.

Mr. Kramer: If you have even a few classes, it greatly increases the amount of time taken by the legislature to consider local laws--in Maryland, about 40% of the legislature's time is taken with local laws, and they have only 21 counties, and the county is the major unit of local government. Counties in any group will become in effect a legislative caucus with respect to the matters affecting that group.

Mr. Russo: I do not think the legislature will abuse its authority to classify, and if we place limits in the Constitution we will have to change them when we have changes in

population growth, ecology, economy, etc. We should write things that are not restrictive so that they will not be limited in time.

It was pointed out that it might be better to limit the number of classes for any purpose than to specify a minimum number of counties for a class, because that could change from year to year. The idea of having no limits should be weighed against the experience in Maryland and in Ohio in the 19th century with respect to cities, when classes got out of hand and local laws occupied too much of the legislature's time.

Mrs. Hessler asked whether there would be pressure on the legislature to increase the number of classifications and thereby increase the amount of local power exercised by the legislature. It was noted that, in some instances, it might be necessary to have separate laws for one county with unique problems. Mrs. Hessler stated that, in Md. even though there is much local legislation in the legislature, they have good county government because they have given individual attention to the problem of counties.

The committee agreed generally that the Constitution should not specify a minimum and maximum number of classes. Next, the committee discussed whether a time limit should be placed on when classification should take place.

Mrs. Hessler noted that a time limit would serve no purpose if classification is related to purpose.

Mr. Kramer: Can we give the mandantory duty to classify any reference point? If no minimum number of counties or minimum and maximum number of classes, but simply on the basis of purpose, then why make it mandantory?

It was noted that even though you mandate a classification system, there is nothing to stop the GA from passing the same law for different classifications. There is no way of enforcing the duty on the part of the legislature to pass different laws for different classes. The committee then agreed that the classification could be permissive rather than mandantory, so that the legislature can, in fact, deal with one or more counties without dealing with all counties.

Mrs. Orfirer stated that the committee wants to get an overall look at the entire local government picture, including cities and townships, before making any recommendations to the Commission for passing along to the legislature, but this consensus on the classification question will permit the committee to move along to something else.

Mr. Taft raised a question about county charters and stated that it takes too long to get the matter on the ballot and the mechanics are too cumbersome. Some mandantory powers in areas of metropolitan wide concern are needed for larger units such as air or water pollution or transportation, which are not subject to a local option to opt out.

Mrs Hessler: Matters of statewide concern or police powers can be acted on by the GA without the municipal powers of local self-government applying. For example, in air pollution, several municipalities in Hamilton county entered into an agreement that the county would provide air pollution control, and then several dropped out, which they could do because it was an agreement to begin with, but if the state had passed a law providing that the county would perform this function, the cities would not have had an option to drop out--it would be a matter of statewide concern on which the legislature had acted and if there were to be a referendum, it would have to be all the people of the state.

Ohio Constitutional Revision Commission
Local Government Committee Meeting
March 13, 1972

SUMMARY OF MEETING

The Local Government Committee met on March 13, 1972 at Theresa's Restaurant in Cleveland. Present were Mrs. Orfirer, Mrs. Hessler, Mr. Heminger, Mr. Kramer, and Mr. Russo. Mrs. Eriksson was also present.

Mrs. Eriksson stated that the Committee on Finance and Taxation is proposing a revision of Article VIII, which has to do with state debt. Two sections in Article 8, Sections 5 and 6 deal with local government. Section 5 states that the state shall never assume the debt of any county, city, town, or township or of any corporation unless such debt is related to invasion or war. These provisions are all traceable to the Constitution of 1851. The Finance and Taxation Committee is considering retaining the basic provision as presently stated in the Constitution, but permitting the General Assembly to provide for the state assumption of debt, but unless the General Assembly made specific provision for this, the prohibition against the state assumption of debt would be continued.

The other changes being considered in that section are to change the designation of the particular subdivisions of county, city, town or township to "any governmental entity" so that it broadens the prohibition to that extent. It would require action of the General Assembly, and it would require the same action if the section were being repealed.

Mrs. Eriksson added that there is one other provision in that section which doesn't necessarily have to do with local government, but it presently includes the words "or of any corporation whatever." This must be taken as meaning private corporations, not municipal corporations, because it has already been spelled out as "city" although "village" has not been spelled out. The Committee on Finance and Taxation felt that there may be emergency situations in which it would be advisable for the state to assume the debt of local government. This might be necessary, for instance, in the consolidation of local governments. Another possible example might be the payments that various cities owe to the state firemen and policemen pension fund if these were considered debts.

Mrs. Orfirer said that opening the door to assumption of such obligations might develop a tendency for the legislature to repeat this kind of thing. If the legislature could have taken over this function to begin with, are you not encouraging a situation on both sides where the state will be expected to do more. Mrs. Eriksson remarked that this would be difficult for individual legislators who would be pressured in their local areas. Mrs. Hessler felt that this would still be subject to the general law provision of the Constitution.

Mrs. Eriksson stated that the Finance and Taxation Committee believed the General Assembly should have the greatest amount or flexibility possible. In practice, this is what has been subscribed to in all of the Commission's amendments thus far, added Mrs. Orfirer. She felt that this might not benefit the legislature, but place them in a box,

opening the door to a besieging of the legislature.

Mr. Russo pointed out that local governments need operating funds, not assumption of debts. Mrs. Orfirer noted that permitting the assumption of local debts would subject the legislature to more pressure than that which it is subjected to now, and that might encourage local government to overspend.

Mr. Russo noted that often the legislature creates changes, but doesn't appropriate any money for it. Consideration should be given by the G.A. to funding required programs rather than to pick up the debts of local government afterwards. This would provide for uniform application, at least.

There was some discussion about a possible situation where a debt of local govt. was a direct response to the fact that it had been mandated by the general assembly to consolidate. Does it make sense for the state government to make good the debt that was incurred because of mandated consolidation?

Mrs. Hessler: This is, in a way, what the state has done on the property tax--the homestead exemption. They couldn't do this on debt because of the constitutional restriction, but they can do it on operations.

Mrs. Orfirer: If the committee makes a specific proposal concerning consolidation, where assumption of local debt would make that more feasible, we would wish to examine the proposition them.

Mr. Kramer cited an example in which the question of the purpose for which the debt was incurred might be an issue: the state coming into a particular municipality to pay off the bonds of an issue for city hall; this is a question to which some consideration should be given. The Supreme Court might question spending state funds for that purpose.

Mrs. Orfirer stated then that the committee was in agreement that any repealing of the section should be held until we see what decisions we are going to make in terms of consolidation, when new problems created for local government could, perhaps, be solved only by the state assuming debts.

Mr. Heminger: The Finance and Taxation Committee must have had apprehension about pressure on the legislature just as that which we're expressing here and they must have felt that flexibility was worth it.

Mrs. Eriksson: Because there's no way to ascertain exactly what situations will arise.

Mrs. Orfirer: It's my feeling that it's just too big a price to pay for flexibility, with not enough advantage.

Mr. Kramer: We've had this provision for so long, and I don't know of any situation where the state has wanted to assume any debts. It may be that the state could work out an installment purchase, on the installment principle. I think it is difficult to point to any example in our history where the provision has prohibited any necessary course of action.

Mrs. Eriksson: Many problems result from the state imposition of new duties or new standards that really don't have to do with debt.

Mr. Russo: That could be part of the problem of local gov't. For instance, welfare was part of the problem of local government until the welfare reform law was passed. The state was forcing local government to raise more and more money for welfare.

Mrs. Hessler: Constitutional changes should not be made unless needed. If there were some reason for this at this time, then it would be different, There are all kinds of aids that can be given to local govts. without assuming their debts. You might want to make it attractive for a community to do something or other, either take over a function at a higher level, or throw in a big chunk of state aid to that operation. Then the local area can assume its own debt.

It was noted that if it were necessary to provide by general law for the state assumption of debt, the problems would be so great that the general assembly would never dream of doing it. For instance, if it were going to be a proposition of taking over 10% of everybody's debt, this would be a much greater benefit for those that had incurred more debt. This would not benefit everyone equally. On the other hand, if it could be done by special law, then there would be the problem of doing for one and not doing for the other.

Mrs. Orfirer: I think that our feeling is that we cannot find any immediate necessity for changing this section. If in our deliberations about the problems of local government, we find that it would be helpful, we would at that time raise it in direct relationship to the problems of local government.

The committee also discussed the possibility that changing the section might encourage the local governments to go into debt.

Mrs. Eriksson: At the present time, of course, governments are restricted by statutory and constitutional provisions. I don't know whether there is leeway in debt limit, which might encourage them to incur debt.

Mr. Kramer: Some communities, including Cleveland, have a large amount of unvoted debt issuing ability. If there were an ability in this state to assume local debts, it could create some temptation on the part of local governments to go to the hilt, saying that state can bail the county governments out. But now if you reach the ten mill limitation, there's just no getting around it.

Mrs. Eriksson: The second section that the Committee on Finance and Taxation wanted to call to your attention is Section 6 of Article VIII. Section 6, which has a parallel for the state itself, reads as follows: "No law shall be passed authorizing any county, city, town, or township by vote of its citizens or otherwise to become a stockholder in any joint corporation or association whatever, or to raise money or loan it for credit or in aid of any such company, corporation or association, provided that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance charged or to be charged by any insurance company, corporation or association organized under the laws of the state, or doing any insurance business in this state for profit." The last sentence does not really have anything to do with the rest of the section. The Finance and Taxation's Committee's feeling with respect to that sentence is that if it is necessary to give this authority to the G.A., then it should not be done in this section or in this article. There probably isn't any necessity for it to be in the Constitution at all, but if there is, it is out of place. The end of the prior sentence

apparently because the section itself prohibits local government from being a stockholder in a joint stock company, and insuring a building in a mutual insurance company is in effect participation in the ownership of a company. This would also appear to be no longer necessary, or if it is, not in this place.

With respect to the rest of the section, which prohibits counties, cities, towns or townships from becoming stockholders in joint stock companies etc., this is basically a prohibition against local governments participating in or lending their credit to private corporations. There is a similar prohibition against such state participation, and the committee is proposing to drastically alter the section concerned with the state. With respect to this particular section, dealing with local governments, the committee is proposing to say "except as otherwise provided by law, no governmental entity (which is an extension of the terms county, city, town or township) shall become a stockholder.....etc." As I noted in the letter I wrote to you, this section has already been legally and constitutionally altered to the extent the economic development section of this article, section 13, does permit local governments to engage in certain types of development by lending their credit or engaging in loans to private corporations providing they meet the restrictions of the law. So it already has been altered to that extent.

Mr. Kramer: This has to do with the general assembly passing laws authorizing local government to do certain things, which would permit the general assembly to authorize local government to provide debt credit to private businesses for the prevention of pollution, for example. Again, this basic section is a railroad canal business of the 1800's, which meant that the general assembly passed laws to allow local governments to buy stock in canal and railroad building corporations, etc.

Mrs. Eriksson: The committee again wants to permit the G.A. to have the maximum amount of flexibility. This is a question of state authorization for local govts. to engage in joint enterprises with private corporations which they are not now permitted to do. It would permit the G.A. to develop policy towards govt. involvement in private corporations.

Mrs. Hessler: There are counties doing that now, aren't there? They write bonds for industrial development.

Mrs. Eriksson: Under Section 13 of Article VIII, adopted in 1965, there are a good many things permitted that would be prohibited if Section 13 did not exist, and the reason that they would be prohibited would be because of the two sections prohibiting the lending of credit.

Mr. Kramer pointed out instances where the prohibition against a local government lending its credit had prevented extension of a sewer line and expansion of an electric utility by two different cities. He stated that he believes that it is possible that there are a number of types of transactions which might be beneficial which cannot be entered into now because of this section, and a good case can be made, at least with the restriction that it first be authorized by the general assembly for changing this section.

The committee then resumed discussion of classification of counties. The consensus at the last meeting was to provide for provision of the G.A. for the organization and classification of counties, to make provision for alternative forms of county government, and providing for the transfer of powers from towns and townships to counties. The proposal would allow what is in effect unlimited classification--any number of classifications based upon the list of factors or any other reasonable basis, and wouldn't make any limitation as a minimum or maximum as to the number of possibilities or the number of counties within any classification.

Mrs. Orfirer: I raised the question of number of classes within a classification. We established I think to everyone's satisfaction that we wanted to suggest that more than the factor of population be in the minds of the legislators. This gives four of five factors. Under that, supposing one of the factors is population. Then you are going to break down population to several cases. This multiplies very quickly. Under each one of the factors you are going to have a range of subdivisions. Do we want to have an unlimited number of slots, or should we limit the number?

Mrs. Hessler: It would be very difficult to use all of these, thereby giving such a large number of slots, because you do have to expressthe purpose of the classification in the law.

Mrs. Orfirer: Would it hinder or unnecessarily tie the hands of the legislature, which we do not want to do, if we made some kind of reasonable limitation? Or would it perhaps be an aid to them in turning down requests for special kinds of legislation.

Mr. Russo: We don't know what would be reasonable in the near future. Now Constitutions can't be changed everyday, so I'd make it very flexible. I think that the <u>issues</u> on which we were basing the classifications would be limited.

Mrs. Hessler: The more possibilities you have the more you open up what amount to special legislation, because you have special situations. If Hamilton County couldn't agree with Cuyahoga County to have planning over zoning, they could just change the population--there are all kinds of ways they could distinguish between the two counties-to give it to one. The question is whether you want to give that much authority--there is much to be said for it--but the legislature would receive a lot of pressure.

Mrs. Orfirer: The words "or any other reasonable basis" may not be necessary. I think that five factors ought to give any legislature enough flexibility.

Mr. Heminger: Agreed.

Mrs. Hessler: The number of governmental units has been included as one of the factors.

Mr. Kramer: It occurs to me that even if you only use one of these factors, if you don't put any limitation on the number of classifications, you could have great difficulty. And one thing that does concern me is the matter of conformity and certainty in the law. If you have wide open classification, and especially various classifications for special purposes, then it's difficult to determine exactly what a county's powers are. One county may be in one classification for one purpose and another for another--it may be a source of trouble. The statutes could become voluminous, and they're bad enough now.

Having a separate set of laws for counties which are in numerous classifications could just become comepletely unworkable, and while there may be benefits, I think there really are countervailing considerations, and one of those is the necessity for those who need to know what the law is, to be able to find out what those powers are without undue difficulty. Therefore, it may be desirable to have a limited number of classifications. You have to draw the line somewhere between flexibility on one hand and proliferation of classifications which will lead to logrolling and a number of other undesirable results. Somewhere you may have to compromise for the desirable flexibility in order to prevent undue pressure on the legislature and the cluttering up of the statutes.

The simplest arrangement would be to have each county in one classification for all purposes.

Mrs. Hessler: It seems to me that classification would open the door for local govts. to do many things, and I would have to see this kind of thing enacted for several years before deciding on consolidation.

Mrs. Orfirer: Our present consensus is that the legislature would have to spell out the purpose for which they're making the classifications. This would eliminate further confusion, because then a county could not fall into twenty-five categories, because it has to have all five in order to fall into a particular category.

Mr. Heminger: If you broaden the base of the five, so that it can include Hamilton and Cuyahoga County, and yet exclude other counties with the same geographic area, you have the same problem.

Mrs. Hessler: There are a lot of things the legislature might want to do that would have nothing to do with the number of governmental units or the evaluation. This would leave them out of that particular classification for that particular purpose.

Mr. Kramer: What we're getting into is the limiting devices. For instance, there should be no more than so many classifications or at the time any classification is created, a county must be able to fit into it. Another limiting device would be that no county shall be in more than one classification for all purposes, so there are all sorts of limiting devices you can use.

Mrs. Eriksson: The only real limit in this section is that the purpose of the classification be set forth in the law.

Mr. Kramer: Even that limitation has its problems, though, but it does open up a large area of central dispute.

Mr. Heminger: To what extent are we talking about the organization of government in counties?

Mrs. Eriksson: We're talking about both organization and government. I think you have to keep both in mind when you're talking about the purposes of classification.

Mrs. Orfirer: I think we're agreed that there has to be some controlling factor here, so that endless proliferation is prevented.

Mrs. Hessler: I don't know that I would agree with that because the legislature automatically is going to consider classification only as it relates to a given power and they don't have to consider all five--all they have to consider is one or more--and it does have to be related to the purposes of the law--so it doesn't give them nearly the leeway that five seems to confer.

It was agreed that the number of factors could be limited. It was questioned whether tax valuation should be kept as a factor, and Mr. Kramer noted that it might be used to determine which counties are in need of industrial aid.

Mrs. Eriksson: If you include "or any other reasonable basis," you really don't have to worry about the specific factors.

Mrs. Orfirer: It seems to me that this valuation of property has a vlue even if you get rid of the property tax, in terms of an industrial versus a rural county. I think if we take out the "or any other reasonable basis" at least we're eliminating some and limiting it to five. That certainly is not going to make it inflexible. Are we agreed on that point? Alright. The question is whether you want to make a "reasonable" limitation on the number of divisions within each of these classifications? Or do you want to leave it wide open?

Mrs. Eriksson: How can you some to a conclusion on that without knowing what purpose is served by the classification?

Mrs. Orfirer: I'm not sure that it matters. Considering we've had no classifications, I'm not sure the problem is affected differently. If the problem is basic enough in nature, it's automatically going to cover a wide enough range to have it make sense.

Mrs. Hessler: You don't really need more than three categories of population--large urban, medium, and small counties. As far as any powers the legislature might give, I can't imagine needing any more than that.

Mr. Kramer: I know ther has to be some degree of arbitrariness in deciding this kind of thing.

Mrs. Eriksson: I'm looking at this from another point of view. You're not establishing population classifications, are you? Aren't you establishing a purpose, and aren't you going to say, for this purpose, then you may have two or three of these things.

Mrs. Hessler: Many state constitutions have up to eleven classifications, but the only law they passed applied to class 1. They've never used the other classifications but just set them up.

Mrs. Eriksson: There's probably no need for a lot of classes--but I don't think you have to think in terms of classes for each of the categories.

Mr. Kramer: Let me give you an example of a case that arose in Cuyahoga County--in the 1950's when the legislatur provided the number of signatures required on the nominating petititon for probate judge, in the counties with more than 1 mill., a smaller percentage of the number of electors would be required than in other counties. The Supreme Court held that this was in violation of Art. 2.26, and applied to theoffice of Judge

of the Probate Court. Special provisions for a certain county violated the constitution. There doesn't seem to be a problem in the wording as we now have it. If you set up a classification, and ten categories fall within that classification, the law has to apply uniformly. Also, classifications have to be reasonable. There are equal protection considerations and laws. The reason for having a number of factors which can be used is to allow the legislature to consider its reason when classifying for a purpose--so that you won't use population when it has no relation to the purpose.

Mrs. Orfirer: May I suggest that we leave this as amended, knocking out the words "or any other reasonable basis," and adding "there shall be no more than three classifications for any one purpose," and set this aside now, until we get into some of the other areas, and get further reactions at a public hearing. We'll get back to it at a later point.

Mr. Heminger suggested adding an environmental factor to the factors.

The committee then moved on to a new topic, a general discussion of regional government, something broader than counties, or at least a discussion of what purpose might be served by going wider than the county area. Mr. Kramer raised some questions:

1) Are the counties of Ohio, as presently constituted, appropriate units for dealing with regional problems?
2) Do they cover sufficient amounts of territory?
3) Are problems of a regional nature generally confined to the limits of counties?

Mrs. Orfirer: I think we started off our original discussions more or less on this basis and it might be useful to continue. Some things fell within the geographic boundaries of a smaller unit and some things were wider than either municipal corporations or a county. If counties, as presently constituted, are not appropriate units for dealing with a sufficient number of regional problems, could they be made so by consolidation?

Mr. Kramer: Or could they be changed to be made capable of handling these kinds of problems also--as to territory and governmental structure. Everything we talk about is interrelated--it could also go back to the question, I suppose, if their powers and structure are not now sufficient for the purpose of effectively dealing with regional problems, whether by means of classification of counties this might be brought about.

Mrs. Orfirer: It seems to me that the powers of counties are really rather strictly limited at present, and that they cannot deal with all problems.

Mr. Kramer discussed the recent Supreme Court decision upholding the airport zoning laws as against challenges by municipal corporations. This has been held a matter of state rather than federal concern, and therefore airport zoning was made a state function by the general assembly. But this might easily not apply to some other function.

Mr. Kramer: I think it's very significant though in that it was portrayed by the court as at least having the possibility of a direct conflict between the exercise by the municipality of a power which is a difficult power to talk about--because sometimes

it is considered a power of local state government. But there was a case where the airport zoning board enacted zoning regulations which the city said were directly in conflict. There are a number of areas like this-you have to look at individual cases to see what the courts have said--if these are state matters or matters of local concern.

Mrs. Hessler: Going a little further, talking about the general question of planning, which would include review perhaps of local zoing--like the Twin Cities program, would the state say we are going to set up a government for certain purposes, like planning, which would have the power and a tax base--and have the power to overrule municipalities, on the basis of this matter of state concern?

Mr. Kramer: Right now I believe that a bill which was presented by the task force on housing contains such a concept.

Mrs. Hessler: The original did, and they changed it to say "for the purposes of granting state or federal funds." Instead of actually setting up a government, they simply gave review power to the regional planning agencies, giving them power to veto.

Mr. Kramer: From the drafts of that bill, at least there would have been a direct confrontation between the state and the municipality with regard to zoning, because it would have given the state power to veto municipal zoning. Each is decided by means of litigation. I don't think that anybody can give you an answer on most situations which might be presented.

Mrs. Hessler: We're asking two things. We're asking the legislature to say we're going to take a chance on this being unconstitutional, and this is a hard thing for legislators to do--and then you get into the question of making the decision, and that's a bad way to make a decision.

Mr. Kramer: I think that's our present situation. It's new--the whole issue of home rule has been a matter of the courts having to draw the line and determine where there is a conflict between municipal ordinances and the state laws.

Mrs. Orfirer: Which is one of the basic tenets we started out with in this committee, the separation of powers really being defeated because the courts were being called on to make so many decisions as to what was constitutional--and this is what we wanted to reconcile.

Mr. Kramer: I think we really have hit the varied type of problems that have to be resolved if there's going to be any type of regional govt. that would have effective powers and broad powers.

Mrs. Orfirer: Perhaps we should discuss what the alternatives might be for larger units?

Mrs. Hessler: I think that we have proved in the last five years that councils of government cannot solve the problem.

Mrs. Orfirer: This is one of the questions that I raised today. It would be interesting to have someone from the dept. of urban affairs or from a council of govts. come and tell us what their experience has been. I don't know where they are effect-

ive and where they are ineffective.

Mrs. Hessler: A council of governments is not a government at all. Nowhere does it have taxing powers; all it has is review. And the review powers come from the federal government.

Mr. Kramer: There are some councils in Ohio that have taken on some governmental functions, and basically, they refer to section 167.08 of the Revised Code which provides that the appropriate officials, bodies, counties, boards, municipal corporations, townships, special districts, school districts, and other political subdivisions--making the definition as broad as possible--may establish councils of government and become members. These may contract with any council of governments to receive any service from such council or to provide any service to such council. Such contracts may also authorize such council to perform any function or render any service on behalf of such subdivisions which the subdivisions may perform. That is really quite a mouthful. The language may sound initially broader than it is--it has to be read in context of other provisions, so it doesn't really allow for a "super government." It probably does not have the power to lay taxes or incur debt. Then you have to go back and consider that the whole council can be set up by only a few members, powers given to it by the members, and no member has to remain a member for very long. From the statute itself, you can see that it would never be possible for very long to enter into agreements and engage in long term planning.

Mrs. Orfirer: If anybody can walk out at anytime, it's pretty tough for them to do much about it.

Mr. Kramer: So it's very difficult to undertake projects, and they're not very powerful.

Mr. Russo: It's a broad law--it's a question of funding, and term and participation--but it's still a good kind of legislation.

Mr. Kramer: This law is a potential vehicle for change if this kind of concept were not possibly worked into the Constitution.

Mrs. Orfirer: What is your suggestion--to turn this over to the Legislative Service Commission?

Mrs. Orfirer: Do you think that we should discuss constitutional changes for larger units? Let's move on to look at the theoretical and practical possibilities of what kind of units could be established and who would do the selection of who comprises this larger unit. We had a pretty good example from the talk we had last month on the Md. units which were as I recall, state mandated, formed of the officials of the units within each geographical unit.

Mr. Kramer: Either for a group of counties or people within an area by petition could establish one of these regional units of government.

It was agreed to begin the next meeting with this discussion. The committee will meet Thursday, April 20, at 6 p.m. for dinner at the Athletic Club in Columbus, followed by a 7:30 meeting.

Ohio Constitutional Revision Commission
Local Government Committee
April 20, 1972

Summary of Meeting

Present at the Local Government Committee meeting on April 20, 1972 at the Athletic Club in Columbus were Mrs. Orfirer, Messrs. Fry, Heminger, and Ostrum, and Mrs. Hessler. In addition, Mr. Loewe of the Chamber of Commerce, Mr. Kelly of the Department of Development, and Mrs. Brownell of the LWV were present. Mrs. Orfirer opened the meeting with a discussion of units of government larger than counties. At the last meeting, there was some discussion of councils of government. We start with the very basic question--Are any new governmental structures or units required in order to deal with matters relating to regions which do not coincide with established units of local government?

Mrs. Hessler: It depends on whether or not the state legislature can do certain things that within the existing constitution are not possible.

Mr. Kramer: The question is really one of general policy; first, in terms of what exists now and second, whether something more is needed. Our overall subject is regional government.

Mr. Fry: I think that we have gone into regional provisions in certain areas, water control, possibly transportation.

Mr. Kramer: There is a distinction between authorities or special districts set up for limited purposes and what really amounts to a government as opposed to an authority. A unit of government is one that has broad authority to take on additional functions. Some are special districts which have more than one function. They're generally related functions. This is a way of getting into this question--when does an authority become what may be a county. What is a county? The constitutiona recognizes the existence and powers of counties to a certain extent--in Article 10, Section 1, the G.A. is authorized to and given the obligation to provide for the organization and govt. of counties. Article II, Sec. 30, also protects the integrity of counties and boundaries by requiring the vote of the people in each special county for any change in county boundaries to be made. I think that another factor is that the counties preexisted the state, and certainly we must take this into consideration in determining what the constitution had in mind. Even though the courts very often talk about counties as being arms and instruments of the state and the G.A. each session changes counties and does what it will with the counties. A county apparently can be several things and it could change. Now the county as presently constituted has a particular form of government and certain powers--and these are not much different than they were in 1851--at least in respect to structure--the powers have been expanded considerably, but they're still counties. Now the G.A. tomorrow could change the government of counties to provide for a legislative, executive... and so on, and still be a county; they could change the powers considerably, and it would still be a county. An existing county could adopt an alternative form of govt. It could be different from all the other counties surrounding it, and it would still be a county. The charter could be radically different from every other county and it would

still be a county. The county apparently is ~~not something~~ which has a particular form of government of specified powers. The county in its essence appears to be a unit of local government which has as its basic function to carry out state functions in an area and which also may have local functions. Now what all this is coming up to is again--what is a county? And I would think that there has to be some kind of definition similar to that which I just gave, being this local unit which carries out state function and which may also have local functions and powers, whatever its governmental functions may be and whatever its particular powers may be. So this leads us to the question of the power of the general assembly, then, to provide for some other form of regional government which would be some general form of government. Now let's assume that the G.A. in an act of providing for say, twenty regions in the state--you can call them borroughs, or provinces, or whatever you call them--and that of course isn't important. But then suppose the G.A. attempted to make these regional governments really govts. with general functions and to begin assigning to these regional govts. the powers that counties now have...you can see that it would be very easy for the G.A. to in effect make the counties powerless--to take away their powers and give them to this regional unit of government. So, the question that arises in my mind is when does one of these regional units--whatever you may call it--become a county? So that the G.A. then would be guilty of violating the constitution by changing the county boundaries, in effect, really creating a new county which would be this new regional area of govt. without getting the consent of the people.

Mrs. Hessler: But there is nothing in the Constitution which says what the powers of a county shall be.

Mr. Kramer: No. Because the G.A. provides organization and government of the counties.

Mrs. Hessler: But to leave the counties setting there and to try to carry out a couple of functions and still assign functions to a different government without changing the boundaries as long as that county were still there?

Mr. Kramer: But you see why this gets to be such a touchy question and such a nuisance thing to try to determine what point at which a new creation is really a county. And you have in effect emasculated the counties.

Mrs. Hessler: Let us assume that this G.A. decides to set up a new regional government which might or might not be coterminous with counties, and gave it planning powers. Counties don't haveplanning powers now. They could adopt them, but most of them don't have them. It's not a power to enforce their planning over municipal govt. which would be a new power that the legislature would be granting to a new agency and my question is would this be constitutional or do you then run into home rule for cities which makes this invalid? And that is specifically in the Constitution.

Mr. Kramer: We may be getting just a little bit ahead of ourselves. We'll have to explore this question a little more, but I hope everyone can understand how we got to this discussion. Now, there is no constitutional power to establish regional units of government, which would attempt to supplant the counties.

Mrs. Hessler: Let's take health--now we recognize that health is a matter of state concern but we do have local health boards and they have existed in the same way

counties are set up by state law, but if we were to apply the recommendations of these medical and public health agencies as suggestions for regionalization of the health function, wouldn't this be a problem--the same problem as planning for example, except that planning hasn't been said to be state function as health has by the courts.

Mr. Kramer: Health function is a very interesting subject. There are cases saying that, since health is a matter involving the public health safety, and welfare, health districts are something apart from the municipal govt., and the G.A. has the power to create health districts in whatever manner it desires. But that really is an exceptional situation because it's somewhat inconsistent with recent cases such as Canada v. Phillips. The police departments which have formerly been treated by the courts as being a matter of state concern is really a power of local self-government, and a charter municipality, at least, may have its own procedures and requirements with respect to the organization of the police department. There are other similar cases. It's only where the G.A. legisla tes on these matters and that ordinances or charters conflict that you have a conflict. The decisions on health districts really are out of the mainstream as far as local self-governments go.

Mrs. Hessler: Has there ever been a case on planning?

Mr. Fry: It may be wrong to use health districts as an example if we look at local govt. as a whole. I would say as a practical matter what you are going to do in the legislature that we would be better off if as a subcommittee of the commission, we assume that we are going to retain our county boundaries. We have organized political organization in each of these counties, and to say you 're going to change any of them--you might be able to do it in two out of the 88--but you just can't do it in all of them. So I think that it would be better to assume that we're going to stay with the 88 counties and then see what we're going to be able to do within that framework.

Mr. Kramer: Under present constitutional provisions, there may come a point where an attempt will be made, in effect, to take a substantial number of the powers of counties and put them into the powers of some form of regional govt. There may be a constitutional problem as to whether you have created something that are really counties masquerading under another name and have done this without getting the consent of the voters in the counties.

Mrs. Hessler: With this much doubt about what might be decided in the courts, we would be better off to assume that we do need a constitutional amendment in order to be sure that we can create some kind of regional govt. if that is what we decide is necessary. Was this the decision made on the two occasions when metropolitan government went on the ballot?

Mr. Fry: When metropolitan government went on the ballot, it was simply a matter of certain communities or metroploitan areas or cities coming in and saying we want this or give us the opportunity to approve the way we are operating at the present time. I was chairman of the govt. operations committee when we adopted that last proposal and it came in because Cleveland and Cincinnati thought they could use it but there was no consideration as to what this could do to the other 86 counties.

Mrs. Hessler: There was nobody who said this was necessary because we couldn't do it without it?

It was noted that one proposal was that an urban service authority without directly elected administrators or legislative people be created, and the other was a Metropolitan Federation Amendment. Both were defeated. This was the authority approach where you could have one function or many functions depending on what you wanted to get together on and it could be two or more jurisdictions which would join together to provide for the services. This authoiryt approach does not provide for responsiveness to the voter. In Ohio, governing boards of some special districts are appointed by the courts and other by the commissioner.

Mrs. Hessler: Is it possible to set up any authorities or special districts which would have an elected body at the head of them? For example, our sewer district in Hamilton County is run by the elected county commissioners. Now it happens that it is a county-wide agency--if it were regional, I'd have no idea.

Mr. Kramer: Proposals in the legislature in that area usually go back to the commissioners in an area appointing someone to represent them on a regional basis. It hardly seems to be necessary to elect officials when you are talking about a special function. In theory, then, you want to appoint someone who has expertise in that area. If you are talking about several functions, then I suppose that the general opinion would be that people should be elected and responsive to the electorate.

Mr. Fry: As a practical matter, we have made a lot of these provisions, but very few of them have been used.

Mr. Kramer: Do you think that's because most of them do require the participating units to come to some agreement?

Mrs. Hessler: We've had more special authorities go down the drain because as soon as they tried to get funding, the people said no.

Mr. Fry: This may be a sign post though. If this has been happening, rather than going to the people for it, give the responsibility to the people that they've elected, not that they won't be responsive to the people that are their constituents, but it might be a lot easier way to arrive at regional solutions in these areas.

Mrs. Hessler: I have to disagree, on the basis of what has happened in the Councils of Government. Councils of Governments have been created all over the country because the federal government has said you won't get funds unless you do. They have all failed to do what they were originally intended to do, which was to have two functions--first a clearinghouse function and also a planning function. And they have had the clearinghouse function--this isn't difficult--this is just sending around to all the constituents a note that so and so is making an application for such and such, and that's easy. But the review agency has not been successful in most places because you're asking the people who are applying for funds and who are elected by a particular constituency to get the most federal bucks they can for that constituency and you're asking them, also, to review the application. They're all going to get as much money as they can into their area from the federal govt. They have not functioned as regional planning agencies. In my opinion, you have to have a regional planning agency, because all future developments in metropolitan areas are outside of the existing govts--intercity or suburban city--in the area where there are no controls. If you have an agency with representatives of

a municipal constituency and county constituencies who are planning for future developments and still having to go back to their constituencies to answer for them, you have no implementation.

The committee considered next the subject of annexation. Tom Bay was introduced to the committee. Mr. Bay is the Executive Director of the Development Committee of Greater Columbus, and he noted that annexation had been used extensively in Franklin County, but while annexation has been a strong tool, it is not the answer.

Mr. Heminger: Does Unigov in Indianapolis relate to what we are talking about?

Mr. Kramer: The Indiana supreme court has not taken the same view towards uniformity that the Ohio S.C. has taken--recall some of our earlier discussions about what it was that led up to home rule. There was the requirement that general laws be of uniform application in the 1851 constitution. The G.A.'s response to this requirement has been an attempt to prohibit the granting of municipal charters to establish an elaborate system of grades and classifications of municipalities, with the result that each one has its own particular form of government and its own powers. This was struck down in Ohio just around the turn of the century, and the courts said you cannot by setting up grades adn classes obey the requirements that general laws must have uniform application. In Indiana, however, the S.C. has upheld these classes of municipalities and counties. The Constitution really has been interpreted differently which has been the important factor. With respect to Unigov, the combination of Marion County and Indianapolis, it was a fortuitous set of circumstances; the people worked very hard to get it through the Ind. legislature. It does not seem feasible for Ohio at this time.

Mr. Fry: We might consider doing what they did for some services...combining the sheriff and the police department, for instance, might be something that we really should consider...a unified safety department or the fire departments. City boundaries are not good in these matters.

Mrs. Hessler: But Springfield is not about to consolidate except for those services which would be an advantage to them.

Mr. Fry: I think that in our constitution we should make it easier for people to do. And if it is true for Springfield, then it is certainly more true for Hamilton County.

Mr. Ostrum: What has happened in Indianapolis is really pretty progressive. Once the legislature spoke, you didn't need any municipal consent by either Indianapolis or any other municipality.

Mr. Fry: We can't mandate it for Columbus and Franklin County, or for Cleveland and Cuyahoga County, but we could set it up. Ohio has more cities than any state in the union, and if we were to make it possible, I think we would have a good chance of getting it passed.

Mrs. Orfirer: Perhaps we should talk about what we'd have to do in Ohio to get that kind of thing here.

Mrs. Hessler: We have done this in welfare--made a function countywide instead of municipal. Municipalities couldn't handle it financially so it was turned over to the next unit of government. A lot of the police services are now countywide which were formerly local because they require a broader base. You can always do this for special services. But you can't put anyone out of business and say you can't do your own zoning or you can't raise your own taxes.

Mr. Kramer: It's an illustration of how difficult voluntary cooperation is. We've not had much success in setting up countywide public services.

Mrs. Orfirer: How do we go about getting this if it cannot be achieved on a voluntary basis?

Mr. Ostrum: What kind of constitutional change is necessary to make it possible? I think it might be very useful for Dick Lugar, the Mayor of Indiana to come and talk to us.

Mrs. Orfirer: What kind of constitutiona changes might be necessary in order to give powers to larger units? Essentially there are two ways--either give the local communities the power to set it up based upon broad constitutional outlines or give the G.A. the right to do the same thing.

It was noted that the first one would have more popular appeal in terms of the democratic way to do it, but the second way might be easier if you could convince the legislators. But you still have a legislator representing that particular area that you are talking about--and the G.A. is going to have to pass on this legislation.

Mr. Kramer: When you are talking about amendment of the constitution you can propose whatever seems desirable--either authorize the G.A. to do something or do it directly in the Constitution. You could provide for the creation of or consolidation of all of the governmental units within a county into one overall government. That's one way of doing it. If you have one, or two or three counties where this was necessary and you were able to do that, I think you could do it. It's also possible to take the route which is presently in the Ohio Constitution by doing this by means of a county charter, which has been singularly unsuccessful in Ohio thus far. I think we've already talked about the fact that there are hurdles that are in the way of adopting a county charter which assumed municipal powers.

The committee discussed the Minn.-St. Paul Twin Cities project, noting that this was done by the state legislature, too, not by the existing units of local government.

Mr. Kramer: It would not have been done if it had not been done at the request of the people in Minn.-St. Paul and I think it was 136 surrounding municipalities. It was specific legislation for that area only.

Mrs. Hessler: The interesting thing about that was that the population of that seven county area is half of the population of the state. So when their legislators were for it, it really was because it was a home rule. What Minn.-St. Paul was saying was that we want a council that will give us home rule for this area. So that the state won't make our decision.

Mr. Kramer: The interesting point, though, I think, is that they were able to agree on this. Of course it is much different from our situation, but they were able to avoid the problem of parochialism on the part of their representatives by having the governing body of the council be made up of representatives appointed from the state senatorial districts rather than having them be representatives of the municipality.

Mrs. Orfirer: I think we ought to keep that in mind. This strikes me as being a very interesting way of going about it that we might find helpful.

Mr. Kramer: And now there is some discussion of having this governing body be elected rather than appointed.

Mrs. Hessler: I do think that having someone from the Twin Cities talk to us might be helpful. If you talk about a planning agency that has a tax base that has representatives whose constituencies are metropolitan and not the local communities, then you are talking about something.

Mr. Fry: We've had so many problems. For example, Southwestern Ohio wanted to have the regional air terminal, so this involved Hamilton County, Butler County, Montgomery County, Clark, a number of them--and we could never get to the position where we didn't have two counties pulling out. You can't get over the provincialism.

Mrs. Orfirer: Consider the suggestion that something similar to the Twin Cities thing might be feasible. What kind of changes would have to take place in our constitution to permit this kind of thing?

Mr. Kramer: We need a better outline of what the Twin Cities council can do. I think that it's probably the strongest power of the council to make plans for the area and to veto the activities of the regional members if they are inconsistent with the overall plan.

Mrs. Hessler: There are two other things. It can actually implement plans and has appointive powers in areas such as sewer and water districts. We have so many special districts that were set up as we went along because the federal government has expertise in various depts. and programs were implemented through special districts to correspond with federal programs. Each federal department has its own clientele, and operates independently from any other department. Congress tried to bring these departments together--to get at some kind of national urban policy--with no success. They simply can't handle these enormous bureaus. So what was attempted was to try to put together these policies through a priority setting organization like the Council of Govts. at the local level. This means putting more and more pressure on these COGs to take on more and more planning and priority setting to the point where you really have to give the COGs more power to become priority planning agencies and to bring together into one coherent mass urban development policy--and the state has to do it because the state really is responsible for these local governments.

Mr. Loewe: But how can you set them up in such a way that perhaps the G.A. or someone outside of the units themselves wouldn't argue about every change that takes place to give more powers to this unit? How can you do it to set it up in such a way that would mandate it, as they were able to do in the Twin Cities area for that area? It gave

them certain rules and powers and then as they wanted to increase it, they must go back to the G.A.

It was noted that the Franklin County regional planning council functions as a COG.

Mr. Kramer: A COG might have broader powers--it would deal with the Intergovernmental Personnel Act, for example.

Mrs. Orfirer: We have discussed possible constitutional changes in respect to territory and boundaries. The consensus seems to be that it isn't practical to propose this. We can live with and work with what we have. Would we retain counties and superimpose another level--and they would retain certain functions and the new level would take over some of their functions and also have new functions.

Mrs. Hessler: I think it is important to realize that there are two trends in the country now and they are both extremely important. One of them is toward more regionalism in certain decisions that affect urban development. The other is toward more people participation, local control for the kinds of things that can be handled that way. We must consider giving smaller areas some controls, as well as large areas.

Mrs. Orfirer: I think that is a very good point and we have to keep the two trends in mind and try to tie them together as we go along.

Mr. Kramer: Consider what has happened to counties in this state. Although structure is really the same, counties now act as both the agent of the state and they have also taken on many urban functions. So that they really have a dual role and if there would be any plan to provide for a regional government that would take over, the counties would still be there and they would still have to be taken care of.

Mrs. Orfirer: What we are talking about is constitutional changes with respect to conferring power of larger units. I think we agreed that this has to be in some way mandated. Local units do not seem to confer power on larger units voluntarily.

Mr. Kramer: I think this ties in to the earlier discussion about counties and the power of the general assembly to create larger units, taking power away from counties and giving it to larger unitis. I am talking about the powers of counties as arms of the state--rather than urban powers. It seems to me that these additional powers should be removed from the counties and given to another unit by the G.A. So the real problem apparently would be with the municipalities and not the counties in those particular kinds of services.

The committee discussed providing "home rule" powers at more than one level, and the possibility of establishing certain things for home rule at the municipal level, and others at regional levels.

Mrs. Orfirer: There is nothing wrong with home rule that changing the level of local government at which it is applied wouldn't cure.

Mrs. Hessler: You have home rule but it changes all the time depending on the size of the government and its requirements. What we have to decide about is which functions should be at which levels.

Mrs. Orfirer: It seems to me that we established early in our life as a committee that one of our major concerns was there is such an ambiguity under the municipal home rule provisions between what is a local concern and what is a state concern and so often these things are thrown into the lap of the courts. We didn't feel that a constitution should be written in such terms that it continually had to be decided in a court.

Mr. Kramer: I recall the discussion of the counsel for the Ohio Municipal League that all of the problems can really be handled by the proper interpretation of the home rule amendment. I think it is interesting to know that there has been a lot of movement in the states which are revising their constitutions to provide home rule in municipalities. Since 1912 there really has been no other state that has followed Ohio's lead toward home rule.

Mrs. Orfirer: Don't we have the strongest provisions for home rule of any state?

Mr. Kramer: Probably so, but since that time no other state has evolved this kind of thing. The recent trend has been to provide home rule but to have overriding control in the hands of the legislature.

Mr. Fry: The more power we give the municipalities and the county unit of government, the better off we are. But there has to be modified control in the G.A.--the effects of what we might enact has to cover more than just one area. The majority of the state legislatures of the country spend most of their time taking care of local problems.

Mrs. Orfirer: What can be handled on a local level should be, and what transcends local boundaries must go into a wider area.

Mr. Ostrum: The Fordham concept is that each county or city may exercise any legislative power or perform any function which is not denied to it by its charter or denied to counties or cities generally or counties of its class. This is in the model cities charter..."within such limitations as the legislature may establish by general law" is also part of the clause.

Mr. Fry: Let me give you a specific example from the last week that we were in session. Cleveland has a financing problem. The mayor who is leaving--his estimates of revenue were based on having an income tax adopted which was not adopted--so the city of Cleveland ends up with a tremendous deficit and it comes back to the legislature to make it possible for the city of Cleveland to find a new financing means. It was enacted but this is not a healthy thing to have that kind of thing decided in the legislature. One county shouldn't have to solve another county's problems. It was finally enacted but it would have been so much better if it could have been handled at the local level.

Mrs. Orfirer: I do not deny that, but the Democrats were not only opposed to it because it was a Republican mayor but because it was necessary to have a sounder finance system in Cleveland.

Mr. Ostrum: Haven't we said several times in this committee that there are certain problems of a regional nature that can only get solved in a regional way, maybe, and isn't this the whole problem?

Mr. Fry: Local people should solve local problems.

Mrs. Hessler: If the legislature wants to have local decisions by local people, they have to set up a form of local government which can make decisions, which means, in some cases, a government which can make regional decisions. If you leave it up to a vote of the people it will never be done.

Mr. Fry: I don't think the federal government is doing it in the right way by offering money. I think we should give local government the chance to raise the money.

Mr. Kramer: I think the Toronto experience is enlightening on this. There was a case where a city was having very serious problems, and they were unable to get together to solve this problem, and because the same was true in Ontario--it may be that providing some machinery for government which will enable that area to take care of its own problems would be the best.

Mrs. Hessler: You have to have a regional outfit to say this is the way the regional growth should go.

Mr. Bay asked whether the constitution could require the legislature to establish districts for the entire state and also establish optional forms of government for the districts. It could even be left open enough that the people could establish their own form. But this would trigger the process of setting up statewide regional govt.

Mrs. Orfirer: You could leave it up to each individual unit to do this within a time limit and then if they did not, one of these forms would have to be adopted automatically--so there really are two options. As I understand it, then, one of the advantages of this plan would be that it would not interfere with the universal application of the law.

Mr. Kramer: This would extend to a third level what we have in effect now concerning municipalities and counties. A statutory form of government and certain alternative forms--regional governments could be as modest or as complex as you wanted them to be. They would have some fundamental powers, such as planning powers. The key problem today is when a problem goes beyond a given boundary.

Mrs. Orfirer: Wouldn't you suppose that each specific option might also spell out that range of powers? There could be an option that could cover more powers than another.

Mr. Bay: I was thinking of options more in terms of structure.

Mrs. Hessler: Would you leave the optionsto the legislature--authorizing the legislature to decide what the options and boundaries should be? So you don't have to have constitutional change every time?

Mrs. Orfirer: But somebody is still mandating--the constitution.

Mr. Kramer: The provisions that were suggested in the Maryland Constitution which was not adopted on regional government and governmental authorities are relevant and interesting. The instrument of government may be created by the general assembly by law.

Mr. Loewe: They were strictly permissive even in regard to creating the region. The general assembly could set up the region but they weren't required to set up the region.

Mr. Kramer: The general assembly could create the instrument of government or it could be created in several other ways. This is how the regions were established--it went on to provide for regional popularly-elected government. I think the most important section, though, concerned the powers and how they are established. Powers may be vested by counties relinquishing powers, or by the General Assembly delegating powers of the state to regional government.

Mrs. Orfirer: It's two different powers and two different methods.

Mr. Kramer: There is the power conferred upon a regional government, and there is power conferred by the G.A. I think it is important to remember though that the county is the most important unit of regional government in Maryland.

Mrs. Orfirer: I don't know if our provision would have to be quite like that, or quite so complicated. Should we have Gene prepare for the next time some examples of how this could look?

Mrs. Brownell: Is this still going to interfere with the municipal home rule business? The question of conflict may still have to be spelled out in the Constitution.

Mrs. Hessler: You might say it was only for regional problems that transcended municipal boundaries.

Mr. Fry: I think we will be on more nearly solid ground if we say what we think is right than if we keep thinking about political expedience. We can't start equivocating; we shouldn't operate like legislators even if we do get hit over the head. We have to ask for what we know is right.

Mrs. Orfirer: We can offer alternatives to the commission--show different routes of getting at the same end.

The committee adjourned. The next meeting will be on May 15th at the "Clevelander Club" on the 38th floor at 100 Erieview Plaza in Cleveland. Dinner will be at 6 p.m., followed by a meeting at 7:30.

Ohio Constitutional Revision Commission
May 15, 1972
Local Government Committee

Summary of Meeting

A meeting of the Local Government Committee was held at the Clevelander Club in Cleveland on May 15, 1972. Present at the meeting were Commission members Mrs. Oxfirer, Mrs. Hessler, and Messrs. Fry, Heminger, Ostrom and Pokorny. Also present were Mr. Eugene Kramer, Mr. Loewe of the Ohio Chamber of Commerce and Professor Lyndon E. Abbott of the Political Science Department of the University of Dayton. The discussion at the meeting began with a statement prepared by Mrs. Hessler, and a transcript of that statement follows:

Fundamental Questions Posed by Options on Regional Units of Government
by Iola O. Hessler

Traditionally, when we talk about governmental reform or "progress," we tend to ask ourselves, where are we now and where can we go from here? I'd like to see us change the emphasis on the question to ask, where do we want to go and how can we get there from here? The very comprehensive list of options presented by Mr. Kramer will be invaluable for deciding how to get there, once we have decided where we want to go.

Changesin the powers, functions or area of local governments are necessary only if existing governments do not have the capability to make the decisions and serve the purposes citizens expect them to serve. If it can be shown that a substantial number of fundamental social choices cannot be made at the municipal or county level, choices which currently are being delegated to local governments, then some other government with broader jurisdiction must make them.

But, must be not first decide what areas of decision-making are no longer appropriate for existing local governments, and at what level or over what area they might be more appropriately allocated? It will then be necessary to ask, what changes in the home rule provisions of the constitution will be required to make such allocations.

This leads to an even more basic question. The state is the sovereign body in the American federal system. All fundamental social choices for 200 years have been made at the state level/ For example, the states created our economy, our capitalist system, through property law, commerce law, inheritance law, banking and credit and insurance law. States created local governments, election law, family law including morals, the judiciary, criminal and penal law, tax systems, the educational system, public health, occupations and professions law.

Although given home rule in 1912 in Ohio, the cities have never made such basic choices and the county, of course, has been simply an administrative arm of the state. Both have operated within the framework of social choices determined by the state legislatures. In the past 30 or 40 years, however, the federal and state governments have been delegating more fundamental decisions to local governments than they are capable

of handling. The real cities have outgrown their boundaries. Technology has transformed our society.

May I suggest that today a minimum list of important functions which can no longer be performed efficiently at the local level, would include:

(1) planning for metropolitan growth and development, including implementation or incentives and enforcement of land-use policies; yet all such controls have been delegated to local governments;

(2) all forms of environmental pollution, air, water, solid waste and conservation of natural resources;

(3) provision of adequate housing opportunity for all segments and income levels of our citizens;

(4) education;

(5) poverty and welfare; closely associated with manpower development and employment opportunities;

(6) public health;

(7) transportation;

(8) a tax system designed to support state-urban policies.

All of these functions require fundamental social choices which home rule does not equip our fragmented system of municipalities, counties, and special districts to make. Every one of them requires some or considerable state control.

The basic question, then, is: does the sovereign state have the right to delegate unguided power to local governments to make decisions having an impact outside their boundaries; or should the state seek to recover its sovereign authority to delegate functions as appropriate, retrieve already delegated powers as required by the rush of history, and determine what levels, forms, powers, and resources of substate governments are necessary from time to time in a changing society?

If our purpose is to find a government capable of making fundamental social choices in the areas I have suggested, and any others that come to your minds, then I submit that the state is that government. Only the state can maintain sufficient flexibility to tailor substate governments to meet changing needs. If we can agree on this basic point, we have then accepted the necessity of modifying Ohio's home rule through the Fordham concept, and we can then go on to consider the options for creating regional governments.

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Mr. Pokorny expressed the view that consideration of proposals for creation of regional units of government may be visionary or impractical, in view of his own experience as county commissioner in Cuyahoga County with attempts at securing agreements among various local government units for the provisions of services to the public. He gave examples such as the failure of Cleveland and the suburbs to agree with the county on a regional sewer system or on a county-wide health district to illustrate his view the regional government may be presently unattainable.

Mrs. Hessler and Mrs. Orfirer both pointed out that one of the features of a regional unit of government which makes it desirable at least to explore the subject would be

elimination of the need to engage in difficult negotiations and bargaining among local units of government as to those functions and services over which such a regional unit would have governmental authority.

Mr. Fry expressed the view that from his standpoint as a member of the General Assembly some form of regional government unit would be desirable if it would enable local areas to solve thier own problems rather than having the General Assembly be called upon to deal with essentially local problems. As an example of the latter he pointed to the recent legislation authorizing the issuance of bonds by the City of Cleveland to help in solving that city's fiscal problems. He also alluded to the case of the Maryland legislature, which devotes as much as one-half or more of its time to strictly local legislation as an example of a type of situation to be avoided in Ohio.

Mrs. Orfirer then suggested that the Committee discuss the matter of regional units of government on the basis of the outline sent to the members prior to the meeting. It was agreed by the members that creation of any such units should not be accomplished by defining their number and boundaries in the constitution. This method was rejected on the basis that it would be too rigid and that the units once established could be altered only by constitutional amendment. The alternative of having the number and boundaries of the regional units defined in the constitution, but with the General Assembly authorized to alter them was regarded as less objectionable, but was still considered to be too rigid.

The Committee then turned to a discussion of possible provisions involving authorization for the General Assembly to create regional units. In connection with the suggestion that the General Assembly might be given unlimited power to establish any number of such units and their boundaries, Mr. Fry suggested that it would be desirable, if such a constitutional provision were adopted, to require that someone be made responsible for initiating a proposed division of the state into regions. The General Assembly would then have the power to approve, disapprove, or modify such a plan. Mr. Fry explained that it is difficult for a plan such as this to originate in a legislative body. It was suggested that responsibility for initiating the plan might be given to the Governor, to the Governor and the presiding officers of the two houses of the General Assembly, or to a boundary commission created for such purpose.

With respect to the possibility that a minimum or maximum number of units be established in a constitutional provision, Mr. Heminger suggested that such a number, rather than being expressly stated, might possibly be based upon population or percentage of population. Other directives might be included in such a provision relating to the creation of districts, including broad criteria based on such factors as natural resources, social and cultural units and amounts of tax and financial resources.

The Committee felt that a provision for creation of less than all of the regions required to encompass all of the territory of the state, thus allowing the General Assembly to create one or more regions initially and the remainder from time to time would be undesirable. In this connection Mr. Loewe pointed out the importance of considering the relationship of any such system of regional units of local government to any system of districts for purpose of administering state services such as that now being considered by the Governor's Commission on Local Government Services.

The possibilities of having regions created by the governing bodies of existing local governments through agreements or by the residents of proposed regions by petitions and elections were thought by the Committee to be not particularly useful in view of the experience to date in attempts to secure regional cooperation among local government units or by referendum procedures.

With respect to the type of government which might be established for regional units of government, the Committee rejected the idea that the constitution should provide in any detail for the form and structure of such governments. The consensus was that this matter could be provided for in a manner similar to municipalities and counties. Under this system the General Assembly could by general law provide for a statutory form and alternate forms of government, but residents would also be able by charter to establish individual forms for any region which chooses to adopt them.

The Committee agreed to continue at its next meeting the discussion of regional units of government based upon the outline previously provided. When a date for the next meeting is established, the members will be notified.

Ohio Constitutional Revision Commission
Local Government Committee
July 19, 1972

Summary of Meeting - July 19, 1972

Present at the meeting held in Columbus on July 19 at the Athletic Club were Mrs. Orfirer, Chairman, Mr. Ostrum, Mr. Pokorny, Senator Calabrese, Representative Russo, Mrs. Hessler, Mr. Heminger and Consultant Mr. Kramer.

Mrs. Orfirer opened the meeting with a discussion of future meetings, guest speakers and public hearings. Agenda for future meetings will include conclusion of discussion of regional units, then return to municipal corporation charters and county charter problems, then call in outside individuals and organizations. She suggested an increase to two meetings a month, one in conjunction with the monthly Commission meeting and one between Commission meetings, probably in Cleveland unless a public hearing is called for elsewhere. The date of the next meeting was set for Wednesday, August 16 at the Clevelander Club in Cleveland.

The committee then discussed Section 13 of Article VIII. Mr. Kramer explained that the proposal would expand authority under section 13, which now provides for industrial revenue bonds, applies to both state and subdivisions, and permits lending of aid and credit ro private persons . Prior to the constitutional amendment, such a program was ruled unconstitutional by the Supreme Court to allow state and subdivisions to construct facilities for private business or industry with tax-exempt bonds and then lease to private business or industry, making payments of principal and interest from the lease payments. The General Assembly retains control over borrowing under this constitutional provision. Under the proposal to amend section 13, authority would be expanded to permit use of provision not only for creating jobs but for maintaining jobs--not just to attract <u>new</u> industry. In addition, it could be used for environmental welfare and living conditions--housing and related facilities for low and moderate income as defined by the General Assembly, and pollution, waste disposal, and other environmental matters. The proposal also provides for a pledge of reserves which could be provided by appropriation for the new purposes.

Mr. Pokorny - Will there be a commission like the Ohio Bond Commission?

Mr. Kramer - No, all set up under legislative powers, like the industrial development bonds.

Mr. Pokorny - I would like to see the application of this section prohibited in such fashion that encourages relocating from central city to suburban areas. The central city is dying--if we are going to give tax advantages to industry to move out of the central city, we're promoting this type of movement. We should provide inducement for industry to stay in the central city--and rebuild the central city.

Mr. Kramer - Use of the additional language proposed for the section "to protect job opportunities" helps to provide for maintaining industry where it is.

Mr. Pokorny - Unless something is mandated, they will still leave the central city and establish themselves in suburbia.

Mr. Ostrum - The legislature should be concerned about this problem, but the constitution should be flexible and permit the legislature to make that decision.

Mr. Russo - A possible solution would be to restrict this type of funding to those designated to be in urban renewal areas by legislative bodies--urban renewal areas are defined by federal law. Perhaps the Constitution needs tightening in this area.

Mrs. Hessler - We have much yet to learn from urban renewal and rehabilitation programs for central cities--model cities, etc. If you tie this to urban renewal, you are tying it to a federal program which may change or may not be working. There are many problems in expanding industry in the central cities, because of changing land use patterns and demands. There may be other ways to solve the central cities problem. Rather than writing into the Constitution a restriction of land use in central city, it would be better to do something about the property tax as a base for schools etc., so that local governments were not so dependent on the property tax.

Mr. Pokorny - I was not thinking of industry only as supplying taxes. If we are serious about our approach to what is happening in all the urban areas in the state and in the country, we see that we encourage industry to move by taking advantage of section 13. We are defeating the things we are trying to preserve by encouraging movement to a more palatable taxing area, more palatable service area - better geographically located because of the freeways. If we put on restrictions on the use of the funds so that they get help if they stay in the central city, industries will stay there.

Mrs. Hessler - If the trend continues that we see now--the changes in land use--the fact that the pattern of the central city and dependent suburbs as changing rapidly because the suburbs are not as dependent as they once were, and you are getting settlement in sattelite communities, and different kinds of communities, you are going to have to change land use in central cities. An industry that needs a lot of space, and a lot of free parking, is not going to be able to rebuild in the central city even if you give them a subsidy. The answer is switching to the income tax and putting more of the services such as welfare and education at higher levels of government that are depending on the income tax.

Mr. Pokorny - This concept will further remove dependency on the central city--it will sit there and rot. We've got hundreds of acres in the central city of Cleveland that is barren right now and that could be developed with incentives such as section 13.

Mr. Russo - We need not only tax breaks but we need to be able to finance the structures for industry because our big problem is giving the inner city people a job, or an opportunity to ride to a job or to part of the industrial complex--and to provide the industrial complex adjacent to the area where the manpower is available. If we let most of industry slip out to the suburbs because of the things we can give them there, we are going to let the central city deteriorate at a much more rapid rate.

Mrs. Hessler - The proposal would permit the holding of industry where it is, by providing the protection of job opportunities.

Mr. Kramer - Existing legislation does not distinguish between central cities and suburban areas--the central cities have the same ability to engage in industrial revenue financing as suburban areas--so it is not the provision itself, it is the use made of it by various areas that has the results we are talking about. The provision has been used by both. One of the largest uses of this type of financing, before the federal government put a lid on the amount that could be issued under

these schemes, was by Lorain County which financed the construction of a plan by U. S. Steel in the City of Lorain. But in Cuyahoga County, the great bulk of this financing has been in suburban areas.

Mr. Pokorny - We should also look at the overall problems of the state to determine where development is needed, not just at the problems of the central city.

Mr. Kramer - Ohio really got into industrial financing as a defensive measure because the southern states were doing this and attracting industry to those states. I would call to your attention the reports from the Minneapolis-St. Paul area about the tax-sharing provisions whereby new industry does not benefit solely the subdivision in which located, but a portion of the growth in the assessment is allocated areawide. This would cut down, to some extent, the competition within an area for location of industry, so location will be based on factors other than solely tax incentives offered by an individual political subdivision.

There are the advantages of tax-free bonds in this type of financing, since industry would not be able to borrow tax-free if it borrowed the money itself, and there are, in addition, real estate tax abatement programs offered in many states and localities for industry locations. Congress, by limiting any one project to $5,000,000 over a period of three years, has cut down substantially the size of individual issues and the total volume of this type of financing.

Mrs. Eriksson - Section 13 proposal has not been recommended by the Finance and Taxation committee, but was presented to the Commission by the Department of Finance and referred to that committee. A public hearing will be held tomorrow at the Commission meeting on the proposal. As drafted, it would apply section 13 to additional purposes. It does not change the economic and industrial development purposes of section 13, except to permit this type of financing to help industries maintain jobs as well as create job opportunities. It would add housing and environment to the purpose.

Mr. Pokorny - If we approve this section, perhaps the original program ought to be changed to encourage industry to locate in the central city--a positive program for this purpose.

Mrs. Hessler - Didnt't this proposal come out of the housing commission?

Mrs. Eriksson - The kind of housing finance program that is desired by the administration might not be constitutionally possible at the present time.

Mr. Pokorny - Is the state's full faith and credit behind the bonds issued under section 13?

Mrs. Eriksson - No, although the new language will permit the establishment of reserves which may be pledged to the housing and environment bonds and which may be supplemented by appropriations from the General Assembly - they would be a hybrid-type revenue bond similar to those now issued under section 2i, issued for example, for higher education.

Mrs. Orfirer - The hearing tomorrow is the opportunity for this group to hear about these proposals, and we do not have to reach any conclusion about this section now.

Mr. Ostrum - The problems we have been discussing about the central city vs. suburbs in attracting new industry are present in the existing section 13. The addition of housing and environment does not change that.

Mr. Pokorny - While I can see the adverse effects on the central city, I can see that this might also benefit the central cities by the addition of housing and environmental and pollution as purposes of the section.

Mrs. Orfirer reviewed the outline on regionalism:

(1) Methods of creating regional government (1) by the Constitution; should it define the number and boundaries? Agreement that it should not, but perhaps should give a maximum and minimum number.

(2) By the General Assembly - this is the better way. If minimum and maximum number established by the Constitution, the General Assembly should have ability to alter the number within the limit. It should be required to establish all regions at one time. The committee has rejected the idea of these units being set up by governing bodies of local government or by resident petition.

(2) Each region to have minimum and maximum population, and perhaps other criteria should be established.

(3) Structure: left flexible so the General Assembly can provide for organization, by general law; keep option open so could be established by charter, and alternate forms authorized by the Constitution.

(4) Type of governing body; elected representative?

(5) Should regional units be established without regard to the boundaries of existing constituent units? Tentatively, there was agreement that even county boundaries could be disregarded.

Mr. Loewe - There are advantages to keeping county lines, even though they are arbitrary - politically and for other reasons. The things you lose because you chose county lines can be relatively minor, compared to the problems involved in disregarding county lines.

Mrs. Orfirer - What might be lost in disregarding county boundaries?

Mr. Loewe - The tradition of the way government is organized, and the political parties depend on the counties as an important way of organizing. Perhaps eventually counties might be dissolved, but in the immediate future I believe they are important. You can live with almost any county line and still come up with a pretty good region.

Mr. Heminger - On the other hand, a city such as Fostoria which sits astride three counties might create problems if all three counties were not included in the same region. Flexibility to disregard county lines in such a situation would be desirable.

Mrs. Hessler - You don't hava to obliterate the counties for the functions they are now providing - they are primarily administrative agencies of the state, and they can go right on being administrative agencies, and you can still combine them as counties into a regional pattern for other functions.

Mrs. Orfirer - It might be very much an advantage to follow county lines, but perhaps we should not write it into the Constitution that they must in all cases be followed, merely make such suggestion a recommendation to the legislature, which they would probably do anyway.

Mr. Kramer - The flexibility permitted by refraining from defining how the lines should be drawn is probably more important than temporary political considerations - that was my understanding from the last meeting.

Mr. Pokorny - The apportionment of the General Assembly follows guidelines which require the apportionment board to follow political subdivision lines whereever practical and possible.

Mrs. Orfirer - Perhaps we should suggest similar language - follow county lines whereever practical and possible, and this gives the General Assembly leeway to make exceptions, and permits flexibility. This might be more acceptable politically.

Mr. Kramer - Have we discussed the question of the type of governing body? Should it be an elected, representative body with an executive also or more like a council of governments? If the region is created without regard to the boundaries of constituent units it would seem to indicate that this would be a new form of government independent of the constituent units. It is important to the whole concept to determine where its powers come from - from the people of the region who elect the governing body, or from elected officials from within the region.

Mrs. Orfirer - The reason we are discussing this is that the local units now existing, in many cases, are not providing the services that we want local government to provide. If it's not being done right, we need a new unit of government. Duplications, and services not being carried out in the most effective and economic way. We should start with the things we would expect a regional unit to administer.

Mr. Pokorny - Will the region derive its powers from the Constitution or from the region itself? Or from the legislature?

Mrs. Hessler - From the Constitution, although the Constitution can delegate to the General Assembly the allocation function of powers.

Mr. Pokorny - If you leave it up to the legislature, you are getting right back to county government. The legislature will not make the decisions.

Mrs. Hessler - The legislature cannot give certain powers,not to regional governments, because there is no provision in the Constitution for setting them up.

Mr. Pokorny - Even under the present structure, we could have improvements if we could get certain things through the legislature. Why do we assume that the legislature will act if we go to a regional approach?

Mr. Loewe - If you spell out the powers in the Constitution, it makes the system so rigid that you are right back where we are now.

Mrs. Orfirer - We would have to work with the language to assure that there is some flexibility maintained.

Mr. Kramer - Another approach is to turn the present system on its head - the powers of the General Assembly vis a vis local units, except municipalities. That is, instead of having only delegated local powers, you start out with the proposition that the local unit has all powers to carry out its functions except those specifically prohibited by the legislature, its charter, or the constitution. If this were done by the Constitution, it wouldn't have to go through the legislature.

Mrs. Orfirer - This would be the Fordham approach at a regional level.

Mr. Kramer - You would not look to a delegation of powers, only to whether there was a restriction of power. This would be a device to overcome legislative inaction.

Mrs. Hessler - What functions are we concerned about in setting up regional governments? The chief problem is that we have developed metropolitan areas that cannot be controlled by any existing government. These developments occur because of the placement of highways, supported at least 90% by federal moneys, by the placement of various other public utilities and then by the private sector purchasing and developing the land. The state should buy the land in the areas of growth, and control its use. The counties may not trust the state, and may not like this because the state legislature has not been forward looking as far as county powers are concerned. But now it is beyond the county level, it's regional - and when you have regions of entirely different size and growth patterns, only the state can take the responsibility.

Mrs. Orfirer - What happens when the state buys the land?

Mrs. Hessler - The state can plan for the use of the land, and can control its use. The state is protecting the public this way.

Mr. Pokorny - You cannot preclude private land speculation, because landowners who own land where highways are built or near water are smart enough to understand the value of their land and to hold it for a profit.

Mrs. Hessler - If the state controlled the use of the land, speculation could be controlled. But a regional government cannot do it.

Mr. Russo - Columbus has offered the simplest solution by annexation - you don't get any water unless you become part of Columbus. Could we not take the most important services and allocate the responsibility - for example, give a particular service to Cleveland or Cuyahoga County and then make it impossible for those in the county or region or whatever to obtain that service except through the governmental agency authorized to supply it. You will never get the people to delegate the power to a different or new unit of government. The county commissioners and the city governments will be fighting the regional authority. So we have to look to the Constitution itself, which has to be voted on by the people. If you give this power to the legislature, the people will refuse to vote for it because it takes power away locally and gives it to the legislature.

Mrs. Orfirer - The reason we need regional government is because, in some areas, functions such as water and air transcend county boundaries.

Mr. Pokorny - Often, they transcend regional boundaries as well. Water pollution cannot be controlled even on a watershed basis. Air pollution shifts with the wind. Pollution must be controlled on a wide geographic basis, and even regions may not solve these problems.

Mrs. Orfirer - Why should we have regional government?

Mr. Russo - For functions such as water and sewers. If the state passes a law applying to regions, then those administering the law in the regions must follow it. Regardless of a shift in the wind, the law would be applied in all the regions.

Mrs. Hessler - The power to set up regions has to be at the state level. The purpose of having regional government is to make it possible for people who know the area to make decisions, but that the overall land use control would be statewide, based on recommendations of regions of the sort that were presented to the Local Government Commission - for the purpose of planning and implementation of laws and policies determined by the state.

Mrs. Orfirer - Do you see regions as administrative arms of the state?

Mrs. Hessler - With a considerable input into the state policy from the regions. In Minnesota, the state has delegated certain powers to the Twin Cities metropolitan council. But the state can change the powers given to the Council at any time, including the boundaries of the region. The state is the source of the local powers. We took that power away in Ohio in 1912 by the way we gave home rule to cities, and I think this has created many problems because now we have outgrown the cities.

Mr. Pokorny - I disagree with that concept, because you are taking the power away from the people and giving it to a remote area of government in Columbus which hasn't got the slightest concept of the problems.

Mrs. Hessler - But the people elect the legislature.

Mr. Pokorny - And the county commissioners and the mayor and the city council. I believe we should give the powers to the local governments and let them solve their own problems.

Mrs. Hessler - Some powers have to be delegated; the legislature cannot solve all local problems and is trying to solve more now than they should; but the legislature has to decide which problems can be solved locally. For example, the legislature should decide who should handle air pollution - statewide or regional. Should sewer systems be operated by counties or regionally?

Mr. Pokorny - I think the counties should have more authority, because county commissioners are closer to the problems than the state legislature, and know what they are. No one else has the same problems as Cuyahoga county, or the same population, or the same conditions. It's frustrating to come to Columbus and have to try to get things through the legislature.

Mr. Loewe - What powers would you be willing to give up to a regional unit?

Mr. Pokorny - Water and air.

Mr. Lowew - How about land use? zoning?

Mr. Pokorny - Zoning we have nothing to do with. We have a regional planning organization that is starting to work - the rural and urban people have their input, and we reach compromises and make decisions, as the federal government insists on, and it is beginning to work. Until the federal government assumes some responsibility

in the water and air fields, I would be willing to have these handled regionally, although I think these problems transcend regions just as they transcend counties. The regional concept is not a utopia. Local units should have input into a regional unit just as I have input into our 7-county regional planning unit. Our transportation committee all sit together and draw up a plan that will affect us all.

Mrs. Hessler - But cannot be implemented.

Mr. Loewe - All this happens because the federal government says, you have to do it this way and have regional plans or you don't get any money. That's not going to happen at the state level.

Mrs. Orfirer - We are back to what do we need a regional government for?

Mr. Bay - I see the need as an agency that can knock heads together when you can't get agreement otherwise. It's a decision-making body that imposes decisions on the counties and municipalities after getting all the inputs from them. Planning and development are the central areas. The regional agency, beyond that, should have options of taking on other functions turned over to it by the local units. If it controls planning and development, it can operate a sewage system if it so desires or it can tell the center city to operate it for the region. If local units want to turn over the refuse collection function to the regional agency, they could. I would give it basic powers - much like Twin Cities Council, but more general purposes, taxing powers, sufficient money to sustain itself. The regional agency would have power to set standards, for example, for individual sewerage systems within the region, without necessarily taking over the operation of that function itself.

Mr. Bay - I think I would like to see the regional government have key powers but still leave the other powers with the local units rather than putting it in the position of playing one local unit against the other. The regional government might say that Columbus should provide the basic sewer system for Franklin County or Delaware for Delaware County, but cannot force Columbus to provide the service for Delaware county. It would have a residual power to provide service upon a determination that a local government was not adequately providing a service.

Mr. Kramer - It could enforce restrictions, or require affirmative action under a penalty of taking over a function itself.

Mr. Heminger - Functions would seem to be areawide are planning and zoning, police, some aspects of health, mass transportation, airport and port authorities and some facets of education might be multi-county functions, such as vocational education.

Mr. Kramer - Some people believe zoning is an infringement on their rights. No official in Bucyrus could get elected if he advocated zoning.

Mr. Russo - Some states have, by state law, taken over the zoning powers.

Mrs. Hessler - The American Institute of Architects has had a task force on the question of land use controls and concluded that, in the future, development and planning controls must be on a much larger scale - people can't just buy a lot and build a house. Development must be economic and for creating better communities--zoning may not be so important in the overall development of communities, because the planning will be based on density of population desired, and meeting the needs of the people in the community in terms of parks, etc. Zoning, as such, may be on

the way out, but it is still very important to people who have it because it is protection for them.

Mr. Loewe - There won't be a big protest at land use planning in areas that are not now developed because no one lives there yet. It would be difficult to try to transfer the traditional type of local zoning laws to a county or regional setting.

Mrs. Hessler - An area like Forest Park is an example of a planned community which doesn't need zoning, because no one is going to put an industrial plant in the middle of it.

Mr. Loewe - But there are a few highrise apartment houses they are worried about because of the population density.

Mrs. Hessler - So you try to control the density depending on the public facilities you are planning to install.

Mr. Ostrum - How do we get support for a broader or regional approach to solving some of these problems that we all recognize can no longer be handled locally with the multiplicity of local units we now have? Some of our local governments that can handle these matters locally efficiently can do so because they are wealthy and they have the money, but others do not. But where governmental functions are not handled well because they do not have the money, they have to look to the federal government or wherever the money is.

Mrs. Orfirer - For regional governments, perhaps federal or state revenue sharing could help the funding problem.

Mr. Loewe - Existing local governmenta will feel their money is being taken away from them.

Mr. Russo - In Cuyahoga county, we could use 1/5 of the state budget just in that one county to accomplish all the services we are talking about. It will cost $40,000,000 to buy the sewer system from Cleveland, without any money for additional construction, and 2 1/2 million just to study the possibility of making it a regional system.

Mrs. Hessler - You will have to charge the sewer users to pay for the system. If you have to have sewers, you have to pay for them.

Mr. Kramer - Summary: we're still talking on a general basis but there seems to be a consensus based on our observations and the criteria we considered before that there are a number of problems which, because of their nature and the existing political setup, are not being adequately handled by local government and are not likely to be met by local government adequately under existing conditions. One method of meeting these problems is a regional unit, because of several factors, including a wider geographic area which includes more of the area affected by the problems, or a wider tax base, or a wider base for the generation of fees for services, and also the ability to have a governmental body which can oversee and make policy for an entire region, not bound by narrow interests in part of a region. This type of government would then be able to exercise certain powers of its own in a region and to exercise certain supervisory powers over existing local governments within the region. It has been suggested that one of the major powers of such a unit is planning and development. Others are zoning, mass transportation, some educational

functions, ports, airports, police and fire protection, sewers, water, solid waste disposal, air pollution. These functions might not necessarily be given to each regional unit, but the regional unit might be given some of the basic powers and have the ability to accept and carry out some of the others if voluntarily turned over by local units, or a power in the regional unit to take over if the locals are not adequately providing--or the state might give powers to the regional unit on a finding that they are not adequately handled otherwise locally. We have not had much discussion yet about financing the regional units.

Mrs. Orfirer - Should the officials of such a unit be elected from the region? from local subdivisions?

Mr. Loewe - If they have powers to carry out services directly affecting the people, I think the elected process is practically mandatory.

Mrs. Hessler - One man - one vote would seem to require this.

Mr. Kramer - If it is a general unit of government, that is true. But not every unit that has the power to tax and to spend public funds has to be elected on that basis. Some of our existing units with planning and advisory powers on a regional basis do not, apparently, have to be elected on that basis. Even where you set them up on the basis of representation of subunits within the overall unit, they do not have to be proportionally representative. However, if we did provide for elected officials, then I think they would have to be elected from districts of substantially equal in population.

Mrs. Hessler - Could the Constitution specify that the state set up regional units without specifying in the Constitution what form of government they would have? There might be different choices--or you might start with appointed officials and then go to elected. Might not be uniform among the regions.

Mrs. Orfirer - I believe we talked about alternate forms, so that several options might be open.

Mr. Kramer - As with counties, the General Assembly could provide alternate forms or we could provide for a charter so that the people themselves could determine the form of government. Counties do not get the cooperation from the local units of government nor do they get the power they need from the state legislature. Somewhere, an infusion of powers has to come from outside those two sources, and this would be through the constitutional provisions.

Mrs. Hessler - I would prefer that members to a legislative body on a regional basis empowered to make decisions would be elected to that body on a one man - one vote basis, rather than representing a constituency that controls their vote, such as a city, but I hope we can keep some flexibility in the Constitution.

Mr. Loewe - How about the executive? Is that required to be elected, or can the executive be an appointed official?

Mrs. Hessler - We have that option at the county level. I don't know why we couldn't have it at the regional level.

Mr. Kramer - Flexibility is important but the whole concept of a regional government as being a functioning body which has definite power may depend on whether it will

be popularly elected and representative with powers independent of the constituent governmental units, as opposed to the councils of government as we know them now--subject to the direct control of the constituent units.

Mr. Loewe - Some people like the representation from the jurisdictions because it keeps their identify alive and does not submerge them, as might happen if people were directly elected from a district to serve on a regional government.

Mrs. Hessler - That is the very reason that the COGs don't work.

Mr. Russo - If you had at large elections, and had combined Cuyahoga county with six or seven other counties, all the representatives would be from Cuyahoga county because it has the largest population.

Mr. Pokorny - Even if you elect from districts, the total population of Cuyahoga county is greater than the total of the other counties, and they will be reluctant to join--just as in the regional planning unit--because they will say that Cuyahoga county will get all the advantages.

Mrs. Hessler - The answer to that is, that they have to join or they don't get any money.

Mr. Kramer - The Constitution could provide that joining is mandatory, not optional, by establishing the regions in the Constitution or giving someone the authority to say that these are the regions.

Mr. Pokorny - Would the legislature have the power to subdivide a county and make it part of two regions or more?

Mrs. Hessler - We should establish criteria which would prohibit dividing counties.

Mr. Russo - As a practical matter, there will be a lot of politics involved in what is included in the regions - Cuyahoga might want to team up with Lake, for example, which has no taxing problems.

Mr. Russo - Perhaps the committee should adopt the regional idea as a strong constitutional concept, very general in nature so it is palatable to the legislature, and permissive, but not binding.

Mr. Kramer - The legislature could establish regions and districts now--as has happened with health districts, which is not necessarily a state function any more than police protection, which is also a matter of health, safety, and welfare. The question is about local self-government, and whether the state can make general laws with which the local ordinances cannot conflict. For state functions, there is no question now that the state can create regions, but we did have a discussion about the state setting up units to carry out state functions which have traditionally been carried out by the county as an arm of the state. The discussion was about whether the state could take away powers from the counties, and leave them a mere shell, and give these powers over to a new form of government as an administrative arm of the state, since the constitution does not recognize the existence of counties and provides that there must be a vote within a county before it can be abolished. If, as a matter of fact, you abolish the county by taking away so many of its powers that it becomes a shell and give them to another unit, that other unit may be construed to be a county not created in accord with the Constitution. So it could be a problem if regions were

established which had county powers. Some of the powers which have been added to counties - such as waters and sewers and solid waste - in addition to the traditional powers of roads and collecting taxes, etc. - could be taken away and transferred to other units, but the things which make a county a county might not be able to be taken away.

Mrs. Orfirer - The powers we are talking about, though, fall into the category of the ones given to counties in the first place by the legislature, not traditional county powers. What is the federal government demanding in regionalization?

Mr. Loewe - The use of regions for the administration of federal funds, so that there is planning and coordination. This will make it easier to make the creation of regions by the General Assembly mandatory.

Mr. Pokorny reviewed the various agencies to plan and receive and distribute different federal program moneys in northeastern Ohio - there are different agencies for law enforcement money, for example, for the city and the county.

Mrs. Hessler - All these things could be put into a single regional government.

Mr. Ostrum - The federal government may change its programs and criteria.

Mrs. Orfirer - If the state sets up regions, would not the federal government use those and not require all these separate and overlapping agencies?

Mr. Kramer - We want to make sure that we consider that the state for its own purposes is creating regions and whether it needs to be recognized in the Constitution or at least that the Constitution not preclude the General Assembly from making these regions coincide as nearly as possible with state needs.

Mrs. Orfirer - If there are going to be regions, they should be the same as far as possible for all purposes - federal and state and local.

Mrs. Hessler - The purpose of the local government services commission is to obtain a complete inventory of services and costs so that they can determine what makes a logical organization into regions. Perhaps they can come up with some agreement by the end of the year about creating regions for the administration of state functions, but they still might not be ready to state which local services should be handled in which way.

Mr. Kramer - From a constitutional standpoint, it would be ideal if we could say that regions for administration of state services should coincide with local government services but we don't want to provide that it has to be done, or to do anything that would preclude it.

Mrs. Orfirer - We don't want just to add another set of boundaries to those already existing.

Mr. Pokorny - We have to provide enough flexibility so that you can do what was done in law enforcement - take the high impact crime areas and give them special assistance. They won't fall into a single regional pattern. All functions will not fall into the same pattern.

Mr. Kramer - These problems cannot be easily sorted out--we are now recognizing the

existing situation. If a state, on its own, sets up a system of regions, it will be possible, I believe, to work with the federal agencies, even though at present they are constantly changing their requirements. So we need a certain amount of flexibility in the Constitution for this reason. If we are to make a rational system out of our government, we should assume that we must have something we can work with, and that the federal agencies will accommodate us. We still have not really discussed municipal corporations. After we have looked at all the possibilities, we may decide that, initially, what we need to do is something about the existing units. We must come back to the things we have started with and make decisions. We will discuss municipal corporations and then take up both county and municipal charters.

Mr. Pokorny - I think we should strengthen county government by removing the hurdles in the Constitution, and making it easier to adopt home rule. We cannot do that and have regionalism at the same time; because in the latter, we may end up with a mere shell of county government. We cannot have both.

Mr. Loewe - I think you can have both--the people can decide whether they want stronger county government or regional government.

Mrs. Hessler - We now talk about two-tier government, and perhaps we should talk about three or four tier government.

Mr. Russo - Perhaps we can strengthen county government by giving it the option for regionalism. If we gave Cuyahoga county the powers of a county charter and give it the right to join with or deal with the adjoining counties, we are giving it the authority to deal with problems on a regional basis without taking away any authority from the county commissioners.

Mr. Pokorny - We can do that presently by contract.

Mr. Russo - But we haven't spelled out the legislative powers you need, such as the power to tax. We haven't given you a strong county form of government with which to work. If we put that in the Constitution, you can do it very simply. If the region took over the Cuyahoga county sewer system, it could spread the tax out all over the region. It would be a multi-county approach, but with the power to tax, it would be much more effective. It is not clear yet to me how this will work, but I would like to see a strong county government that could negotiate with other counties on a regional level and would have the rights that go with it, the same as a charter amendment.

Mr. Kramer - There are already extensive powers to enter into voluntary agreements.

Mr. Russo - But there are no taxation rights or right to take property to go with it. Cuyahoga county cannot go to Richmond Heights and say: You are part of the county sewer system. We could give them that right - to go into the suburbs and take over the services at the county level and then they could negotiate at the regional level. They would not have to pass a county charter, if our proposal would give this authority to them. Both the regional concept and the strong county concept will be difficult to sell. But many people have already determined that there has to be a stronger county. Many have not yet seen the concept of regions.

Mr. Kramer - Many counties resist any changes in their own power and structure because they think they are doing fine as things are. Only about a dozen counties feel any real need for change presently. Classification may be the answer to resistance from those counties that do not see a need for change. The question is: is the county

the appropriate unit to take care of the kinds of problems that we see as needing a regional approach?

Mrs. Orfirer - It would have been easier if the state had gone ahead and established regions in those areas where there is a need.

Mr. Loewe - I think that by the time the proposals of the Constitutional Revision Commission get to the ballot, the Governor will have acted to create regions, and they will have been tested so that there will be some sort of history.

Mrs. Orfirer - Shall we continue this discussion or shall we try to have an expert for the next meeting? Someone who can help us cut through all this?

It was agreed to invite someone from the Twin Cities Metropolitan Council to meet with the committee in August.

Mr. Pokorny - We need someone to tell us what they did with their municipalities, how did they elect the regional structure, what powers do they have, do they conflict with the underlying powers of the municipalities?

Mr. Loewe - It would be good to have a person with knowledge of a specific regional concept, such as the Twin Cities, but also a generalist such as Bill Cassella of the National Municipal League who could give an overall view of regions generally, including the good and bad features and where they work and where they don't.

Mr. Kramer - Also keep in mind Toronto - even though the conditions are not the same, we should remember that we are now trying to decide, not how to accomplish regionalism, but whether it is worth accomplishing.

Ohio Constitutional Revision Commission
August 16, 1972
Local Government Committee

Summary of Meeting

Present in addition to Committee members Mrs. Orfirer, Mrs. Hessler, Rep. Russo, Senator Calabrese, Mr. Ostrum and Mr. Heminger were Senator Kenneth Wolfe from Minnesota, County Commissioner Seth Taft of Cuyahoga County, Mr. Martin Jenkins of the Development Committee of Greater Columbus, and Mr. Ed Loewe of the Ohio Chamber of Commerce.

Mrs. Orfirer: Senator Wolfe, we're really delighted to have you with us here tonight. And as we start looking at the problems of regional government, we couldn't think of a better place to go than to the Twin Cities. And so we're eager to hear what you have to tell us about it. Do you have a few remarks you would like to make before we start bombarding you with questions? I think most of what you have to say will come out in your response to questions, but perhaps, you might want to give us a little idea of how this all began.

Senator Wolfe: Thank you. Somebody said to be classified an expert you have to have come more than a thousand miles, so I guess that I don't quite qualify, but I am happy to be here tonight. I have been to a number of cities and towns in the U.S., talking about the Twin Cities experiment, and that is exactly what it is--an experiment. It's an attempt to solve some urban problems--whether our pattern can be followed exactly is another question--I would imagine that you would have to modify it somewhat. We're not sure as to exactly where we're going--plans are being modifed all the time. Greater powers are being given to the Metropolitan Council than were originally intended in the act--and I would like to just give you a brief history of how we got involved in this. Just from my standpoint--as one individual who saw it from its beginnings. The State League of Municipalities in Minnesota has been a viable organization, and taken a lot of interest in what's happening. In 1965, they organized a subsection of the State League called the Urban Section. I wound up being chairman of this particular section of the State League. We had a wonderful crew of people working on the Committee--I think that there were twenty people working on the Committee--we thought our first job should be to try to identify our problem and get cooperation among the municipalities and governmental entities to try to solve these problems. We never thought at that time of setting up any superbody whatsoever.

From 1955 to 1965 we tried the cooperative approach. We have 130 communities in the metropolitan area of Minneapolis-St. Paul. We have communities that run between the population of 350 up to a half a million. They run the whole gamut of size. We also have 7 counties in the Metropolitan area--it's half the population of the state of Minnesota, about 2 million people. We tried to identify the problems and the problems we identified were mechanical problems--mechanical to the extent that they were sewage, treatment and disposal, transit, green areas and parks--we identified the whole gamut of urban problems--but we didn't know how to solve them. We didn't know how to approach it, so we thought that we would start by the Council of Governments approach so in each of the 7 counties we set up regional councils of governments. These served as a sounding board for all the problems affecting the cities and their suburban areas. We had some very spirited discussions at these meetings. Another mayor and myself wanted to do something

on a regional basis. The big push at that time was to make one single city out of the 7 county area. We truthfully were trying to save local government--and we wanted to only give those powers to a regional government that local government couldn't handle on their own. That's as far as we wanted to go--and with that thought in mind, we started with what was then called the Metropolitan Planning Agency, established by the legislature to plan for the metropolitan area. The one problem with metropolitan planning agency was that they would plan and they could plan--but they had no muscle to implement any plan they came up with. They spent over three million dollars developing a comprehensive plan for the area--and I tried to find a copy of that plan--I finally found it in a closet. Nobody paid any attention. So we went to the legislature with the first and major problem that had to be solved immediately--untreated sewage going down the Mississippi river--we had to do something about it. We drafted with the aid of the Metropolitan Commission the first metropolitan bill which was introduced in the legislature in 1961, and passed the house in 61, 63, and 65, but it never got through the Senate. We tried to get a traffic bill through--but that didn't get through the legislature. We hadn't had any reapportionment in the state of Minnesota for 43 years; the rural areas controlled the state of Minnesota almost 100%. So we had a lawsuit in the federal courts and got reapportionment. Then I got elected to the Senate, and I tried to get some of my colleagues in the Senate interested in regional government, and we tried to set up some kind of plan for a metropolitan agency whose only powers would be those in which local government could not do the job by themselves. The cooperative approach as I explained before was like trying to grasp a balloon--the minute you think you have control over it, it pops. We never could get anybody totally agreed on where we should go. So we went to the legislature, and in 67, we proposed a council to be set up, an elected council--it was to consist of 14 members and the chairman. The 14 members were to be elected from districts composed of two senate districts. We were given one man-one vote in that system. We had to compromise--and we wound up with a fourteen member and a chairman appointed-council. The fourteen members were appointed from the districts and the chairman was appointed at large, by the governor. The governor was to consult with the legislature about his appointments. He did consult, but he didn't pay much attention, but he did an excellent job, and he put some outstanding people on the Metropolitan Council. He had some of the top business people in the area--people who probably would never have been members if they would have had to run for election. These members serve on a part-time basis, except for the Chairman. The Chairman has practically a full-time job. He is a voting member; he presides at all the meetings of the Council; he acts as the principal executive officer. And he is responsible for carrying out all the policy decisions of the council. He appoints all of the council employees subject to the approval of the council, and the council sets his salary. The powers we gave to the Metropolitan Council were to be planning, and coordinating--which doesn't sound like much, but I have a copy of the act with me. I am not going to go through all the powers--but I would like to point out that in the process of planning they are required to come up with the development guide for the whole seven counties. This development guide shall include physical, social, and economic needs of the metropolitan area, future developments which have an impact on the entire area, including but not limited to such areas as land use, parks, open space, airports, highways, public libraries, schools, health facilities, transit, and others. We set up the Transit Commission which must comply with the overall Development Guide. Anything that they do or recommend must be approved by the Council in the process. We set up a metropolitan sewer board--they too must come within the scope of the Metropolitan Council and anything they do must receive their o.k. Also we gave the metropolitan council the right to review all federal grants to municipalities, which gave them considerable power

as far as the planning within municipalities. Any major comprehensive plan of any municipality must be submitted to the metropolitan council; the council must then either o.k. it or within sixty days, they must give reasons why not. They have within their scope the prevention and control of air pollution; acquisition of and financing of suitable parks and open spaces, the control and prevention of water pollution in the metropolitan area, the control of long range planning in the metropolitan area, acquisition of the necessary facilities for the disposal of solid waste material, examination of the tax structure, assessment practices in the metropolitan area, acquisition for storm water drainage, necessity for the consolidation of common services of local government, that consolidation being most suitable for the public interest; acquisition for development purposes in the metropolitan area. And then we went in the 71 session a step further, and said within themetropolitan area, we will put 40% of the entire growth of the industrial-commercial development into a common pot--which will be distributed then to all municipalities and school districts on the basis of population--which we did. This is the first time I have ever heard of anything like this. It's on a straight population basis. This provides additional funds for those areas that don't have the funds to operate. School districts receive funds on the basis of need.

Mrs. Hessler: Hasn't the Citizens League recommended that this be on the basis of need.

Senator Wolfe: This probably will come. If it has done nothing else, it has slowed down this competititon among municipalities for tax base in our area--and the competition was really wild for awhile. Now in the 1971 session, we expanded somewhat the powers of the Metropolitan Council. We included water shed districts, health care facilities--there was tremendous competititon among the hospitals in our area to build the biggest hsopital--now all the plans go through the metropolitan council, before funds from the federal government can be used for this purpose. They must get a certificate from the state department of health--a certificate of need--and that certificate can not be issued until the Metropolitan Council has given its stamp of approval. A Transit Commission has been put more directly in the control of the metropolitan council, so that all of their plans must be cleared through the council. Now, I have made this as brief as I possibly could--to take you through fifteen years of development. The biggest single factor outside of the support of a few dedicated public officials was the Citizens League which got thepublic behind this thing which made it possible for this to get through the state legislature, and none of it was easy. Most of these things passed by a very small margin--but I do have here the results of four or five hearings that have been held during the last two months by the Metropolitan Council throughout the metropolitan area to allow local officials to come in an hear what we are doing and discuss where we should go. The surprising thing is that all of them, except for perhaps one, said that they are for the council. They think the council has made some mistakes in judgment--but they are all for an elected council rather than an appointed one--and the feeling behind this is that elected municipal officals don't feel that they should have to go through an appointed body to get their plans through. Elected officials are more responsive--and they would like to see an elected body.

Mrs. Hessler: The Citizens League said that the chairman of the council should exist clearly as a leadership office and not merely as an additional duty imposed on one of the council members if they are to be elected. But that's not true is it?

Senator Wolfe: No it isn't--that's a mistake. Somebody made a mistake, because he would be elected at large, and not elected from representing one of the council districts.

Mr. Loewe: If they did have elected council members, would the chairman have pretty much the same duties he has now, or would he change?

Senator Wolfe: I would say that he would probably, in the proposals we have made up to this point, the chairman was the only person not elected--all the fourteen council members were to be elected--but the chairman appointed from the entire district. And the basic reason for this was the fact that having 2 million people vote for the office would make it a terrifically large political job, and we though that we probably would get a person of good caliber--but we didn't want to make it a political thing. So that was to be an appointive office, by the Council itself.

Mrs. Orfirer: What were the original pressures to have the council appointed?

Senator Wolfe: They came from a senator--one of the more able senators--who though that an elected body representing half of the population in the state would become more powerful or at least as powerful as the legislature. He didn't like this idea--he was very powerful--he was chairman of practically everything--and he cut out the election portion. And he was able to bring it with him to the floor--the idea--he sold it by five votes, that it would have been too powerful a body. So we wound up with it appointed--but that was the only thing which was really changed. The rest of it was my bill--it has worked quite well. An appointed body has one disadvantage I think--any man who is elected to office has the tendency to feel that he must communicate with his constituents. If there be a fault on the part of the metropolitan council members, they have a terrific amount of work to do--they are on a part-time basis and their salary is nothing--but they have not had constituency contact, and they don't talk to mayors. They should be talking to these people--they should be getting them on their side. As a consequence, there is some back swirl among these people. I've told them to go out and talk, and they respond that they don't have time to go out and talk to these people. Well, if they'd been elected, they would have found time enough to go out and talk to them. I think there is a fear on the part of the mayors and councilmen that they would feel more comfortable if there was somebody elected from their district, and if he didn't come and talk to them, they'd have some say about whether he got elected or not.

Mrs. Orfirer: How did they happen to agree on the Governor to be the appointer of the chairman?

Senator Wolfe: That was not too hot--somebody had to pick him out, and they had to pick him from the entire seven county area. Nobody questioned that point. And both times he has picked good council chairmen--excellend in each instance. The governor also appoints the members.

Senator Calabrese: How come they don't choose a chairman from the membership--or is it more or less political?

Senator Wolfe: Probably so. It would mean then that this man who was appointed to serve on a part-time basis would then have to spend practically his entire time on the job--because it is a full-time job. So I suppose that they thought that this wasn't the best way to get someone who was willing to do this. We wanted to appoint someone who had the desire, the ability, and could take it on as a full-time job.

Rep. Russo: The people want to have elected representatives at the county level , nothing less than that, I would assume, will be promulgated in the future.

Senator Wolfe: Some unbelievable people--good people--have accepted these appointments. One of the Senator's arguments against having the men elected (the members of the council, that is) was that we could get better men if they were appointed. And we certainly have had good members. I don't know if he is correct or not--but we sure do get some top-notch brass. Business people, attornyes, labor--surprisingly excellent civic-minded people. We had one woman member, and that's all, but I am sure that there will be more. And it's almost a certainty that we will have an elected council after the next legislative session. Everybody is running on that basis--and that's the way it seems to me.

Mr. Ostrum: Senator Wolfe, one of the reasons our committee has been discussing is unit of government larger than local, regional governments, because of the problems of local government that can't seem to be solved by local government bodies. So if you take a problem like air pollution, one you mentioned earlier, can you give us any example of what the metropolitan council has done in regard to that problem.

Senator Wolfe: We have a tendency to do in the state of Minnesota what all governments do all over the United States--that is to devise two or three solutions--or two or three bodies to take care of anything. At the same session at which we set up the Metropolitan Council we set up the Pollution Control Agency for the state. We now have a little conflict between the pollution control agency and the metropolitan council because the powers overlap. The pollution control agency was threatening to sue the metropolitan sewage agency because it wasn't moving fast enough, but right now they have come to an agreement by which the pollution control agency will be the operating body--it will do the monitoring and set up the standard, but they must come to the metropolitan council for approval of what they do so that it fits in with the rest of the plan. The whole point of the metropolitan council is to coordinate--to see that these single purpose districts work it out with each other where the sewer lines will go, where the monitoring systems will go. All must fit in under the metropolitan plan. They must get all their plans o.k.yed--instead of letting them just go ahead--there really can be some kind of organized planning. I think we have solved the problem of the two agencies--telling them to get together. So that the pollution control agency will set the standard through out the state of Minnesota, including the Twin Cities area, and then the methods of monitoring and operating must be o.k.yed by the Council itself.

Mrs. Hessler: Now who is paying for this--for the 200 million dollars worth of sewers, for example?

Senator Wolfe: It's a user charge. The Metropolitan Council only gets seven tenths of a mill to operate--so it's by a bond of the state of Minnesota. The municipality will pay about 35% of the cost of the installation, and the state and the federal government pick up the rest. So we are using the credit of the state and the federal government to provide the rest. Charges are set up on the basis of the formula outlined in the sewage bill itself. The bill is a long and detailed bill--it allows for postponing some of the charges until the end of the development. In this sewage bill, the most difficult thing we had to work out was the charge system whereby we could take care of something 30 years into the future and still pay for it. We couldn't possibly pay for it today. Some areas are still not developed.

Mr. Ostrum: The metropolitan sewer board was not created by the metropolitan council, but by the legislature?

Senator Wolfe: All of this was created by the legislature. It exempts the previous sewer district (Minneapolis-St. Paul) from the present new district.

Mrs. Orfirer: How did the council get the various facilities you described?

Senator Wolfe: We bought them. We bought out Minneapolis. They were selling surplus capacity to suburban areas, at an outrageous cost. When we bought out, we bought out that surplus from the city of Minneaplois. The price was determined on the basis of original cost, updated, with a depreciation, and it was set up in the bill--so that the legislature would know what the cost would be. It cost the city of Minneapolis 3½ million dollars--and that was 45 years before--so under the formula they were paid back 140 million. But it would have cost us more than that to replace it.

Mr. Ostrum: Isn't there also a budgetary role?

Senator Wolfe: They also review the budgets of the sewer agency. And the council actually cut back on their budget this time, saying that the agency was expanding too fast.

Mr. Ostrum: What's the budget?

Senator Wolfe: I think it runs about 2 million dollars--I'm not positive.

Mr. Ostrum: How large a staff does the council have? I can't imagine for such a council?

Senator Wolfe: It's a pretty big staff. That 2 million dollars is well spent. They have a large staff--there must be a hundred and fifty.

Mr. Loewe: Senator, when was the comprehensive regional plan first completed?

Senator Wolfe: The plan is not totally complete yet. All the powers of the previous metropolitan planning commission were granted to the metropolitan council and all of their staff was moved over. So they had a running start on the planning--they knew where the big development areas could go. As I said, much of their staff was inherited. The major part of their development guide is completed and then in some areas, like the health area, they haven't yet made the total decision. But for instance, in health care, we have way too many beds in hospitals in the metropolitan area, and it runs the cost way up--so they just put a lid on the number of beds. We're going to use the facilities we have now.

Mrs. Orfirer: Senator, when you started out, was there any opposition and where did it come from?

Senator Wolfe: Yes, there was a lot of opposition, and the major part of the opposition came from communities that bordered the rivers--they thought they could provide the sewage disposal more cheaply, and sewage disposal was the 1st thing we wanted. These people who lived along the rivers wanted to run their own sewage disposal, and skip the idea of a council. But these people were the minority--at no time did we have less than 80% of the community behind us. But those communities spent alot of money trying to beat down the idea of a council--and a metropolitan sewage board--they hired consultants

and they really fought us--mainly local government officials. The counties fought us on the green spaces. But we always had 80% support of the citizens. The big problem was the upstate representatives in the legislature.

Senator Calabrese: Does Dade County have the same set up?

Senator Wolfe: No, Dade County is very different. There they really went in and took over the municipal functions. When this was all being proposed I was President of the League of Municipalities, and we sent a couple of our men up to Toronto to look it over, and I went up to Dade County and up to the Bay area, and up to Seattle--I didn't see anything I liked. In Toronto, they had one community--one county--and we had seven. The English are a different sort of people. Our local government officials were not about to give up their local government power. They were willing to give up the things they couldn't do themselves, but they weren't willing to give up the other part. And I didn't want them to.

The Council didn't have a lot of money, but they control all the special districts that we have now--and they coordinate all the plans, and the budget must be approved by them. So they control those expenditures of the special purpose districts.

Mr. Taft: The thing that impressed me is that everything that the Senator describes--it was not authorized by the legislature--it was passed by the legislature. "Thou shalt do it." Now in our laws we've got a lot of permissive legislation--a lot of things we can do--we've been able to reorganize our regions for 30 years here, and we've had about ten elections on the subject, and they've all been voted down. The thing that our legislature has never been willing to do is to say "Thou shalt"...reorganize along the following lines." As a matter of fact, the number of school boards in our state is maybe half what it was fifteen years ago, because of the compulsion of the state legislature, but they have never been willing to provide that compulsion in the general government area. The legislature has got to act; the voters have been voted down too many times.

Senator Wolfe: In Hennepin County reorganization, I carried all those bills. We got rid of the elected county auditor, treasurer, sheriff, and put in a county manager. In other counties, they did the same. Special laws passed for each county.

Senator Calabrese: You see, Senator, we have all these public officials--mayors, sheriffs, etc., and they don't want to give up. If we don't do it by the legislature, we are never going to get it.

Mrs. Hessler: You said that there was 80%--almost universal--citizen approval. We don't see to have had this, and this is what I am so interested in. That you managed to get citizen approval, although you didn't have a vote--I don't know how you did it.

Senator Wolfe: Let me tell you what happened. I said we first tried to create a sounding board. The Citizens League, in one case--of citizens. We finally created a Metropolitan League of Municipalities. And this was the sounding board. And we were in the paper everyday. I'll tell you--we had some battle royals at these meetings--unbelievable--formal votes of censure were taken. I was censured by the council for proposing a metropolitan sewage district. The Minneapolis Chamber of Commerce came out with broadsides against this whole idea. It took us a number of years of hard education, meeting

after meeting, selling it, and finally it got so that we could work together. Some of my best friends are on the Minnesota city council--they come to me when they want some of their legislation passed, because their own legislators don't have guts enough to pass them. We discovered something, and that is that the state legislature really was the key. The key to the whole thing. These cities are important to our state, and they must be developed on a planned basis or they are going to get deeper into trouble all the time. The legislature has the power to do anything. We said the hell with the constitution--you can find a way to get around it in anything you want--the selling job has to be done to the legislature. I lobbied for this idea while I was Mayor through the whole 61, 63, and 65 sessions. I spent a lot of time lobbying for this proposal. I went from door to door.

Mr. Taft: I think that right now, if the legislature were to pass a law, specifying how sewage problems were to be handled, the Supreme Court would say that it's not a matter of local self-government. I don't think the Ohio Constitution is, anymore, a restriction on the kind of regulations that we're talking about here--now maybe, the people don't like the idea of getting the supreme court to reverse itself, which is what they would be doing. That which was local 50 years ago is no longer local.

Senator Wolfe: What you need is people who will fight for it in the face of anything, in the face of damnation, if you think that is what you should do. If you feel you need comprehensive planny agency that will coordinate all these single purpose districts, then you are going to get these people to get up and get in the newspaper, and create fights and problems--out there where everyone can see them.

Senator Calabrese: Let the court decide, after all. We pass a bill, what are you worrying about the Constitution. Let's pass the bill.

Senator Wolfe: If it doesn't do anything else, it at least comes back at the next session of the legislature. I really think it depends on whether or not you've got enough people who want to do something--to get out there and work for it and really make some hard-nosed statements and keep on saying it.

Mr. Taft: Locally, we tend to muddle through, to concentrate on the problem, rather than how the problem is being solved. And so we get a solution that relieves the pressure to reorganize and so we don't reorganize.

Senator Wolfe: We still have counties functioning. It may be that we still have one level of government more than we need. I wouldn't be a bit surprised to see, maybe within the next ten years, there will be a local municipality, there'll be a lot of consolidation, and then there will be a metropolitan council and if the counties don't serve a real function, they are not necessary. I don't know your problems well enough to tell you how it would be here. Maybe your county can be your coordinating body.

Mr. Taft: We have one central county which is two-thirds of the metropolitan area. It still is increasingly apparent to me as a county commissioner that our county is now the metropolitan area--which in fact includes parts of seven counties around us. The major functions of our county are really serving the metropolitan area, which is beyond the borders of the county.

Senator Wolfe: I guess instead of bringing all these documents, I could have done you more good if I'd brought you clippings from the newspapers for the last fifteen years,

when we battled this thing out. But that was where we really had it--where the gut business came out--and it was really a battle; it's a wonder I didn't get ulcers, and I wasn't alone. The Citizens League was a terrific help--they did great work in selling the community on it, and they didn't mind getting into a controversial stand and doing something. And when people see a group with the status of the Citizens League coming out for something, it really helps--they weren't partisan, they had no public or political officers--so they really could make a point. But it took us ten years to get it done.

Mr. Loewe: Senator, can you appraise some of the valid criticisms that are made of the present structure, of the council, that have been made by municipal officials in recent years, or that have been made by yourself?

Senator Wolfe: The biggest problem is the number of things that have come before the council, because it has had so much to do, and it has really been overburdened. They have so much to do that they have a tendency to do the right thing, but not do it with a good selling job. I don't think that I have any complaints about what they've done, I think that their decisions have been excellent--but they've made decisions and then they haven't thought that they had to explain it to anybody. The communication was not bad between people as such, but between municipal officials and county officials, and the metropolitan council. I had a mayor tell me just the other day, they act like a bunch of bureaucrats over there--they don't come and talk to us. I told him he has to go and communicate with the council too--it's a two way street. The mayor felt that they should come to him, and that they were just appointed. They haven't been consulted enough. I think the mayor's objection was a valid objection. We've told them too. You've got to get out and talk to people. You've got to tell them why you are doing what you are doing. And I don't know if the message has gotten through or not. But that is the biggest and most valid criticism I can think of. Other than that, I think they have done a magnificent job.

Mr. Loewe: Are there any changes in the offing for the council that you haven't mentioned?

Senator Wolfe: No, I think that some of the laws establishing the various services need some clarification--the Transit Commission for example. I introduced legislation at the last session for this. The Airport Commission is the worst one--this is one which was set up many years before the beginning of the council, or any of the other agencies. What's happened is that they plan on their own--then come to the council for approval--and the council is not in on the original planning. That needs to be changed. But other than that I think that we are in pretty good shape.

Mr. Heminger: Have you had any big constitutional hurdles?

Senator Wolfe: Only local consent. In the state of Minnesota, we have run the whole gamut from one end to the other of our constitution on local consent. We said no special law could be passed in the legislature, unless it was receiving of the consent of the local community which it would concern. And then we went the other way and said that there couldn't be any special legislation--you can't just write a bill for one town. So talk about getting around the constitution--they passed a bill which said that all communities in the state of Minnesota that have a hundred thousand population and are located in a particular county--and they made it stick. And finally to put this thing in, we had to knock out the local consent clause, because if one community in the seven

county area had disagreed with the metropolitan council act, they could have thrown the whole thing out and killed it. So we knocked out the local consent clause. Now we can pass special bills in the state legislature without getting local consent. In Minnesota, you have to pass a constitutional amendment by a majority of those voting, too, and that's miserable.

Mr. Ostrum: Was there a fight to get that constitutional amendment adopted.

Senator Wolfe: We got rid of it by legislative action, in 1967. I'll leave you all the history of it. We got rid of it by legislation, and made it stick. The present constitutional provision reads, "Every law which applies to a single local government unit or group of such units or a single county or a number of contiguous counties, is a special law, and shall name the unit or in the case of counties, the counties to which it applies. The legislature may enact special legislation, concerning a local government unit. A special law, unless otherwise provided by general law, shall become effective only after approval by such government unit, and by such majority of the governing body..." and so forth. We made a legislative change. We've gone back and forth on this three or four times. Constitutionally required approval of special laws unless general law provides otherwise--so we wrote a general law. That's how we made it stick. So you can see, you can get around the constitution on anything.

Mrs. Orfirer: Senator, we thank you very much. Your discussion is most illuminating.

Has everyone a copy of the draft that Gene prepared of suggestion legislation for an amendment to the constitution? We're also giving you copies of Iola's suggested amendment. I thought that to start out with, it might help the discussion along a bit, by pointing out what this wording does accomplish, specifically and in general terms. It applies to the creation of regions. It provides that it would be mandatory for the general assembly to create the regions, and for the total area of the state. It leaves open temporarily the minimum and maximum number of regions which could be created by the general assembly. We had tentatively agreed that we thought there ought to be a minimum and a maximum, but we wanted to give the legislature between those, as we talked about earlier. It provides for a boundary commission which would obviously set the boundaries. This would reflect, as we heard at the last meeting, that we can't expect the legislature to be responsible for the technicalities of this--but give them a plan and have another group do that, and so on. It provides that the regional boundaries be coterminous with existing groups of county lines, in every case except where a municipal- traverses a county line. This is the only loophole from following some sort of county boundaries. It provides that after these have been established, there should be some way for the possibility of review of these boundaries, and it also tries to provide that this not be able to happen every six months or year or so--so that they aren't constantly bombarded, with requests to change a boundary line before you can really see how they are working--but there should be some way to reconsider how they are drawn at some interval, on a fairly periodic kind of basis. Do you want me to continue this way, going through the bill, or do you want to stop now, and discuss how they are created.

Mrs. Hessler: This is a constitutional draft--doesn't the legislature have the power to do this without a constitutional amendment?

Mr. Kramer: Yes, it has the power.

Mrs. Hessler: What you're doing here then is making it mandatory and setting up certain standards for how it is to be done.

Mrs. Orfirer: Form of government. The first thing is the means of adopting the form of government, and this could be done according to this wording in three ways. It could be done in a statutory way by general law; it could be done by special law in one or more regions, but in that case, it provides for a referendum of the people; or by a charter, within that region, and that the procedure for implementation of the charter would be prescribed by the general assembly rather than being spelled out in the constitution. The structure would provide for a separate legislative and executive branches, the legislative branches to be either elected or appointed as determined by the region. They would either be appointed or elected from uniform districts or a combination of districts and at large. Then, basically, what was outlined was powers, and there were certain principles behind the spelling out of these powers. We bring to you for your thoughts and discussion that these regions would begin with fairly limited powers, and to have the ability to add more as the region acquires experience in handling these problems, and the confidence of the people within the regions develops. The stages of powers within these regions would be three: one would be the planning and review function which they would mandatorily have at the outset; they would also be able to contract for services with the local governments on a voluntary kind of basis. The next step could be the assuming of services and functions that are now provided by units of local government, and there are qualific tions made for this, the reaons for which will be obvious. One is that it will be a constitutional mandate that there will have to be notice, and a hearing before this took place. Such a takeover would be subject to both the initiative and the referendum, and that in the absence of initiative or referendum procedures, it would be subject to a veto of the general assembly. We tried to make this as workable, as equitable, and as politically feasible as possible. What is really does is provide the capability of taking over functions without the requiring of the taking over of functions. It does not dismantle any present units, which I think is very important. It provides political checks and balances over the assumption of power. It becomes not threatening because it is subject to the control of the people and the legislature. The regions would have a limited for of home rule--all those powers except those denied by general law, or charter, or statute. That is basically how we see what this provides. And it is more an expansion and condensation of the material we sent out to you with the draft. Now shall we just start reading the form of the draft itself, and we can discuss what we have just outlined here.

"The general assembly shall by law divide the state into not less than____ and not more than____ regional units of local government, and establish the boundaries thereof, and may, as hereinafter provided, revise from time to time the number and boundaries of such regions."

Mr. Kramer: I think that it is important to note that these are regional units of local government, and this is as distinguished from state subdivisions for purposes of administration--these would be general units of local government, operating with their own powers, and handling local problems.

Mrs. Hessler: How does this work in with the phrase "local government" in the home rule article?

Mr. Kramer: It is not local self-government--this is merely descriptive of what it is, and doesn't result in the conferring of powers under the local self-government provision of the Constitution.

Rep. Russo: There is a conflict in the language--that a certain number must be created initially but unlimited changes are permitted.

Mr. Kramer: The intention is that any revision would be within the minimum and maximum number. The boundary commission approach is just used initially, because this would be a difficult thing for a legislative body to initiate on its own but once you have the system established, you wouldn't have that problem.

Mrs. Hessler: Would a commission be as effective a method as using an executive agency or the Governor to set up the districts?

Mr. Kramer: The boundary commission would not be directly a political matter. It is stipulated that not more than half of its members can hold political office.

Mrs. Hessler: Maybe none of them should.

Mr. Kramer: This is just something to talk from, and maybe that should be a point for consideration.

Mrs. Hessler: It seems to me extremely desirable that any regionalization of state functions should be coordinated with regional functions as created here. You're going to get terribly confused about where to go if you have different boundaries for the local administration of state functions and the local administration of regional functions.

Mrs. Orfirer: It can work either way. It would have to be a cooperative effort.

Mr. Kramer: I think it would of course be an ideal, but we have to recognize that they might not coincide in any event.

Mrs. Hessler: The state might not be able to put all of the functions into coterminous groups.

Mr. Kramer: So that it would be great if they did coincide, but I don't think we would want to require in the Constitution that they must coincide. One or the other would possibly be forced into disadvantageous boundaries.

Mrs. Hessler: Wouldn't it be easier to get the citizens of Ohio to pass such an amendment than to get the general assembly to do this? If you take it to the people, you have a tremendous education job as we all know, but maybe you ought to start with the legislature and then take it to the people if you can't get it through there.

Senator Calabrese: You have to do it through the legislature. Otherwise, you're never going to get it.

Rep. Russo: It's much easier for us to say "the powers not denied by the constitution." It's too long, and you have to argue on too many individual points.

Mr. Kramer: No question that it is much simpler, but I think that there are many ramifications to it. People may fear to have a regional government come in and take over all powers. This language is limiting with a purpose--to provide the region with some basic limited powers and the planning and review powers and to allow them to develop from there. This way, they could not take on too many things at once. The idea of this proposal is to give them power and then let it develop from there.

Mr. Loewe: Once we've got this in the constitution, there's nothing we can do to get around it short of going back to the voters. The chances for unconstitutional acts in the region happen more often.

Mr. Kramer: You're talking about a complicated subject. Of necessity, you can't write about it in half a dozen words. A lot depends on how you envision a regional government--if you think it is feasible and workable then you can give it a broad power--then obviously, you don't need a provision that goes into great detail about its powers and limitations. And if you feel that the regional system of government is something which many people would basically distrust, because of the loss of control, and problems which have come up, then regional government has to be strengthened in certain ways, and its powers should be limited and its ability to take over functions should be limited also, and subject to political control.

Mrs. Hessler: You spell out that such a regional government could take over any services which the people give it, so you wouldn't have to go back to the Constitution, and amend it.

Mrs. Orfirer: Where the restrictions come in it is more difficult, and this is what we thought was essential; because it was the only way to not scare off every other public official and every other person who wants to maintain identity with his own home community--and they do have certain functions which they are capable of carrying out. We've talked here very briefly about the two extremes--one of having a regional government but not handling everything and leaving some things to be handled on a local level, and this is what we attempted to do with this. I think it really is a very exciting kind of concept, and maybe what we really need to do is to continue to read along and discuss it as we go along so that we're all at the same place at the same time--in terms of where it is flexible and where it is limited--and then decide where you want to loosen it and tighten it. As you go along there are probably certain things in it that cannot be done any other way than in the Constitution. It's a question of whether you want to do them or not.

Mrs. Hessler: As we go along, will you point out those things that do require constitutional amendment?

Mrs. Orfirer: Number of regions considered was approximately nine as a minimum.

Mr. Kramer: Possibly as many as twenty.....The draft attempts to present a great many ideas; not all of which may be necessary to the proposal--but there are a couple of limitations provided for the number of regions. One limitation is the maximum number, and there is also a provision dealing with the compactness and contiguity of the territory and the appropriate size of providing governmental services on a regional basis.

Mrs. Orfirer: Let's go on together. "Not later than so many months after the effective date of this section, the Governor, the Speaker of the House, and the President pro

tempore of the Senate, shall jointly appoint a commission consisting of so many members not more than half of whom shall hold other public office..." This is a debatable point, mentioned by Iola, of whether you want any of them holding public office or not, anyway..."who shall within a certain time after their appointment, submit to the General Assembly their recommendation as to the number of regions to be created and the boundaries thereof. Each region shall be composed of compact and contiguous territoties, and be bounded by county lines, except that each municipal corporation shall be located entirely within one region, and shall be of appropriate size and composition for the purpose of providing governmental and proprietary services on a regional basis for the protection and advancement of the health, safety, and welfare of its inhabitants. The General Assembly by a 3/5 vote of the members elected to each house may on its own motion or on the petition of the legislative authority of any region, of the legislative authoiryt of any county or municipal corporation within each region, revise the numbers or boundaries of any region, but the boundary of any region shall not be revised within a period of so many years after it is established." I would hope that could be simplified, Gene, because I think all we really want to get across is that there is a way that this can be reviewed and corrected, but not everyday.

Mr. Kramer: There are a number of municipalities that cross county lines--it's usually a small portion in another county--there are a few--The problem is that if you say, "shall be bounded by county lines," then there may be a situation in which a municipality may be divided.

Mrs. Orfirer: This is what we were trying to avoid, as some of you mentioned.

Mr. Loewe: Of course, in such cases you might belong to one region but contract with another for certain purposes.

Rep. Russo: You might change the word "shall" to "may" to deal with individual situations.

Mrs. Orfirer: You mean that "each municipal corporation may be located within only one region" so that it is an exception to drawing the line along the county borders.

Mrs. Hessler: I don't like the idea of requiring a 3/5 vote of the general assembly. I never liked anything but a majority.

Mr. Kramer: They are required to be set up so it is not practical to require an extraordinary majority to set up regions. But it makes it difficult to change what is done. It requires stability of regions and to make sure that there is only a change when it is really wanted.

Mrs. Hessler: I think stability is a bad thing. You shouldn't make change difficult.

Mrs. Orfirer: Any other comment on this one? On the 3/5 vote? Does anyone else have feelings with or disagreeing with Iola's?

Mrs. Hessler: You're talking about change, and this motion would come from the regions--I just don't see why it should be more difficult to change.

Mr. Kramer: What we were emphasizing was the stability of boundaries. I duppose inertia would itself require a lot of stability. It has to be approved by referendum in the counties. Once the regions are set up and they are operating, that in itself would be a great deterrent.

Mr. Taft: I understand why some of these details were put in--to make clear what is intended. On the other hand, when you finally get down to writing a constitution, super detail is worse than litigation.

Mrs. Hessler: What about "the General Assembly may revise the numbers and the boundaries"?

Mrs. Orfirer: "The General Assembly shall provide by general law for the form of government for regions, and for the framing and adoption by the electors of any region of a charter providing for the form of government."

Mr. Loewe: That implies that there is a form of government for all the regions immediately, when they go into existence, but then there would be a charter if they adopted one.

Mrs. Orfirer: "The general assembly may also, by special law, applicable to one or more regions, provide for an alternate form of government for such region or regions, but no such form of government shall become operative until the same shall have been submitted to the electors thereof and approved by a majority of those voting thereon, under regulations provided by law."

Mr. Kramer: The charter and the alternative form must be voted on.

Mrs. Orfirer: "The form of government of each region shall provide for an elected or appointed executive officer, and for an elected or appointed legislative authority, consisting of representatives from districts, or a combination of representatives elected from districts and at large."

Mrs. Hessler: I don't understand that--providing for either elected or appointed--we've got to decide that.

Mr. Loewe: Why do you have to spell that out--that it shall be either elected or appointed?

Mrs. Orfirer: What we are saying is that you have the choice. You are mandating that either is a possibility, for each region to make that choice.

Mr. Kramer: You're making sure in the constitution that the choice is there for each region.

Mrs. Hessler: What about leaving out that last sentence? Then we don't have to argue about why we can't have an all at large election?

Mr. Kramer: One question is whether the constitution should place any limitation on the forms of government. Do you want to require separate executive and legislative

branches--that is the first part of that sentence. If you want to require it, then you need a provision in the constitution.

Mrs. Orfirer: We want to require--I thought that the point was to give them a choice between elected or appointed. So just take out "elected or appointed." Now don't you need "consisting of representatives from districts"?

Mr. Taft: You don't have to say it. The question is do you want to limit it?

Rep. Russo: I think we've got to spell out districts and at large--so that it is a representative board. As a matter of fact, the chamber likes them at large better because then they have better control. If they are all out of districts, then they become parochial. You're destroying the concept of regional citizenship.

Mrs. Hessler: Consider providing that no local officers can serve on this body.

Mrs. Orfirer: I thought that they would not be taken from the local government officialdom, but from wider districts.

Mr. Kramer: There are already existing restrictions on public officials holding other public office.

Mrs. Hessler: Not if you have an appointed legislative authority--you could do it anyway you want.

Mr. Kramer: That is why it is specified that if it was representatives from districts, they would have to be equal population districts. It would be a general unit of government--but not representatives from existing governmental units, as a COG.

Senator Calabrese: I believe in the same principle.

Rep. Russo: We've got to have some at large representatives here--to represent other kinds of thinking. If you put only districts in there, then we've got a problem.

Mr. Kramer: Then the type of provision you would mean would be not more than certain " of representatives shall be elected at large.

Rep. Russo: I wouldn't want this draft to be limited to the district only.

Mr. Kramer: We could say not more than half....

Mrs. Orfirer: Why don't you just say "from a combination of representatives who are elected from districts and at large?"

Mrs. Hessler: Now are you going to require the general assembly at the beginning of that paragraph to provide for the form--are you going to say that they have to provide a form which has some members at large?

Mr. Kramer: Yes, however the form of government is determined, you have to provide for a form.

Mrs. Orfirer: Are we going to leave in "elected or appointed" or do we want it to say elected only?

Senator Calabrese: Elected. They want responsible people.

Mrs. Orfirer: Elected on a non-partisan ballot?

Senator Calabrese: You don't want to destroy the two party system.

Mrs. Orfirer: O.K., you're going to leave that...."and for a legislative authority consisting of representatives elected from districts and at large..." temporarily. "The regional government shall be responsible for formulating and revising comprehensive plans for the development of the region as a whole or portions of the region substantially affecting a county or a municipal corporation therein, for regulating such development in accordance with the comprehensive plan." This is one of the things where I think maybe your question is answered, Iola. The regional government and its departments shall also be the local agency with the power to review applications for federal and state aid.

Mr. Taft: I think this is a detail that doesn't belong in the constitution, moreover, you can't tell the federal government to use a particular agency.

Mr. Kramer: It's an attempt to have this agency act as a review agency. It's a very difficult thing to try to provide this, and to do something about the multiplicity of review agencies. This is a very troublesome provision, and the idea is of value--it would require that this be the review agency to the extent possible. On the other hand, it does add some detail to the provision and it is something that should be taken care of by the general assembly. Some federal provisions do require special review agencies.

Mrs. Orfirer: Let's hold it and continue and then see where it fits in.

Mr. Taft: Planning authority may be too broad--too comprehensive.

Mr. Kramer: If you are not going to have them planning for everything, including local planning in a region, you've got to limit it somehow--the only things you've got to work with are municipalities or a county. The alternative would be some vague language about developments affecting a substantial portion of the region.

Mrs. Orfirer: I think you are obligating the regional government to be responsible for formulating and devising plans all the way down, to municipalities--isn't it sufficient that they should have some regulatory powers and let someone else do some formulating? Why should the regional governments have to formulate and devise?

Mr. Kramer: What you are talking about is a plan for the entire regional area and you would not necessarily get into this question of water supply for a few small municipalities. That isn't part of a comprehensive plan--it's a detailed matter. But if the region isn't going to both plan and regulate--then you are going to have to have something equal to do it. A comprehensive plan for the region is an overall plan...that would not necessarily go into detail in every corner of the region.

Mrs. Orfirer: Perhaps there is a better wording.

Senator Wolfe: We have two parts to this language in Minnesota. First, we leave it up to local government to do their own planning. You couldn't put it into your constitution; it's too detailed--there is a mechanism here that if they can't come to any resolution of differences it goes back to the legislature. And the Metropolitan Council has the power to make comments and recommendations.

Mr. Kramer: This is of course aimed at municipal corporations, and "substantially affecting" language...where their actions affect more than their own municipality.

Mrs. Orfirer: O.K., Gene, why don't you take another look at this and see if you feel that there is a better way to phrase this. Now what about the rest of this paragraph? "A region may upon such terms and provisions as may be agreed upon by and between the regions and any one or more political subdivisions or units within the regions, form any function or render any service for, or in behalf of, such political subdivision or unit, and may agree to provide any service or to receive any service from any other reason or any political subdivision."

Mrs. Hessler: Isn't this already in the Constitution?

Mr. Kramer: The Constitution already provides for this kind of power as for counties and townships and for municipalities, but you have to include regions or they wouldn't have the power.

Mrs. Orfirer: We're going to take one more section. "The legislative authority of a region may at any time propose that any function or service, including but not limited to those related to...the following things...which are found by such legislative authority to affect the development, or the health, safety and welfare of the inhabitants of the region as a whole, or portions of the region encompassing more than one political unit or political subdivision thereof, or which begin or terminate within the boundaries of a municipal corporation, but which substantially affect the areas of the region not within the boundary of such municipal corporation be assumed by such regional government." Here comes the important part..."No measure authorizing this assumption shall be passed by the legislative authority of the region, until the notice of such proposal shall have been given and hearing held thereon. The right of initiative and referendum shall be secured to the people of the region as to every such measure"--why do you have to say 'without exception?'--"and no such measure except such as is adopted by the people or to which a petition signed by not less than ___% of the electors of the region shall have been filed with the executive authority of the region within 30 days of the passage of such a measure demanding a referendum thereon shall become effective until submitted to the general assembly and not disapproved within 60 days of the date of such submission."

Mrs. Orfirer: I think that you have got to give the people this right and you have got to give the general assembly some power.

Mrs. Hessler: You can't get anything done with initiative and referendum.

Mrs. Orfirer: It's not so easy to get something done that way; it really isn't. I don't see how you can take it away from people. At the next meeting we will give this a lot more thought and compare it with a lot of other things we have.

Mr. Kramer: Eminent domain is needed to permit to buy property being used for public use already.

Mrs. Orfirer: The next committee meeting will be in Columbus the night before the Commission meeting, the 21st of September, and the morning of the Commission meeting, the 22nd.

Ohio Constitutional Revision Commission
Local Government Committee
September 21, 1972

Summary of Meeting

A meeting of the Local Government Committee was held at 7:30 p.m. at the Athletic Club in Columbus on September 21, 1972. Present were Mrs. Orfirer, Chairman, Representatives Fry and Russo, Senator Calabrese, Mrs. Hessler and Dr. James Norton, President of the Greater Cleveland Associated Foundations, and staff members Kramer and Eriksson. Attending were representatives from the Chamber of Commerce, the League of Women Voters, the Housing Advisory Commission, and the Local Government Services Commission.

The Chairman invited Dr. Norton to comment on the committee's regional proposal.

Dr. Norton - I notice that you want to divide the whole state up into regions. You don't say you're going to abolish counties. Why regions? Why should the whole state be divided into regions other than for administrative purposes on the part of the state?

Mrs. Orfirer - Immediately for planning and review purposes, and then according to the present draft they would have the capability, when a necessity is shown, of providing services and taking over other functions.

Dr. Norton - Are these so important for every section of the state? So that you would literally create another unit of government?

Mrs. Hessler - How do you control and regulate urban growth unless you have what have always been municipal powers?

Dr. Norton - Yes, but you are talking about not only urban areas but what are you going to do in the rural areas?

Mrs. Hessler - Regions would offer a means of meshing programs, state and local.

Dr. Norton - But you've got state government which as you say is going to be more and more active in any field, and you're telling me that even in the poorest sections of this state we still need another layer of government. The way I read it you have to divide the whole state into regions. And that there is going to be government established in each one of these regions.

Mr. Kramer - You would eliminate all the various regional planning agencies, councils of governments and all these sorts of things, with one uniform state-wide system.

Dr. Norton - Let's imagine the most rural section of the state, where we have townships and an occasional village within a county. We're now going to impose over that another level which will be a regional government.

Mr. Fry - In establishing these areas we are not just thinking of the urban areas, but you've got problems where the state is divided up into regions and for other purposes and if we could establish one regional unit for all purposes it would be simpler--agriculture, federal money in Appalachia. I don't know what is going on down there with federal money but I'm certain there is something going on there. One plan, if it can be worked out is preferable to having half a dozen different plans.

Mr. Russo - A diversity of problems doesn't mean the concept of regions is bad. If

you have a county that is full of townships and villages there's going to be helter skelter system that will develop in a period of years. If you have a regional concept for functional services you won't have that happen. If you go with regional concepts you have an orderly development of functional services regardless of the amount of people that are there and the kind of planning that is necessary. No matter what the state keeps saying about assuming their own authority we've got to go to the federal government more and more often and they're making us more dependent on them. We have to be prepared to do the kind of planning that is necessary to solve those problems. For instance, how does a back country farmer get his stuff out to the main market? How do we control the strip mining situation if we don't have a regional concept in strip mining?

Dr. Norton -My feeling would be in regard to your last two questions--farm to market roads and strip mining--they can't be done on a regional basis. If they're not going to be done by the state they won't get done. I don't think that any region that you would devise that encompasses an area in which there are strip mines would have the strength to protect itself against strip mining.

Mr. Russo - Let me point this out. For every $1 that we were to get for mass transit we have $3 federal dollars available. If we're not talking about roads, then we're talking about a mass transit system. For every $1 that we put up for reclamation purposes, we also have $3 available in federal money. The State of Ohio has only spent in the reserve fund $1,000,000 for reclamation of land prior to 1949. All it can get out of that is $3,000,000 in matching funds. If we had this on a regional basis I think we could go much further if we can pick up the money that is necessary to solve some of the problems. The state is not going to be able to tax at the level that we need now for these kinds of problems and the only thing we can look for is to the federal government and be prepared to get it from them in this fashion.

Dr. Norton - That I agree with. There are going to be more federal funds and they're going to be available for a broad range of projects, but I don't understand how a rural region or a primarily rural region can get the federal funds. They don't have the wealth which is necessary to match the federal dollar and they don't have the bureaucratic competence to look for the federal dollars. For the more rural areas you've going to have to look to something like state government.

Mr. Russo - When you do that you're going to have the city boys beating the rural areas out of their money.

Dr. Norton - I think that's probably right. I don't disagree.

Mr. Russo - We've got to have a Constitution flexible enough to meet the coming crises. With a regional concept, regardless of whether it's Appalachia or Cuyahoga County, it doesn't have to be imposed in Appalachia today or tomorrow as a functional government, but the concept should be there.

Dr. Norton - Am I the first person who has raised the question of whether you really have to establish regional governments?

Mrs. Orfirer introduced Dr. Norton to the committee and guests. He is President of the Greater Cleveland Associated Foundations. He is currently serving on the Citizens Committee on the State Legislature, and is Chairman of the Governors's Committee on the Recertification of Noaca. Before coming to Cleveland to direct the Metro Study Commission he held several educational positions, including a professorship at Florida State University, at Harvard University in public health and

Louisiana State University, Western Reserve University and the University of Texas.

Mrs. Orfirer - We invited Dolph here tonight for the express purpose of giving us his reaction on the proposal of regional government, and I think before we get into that I ought to make it very clear that the committee has determined that they will not make any recommendation, even to the full Commission, until we have looked at the whole gamut of local government, so that what you have received as a draft on regional government is simply a working document. It's much easier to talk pros and cons with a proposal before you that you can study and tear apart. This is a draft proposal and that is the way that we look at it. One of the things that make us look, at the moment, favorably on the proposal, is the very fact that it has a capability of being gradually implemented, so that when it starts out, all regions are only given functions of planning and review, that it can, as a second step, contract for services. The third step of taking over any kind of services is predicated on the demonstrated need of the local governmental units for this particular service. It may be a later step. Assumption of functions would be subject to the referendum and to the approval of the General Assembly.

Dr. Norton - I want to express my appreciation for the invitation. Let me tell you why I accepted the invitation. Because I like to know what is going on the field of regional affairs and I enjoy talking about it, because I am convinced that most of the problems, that is local government problems, cannot be handled by the units of government that we have traditionally assigned those functions. We are in very serious trouble and to work on the problems we have to have something that has a regional approach. I am very much committed to that. I have written articles that date back 15 years on this subject and have spent a great deal of time on it in my academic profession but secondly, let me make the point that I accept what you have as a draft but once a draft is written the question comes up then "How many people are going to say that the idea is a good idea or that the idea deserves modification?" And I was raising the question because I think that you have written something down about it and I want to find out what's the argument. How many people really would believe that there is an important reason for establishing another level of government with the costs involved all across the state of Ohio. If I had been drafting this or planning it I think I would have come up with something quite different. I think that I would have proposed that the legislature shall establish a regional government or a region for each metropolitan area or combination thereof, and then begun with that, because that focuses on urban problems. You've got the Cleveland region, you've got the Akron metropolitan area, the Lorain metropolitan area, the Stark County metropolitan area, the Youngstown metropolitan area. I don't know whether you need a government for all of those or not. At least those have a certain set of problems that I think warrant the cost that is inherent in another level of government. I really don't quite understand why a lot of the rural areas of Ohio cannot utilize the present structure of government to solve some of the problems that we're talking about. We've got problems in transportation and pollution and natural resources but many of these, I think, have to be solved by the state government. That's not what we're talking about. We talking about another unit of local government. I make this point just to try to clarify in my own mind what you're really talking about, and I just wonder if you really think that you need another level of local or sub-state government, throughout the State of Ohio.

Mr. Hunger - I was at the County Commissioners convention on Tuesday and we talked specifically about regional government and county government, and county government reform. There was much talk about home rule from the larger counties, and the small counties talked about they don't need any more than they have now (the rural counties). Then one of the commissioners from Medina County got up and said "What about us?

We're 26th in population. We don't fit in A or B. Can't you make it A, B, and C?" Finally he said "Let's call in red, green and purple. We're green and you're red and you're purple." We tried out our ideas that we have been talking about--a variety of ideas such as districting, increasing the number of commissioners, personnel and budgeting power for county commissioners on through to home rule. Some people would say "O.K. you define region as a rural county." That would be feasible, practical and all the rest. But the township trustees say "Give us home rule." Forty-five thousand people in a township asking for home rule. I might add that I recommended and the Local Governments Services Commission accepted not the word "government" but that we should be looking at regional governance. But the whole idea of what kinds of functions or activities should be put on a regional level--voting, tax levying, eminent domain, etc.

Dr. Norton - I think that this group is ahead of you on that. It's fine to talk about functions first, but the question eventually comes to one of shall there be a viable governmental unit on the regional level? And this proposal here which suggests one is good in recognizing that there will be. We could come up with something like a council of governments which is the biggest farce that has ever been perpetrated on the American population, and I think we've got to be realistic. At the same time, I hate to throw out what, from all sides I hear is an outstanding regional planning authority.

I think we should tackle this head-on, why it should be state-wide. It's no longer a question of whether you're going to have some form of regional unit but what form it's going to take, A number of considerations can go into something like this. One would be the massive problems to do something other than state-wide. Now you've said, with respect to functions, you're going to start and build. Why with respect to regions wouldn't you be willing to do the same thing?

Mr. Kramer - Well, because there has to be some over-all planning. Each part of the state is completely covered by planning organizations of one sort or another. This would be really a modest proposal in the beginning in that it would be a replacement for these.

Dr. Norton - If you do that you're going to come up with something unsatisfactory for those that really only need regional government, and is a burden for those to bear who don't need it.

Mr. Kramer - Well, every municipality, every village that wants to apply for federal funds has to go some place.

Dr. Norton - They're not hampered. They don't need a region for that.

Mr. Kramer - But they need some form of regional planning.

Dr. Norton - They need a regional review agency. That's quite different from regional government. Why not begin with the idea that for those that really need a regional unit of government you're going to establish something that has the strength to do something valuable. As for the others, you'll let it evolve. When the time comes you'll have the legislature prescribe another unit. What do you mean by something valuable?

Dr. Norton - Give them some tax authority, or a source of income. What you have to provide is for some structural government. You're setting up a one general law

government and then you're setting up a series of alternatives with the provision that they can go through the process of writing their own charter. For we know that the writing of their own charter for a large region is a futile exercise. The history is clear in Ohio. If you're going to really do something, give them a strong form of government and establish it. Once it is established then it can come up with its own charter. Then it can choose options. That's one of the questions you raise--whether it all has to be an elective legislative authority or not. I'm not so sure that I know the answer to that.

Mr. Kramer - It will all be elective.

Dr. Norton - And no appointees? The legislature in Minnesota, as it started squaring away on this thing, came up with the idea that at least initially they would appoint them. I don't know that they got a better group. Maybe it would be good to have them appointed and provide that in four years there has to be an election. But your point is well taken. At some point you're going to have to have elected officials.

Mr. Kramer - If it's going to be a general unit of government, they're going to have to be elected.

Mr. Fry - If we could make the region conform to other districts, it would be good. When we were doing redistricting and reapportionment we tried to get an area--representative districts, senatorial districts, and congressional districts so they would all mesh. We couldn't do it. If we do go into regional government what about using the elected officials that you already have in those areas and making them responsible for appointing officials? Using the people that are elected so we just don't get a whole new level of elective officials. The regional responsibility and the state responsibility would be in the same fields, anyway.

Dr. Norton - We spent a great deal of time thinking about this in a seven county area that includes Cleveland and Akron, and the best thing to come out is the idea of choosing members of the legislative body from the state legislative districts. You would have a 30 member board. The legislative districts meet the one man one vote requirement. Some districts which are all white, some are all black, some of one ethnic or another, and it's a good representative group. Now I'm not sure you would want that in a district that would have fewer people. That area has about 2,500,000 people. I'm not sure you would want that for 800,000 people. Maybe you ought to raise the salary of the representatives so it would be a full-time job.

Mrs. Hessler - Could one person handle both jobs?

Dr. Norton - I really think that it would be two different jobs. I think the districts are right but I see two different jobs.

Mr. Fry - Where the responsibilities overlap, you would be better off with the fellows already elected.

Dr. Norton - I would be happy if you would just eliminate the prohibition that would prevent a person from serving in both capacities. In Massachusetts you find very often a person who is a township trustee or a small city mayor also a member of the legislature.

Mrs. Orfirer - Don't you think that there might be a conflict of interest?

Dr. Norton - Perhaps, but you know I am a participatory democracy man.

Mrs. Orfirer - Hopefully, the people who would represent such a district would have this wider view which is the purpose of the region.

Mrs. Hessler - The big handicap with councils of government is that the representatives are representing their own constituency from which they are elected and they are unable to represent a region because they have to represent their own political subdivision.

Senator Calabrese - I get elected from the 22nd senatorial district. But when I take the oath of office, if's for the State of Ohio.

Dr. Norton - The point you are making is a very important one. It differs from what happens in a C.O.G. when a mayor represents his city. He's not going to get elected unless he does a good job for the city. I think that's quite different.

Mr. Fry - In the 108th General Assembly we had a bill that had to do with flood control, something based on flood basins, etc. You don't have many choices in setting up new functions. You either go for the county commissioners and they choose someone to represent them, or you can take the state representatives. I think Tony has a good point. You've got an additional responsibility, because he may be elected by a local constituency. When it comes to regional matters you represent this region. If we were to have regional government it would be preferable to have a whole new level of elected officials.

Mrs. Orfirer - Let's get back to the statewide carving out of regions. Before we talk too much about the details of who's going to be elected to it, we ought to go back to this question of whether it should be state-wide, which has been our feeling from the beginning.

Dr. Norton - First of all, is there a need in every area of the state for a planning and review agency?

Mr. Kramer - You can make a distinction. One of the ideas behind it was to set up one system throughout the state but make the assumption of powers gradual. So far as additional powers are concerned then, you might distinguish between the rural areas which probably don't need the region, allow them to have an appointed group of officers and allow only those regions which have elected officers to have the additional powers. This makes for flexibility: one region may have many functions and another only the basic functions. I think a distinction could be made on the basis of whether they had elected officials or not.

Dr. Norton - The only concern I have is the concern that if you create that sort of option you're going to have actually developing over a period of time governments which are not given the attention, strength, and the concern of the state legislature. Traditionally, we would just like to go along with what we've got, or with the slightest modification of it that satisfies some need. And I think if you're talking about a regional government that's satisfactory to handle tough questions that come with rampant urbanism you're going to have to have somebody biting down hard in the structure of government, and my feelins is that if you want to provide flexibility, your basic flexibility ought to be given to the legislature in establishing the government to serve urban areas first. Other things we have managed to take care of very nicely, thank you. To be sure they could be metered on a chart or they could

be more logical or that sort of thing but we're talking the real world of politics. I think we had just better do something that addresses itself to the key problem. I am obviously not as knowledgeable as you on politics, you who have spent your lives in it, but I feel pretty strongly about that. Let me put another question.

The reason I asked earlier about what you've done with local government in general was so I could get a feel whether you were distinguishing regional government from what a lot of people call metropolitan government, or with what a lot of people deal with today as county charter government, or an optional form of government, that sort of thing. My own feeling is that anything we do to improve any level of government ought to be welcomed. I have another feeling and that is that there are some metropolitan areas small enough where county government is an appropriate question to be discussed. I think anybody who really worries about metropolitan government of Cuyahoga County is wasting his time. They should have been worrying about that 30 years ago. This of course gets me away from my home turf but one of the ideas that is currently being bandied about when you talk about metropolitan government is the one that your committee, John, will get into and that's this business of two-level, two-tier government that was propounded in a formal fashion by the Council for Economic Development. This is the structuring of metropolitan government that actually says there are some things we'll handle over the metropolitan region, whatever that is, and it may be that within the metropolitan region we can actually handle a lot of the other things on a real sub-unit basis. We'll take Columbus, for example, which I gather is one of the cities that is currently considering this sort of thing and we'll actually cut the City of Columbus up for certain purposes to give more opportunity for people in a local level to have impact on their own services. Now as I read what you wrote I gather that you do provide that that could take place because you say that you can divide this unit of government--that you can divide the region up almost any way you want it to go for services, or politics, and so on. Have you actually thought through a sub-regional structure and how it might relate to the region?

Mr. Fry - Mark Hatfield has a program on that. He tried to get it accepted at the National Republican Convention. It wasn't, but it's the idea of neighborhood government. I don't think it received serious consideration anywhere but he got an impression about, I can say that.

Dr. Norton -The City of Rochester, New York is working on this and there are conversations going on with the city officials of Columbus about it.

Mrs. Hessler - We had a proposal from the city manager in Cincinnati about three or four years ago. It died.

Dr. Norton - Do you think that maybe you ought to put in something on sub-regions and how they relate to the region?

Mr. Kramer - I think now the sub-regions are contemplated to be fairly large. We are not talking merely about neighborhood but it wouldn't preclude municipalities from dividing themselves up.

Dr. Norton - But that's not what I am talking about. There are some existing municipalities that if you wanted to you could say "These are the sub-regions." Or you could use your counties in the seven-county area as sub-units. But I am thinking about a place like Columbus--by the way I don't know what a neighborhood is--some sort of district that considered itself some type of community for certain purposes.

The people who work in this field talking about centralization and decentralization, talk about decentralizing to units of 250,000 in the City of New York and that's not much decentralization.

Mr. Fry - Madame Chairman, it seems to me that what we would want to do in the Constitution would be to keep flexibility. We don't want to get anything so tied down, either local or regional, that the district areas couldn't handle themselves.

Mrs. Orfirer - We have talked during all our discussions about this fact that the decentralization ought to accompany the regionalization, but this is not something, as we have seen it, that demands constitutional attention. We'll leave that to John or we'll leave it to the cities and townships. But there is nothing in the draft that in any way precludes the kind of neighborhood development.

Dr. Norton - Do you think that what you have here permits it in adequate form? I'm suggesting that there may be political functions that you do not provide for here.

Senator Calabrese - You are very familiar with our problems in Cuyahoga County. We've got 64 chiefs of police, 64 mayors, etc.

Dr. Norton - It fits a definition of a neighborhood but I don't think that I could handle that if I were working in the field of structuring a government because it is so small a part of such a very large unit. If you get down to Little Italy's population it must be on the order of 5,000 or less.

Mr. Russo - You might have a complex in the neighborhood. You might want to make provision for some special activity of that complex within the region concept.

Dr. Norton - Right.

Mrs. Eriksson - Could you give us an example of the kind of activity you had in mind?

Dr. Norton - Start with the aged.

Mrs. Hessler - Day care centers, or the ability to choose how they will spend capital funds.

Dr. Norton - A health program or essentially a model cities program, except not have it isolated in the model cities area.

Mr. Russo - When we talk with the students participating in the neighborhood program, they don't have any say of where they're going to be able to participate. Each unit could have its own autonomous body. That could fit in any regional concept.

Dr. Norton - I would see it being a little bit different. For example, let's take a school. Let's say the way the school system will allocate or will determine its curriculum needs for the people who live in the neighborhood as contrasted with those who live in the region is sort of left up to the people in that neighborhood. Now there would still be certain regional functions: vocation education has to be regional, special education for the deaf, the blind, the handicapped has to be regionalized, but maybe we could devise a technique which would let the people in the neighborhood have more control over whatever went into the schools.

Mrs. Orfirer - How do you see this relating to the concept of creating regions as units of government?

Dr. Norton - I'm really back to the basic principle which you enunciated which was that you wanted flexibility in the whole thing. A lot of people who worry about metropolitan areas have identified the decentralization of certain choices, as well as the centralization of choice. I would suggest maybe you should get the C.E.D. document and take a look at it.

Mrs. Hessler - They provided two levels of cities, one is the regional and one the urban.

Dr. Norton - This they did not make clear. One could be regional and one, the community.

Mr. Russo - Couldn't we have a regional government with its powers granted by the legislature, without putting it in the Constitution?

Dr. Norton - As long as the Constitution doesn't preclude it.

Mr. Kramer - For the most part, the suburbs do provide for neighborhood government. The idea of this regional system is that existing units would not be disturbed except when needs are demonstrated to have the region provide some of these services.

Mr. Russo - How can we assure the people's rights to participate at the local level, whether they're a unit or not.

Dr, Norton - It would have to be a governmental orientation. You have to operate through some structure but you take a look and try to rationalize the suburbs in Cuyahoga County.

Mr. Kramer - But there is great attachment to them. And I think we have to recognize the attachment and they they do carry out many functions effectively.

Dr. Norton - It's very interesting. You like to be right even if it hurts. I was at Westlake recently and some people were explaining to me about the trouble they have with sewers. We told them that in 1959 they were going to have these problems and they said "Oh no, we won't." Gates Mills has the same thing and is totally inadequate to perform the function.

Mrs. Orfirer - But it performs a neighborhood function. It doesn't perform well as a unit of government but it performs as a decentralized home base kind of thing.

Mr. Kramer - There are services that are being carried out improperly by these local units and the region should have the ability to take over. Some of these suburbs are just big blocks on the map, old townships and that sort of thing; people have formed attachments to them. They do serve a function and do provide for the neighborhood.

Dr. Norton - You are aware, of course, that precisely those blocks are the ones that are attacking regional government.

Mrs. Hessler - You are really talking about a three level at the very least.

Dr. Norton - We cannot accept as an excuse maintaining the form that we have the fact that people are opposed to change. There are ways of changing that are easier to accept and which can accomplish the goal.

Mr. Hunger - You could talk about two tiers all over the state if you relabel what that tier is. In a rural area the regional tier might well be the county.

Mrs. Hessler - We have a growth pattern in the southern Ohio metropolitan area taking in at least four counties. But you never could get rid of those counties. You've got the whole political system built on the counties.

Mrs. Orfirer - I think that's one of the plusses in the draft, plusses in terms of saleability. We're not disturbing any other layer of government. We may lead them gradually to the point where they feel that so many of their services have been better provided at a regional level that they can cut down some of their activities or even that they may then look toward mergers. But it doesn't in any way require it or even suggest it. I think this is pointed out. Metro is a dead word where we are.

Mr. Loewe - Would it be more viable to mandate the legislature to set up these regions or put it in the Constitution and let the legislature decide the proper time to do it. Which would be more viable?

Dr. Norton - I don't know. I think that would be a good question. How do you get the amendment passed? My feeling is strongly in favor of moving as much in the direction as possible. If you think you can get it passed then have the people mandate it. If you don't think you can get it passed, permit the legislatuve to do it. The legislature is more rational about local problems than the local units.

Mr. Fry - I think that raises two questions. First I hate to see the legislature getting into the position that a lot of state legislatures are in of voting on local problems. I would favor the legislators in Cuyahoga County, for example, doing what needs to be done. On the floor of the legislature, where the legislators from Hamilton County have to vote on something that has to do with Cuyahoga County, you encourage log rolling, trading votes. The second point is in education. I don't know anyone who has studied the state educational system that wouldn't tell you that we would have a much better educational system without some 640 boards of education. But if you have a person elected to a board of education he feels a certain responsibility to retain that board of education in existence. But that person might not be uncomfortable if you took it out of his hands. Then we would have one board of education for Clark County. I'd be willing to make that decision in that area, but the local boards of education aren't going to accept that.

Dr. Norton - I think that your experience, you know what happens when you start dealing with local legislation is entirely right. It usually works out that legislative courtesy prevails, and the legislature will go along with any unified county delegation as to what happens.

Senator Calabrese - Before the reapportionment, that used to happen.

Dr. Norton - There is another point. Charlie mentioned the business of school boards. In the last 30 years we have gotten rid of some 30,000 school boards in the United States, and we haven't done it because the school boards got rid of themselves. We have done it because of the state taking action. The question was why

has there been the willingness to change the school structure? And not the willingness to change the municipal structure?

Mr. Fry - The school board members don't have the political power.

Mr. Russo - There is some political philosophy involved in the township concept.

Dr. Norton - Except for the home rule concept.

Mr. Hunger - The school districts have always been regarded as being merely agents of the state, and single purpose entities.

Mrs. Orfirer - I think you have all come up with the answer to why this is constitutionally mandated, because we feel it is to the greatest advantage of the legislature.

Mrs. Hessler - Further the statement in our proposal that the state shall set up these regions. I have the feeling that you're not very happy with this, Dolph, and feel it should be reworked.

Dr. Norton - I would probably be repeating myself but if I could summarize (1) I think that nothing should be done that would lessen the strength of establishing regional governments for urbanized areas; (2) I do not see any particular advantage to be gained by establishing a new form of government within the political and social economic cult involved where they are not absolutely needed. That would be my summary. I would not be inclined to say the state should be divided, you don't have to divide the whole state if you set up regional governments. The legislature shall by law establish regional governments within the metropolitan areas of the state and in such other areas as necessary.

Mr. Loeve - If you put it into a constitution, how do you make it flexible enough so that you don't leave somebody out? In the northeastern Ohio area I'd include at least three and maybe five metropolitan areas, in any regional government. I'm saying take the metropolitan area basically and mandate that there shall be a regional government. A regional government could encompass five metropolitan areas. My question would be why do you have to establish a regional government where we currently have a satisfactory arrangement without the attendant disruption of starting a new government. I think you may be underestimating what it takes to establish a unit of government. It is a traumatic experience. The legislature has the authority here to decide the boundaries. I wouldn't sit here and write it or I wouldn't write it into the Constitution. I'd write the authority for the legislature to decide. It's currently going on right now and I doubt that you could defend establishing a government against a strong attack which says "What additional benefits is this government going to bring with all that it takes to establish a regional government?"

Mr. Kramer - There's too much emphasis upon the term "government." It's simply providing a different framework for performing functions that are already being performed.

Dr. Norton - This is precisely my point. I would hate to see the casualness of that take away the emphasis that I think must be in your Cincinnati, your Cleveland, and your Columbus and Toledo areas. If it can be done easily, you're undermining the whole concept. If you're going to do something that is already going on across the state or if you're going to meet the needs of an urban area, what's going on currently

is so inefficient as to be totally outmoded I wouldn't turn my hand to have what's going on now.

Mr. Loeve - Isn't it true that long before this has the chance to be put into being, the federal government is going to require the state to create these planning regions? We'll have them long before the regional set-up takes place for our large urban cities.

We don't have to worry about it. It's going to happen because we're going to be squeezed into doing it, so most areas already have what they want or what they need. Then you can concentrate upon what Dolph has been talking about--the metropolitan area.

Dr. Norton: I would suggest that you take what you think you've written here and spell it out for three different areas of the state--a large metropolitan area or a congress of metropolitan areas such as you have in the Cleveland area, take an isolated metropolitan area, and take a rural area. See what you come out with. I just think that you'll be quite surprised with what you've got written into the draft. My predicition is that when you do that you will not come up with something that can satisfactorily handle a rural area of Ohio and the multiple metropolitan area.

Mr. Kramer: Would it be because of the structure of the government or powers?

Dr. Norton: The structure and powers of the government.

Mr. Kramer: The structure can be different, and the powers.

Dr. Norton: But what you're doing is coming up with some general law of government to get the thing off the ground. Now for you to say that that's going to be the same in the rural and urban areas I think would fly in the face of political experience. I don't think that you would convince the county commissioners or the state legislature of that. I also want to comment on contracting. We have a classic example of the contracting for services provision in the state. It is built into state law. It has guaranteed the worst public health system in the U.S. There may be one that is worse, but I don't know if it. It is a provision that runs like this. Any municipality or any city can contract with the county health dept. for health services as long as it wishes. It can back out of the contract at any time. What happens is that the municipality can meet its legal requirement with a minimum expenditure, an expenditure of 5¢ per person, or something on that level. They then contract with the county for what they think might be adequate public health. They county lowers the requirements to such a level that it cannot provide adequate public health in the city or anywhere else, and you have Gresham's law, the bad driving out the good so that we have a complete waste of the public health dollar in places like Cuyahoga county. You'd have to go a long way to dream up a worse system. I think that's the problem you bump into here. If you give somebody the authority, give them the power to act. If it's a governmental unit that is responsible and there are responsible officials, give them power. Don't put them in the business of trying to bid.

Mr. Lowwe: Couldn't contracting work for an interim period?

Dr. Norton: I think then you will get into the situation you find in Cuyahoga, between our central city and our suburbs. We have one of the best water systems that is available for a county-wide area but that is constantly under attack, between the City of Cleveland and the suburb over contract terms. I just think that we've had enough experience to say if we were going to propose whatever we could propose we ought to propose something else.

Mrs. Hessler: May I just add to what you said. We considered the county had to take over sewerage, etc., simply because the state of Ohio said your health problems are so great you have to do it, but the county could not handle this so they contract with the city to do a county-wide service which keeps the county as a lousy government in existence that much longer because the services don't meet the standard. Whereas if they had to provide it, they would have had to change the form of the government.

Mrs. Orfirer: So you don't feel that they should be permitted to contract.

Dr. Norton: If you can impose enough obligation that makes it unprofitable to contract, maybe so, but when they take a function, take it.

Dr. Norton: There is nothing here about race.

Mrs. Orfirer: Why should there be?

Dr. Norton: Because one of the most important aspects of American politics today is the blacks' attitude towards whites and the whites' attitudes towards blacks. And there is no place where it shows up more than in questions of governmental jurisdictions.

Mrs. Orfirer: I understnad but how do you write something about race into the constitutional amendment?

Dr. Norton: Not in the constitution, in this paper about effects. I think one of the effects of not adopting but proposing a regional government amendment is going to be key conflict in the political sphere between black political leaders and white political leaders, and this is going to prejudice everything you do, and that you're going to have to try to evaluate this in some way and come up with a strategy that satisfies different groups.

Mrs. Hessler: The only real reason for breaking down your central city government for local self determination is this racial or ethnic question.

Dr. Norton: You might feel that way as a political scientist but there is a group of theorists that I talk to occasionally that think it's dear to their hearts because they are great participators and you have to give them at least credit for the emotion, whether they do have the reationality or not.

Mrs. Hessler: This may be justifiable from the point of view of the people who live in the ethnic neighborhoods.

Mrs. Orfirer: We are going to have to deal with the question of taking the power base away from the black people, in the big cities. I think we have to be prepared to meet this.

Mr. Russo: I've discussed this with enough regional and county leaders and it's been simple enough with the leaders I've discussed this with--not national leaders. All we talk about is the fact that how much representation can the blacks get in the county form of government and we've determined that we go on a ration basis--that's it--no problem.

Dr. Norton: This is one of the beauties of using the legislative districts in a place like Cuyahoga County, or if you were to do it in the seven county area on a regional basis.

Mr. Russo: We're talking locally on a county basis. But we are talking to the black community in terms of their share of county government and double money. You're going to get a big chunk from Cleveland, and then you're going to get more money from Cuyahoga County. That's practical politics.

Dr. Norton: That's right and that's one side of it. The other question is what are you going to tell the Mayor of Maple Heights?

Mr. Russo: Now the blacks have for years opposed the county form of government, at least since 1958. What we are going to do is divide districts so that they will have a

proportionate share in the county form of government. You can't ask for any more.

Dr. Norton: Wait a minute. If you take a look at the vote, I think it is easier to sell the blacks than it is the white suburbanites. If you take a look back at what happened in 58 and 59--race was the key issue. The blacks saw their political base destroyed--the whites saw that their suburbs would be impacted by blacks. You have that double thing. I think if we talk race--that's what we're talking. We're talking both those things.

Mr. Russo: We now have a distribution pattern in Cleveland outside suburbs, and we've never had that before.

Dr. Norton: All I'm saying is that there is a white problem that you've got along with the black problem.

Mr. Fry: It will be a lot easier to impose at the state level and a lot easier to get adopted at the local level. If you did it on a representative basis and you used the local government as regional organizations in this region would have a claim on so much of the local government moneys going to that district. Just as we do on a ten mill limitation--we could say that so much of it could be used for regional purposes. This puts all of the decision making on the representatives, but it's a lot easier to work it out on that level, and the blacks are there electing their representatives too.

Mr. Loewe: There has to be some balance between what the state contributes and what the region raises itself.

Mr. Hunger: Dolph, the whole question of revenue sharing, is up to the legislature, because clearly the bill now coming out will have major role on what they can require in the way of regional government.

Mr. Norton: The legislature has a magnificant opportunity because of revenue sharing.

Mr. Fry: The federal govt. thinks it has taken care of it by saying so much has to go to the cities but all the legislature has to do is to say considering the amount the cities get, we're going to make this sort of distribution.

Mrs. Orfirer: We outlined some possible sources of revenue. We started with Operating Fund Sources and the first sub-heading under it is State funds from revenue sharing and existing sources of funds from federal contributions for planning and review agencies and the state income tax. Local governments within the region on a voluntary or enforced basis--two possibilities. Then there's the region as a taxing authority which has the possibilities of a voted or unvoted property tax, regional income tax, regional sales tax, user charges for revenue producing operations. Then the second big heading was under Capital Expenditures. Under that, Federal Grants, State Grants, contributions from units within the region, and regional bonding authority, both voted or unvoted general obligation bonds. Can anything be added to this list? I wonder if we should start on the more general basis of whether there is disagreement on the need for these units of government to have their own taxing authority. I think that's pretty well accepted. Does anyone want to comment on that? It does go with what you were saying, Dolph, that they have to have raise money from the unit that has the responsibility.

Mr. Hunger: More than that, though, they need locally raised taxes from units or areas to force those people out of stake and the decision making that comes out of those areas.

Dr. Norton: Not from units--you mean locally from the region?

Mr. Hunger: I don't care whether it's neighborhoods or units or whatever, but I'm not suggesting billing the units.

Mrs. Orfirer: You just mean that it's good philosophy to have the people knowing what they're paying for.

Mr. Hunger: The receivers of the service that have a stake in it.

Mr. Loewe: Picking up transfer of service charges for regional govts.--that is pretty simple and doesn't have too many effects on problems although I suspect that direct debt limitation might have some effect there when you start financing sewers and water. It gets pretty complicated in terms of the ability of that unit to get inside 10 mills. There is that constitutional limitation that makes some units run out of the ability to finance water and sewer.

Mr. Fry: Then I don't think 10 mills will have much to do with regional govt. anyway.

Dr. Norton: I think that unless some adjustment is made, that's a good way to give up the whole thing--schools and cities don't want to give up their inside millage.

Mr. Loewe: Everything regions get would be outside, right? They'd have to vote for everything.

Mrs. Eriksson: You could build into your proposal a certain amount of millage which would be in addition to your ten mill limitation.

Mr. Loewe: Don't we have to be somewhat crystal ballish to come up here with where local govt. is going to get its money from and to recognize what are the possibilities for the competing regional govt. to also get into the swim? And if things are going to change drastically, like the state is going to take over all the property tax and the schools, how is that going to affect regional government. Regional govt. won't have any of the property tax at all.

Mrs. Orfirer: This is going to be a tough one because if anything can kill us besides the problem we were talking about earlier it's going to be this taxation business.

Mr. Russo: I subscribe to user's fees and general bonding.

Mr. Kramer: Ideally the regional govt. is not going to be adding greatly to the tax burden. It should be a shifting of the tax burden. And again the idea would be that overall it would effect the economies, but that's a little hard to sell. As you said, it would be very easy to transfer user fees, it doesn't make any difference if somebody is paying this water bill to his region or to city hall, and to the extent that it is carrying out existing functions, it should not greatly increase the cost of that.

Dr. Norton: The constraints on the money that's available are such that you don't always do a good job. I think this is one thing that gets back to my earlier question about why do you need more money. That is, it is going to cost more money if you do anything, and if you do a good job it is going to cost substantially more money. And you are just really at the nitty-gritty when you talk about dollars.

Mrs. Hessler: You can't promise to reduce costs, because the reason you want change is to provide more services.

Mr. Loewe: But the real selling point is that you are going to do it so gradually that the pinch will never be so heavy that people will get uptight about it.

Mrs. Hessler: Well, they're uptight right now.

Mr. Loewe: Well, what I mean is you transfer functions one every three or four years, or you move into a certain area slowly enough that impact will be slight.

Mrs. Orfirer: It's going to cost them money anyway--they have to have the services. They're going to have to increase to meet all the new capital expenditures and the new guidelines for so many of these functions--pollution, water. Have we any idea what realistically we're talking about in terms of money?

Mr Regele: The Housing Commission was talking about $100,000 to each unit of state funding for administrative purposes for planning.

Dr. Norton: Let's take this seven-county Cuyahoga County. We're going to have as I speculate 30 representatives, from these districts. Are we going to pay them anything? What about the executive? We're going to have to pay him something, and he's going to have different functions. We're essentially going to have 30 times 10,000 each plus the executive--do you see what we're talking about?

Mr. Hunger: I had it figured out roughly as three-quarters of a million, with 10 or 12 districts in the state. That's minimal. It is $125,000-$150,000 for transportation planning--just one function.

Mr. Fry: I think we could get some basic administrative costs for the state's contribution to local government from the local govt. fund. This would be the easiest way to do it--no one has to voteon it--give you the same money for the ongoing cost of govt. If you do it any other way, you are going to choke out regional govt. The first thing they have to do is say now we're organized, now let's go out and raise the money--you're going to choke them out.

Mr. Kramer: Like joint vocational school districts--the first thing they have to do is go on the ballot. And a lot of them are just sitting there as paper organizations, becuase they can't get any money.

Mr. Loewe: How much of an obligation do you have towards giving thelegislature a way to implement this? How far down the line do you feel that we really have to go?

Mr. Kramer: That's a good question of how much to entrust the legislature to provide adequate funding. If you are confidant that the g.a. will do it, all you have to do is not prohibit them from doing it. If you think otherwise, you might have to add more, for instance, adding a property tax, that would insure that they would have money. If you are talking in terms of a modest amount, a mill or less, it doesn't sound like that much, but it would raise a lot of money.

Mr. Fry: Particularly if it is made up of a lot of state representatives, I can see them welcoming the oppo rtunity of transferring to this group of representatives--so we don't have to change everything in the law because Cleveland's got a problem,

which is wrong. New York is the greatest example--if you could dissolve N.Y.C.'s problems--you could cut the statutes in half. But if you offered the legislature the possibility that these problems could be handled on a local level by the legislators in that region, and give them a chance--local gov.t money and taxing authority on their own--make this the responsibility of the state legislator because he should be more familiar to make these decisions at a regional or state level than anyone else. Right now I can see some rationality to it.

Mr. Hunger: Would it be logical to put in there something about the kind of funding the legislature could authorize?

Mrs. Eriksson: There's never really been any problem though with the legislature authorizing for example, special districts which levy property taxes.

Mr. Hunger: Sales tax is always the easiest one to get through. Wouldn't that be an easier one for regional govt., because the model is for a piggyback sales tax, already in the constitution.

Mrs. Eriksson: I don't think you need to write it into the constitution.

Mr. Fry: The legislature might do it and make it generally applicable across the state.

Mr. Hunger: The legislature is going to be asked to implement it--they're going to want some guidelines. You can't really stop at the end of the constitutional amendment--you have to go as far as you can.

Mr. Kramer: As far as the statutes are concerned, there's quite a difference between giving the region its own independent tax source that the g.a. can't tamper with and making provisions for the g.a. to enact provisions. Now you may want a guaranteed amount, with the recognition that you may have to provide funds over and above that--but a certain minimum may well be necessary if you want to have an effective regional govt.

Mrs. Orfirer: If you provide general bonding authority, you have to provide taxing authority with it.

Mr. Loewe: And what besides the property tax can you use for that--for general obligation, not for revenue bonds,--what sources in Ohio?

Mr. Kramer: Whatever the market will accept.

Mr. Fry: We've paid bonds off with cigarette taxes, with highway-use taxes--

Mr. Loewe: That's at the state lvel--what about locally? The city of Columbus uses its income tax to finance its bonds, but on the ballot they've got the property tax to back it up.

Mr. Kramer: That's the way that self-supporting utilities operate in municipalities too. They're actually paid out of those sources, but that is why they are high quality bonds. It is extra security for the bonds. The property tax is still very important as the base for the security of the bonds. You might provide for a sales tax or some other tax; they probably could sell the bonds--it's a question of how much interest you're

going to have to pay.

Mrs. Brownell: Is there any recommendation on balance between state and local funding?

Mr. Kramer: Ohio traditionally has left local govts. very much to themselves--they have independent taxing authority and they issue bonds--and the state has provided funding for school districts. That may be changing now with the federal revenue sharing, you have another level coming in. From the standpoint of local govt. officials, they're so hard pressed for money they will take it from anyplace they can get it.

Mr. Fry: I think that the concept that could be the most easily adopted would be sufficient funds from the state to provide for the operating funds but special projects handled regionally--Now I don't know but this would be my guess that this is the one that you could sell to the legislature. I think that we don't want to handle this the way that we handle the schools because there is no one happy with the way the schools are being handled.

Mr. Loewe: It is very difficult to realize all the possible projects that a region might be required to fulfill, or all the operating funds which might be needed--and until these really are visualized, I really think you can't make a move to finance things to the very end until that happens. Maybe you're a little bit early in terms of trying to figure the financial situation.

Mrs. Orfirer: Well, what we want is the minimum that we can put into the Constitution that will assure the flexibility of finance that may be necessary. It is going to have to be different in each region.

Mr. Fry: I can see successful campaigns for some functions, such as parks, in some regions, that wouldn't sell in others at all.

Mr. Kramer: Let's take the user thing. There seems to be no reason why a region shouldn't have the power to submit voted tax levies or revenue bonds. Those are easy, because the people of the region are going to vote on them. The hard one really is those taxes which can be levied without a vote of the people. That's where the hard choice comes in--how that power if provided, will be provided--or if you want to have state funding for the minimum functions--planning and review.

Mr. Fry: You could say the state will go so far, and then beyond that, it will be subject to voter approval.

Mrs. Orfirer: What is the minimum we could say in the constitution that would provide the kind of flexibility we want and adequate funds?

Mr. Kramer: Well, if you want flexibility I could say leave it up to the general assembly.

Mrs. Orfirer: What happens if you say the legislature shall provide for taxing powers for the region, and give a second step of providing functions to the region.

Mrs. Eriksson: If you want to give them some taxing powers, then you probably should give it to them directly--in the constitution--if you want to make sure that they have independent taxing powers.

Mr. Kramer: If you give them the same kind of powers that municipalities have, then they have got taxing powers, because the court already says that within its own domain a municipal corporation has the same plenary taxing power that the general assembly has, except as limited by the pre-emption doctrine. I'm not sure the pre-emption doctrine would apply to a region unless you have this same kind of provision that you have concerning the municipalities from article XVIII, Section 13.

Mrs. Eriksson: But then you would have to give them home rule or "local self-government."

Mr. Kramer: So this would be one way of providing it.

Mrs. Eriksson: Which has much broader applications than taxing powers--you wouldn't want to do that unless you really wanted to give them all powers.

Mr. Kramer: Then they would be able to levy a broad range of taxes.

Mrs. Eriksson: I don't know what it would mean if you just said they shall have power to levy taxes.

Mr. Loewe: I guess our politicians would play it pretty cool on the financing and hope that it would be taken care of by the state in the early stages of regional govt. And they'd do it within the first budget that became available once the regional govts. became created without disrupting the whole financial structure of the state government. That would be the way, as far as I can see it, to try to implement the thing immediately upon the adoption of the constitutional amendment.

Mrs. Orfirer: I think we can do a lot with regions for years without having to get into finances and raise a lot of taxes with funds available from what you have all been saying. Somewhere along the line, they're going to have to have their own source of revenue, if they are going to be the kind of regions capable of taking over, and I don't know how we get around it.

Mrs. Hessler: If you have a regional govt. that covers more than a couple of counties, you're going to have to have a bigger legislative body than anything we're used to now.

Mr. Kramer: I would think that the salaries paid to the legislators of the regions should be commensurate with the kinds of services that they perform and while they are performing the minimal services of overseeing planning and review, salaries need not be great.

Mrs. Hessler: None of the present planning commissions are paid.

Mr. Kramer: It would be when they actually began to take over substantial amounts of services and have more repsponsibilities.

Mrs. Eriksson: The Twin Cities Council receives no compensation.

Mr. Kramer: I just can't see why if you have a thirty member legislative body they should be paid $10,000 a year, when they're just starting out--put the money into staff people. This region would take over the funding and the personnel of existing agencies to a very large extent.

Mrs. Eriksson: John, was you 3/4 million based on the assumption that you would be

paying a salary of something like $10,000 to legislators?

Mr. Hunger: Yes, and staff, etc.

Mrs. Hessler: Well, John, we've got a budget of 3/4 million for our planning operations now.

Mr. Hunger: I know, and that's really minimal service.

Mrs. Hessler: It's as minimal as you can get.

Mrs. Orfirer: Who pays for that?

Mrs. Hessler: The local govts. that are members thereof.

Mr. Kramer: Is is possible, John, to take an existing region or a hypothetical region to determine what the present costs really are of carrying out planning and review...and then to give also a figure as to what should be established.

Mr. Hunger: That's one thing we are doing.

Mrs. Orfirer: When you say should cost, sometimes it should cost less and sometimes it should cost more.

Mr. Kramer: And then what would be the effect of having one overall board to di this--that would be the kind of data and information that we need to talk about, the amount of money that's needed.

Mrs. Orfirer: You know one thing that bothers me, Gene, is that sometimes we talk about these regions in terms of planning powers, as unbrella regions that would coordinate the work and review the work of the existing or future existing planning commissions and sometimes we talk about it as though its going to take them over, maybe employ some of their staff--or that the funding that goes into them will go into the region. I think we are talking about two different things, sometimes, and maybe it would be one way in one region and another way in another region.

Mr. Kramer: Federal requirements may not permit that--it may come under the umbrella of the regional govt., but if possible, when you are setting something up like this, you really want to have the wide range of authorities.

Mrs. Orfirer: Do you see some of the existing ones as disbanding?

Mr. Kramer: I would certainly forsee all of the c.o.g.'s, all the regional planning commissions disappearing.

Mrs. Hessler: Actually, they will all disappear, because right now more and more you are getting the regional commission, which is the county-wide commiss on, doing work for the seven or nine counties--on a metropolitan basis. When you get to the regional zoning stage, the local planning commission will disappear.

The Committee adjourned until 9:30 a.m. the next day at the office.

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
Elections and Suffrage Committee
August 1, 1974

Research Study No. 39

Public Officers: Qualifications, Oath, Salaries
Article XV, Sections 4 and 7
Article II, Section 20

This study examines three sections of the Constitution dealing with public officers: Section 4 of Article XV, which states that a person may not be elected or appointed to a public office unless he possesses the qualifications of an elector; Section 7 of Article XV, which prescribes that every public officer shall take an oath of office and an oath to support the federal and the state Constitutions; and Section 20 of Article II which, among other things, prohibits in-term changes in salary of a public officer.

Summary

Since Section 4 of Article XV makes the qualifications for public office depend on elector status, and since constitutional elector status presently consists (by construction) of being 18 years old and a resident such time as provided by law, the most important question raised by Section 4 is whether the Constitution should specify additional age and residence qualifications for all or some public officers. The Legislative-Executive Committee discussed this question in connection with qualifications to serve in the General Assembly and in the Executive Branch (notably Governor and Lt. Governor) and made no recommendations for additional qualifications.

As noted in the discussion regarding Section 7, no current problems appear.

Since the people have removed the prohibition against in-term pay increases for judges, Section 20 of Article II raises the question whether a recommendation for modification should be made for removing the prohibition for some or all other public officers. It is noted in the discussion that the people recently rejected a proposal which would have removed the prohibition for some officers. Again, the Legislative-Executive Committee studied this question in connection with legislators (section 31 of Article II) and elected Executive officials (section 19 of Article III) and did not recommend change.

Article XV, Section 14

No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.

History

Section 4 of Article XV first appeared as a constitutional requirement in 1851. This section was proposed by the Legislative Committee and was adopted by the convention without debate. The Committee on Arrangement and Phraseology moved this provision from the legislative to the elections article of the constitution.

No model for this section was noted in the convention debates nor had any similar provision appeared in either the Northwest Ordinance or the 1802 Ohio Constitution. Both of those prior organic acts contained requirements for the positions of governor and legislator only, and these requirements were phrased in specific rather than electoral status terms.

In order to determine the specific qualification required by Section 4, it is necessary to consider the constitutional provision setting forth the electoral qualifications, Article V, Section 1. The original 1851 section on electors required that a person be 21 years old, white, male, resident of the state for one year immediately preceding the election and a resident of the county, township, or ward in which he resides such time as shall be provided by law. However, the 1851 list of qualifications did not require that the person also be a taxpayer or a laborer on county roads as the first Ohio constitution had.

At the 1912 constitutional convention both Article 4 and its correlative elector section were amended. Section 4 was amended to contain a proviso that "women who are citizens may be appointed as members of or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both." This amendment was intended to allow women to participate in state government by holding certain offices which were "particularly suited to their talents," irrespective of their lack of electoral status. A further proviso which would have allowed women to hold notary positions was defeated on the convention floor.

The electoral section was amended by the 1912 convention to delete the requirement that electors be "white." This deletion was a mere matter of form due to the prior enactment of the 15th amendment to the United States Constitution which had taken effect in 1870 and which prohibited the denial of the franchise on the basis of race, color, or previous condition of servitude. A proposal to delete the word "male" from the list of requirements was approved by the convention but was defeated by the voters.

In 1953 Section Four was again amended, this time, to delete the 1912 provision concerning women which had been made obsolete by subsequent amendments to the United States Constitution and to the Ohio Constitution granting the right to vote in 1919 and 1923 respectively.

In 1957, Amended Senate Joint Resolution No. 20 (102nd General Assembly of Ohio) which would have entirely repealed Section 4 was narrowly defeated by a popular vote of 996,513 to 1,040,216.

In the same year, the voters approved an amendment to the electoral section allowing citizens of the United States over 21 years of age and citizens as required by law to vote for presidential and vice-presidential electors if they were not qualified to vote otherwise because they did not meet the residence requirements. However, these citizens

were not called "electors", and thus the amendment did not affect Section 4 or qualifications for holding office.

The state residency requirement of one year for being an elector and thus office holder was reduced to six months in 1971 via an additional amendment to Section 1 of Article V. However, the six months requirement has subsequently been held to be unconstitutional under the equal protection clause of the 14th amendment to the United States Constitution. Schwartz v. Brown, U.S.D.C. (S. D. of Ohio) Civil Action 72-113 (1972) applying Dunn v. Blumstein, 405 U.S. 330 (1972) (Dunn, supra, had held that because voting is a fundamental right, a very substantial state interest must be shown in order to restrict that right.)

The interpretation of Section 4, Art. XV, was further altered in 1971 by the passage of the twenty-sixth amendment to the United States Constitution which prohibited the denial of the franchise to those over 18 on the basis of age. Thus this change in the interpretation of Section 4 opened public offices in Ohio to all those over 18.

The proposed amendment to Section 1 of Article V of the Ohio Constitution already adopted by the Commission as part of the Elections-Suffrage Committee's report, alters the section to require only that a citizen be eighteen years old and comply with the applicable state, county, township, and ward requirements as prescribed by law in order to vote. The proposed amendment, if adopted, would assure eighteen year olds the right to hold public offices in Ohio by granting them the undisputed right to vote. Ohio has no other age requirements for public office, nor for specific public offices, other than Section 4, Art. XV. Section 3 of Art. II requires members of the General Assembly to have resided in their districts one year preceding their election. An exception is made in Article IX for a reapportionment year.

Comparative Provisions

Nine other states prohibit non-electors from holding office, while three states specifically make all electors eligible as office holders. Five additional states have similar requirements which are qualified in one respect or another, such as provisions which are inapplicable to school boards or city managers. Thus approximately one-third of the state constitutions corrolate the ability to hold office with the ability to vote.

Six additional states have a general residency requirement for office holding, while seven states including six of the states requiring residency require citizenship to hold state office.

Specific requirements of age, citizenship, and residency are also common in reference to particular state office such as governor, judge, and legislator. For example, 34 states have age requirements for being a member of the upper house of the legislature, and in 18 of such states, the age is 25, while in other states the requirements vary between 21 and 30 years of age. Thirty-one states have age requirements for the lower house and in 23 of such states the age is 21, while in the other states the requirements vary between 21 and 25 years of age. Eighteen states specifically require U.S. citizenship to be a legislator, and 13 states require between 2 and 5 years of state citizenship. Eight states have residency requirements in the district from which the legislator is elected, most commonly one year. Seven states require residency in the state varying between one and seven years.

The office of governor is even more likely to have specific qualification in the constitutions of other states. Forty-one states have an age minimum for holding the governor's office. Four states require that the governor be 25, thirty-six require that he be 30, one requires that he be 31, and one that he be 35. In addition, thirty-six states require that the governor be a U.S. citizen and twenty-one of these states specify a number

of years for which the person must have been a U. S. citizen. One state requires 2 years of citizenship; seven states, 5 years; one state, 7 years; five states, 10 years; one state, 12 years; three states, 15 years; and three states, 20 years. State citizenship is required for the post of governor in fourteen states. The years of state citizenship required varies as follows: one state requires 2 years; eight states, 5 years; two states, 6 years; two states, 7 years; and one state, 10 years. Thirty-six states require a period of residence in the state prior to election. One state requires 1 year of residence; eight states require 2 years; one state, 3 years; one state, 4 years; fourteen states, 5 years; two states, 6 years; seven states, 7 years; and one state, ten years.

Twenty states have minimum age requirements for the post of judge of the highest court in their state constitutions, and several states, including Ohio, have a maximum age of seventy. Minimum age requirements commonly set are thirty-five years, required in four states, and thirty years, required in fourteen states. Minimums of twenty-six and twenty-five are set in one state each. Other states get around age minimum for these posts by setting up a requirement that the person must have been a lawyer for a prescribed number of years, usually five or ten years. Nine states require state citizenship and fifteen states require U. S. citizenship. Eighteen states set forth some form of residency requirement for this post in the constitution. Index Digest of State Constitutions, 2nd Legislative Drafting Research Fund of Columbia University, 1959.

Statutory Provisions

Chapter 3503 of the Ohio Revised Code sets forth the further statutory qualifications necessary to be an elector in Ohio. Section one of Chapter 3503 sets forth the statutory age and residency requirements and the rules for assigning electors to precincts. Section 2 sets forth the rules for determining the existence of residence as called for in Section 1. Sections 3 and 4 respectively provide for the voting rights of certain inmates of soldier's homes, public institutions and private institutions. The residue of the chapter deals with the voter registration requirements.

Interpretation

Section 4 of Article XV does not by implication forbid the general assembly from requiring additional reasonable qualifications for office holding. The legislative article, section 1, specifically vests the legislative power in the legislature; this power can be restricted only by a direct expression of restriction and not by a mere supposed implication. State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 102 (1875). In Covington, supra, the law in question set forth additional residency and literacy requirements for policemen in cities of the first grade, the court held that these requirements were reasonable and that they were not in conflict with Section 4, Art. XV of the Constitution. Other requirements for office holding in addition to elector status which have been held to be valid include a law providing that members of a public board of city affairs be of different political parties and a law providing for the exclusion from office of those who used corrupt practices to obtain election. State ex rel Atty. Gen. v. Ratterman, 58 Ohio St. 731 (1898); Mason v. State ex.rel. McCoy, 58 Ohio St. 30 (1898). These cases confirmed the Covington doctrine that in order to restrict legislative power the restriction must either be explicitly stated or a necessary inference rather than a mere permissible inference. Thus Section 4 Art. XV does not forbid the legislature from establishing additional requirements for office holding.

The elector status requirement of Section 4 is applicable to all state officers elected or appointed. The chief elements of an office, which trigger the electoral requirement, are independent public duties which are a part of the state's sovereign power, vesting of these duties by virtue of the holder's election or appointment, and the lack

of control over the holder by a superior officer. State ex rel. Morgan v. Board of Assessors, 15 N.P. (N.S.) 535 (1914) (citing and following State ex rel. Atty. General v. Jennings, 57 Ohio St. 415 (1898).) In Morgan, supra, the court held that the post of deputy tax assessor was not an office due to its subordinate position to the post of tax assessor and therefore could be held by a non-elector woman. In Parkinson v. Crawford, 13 N.P. (N.S.) 73 (1912), the court defined an officer as one who exercises in an independent capacity a public function in the interest of the public. The Parkinson case held that the post of special constable was an office and thus must be held by an elector under Section 4, Art. XV.

Positions which have been held to constitute offices in the Section 4 context include a trustee of a state university, Thomas v. Ohio State University, 195 U.S. 207 (1903); a special constable, Parkinson, supra; and a notary, State ex rel. Robinson v. McKinley, 57 Ohio St. 627 (1898).

Positions which have been held not to constitute officers include the position of supervising judge of the court of common pleas, because the duties of this post were not distinct from those of a judge; the position of chief of police, because the city charter failed to vest this position with independent powers; and the positions of deputy tax assessor, deputy supervisor of elections, and deputy clerk of court, because of the lack of independent function in these positions. State ex. rel. Hogan v. Hunt, 84 Ohio St. 143 (1911); La Polla v. Davis, 40 Ohio Op. 244 (1948); Morgan, supra, State ex. rel. Vail v. Craig, 8 Ohio N.P. 148 (1900), 1954 Ohio Atty. Gen. No. 3999.

Whether or not an individual is an elector and thus eligible for office is determined by the state law governing electors, Parkinson, supra. Two questions concerning elector status in relation to Section4 have been raised and reported. This first of the decisions held that citizenship is necessary for elector status and the second that the date for determining age eligibility is the date of the general election rather than the primary. State ex rel. Keeler v. Collister, 6 Ohio Cir Ct. (N.S.) 33 (1905), 1941 Ohio Atty. Gen. No. 4013.

Current Questions

One, is the restrictive policy of Section 4 as to all state offices a wise policy in our highly mobile contemporary society in light of the highly specialized training necessary for some jobs and the thus restricted labor pool available to fill these jobs among Ohio electors? Two, should higher qualifications in terms of age, citizenship, and residency for some state offices such as governor be placed upon candidates?

Article XV, Section 7

> Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation to support the Constitution of the United States, and of this state, and also an oath of office.

History

The concept underlying Section 7 of Art. XV that every elected and appointed officer should take an oath or affirmation to support the applicable constitutions apparently was originally derived from the federal law through the Northwest Ordinance. An oath requirement concerning the support of the Ohio and Federal constitutions and the faithful discharge of the duties of the office was included in both the 1802 and 1851 Ohio Constitutions.

The United States Constitution, Art. VI, requires that

> Senators and Representatives (of the United States) and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several Staes, shall be bound by oath or affirmation to support this constitution.

Section I of Article II prescribes the presidential oath of office which includes an oath to faithfully discharge the office as well as an oath to uphold the Constitution.

The Northwest Ordinance, the original organic act governing the Northwest territory, required officials of the territory to take an oath of fidelity and of faithful discharge of the office. Section 12 of the Ordinance reads:

> The governor, judges, legislative council, secretary, and such officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office...

The original Ohio Constitution of 1802 contained an oath requirement at Art. VII, Section 1. It read:

> Every person who shall be chosen or appointed to any office of trust or profit, under the authority of this state, shall, before the entering on the execution thereof, take an oath or affirmation to support the constitution of the United States and of this state and also an oath of office.

At the 1851 convention, the legislative committee recommended and the convention adopted without debate, a substantially identical section. The 1851 oath section deviated from the prior section only in the omission of the adjectival phrase "of trust or profit" which had formerly modified the word office. The Committee on Phraseology and Arrangement was responsible for this alteration and no debate concerning the change is recorded. This latter committee was also responsible for the placement of this requirement in the elections section rather than with the other provisions introduced by legislative committee.

Comparative Analysis

The vast majority of state constitutions require an oath to support the United States Constitution, the applicable state constitution and to faithfully perform the duties of the office. The Model State Constitution rights no oath outright; however,

however, its Bill of Rights prohibits the requirement of any other oath than one to support the federal and state constitutions and to faithfully execute the office.

Statutory Provisions

The general provisions governing oaths of office are found in Chapter 3 of the Ohio Revised Code. Section 3.22 reiterates the requirements of Section 4 of Art. XV, that all officers chosen or appointed under the constitution or laws of this state shall take an oath of office. This section also expressly requires that deputies and clerks of such officers also take an oath. Sections 3.20 and 3.21 provide for an affirmation in lieu of an oath and section 3.23 sets forth the elements of the oath which must be taken. Other sections of the Ohio Revised Code require specific officers to take an oath pursuant to Section 4 of Art. XV. The section numbers and the offices involved are: 311.02, County Sheriff; 315.03, County Engineer; 317.02, County Recorder; 319.02, County Auditor; 321.02, County Treasurer; 337.04, Superintendent of the County Home; 503.25, Township officers; 271.05, Supreme Court Justice; 2701.06, Judges of the Court of Appeals and the Common Pleas Court; 2965.04, Member of Parole Board; 2965.08, Secretary of the Parole Board; 4713.02, State Board of Cosmetology; 4717.04, State Board of Embalmers and Funeral Directors; 5537.02, Ohio Turnpike Commissioner; and 5593.02, State Bridge Commissioner and City and County Bridge Commissioner.

Judicial Interpretation

Whether or not a person holds an office and is thus required to take an oath as prescribed by Section 7 of Art. XV is not determined by the statutory designation applied to that position but rather by the nature of the position. State ex. rel. Atty. Gen. v. Kennon, 7 Ohio St. 546 (1851); Benckenstein et al. v. Schott, 92 Ohio St. 29 (1915); Parkinson v. Crawford, 13 N.P. (N.S.) 73 (1912).

In Kennon, supra, the question before the court concerned whether or not certain commissioners had been properly appointed under Art. II, Section 27 of the Ohio Constitution governing the appointment of state officers. The court, in response to one of counsel's allegations that the commissioners were not offices within the meaning of Art. II, Section 27 because no oath of office was prescribed in the statutes under which they were appointed, held that they were officers and that they therefore were obligated to take the oath even without a specific statutory requirement to that effect. The commissioners were officers because they were charged with " a particular duty, charge or trust conferred by public authority and for a public purpose" and that their positions were "an employment on behalf of the government, in any station or public trust, not merely transient, occasional or incidental." Kennon, at 556.

Thus the omission of the designation "officer" and a specific oath requirement from the statute creating their position was not determinative of whether or not they were officers.

In another case, Parkinson v. Crawford, 13 N.P. (N.S.) 73 (1912), the oath requirement was again discussed in connection with a determination of whether or not a certain position was an office and thus fell within the definition of an office in another provision. The office in that case was that of a process server and the constitutional provision involved was Section 4 of Art. XV which requires officers to be electors. The court noted that Section 4 and Section 7 of Art. XV both use the term officer in the same sense and then defined an officer as

> one who exercises in an independent capacity, a public function in the interest of the people by virtue of law, upon whom is devolved the performance of independent statutory duties, which to a certain extent, involves the exercise of part of the sovereignty of the state.

As noted above the designation of a position as an office or its holder as an officer does not per se create a technical office necessitating an oath within the provisions of Art. XV, Section 7. In the Benchenstein case, supra, the Ohio Supreme Court held that the reference to an "officer" taking a deposition in O.G.C. 1105 was not limited to "technical" officers, i.e., those who had taken the Section 7, Article XV oath. Section 1105, which allowed officers taking depositions to imprison persons who refused to be sworn, was preceded in the code by a section permitting out-of-state officers to take dispositions. In light of that preceding section, the court held that the Ohio oath was unnecessary. The unstated rationale underlying this decision, however, appears to be that the out-of-state deposition taker was not an officer of an Ohio court, but rather was taking the deposition by the permission of the state of Ohio but under the authority of another state.

Problems

There do not appear to be any current problems with this section. Although it may be questioned whether it is necessary, its presence does not seem to create problems.

Article II, Section 20

> The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all offices; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

History

Section 20, Article II of the Ohio Constitution was an original portion of the 1851 constitution. This section, applicable to "all offices", had no equivalent in prior organic acts.

However, the prior 1802 constitution did have provision which prohibited changes in the salaries of the judges and the governor during their terms of office, at Art. II, Section 6 and Art. III, Section 8 respectively. These prior sections may have been adapted from the United States Constitution which prohibits in-term pay increases or decreases for the executive and decreases for judges.

Section 20 was introduced at the 1851 convention by the legislative committee. The convention floor debates seem to indicate that the delegates viewed Section 20 primarily as a provision to prevent graft and pocket lining. However, though no mention of such purpose is made in the debates, historically such provisions were designed to assure the division of power between the three branches of government and such an unstated purpose for Section 20 can safely be assumed. Frederick Woodbridge, History of Separation of Powers in Ohio, 13 An. L.R. 191 (1939).

The merits and demerits of Section 20 were debated at great length on the convention floor. At one point, the section was even stricken from the committee report as being unnecessary in light of similar prohibitive provisions in the executive, judicial and legislative articles and as being poorly worded in that it civered more than one subject matter, i.e., it both granted and restricted legislative power. Later in the convention the section was reintroduced and, after members of the committee explained that it would have no effect on officers compensated on a fee basis and that it would apply only to in-term pay raises, the section was endorsed by the convention.

Comparative Analysis

Ten other states prohibit increases and/or decreases in compensation for all state officers after they are appointed or elected or during their term of office. Index Digest of State Constitutions, 1959. However, a majority of the states expressly prohibit such changes in term for executive officers, legislators and judges. The Model State Constitution prohibits in-term pay increases for legislators only. G. Braden and R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis (1969). The federal constitution as noted above prohibits any change in compensation for the president and prohibits the diminution of salary for federal judges.

The primary source of the legislature's power to fix terms and compensation for state officers is Section 1 of Article II. State ex rel. Metcalf v. Donahey, 101 Ohio St. 490 (1920). However, Section 20 of Article XV imposes a duty upon the legislature to exercise that power. Metcalf, supra; State ex rel. Howe, 25 Ohio St. 588 (1874); State ex rel. Atty. General v. Neilbling, 6 Ohio St. 40 (1856). The legislature in fixing the terms of office can not vary the terms of office set forth in the constitution. Neilbling, supra; Howe, supra. Examples of proper instances for the exercise of the legislature's Section 20 power include the fixing of the term of a clerk of court appointed to fill a vacancy and the extension of the term of the prior superintendent of the boy's state school to fill the interim until a successor was qualified. Neilbling, supra; Howe, supra.

The term "officer" in the context of Section 20 applies both to holders of offices provided for in the constitution and holders of statutorially created offices, and to appointed as well as elected offices. Metcalf, supra; State ex rel. McNamara v. Campbell, 94 Ohio St. 403 (1916). However, the fact that an office is created by the constitution does not per se make it a state office subject to the provisions of Section 20. State ex rel. Hess v. Rafferty, 19 Ohio N.P. (N.S.) 337 (1916). For example, mayors and other officers of municipal corporations or officers of school districts hold offices created for the benefit of the locality rather than the state and are not therefore subject to the provisions of Section 20. State ex rel. Ferry v. Board of Education, 12 Ohio Cir. Dec. 333 (1901). But when the state seeks to exercise its sovereign power through the agencies of the county or township officers, the statute creating the office and the compensation for the office must conform to Section 20. State ex rel. Godfrey v. O'Brien, 95 Ohio St. 166 (1917).

The legislature in fixing the terms or compensation for an office may do so by a description or formula from which the time or amount may be determined as well as by specifically setting forth a term or an amount. Howe, supra, (term determined by description); Cricket v. State, 18 Ohio St. 9 (1868) (formula set forth to determine compensation). The legislature's Section 20 power to fix terms of office includes within it, the power to extend terms of office once they are set. Howe, supra. The second clause of Section 20 acts as a limitation upon the power of the general assembly to fix the compensation for an office. Metcalf, supra. This clause prohibits any change in the salary of any officer during his existing term, unless the office is abolished.

The second clause's prohibition is applicable only to officers as opposed to employees. State ex rel. Milburn v. Pethel, 153 Ohio St. 1 (1953); State ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947). The usual criteria for determining whether a position is a public office are durability of tenure, the presence of an oath, bond and emoluments, the independence of functions exercised by the appointee, and the character of the duties imposed upon him. The character of the duties, however, is the chief determinant of officer status. If the duties involve the exercise of continuing independent political or governmental functions then the position is an office and not an employee. Landis, supra. The Landis case which set forth the above criteria arose under a similar section of the Ohio Constitution which prohibited pay raises for county officer during their term. Its definition of the term "office" was applied to Section 20 via Milburn, supra, which held that members of the county board of election were officers in the Section 20 context and were thus prohibited from receiving an in-term salary increase under Section 20. Milburn, in so holding, noted that the officer's power must involve an exercise of a portion of the judicial, legislative or executive function in order for Section 20 to be applicable. Other cases defining the term "officer" in the context of Section 20 have stressed that to be an officer one must be the individual appointed or elected to office rather than a mere deputy or assistant, that the officer must aid in the permanent administration of government rather than performing some temporary or special task, and that the officer is a public servant upon whom the public has a right to call for the discharge of his duties. Theobald v. State, 10 Ohio Cir. Ct. (N.S.) 175 (1907); Walker v. Cincinnati, 21 Ohio St. 14 (1871); State ex rel. Ferris v. Bush, 12 Ohio N.P. (N.S.) 369 (1912).

The prohibition of the second clause of Section 20 is also limited to changes in salary. The words "salary" and "compensation" as used in Section 20 are not synonymous. Thompson v. Phillips, 12 Ohio St. 617 (1861); 1939 Ohio AG No. 749; 1951 Ohio AG No. 978

> It is manifest from the change of expression in the two clauses (of Section 20) that the word salary was not used in the general sense, embracing any compensation fixed for an officer, but in its limited sense of an annual or periodic payment dependent upon time, not on the amount of service rendered. Thompson, supra at 617.

Examples of compensation based upon the amount of service rendered and not constituting a salary are perdiem payments, compensation based on the amount of the tax duplicate, and fees charged by the piece of work. 1951 Ohio AG No. 978, Gobrecht v. Cincinnati, 51 Ohio St. 68 (1894); State ex rel. Taylor v. Carlisle 3 Ohio N.D. (N.S.) 544 (1905); Theobald, supra.

However, when the officer's compensation is salary, i.e. periodic payment dependent solely upon the passage of time, no change in that salary can be constitutional made during his term. McNamara, supra, 1951 Ohio AG No. 978. An imposition of additional duties on the office holder does not make an exception to this rule. Donahey v. State ex rel. Marshall, 101 Ohio St. 473 (1920); Bordenkircher v. Lingrel, 29 Ohio N.P. (N.S.) 1932. The salary which is not subject to change is the salary in effect at the commencement of the term not withstanding the fact that a bill changing the salary has become law at the commencement of the term and is merely waiting the expiration of the referendum period to take effect. 1917 Ohio A.G. vol. 2, p. 1384. Nothing in the prohibition of Section 20 forbids the establishment of a salary for an officer during his term when no salary had previously existed nor does Section 20 forbid a voluntary relinquishment of salary by an office holder. State ex rel. Taylor v. Carlisle, 3 Ohio N.P. (N.S.) 544 (1905); Cleveland v. Phillips, 19 Ohio L. Abs. 71 (1935). The prohibition against salary changes in term refers strictly to the officer's term and does not apply to a person appointed to a partially expired statutory term where the salary of the office is increased by a statute effective during the preceding portion of the term when someone else held the office. State ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947).

Cases in which changes in salary have been held to be unconstitutional include cases involving the salaries of a common pleas judge, Zangerle v. State ex rel. Stanton, 105 Ohio St. 650 (1922); a judge of the court of appeals, Metcalf, supra; a member of the state railway commission, Donahey, supra; a county commissioner, State ex rel. DeChart v. Keslser, 133 Ohio St. 429 (1937); and a justice of the peace, 1927 Ohio A.G. p. 905.

Current Issue

Should Section 20 be retained as a portion of the Ohio Constitution? As stated above, the legislature would have the power to fix terms of office and compensation under Section 1 of Article II even absence Section 20. Further, the Ohio Constitution currently prohibits in-term compensation changes for executive officers at Art. III, Section 19 and for state legislators at Art. II, Section 30 and prohibits diminution of judges' compensation during their terms at Art. IV, Section 6 (B). In addition, Art. II, Section 29 of the Ohio Constitution states that

> No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered or the contract entered into; nor shall 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 of each branch of the general assembly.

Although there are no cases in point, it would appear that this section would be applicable to public officer's pay increases in term because these would occur after mutual obligations constituting a contract would have arisen between the public and the office. (Persis, supra, held that Section 20 officers are public servants, and in the case of Cleveland v. Litty, 98 Ohio St. 483 (1918) (arising under Art. XV

Section 4) held that a public officer is a public servant and that because of that position, a contract exists between him and the public which takes effect at the latest when the officer takes his oath of office. The Luttner contract rationale should by analogy be applicable to Section 20 officers thus making a two-thirds vote necessary for in-term pay raises.) Thus ample protections against pocket-lining raises and raises which would impair the independence of the three branches of government appear to be present in the Ohio Constitution even without Section 20. Therefore the question arises, is Section 20 necessary?

In the consideration of this issue, it should be noted that voters failed to ratify in a recent election a constitutional amendment which would have allowed in-term pay increases for certain county officials, and others - officials occupying a position identical to that of another person whose salary is higher because his term begins and ends at a different time.

Public Employees

Section 10 of Article XV was added to the Ohio Constitution in 1912 and has not been changed since then. It reads as follows:

Article XV

> Section 10. Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

No other provisions of the Ohio Constitution deal exclusively with public employees. A variety of provisions relating to public employees, in addition to a merit system requirement, are found in other state constitutions, however. These include provisions relating to political activity, conflict of interests, right to bargain collectively, and pension systems. This study will discuss the merit system provisions and the constitutional issues arising under such a provision, and will briefly mention some of the other provisions not found in the Ohio Constitution.

Merit System

History. The 1912 constitutional convention adopted Section 10 of Article XV with little debate and only a few negative votes. Proponents of the provision asserted that it was a "blow to the spoils system". It was viewed as part of the progressive, reform movement that incorporated the initiative and referendum--one spokesman for the merit system in public employment stated that the Initiative and Referendum and the merit system, together, would get rid of political bosses in Ohio. A merit system was already in effect in some Ohio cities at the time of the convention. Proponents recognized, in their supporting statements, that some positions would have to be exempt, but felt that a general constitutional provision, leaving the implementation to the General Assembly, was preferable to a detailed provision attempting to spell out such matters as precisely which positions would be exempt.

The history of the movement, and the abuses that led to it, for merit systems for the employment of persons in the civil service--those in public employment not in the military service--is an interesting one, and thoroughly documented in many sources.

> The grand and familiar political themes of the early civil service movements were uncomplicated, to begin. The public official was to be protected from arbitrary replacement as different parties or factions succeeded one another; and the merit system was to be out of the reach of "spoils politics." Politics was to be kept out of public personnel administration, to put the underlying intention in its most simplistic form. There was a quid pro quo. In return, again simplistically, public personnel were to keep out of politics. The civil servant was idealized as a useful technician, in short, competent but politically neutral and intent only in his strivings to achieve the ends determined for him by political policy makers.[1]

From the time of the Pendelton Act in 1883 to the present time, there has been a constant, if sometimes slow, progression at all governmental levels toward a merit system in the selection and retention of public personnel. State and local governments have proceeded more slowly than the federal government, as a general rule,

although merit systems were operative in some states even before the federal system really took hold.

As noted above, the concept of the reformers had two parts--the employee, selected on the basis of his qualifications and not his affiliation with the party in power, was to be protected in his job, as long as he performed satisfactorily, from the whims of politics; such an employee would be politically neutral--that is, he was to perform his job without permitting his own convictions about policy or politics to interfere, and was not to use his job as a tool for the advancement of party. The first objective is easier to define and administer than the second.

Models; Other States The provisions in the current edition of the Model State Constitution for a merit system read as follows:

> Section 10.01. Merit System. The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence.

Earlier editions of the Model carried a more detailed provision, requiring a classification system, and creating a department of civil service, and requiring certification of the department (or similar municipal department in the case of a home rule city) before payment could be made to an employee. The comment in the current edition of the Model indicates that the drafters no longer considered the longer provision necessary except, perhaps, in jurisdictions where the civil service merit system tradition is not strong.

Similar model constitutional provisions have been proposed by other individuals and organizations. For example, Elmer Graper, writing in an issue of the [illegible] in 1935 (an issue largely devoted to a revision of the Pennsylvania Constitution) recommended the following constitutional provision:

> Appointments and promotions in the civil service of the state and of municipalities shall be made on the basis of merit and fitness, to be ascertained, so far as practicable, by competitive examination. The legislature . . . .[2]

The National Civil Service League promulgated a revised model public personnel administration law in 1970, and recommended at the same time the merit system provision of the Model State Constitution.

Slightly over one-fourth of the states have merit system civil service provisions in their Constitutions. Most are fairly simple and short, similar to the Ohio provision. The Alaska Constitution, for example, requires the legislature to "establish a system under which the merit principle will govern the employment of persons by the State." A few, such as Missouri's, limit the mandatory application of the merit principle to specified state agencies or institutions. Some states which do not have a mandatory constitutional provision have applied the merit principle only to agencies, departments or programs where it is required as a condition for receiving federal grants, and in others, such as Illinois, the merit system is a long tradition, at least in state government. There seems to be little question that a state

legislature has full legislative power to provide for a merit civil service system if it so desires, whether or not mandated or authorized by the constitution. Such a system, in general, does not abridge anyone's constitutional rights.[3]

Contrasted to those state constitutional provisions mandating the merit principle in general and leaving the implementation to the legislature are a few state constitutions which spell out, in great detail, the administration and operation of the system. Michigan is the most often quoted example of this; California's Constitution is also detailed with respect to the civil service system and even the new Louisiana Constitution has lengthy provisions dealing with both state and city civil service commissions.

The Ohio System. The General Assembly responded promptly to the 1912 constitutional mandate, and enacted a comprehensive civil service law in 1913, to take effect on January 1, 1914.(103 Ohio Laws 698). As required by the constitution, employees of the state, the counties and cities were covered. In addition, employees of city school districts were included. The civil service was divided into classified and unclassified service, with the unclassified service including the specified "exempt" persons and categories and the classified, or competitive service, including all the rest. The unclassified category included elected officials, court bailiffs, heads of principal departments, boards, and commissions appointed by the governor, secretaries to such persons, boards of elections, and others. Although city school districts were brought within the merit system, one category of exempt persons included all teachers, instructors, superintendents, presidents, and principals employed by the school districts, colleges and universities so that the school employees covered were only nonteaching employees. Separate civil service commissions were to be established in each city.

Many changes, of course, have been made in the statutes since 1913. Most recently, Senate Bill 174 of the 1973-74 session of the General Assembly, effected a complete reorganization of three state departments by combining them into one--the new Department of Administrative Services. The combined departments were the Department of Finance, the Department of Public Works, and the Department of State Personnel. The personnel function, included the administration of the merit system and the Personnel Board of Review, which replaced the former Civil Service Commission, are now part of the new Department. Chapter 143. of the Revised Code, which formerly contained the civil service provisions, is now Chapter 124. of the Revised Code.

The basic scheme, however, is much the same. The civil service has been expanded to include city health districts and general health districts as well as, as originally, the state, counties, cities and city school districts. The most recent addition is a category of "civil service townships" which authorizes, but does not require, townships with a population of more than 10,000 to establish a civil service system for fire and police employees. "State service" describes employees of the state, the counties, and general health districts. Employees of cities, city health districts, and city school districts come under the appropriate municipal civil service commission. "Classified service" embraces everyone not in the unclassified service--those required to take competitive examinations and unskilled labor, for which competitive examinations are deemed impractical. The unclassified service describes the exempt categories--elected positions, department heads, legislative employees, substantial numbers of court employees and county employees, employees of the governor's office, and others. The number and variety of unclassified employees has increased substantially since 1913.

It is not the purpose of this study to describe the operation and administration of the Ohio civil service system, but only to note possible constitutional issues.

Issues

1. General or detailed constitutional provision? Or no constitutional provision?

As is true with any constitutional provision that is unnecessary in the sense that the General Assembly has power under its general legislative power to provide by law for whatever is under consideration, Section 10 of Article XV could undoubtedly be eliminated from the Ohio Constitution without destroying the state's civil service system. With respect to cities, at least those with charters, in the absence of the constitutional requirement, there might be some question whether the state could require cities to maintain a merit system. However, merely because the provision could be removed without diminishing legislative power it is not necessary to conclude that it should be removed, since it mandates the general assembly to act in a field in which it might otherwise fail to act. If the policy conclusion is reached that a merit system in public employment is desirable, it would be difficult to justify removing the provision from the Constitution. J. Alton Burdine, writing about the necessity for constitutional revision in Texas in 1943, advocated a constitutional provision requiring the enactment of a general merit system law covering state and local administrative employees and employees of the legislative and judicial branches. He noted that the legislature has power to pass such a law, but had consistently failed to exercise its power.[4]

Arguments given in favor of the system used in Michigan, California, Louisiana, and perhaps other states, of providing in some detail a civil service system in the Constitution, are that it creates an agency independent of legislative tampering, and possibly of executive tampering as well; and that it permits limiting the exemptions by spelling them out in the Constitution, also safe from legislative or executive tampering.

The independence of the constitutional agency, however, can create problems for administrators and is not generally favored. The Committee for Economic Development, in its 1967 report entitled "Modernizing State Government" commented as follows on the personnel function:

> We believe that it is time to make a clean break with the past, and that the states should take a leading role in the installation of up-to-date personnel systems.
>
> When this function is vested in an independent civil service commission, "management often finds itself unable to determine its own manpower requirements, to rotate as part of their development, or to promote primarily on the basis of ability." Even greater frustrations result when attempts are made to maintain departmental discipline or to remove incompetent employees. Independent state civil service commissions should be replaced by central personnel agencies under directors appointed by and responsible to the governors. Admimistrative responsibility cannot be placed upon a governor unless he also has basic authority over personnel.

Constitutional rigidity can be worse than legislative rigidity because it is more difficult to remedy, and the 1961 Michigan Constitutional Convention added to the list of exemptions a number of positions in the governor's office: "thus giving constitutional sanction to a practice that had become customary"[5] as well as other positions. Moreover, the Michigan system permits the civil service commission to establish pay rates for the employees under its jurisdiction, and one of the issues at the convention was whether the legislature should not have some control over at least pay rates. A provision was finally added permitting the legislature, by a 2/3 vote, to reject or reduce proposed pay increases. Another problem that developed because of the constitutional independence of the Michigan Civil Service Commission surfaced when public employee unionism began its upward surge in the mid-1960's and controversy developed in Michigan not only over the whole issue of public employee labor relations and the right to strike and bargain collectively, but also over whether the legislature or the Civil Service Commission was in charge.[6]

2. What governmental units are covered?

The Ohio Constitution mandates the application of the merit principle to the employees of the state, counties and cities. The legislature has added city health districts, general health districts, and city school districts and, permissively, certain townships. The Model State Constitution and other similar model proposals would make the merit system mandatory for state and all political subdivision employees. There no longer seems to be any doubt about the General Assembly's ability to extend the requirement to units of government not mentioned in the Constitution (Karrick v. Bd. of Education of Findlay School District 174 Ohio St. 467, 1962) and the only question is whether the Constitution should mandate a merit system for additional, or all, public employees not presently covered--villages, townships, special districts of various types.

As with all matters relating to cities, Section 10 of Article XV must be read together with Sections 2, 3, and 7 of Article XVIII of the Constitution, the municipal corporation government and "home rule" provisions. The following generalizations are offered with respect to civil service and cities in Ohio:

1. A charter city which provides by charter for a civil service merit system need not follow the statutory rules. The chief of police, for example, in such a charter city need not be chosen from a civil service eligible list as provided in the statute, but could be selected as provided in the charter or by ordinance enacted pursuant to the chapter. (Lynch v. Cleveland, 164 O. S. 437, 1956).

2. A charter city which does not provide for a merit civil service system in its charter would be in the same position as a noncharter city in that respect.

3. A noncharter city must follow the state laws for civil service. It cannot vary from them. (Petit v. Wagner, 170 Ohio St. 297 (1960)

4. A noncharter city can, however, enact laws establishing pay scales and the number of employees--these are essential elements of local self-government. (State ex rel. Mullin et al.v. Mansfield, 26 Ohio St. 2d 129, 1971).

Conflict appears to exist in the statutes concerning the civil service status of employees of elected county officials. However, it seems clear that if a county should adopt a charter, it could create its own civil service system as to charter cities.

3. Who is Exempt?

The lengthy list of exempt positions and categories (the "unclassified" service) in Ohio might lead to the conclusion that the Michigan or California system--writing the exemptions in the Constitution--is better than leaving the determination to the General Assembly. Since the constitutional mandate appears to require all appointments and promotions in the specified governmental units to be made according to merit and fitness "to be ascertained, as far as practicable, by competitive examinations" the only constitutional test for exclusion is whether it is practical to devise an examination for the position. To the extent that policy-making functions and political sensitivity may be part of the position, it would be difficult to devise such a test. Department heads, for example, and the Governor's press secretary, would fall within such categories. However, the present law exempts all employees in the Governor's office, and such an exemption may be suspect. Many county employees and court employees are also exempt, whose jobs could very likely be defined with sufficient exactitude and objectivity to enable the examinations to be prepared to test for the necessary skills and knowledge.

At the same time, it should be noted that, of the total state employment (no county or other local employees) of 58,571, 52,866, or between 88 and 89% of the total, are in the classified service. Since some states cover only those employees necessary to meet the requirements of federal funding, 88% represents a substantial percentage of the total.

If the present system of permitting the General Assembly to determine which employees should be covered is not satisfactory, it is difficult to determine how the constitutional language could be changed except to include in the Constitution a specific list of positions or categories to be exempt from the merit system.

4. Merit and Fitness: Other Job Qualifications and Requirements

Without the reviewing of laws and literature on civil service in detail, it is apparent that "merit and fitness" include the knowledge and skills required for satisfactory job performance. Merit and fitness are to be measured, so far as practicable, by competitive examination.

What about other job requirements? Does the fact that the Constitution specifies only "merit and fitness" rule out other requirements? Even if part of "merit and fitness", many job requirements are today found to be unconstitutional because they discriminate against individuals or groups of persons on the basis of race, sex, religion, national origin, or color, or because they violate the Constitution for some other reason.

A recent report published by the International Personnel Management Association details some of the many legal problems besetting public employers, as well as private ones. Some job requirements, such as citizenship, enumerated have been part of public employment, and the merit systems, since the early days of public employment, when qualifications were first specified by law. Today, however, if they are found to discriminate or to violate the due process or equal protection clauses of the Constitution, they are increasingly being held unconstitutional by the courts. The following excerpt from the report summarizes some of these job requirements or qualifications:

Job requirements

Citizenship and residency. Both of these commonly accepted requirements limit open competition, restrict mobility, and discriminate by race, religion, and national origin to the degree that these people are not evenly distributed across all political jurisdictions. Expect court cases unless these requirements are dropped.

Age. Many jurisdictions require a minimum age of either 18 or 21 years for all job applicants. This may discriminate against poverty groups (largely minorities) who seek employment between the ages of 16 and 21 rather than continue their education as their more affluent (largely nonminority) counterparts do. Minimum age requirements should be lowered to age 16 unless a higher age is necessary for successful job performance.

Height and weight. These requirements are often found in firefighter and police officer jobs. Minimum heights usually range from 5'7" to 5'10", with weight proportional to height, which would discriminate against the shorter races and women unless height were a BFOQ.

Occupational credentials. Licenses, registrations, certifications, and the like may be required by state law, but a national survey by the Department of Labor (1969) found that exorbitant fees in some states put severe restrictions on mobility and the selection procedures used by the credential-granting authorities were typically unvalidated. Thus, any employer using occupational credentials as part of his/her selection process would be well advised to obtain a selection manual from the credential-granting authorities to determine whether their selection procedures were fair and valid. If no fairness or validity could be demonstrated, the employer should seek legal counsel to decide whether or not to suspend these requirements for initial employment until the selection procedures for the credentials were revised. It does not appear to be any defense to argue that the responsibility for the credential selection procedures rests with the credential-granting authority and therefore the employer is an innocent bystander.

Education and experience. These requirements, of course, must be validated as tests. Training and experience may be substituted for formal education, if there is evidence for doing so, but the practice of waiving education requirements for present employees on open exams if the employees are "otherwise qualified" is definitely suspect and should be discontinued unless there is research to support its use in specific situations. General education requirements (e.g., high school diploma or college degree) should also be avoided, as stipulated in the Griggs decision (U. S. Supreme Court, 1971c). A more acceptable approach is to use education requirements only when they could be considered to be obvious samples of job performance (e.g., an engineering degree for engineers, courses in bookkeeping for bookkeepers, etc.) rather than signs of job performance (e.g., high school graduation indicates high motivation) unless there is strong validity evidence to support such practices.

"Minimum" versus "desirable" requirements. Desirable requirements are sometimes used in hopes of avoiding the rigidities of minimum standards. Unfortunately, the results can be far worse. Potential job applicants often select themselves out when they see they do not meet the "desired" standard, which by definition is usually set at a higher level than one would need to do a minimum acceptable job. Furthermore, experience and training ratings have a way of turning desirable requirements into the minimum needed to pass, rather than the maximum possible score, and, in any event, there is always some point on the scale which is a functional minimum needed to pass even though it is not formally stated. Thus, there are always minimum requirements and the so-called desirable requirements only serve to limit applications--often to the detriment of the groups protected under law. The only answer seems to be set realistic minimum standards which can be defended by research evidence.

Character requirements

Every set of laws analyzed contained some provision for rejection of applicants or dismissal of employees on the basis of "bad Character" in the following areas: (1) subversive activities, (2) infamous conduct, and (3) personal problems. Legal problems can result when these requirements are phrased so vaguely as to preclude their consistent application to all persons or when they conflict with the 5th Amendment, the 14th Amendment, or the 1964 Civil Rights Act.

Prohibited subversive activities usually specify membership in groups advocating violent overthrow of the government. The 1964 Civil Rights Act does permit discrimination against Communists and any other group when national security is threatened, but civil service laws which reject applicants who have been "in any manner disloyal to the Government of the United States" or who refuse to testify on the grounds that it might tend to incriminate them face possible conflicts with the 5th and 14th Amendments.

The next category of civil service laws in this area rejects all applicants who:

1. are "guilty of infamous conduct"

2. have committed "conduct unbecoming of an employee"

3. have committed "scandalous or disgraceful conduct while on duty"

4. have evidenced "bad character, dissolute habits, or immoral conduct."

A related law denies sick leave or reemployment rights after leaves of absence due to "moral delinquency." The vagueness of these laws makes their consistent enforcement almost impossible. Great caution is advised whenever these laws are invoked.

Personal problems (e. g., drug dependency, poor credit rating, arrests, and convictions) may be discriminatory rejection criteria unless their

relationship to job performance can be demonstrated. Inconsistent application of these laws often occurs, for example, when some alcoholic employees are discharged while others are sent to treatment centers.

Nepotism

Prohibitions against more than one member of the same family working for the same organization, or for the same department within an organization, typically works against women, in which case it would violate the 1964 Civil Rights Act unless it were shown to be a business necessity.[7]

The conclusions reached by the author of this report are based on court cases from many jurisdictions, not necessarily Ohio, and many of the problems have not yet reached the Supreme Court for final determination. They are noted here, not to suggest that changes in Section 10 of Article XV of the Ohio Constitution are indicated, but only to point out the variety of problems that legislative bodies and executive agencies must consider in creating personnel systems today.

5. Political Activity, Conflict of Interests

An important part of the original concept of the civil service merit system was prohibition against political activity by government employees covered by the system. The "Hatch" Act represents the statement of "no political activity" for federal employees in the civil service system, and for state and local employees in programs supplied with federal funds, as a general rule. Many state civil service systems, including Ohio's, have a similar provision in their laws. At least one state, Louisiana, has written the prohibitions into its Constitution.

Prohibitions against political activity by public employees have come under scrutiny in recent years, however, and some have been held unconstitutional as unnecessarily restricting the rights of the employees under the equal protection and due process clauses of the federal Constitution. In 1966, Congress established a Commission on Political Activity of Government Personnel to investigate and study Federal laws which limit or discourage the participation of Federal or state officers and employees in political activity. The report of this Commission, further studies by federal and state officials, and court cases have resulted in re-examination and restatement of the rules and regulations governing what public employees can and cannot do in the realm of political activity. In this evolving field of law, it would be difficult and probably unnecessary to attempt to write into the Ohio Constitution any provisions relating to political activity by persons covered by the merit system.

Conflict of interest and ethics provisions for state or state and local officials and employees have also been written into some state constitutions. For example, the Hawaii Constitution requires financial statements to be filed by candidates for and holders of certain offices; it also permits the legislature to adopt a code of ethics for state and political subdivisions elected and appointed officers and employees. (Section 2 of Article 13 and Section 5 of Article XIV).

Collective Bargaining and Unions for Public Employees

The relationship between a civil service or merit system of public employment, an elected legislative body that traditionally has regulated the terms and conditions of employment of public employees, and organizations of such employees devoted to collective bargaining as the method of fixing terms and conditions of employment, is a difficult relationship to sort out. For constitutional purposes, it is not really necessary to analyze the various conflicts inherent in these systems, since they can be resolved by statute and by the process of administration.

Several state constitutions, however, do contain a positive statement granting public employees the right to organize and bargain collectively, or do something less than bargain collectively such as make grievances knwo through their own representatives. Section 2 of Article XII of the Hawaii Constitution recognizes the right of public employees to organize and bargain collectively, as prescribed by law. (Section 1 of this Article recognizes the right of private employees to organize and bargain collectively. The original Hawaii constitution only gave the right to public employees to present grievances through representatives of their own choosing, and the collective bargaining provision replaced the prior provision in 1968.)[8] Article I of the New Jersey Constitution, paragraph 19, recognizes the right of public employees to organize and to make grievances known through representatives of their own choosing. A new provision in the Pennsylvania Constitution (section 31 of Article III) provides for collectively bargaining for police and firemen.

These constitutional provisions follow the trend of the times, rather than the other way around, and such provisions tend to be obsolete before they are adopted. A constitutional provision attempting to define the subject matter of bargaining, and with whom the bargaining is to take place (how do you express the procedure for bargaining with the legislature?) would be extremely difficult to write and it, too, would be obsolete before it could be adopted. It seems desirable to leave these matters to statute and to the evolution of public employer-employees relations rather than attempt to write such provisions in the Constitution. Michigan, however, has written at least some elements of the bargaining process in the Constitution by assigning the Civil Service Commission the responsibility for fixing state employees' wages, giving the legislature only a veto power over the final results.[9]

Justification for writing a public employee collective bargaining provision into the Constitution might exist if a statute providing for the right of public employees to organize, have dues check-off, bargain through their chosen representatives, and similar matters, had been held unconstitutional. This has not happened, however, in Ohio. An ordinance of the City of Dayton permitting union dues check-off was originally held unconstitutional (Hagerman v. Dayton, O. S.) but a subsequent statute passed by the General Assembly (Section 9.40 of the Revised Code) authorizing dues checkoff has cured the defect. The right of public employees to join unions has been upheld as a federal 1st amendment right.[10] There is much public employer-employee collective bargaining taking place in Ohio without the benefit of any state law, but the authority of the General Assembly to pass such laws if it so chooses is not generally questioned. The Ohio law forbidding strikes by public employees (the "Ferguson" Act) although not very effective in preventing strikes, has, nevertheless, not been held unconstitutional.

In commenting on employee organization and collective bargaining (both public and private) constitutional rights, and constitutional right-to-work provisions, the authors of "Con-Con - Issues for the Illinois Constitutional Convention noted that:

"In practice the presence or absence of constitutional or other legal barriers to concerted action by public employees has neither deterred nor prevented such action, nor has the presence of constitutional provisions that broadly grant the right to organize and bargain collectively to all employees significantly enhanced their organizing efforts."[11] The Model State Constitution contains no collective bargaining provisions for either public or private employees nor right-to-work provisions.

Pension and Retirement Systems

Dr. Albert Sturm, in his "Trends in State Constitution-Making 1966-1972" notes that, in that period of time, constitutional changes included "sundry provisions for the establishment, investment, management, and use of pension and retirement funds for public employees in approximately a fifth of the states." p. 62 Perhaps typical of these provisions is one in Hawaii's Constitution, Section 2 of Article XIV, which provides that membership in a state employee retirement system is contractual with benefits not to be diminished or impaired. The objective of many of these provisions would appear to be protecting the employees' rights in a system if there is one. The new Louisiana Constitution requires the legislature to provide for the retirement of officials and employees of the state and political subdivisions, and school teachers, and guarantees the employees' benefits, but no constitutional provisions were found spelling out in detail the provisions of a retirement system.

The Ohio Constitution contains no provisions relating to retirement systems of public employees. In a commentary to a proposed section relating to pensions and retirement systems for public employees, The Texas Constitutional Revision Commission noted that some of the provisions in state constitutions were adopted because there was some doubt about the constitutionality of state retirement systems, but that such doubt no longer existed.

Conclusion

A recent issue of the Public Administration Review contains a symposium on "The Merit Principle Today" which points out the various problems and conflicts existing between modern principles of personnel administration, unions, equal employment opportunities, testing systems and principles, and the traditional civil service system. David T. Stanley of the Brookings Institution, the symposium editor, sums up the findings with "We have painted a messy picture, but that's the way it is."

Assuming a decision to retain a constitutional mandate to the legislature to provide a merit system, Ohio's Section 10 of Article XV appears to be as adequate as any, with possible consideration for expanding it to require a merit system for all political subdivisions.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
October 17, 1974

Research Study No. 43

Employee Welfare
Article II
Section 34; Section 37

Two constitutional provisions governing employee welfare proposed by the 1912 Constitutional Convention will be examined in this memorandum. Article II, Section 34 and Section 37, as they appear below, have remained unchanged since approved by the voters in 1912.

> Section 34. Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power.
>
> Section 37. 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 provisions emerge from an era of American history when the forces of labor were not clearly defined, nor fully organized. Some workers were forced to accept labor conditions that were intolerable in order to survive. The government, committed to a policy of laissez-faire, was reluctant to adopt policies and laws regulating industry; likewise, some courts took the stance that legislation attempting to govern aspects of labor were in possible violation of the rights of liberty, contract, and private property. When the delegates to the 1912 Constitutional Convention began to discuss proposals regulating labor conditions, it was apparent that many feared that conditions had become so unbearable that strikes, shut-downs, and possible violence would follow if the state did not take some positive action regarding employee welfare.

I. Section 34

Early History

The standing committee on labor of the 1912 convention first considered the proposal by Delegate Farrell to enable the legislature to regulate hours of labor, minimum wage, and the comfort, health, and safety of employees. Article II, Section 34 is the original proposal, verbatim. The merits of the proposal were debated at length, with attention given, almost exclusively, to the minimum wage clause. The sponsor of the proposal stated that he formerly had not been an advocate of a statutory minimum wage, but had been compelled to change his position.

> "When one considers the relentless war that has been waged against the trade union movement in this country, and the war of extermination that is now going on, and, in some instances, meeting with success, in putting some unions out of business, and the general application of "black list", all for no other reason than the piling up of capitalistic profits without any regard for justice in the premises, when we see the attempts making to build up industries

on a foundation of wages too low to admit of sufficient rest and relaxation for even moderate health, we are driven to the knowledge that it is time that a decent humane effort should be made to remedy this un-American condition." (1)

The history of minimum wage legislation was sparse at the time. The first minimum wage law was adopted by New Zealand in 1894, providing for conciliation boards with authority to fix minimum wages. England adopted a similar law in 1910. Massachusetts was the first of the United States to pass such a law, in 1912, and minimum wage bills were presented to the legislatures of Minnesota and Wisconsin during the time of the convention.

Opponents of the proposal argued that a minimum wage was detrimental to employers and employees. They predicted that a legislature controlled by labor unions would promptly limit hours and establish a minimum wage. In addition to constituting a deprivation of liberty by regulating a man's earning powers, such restrictions, it was argued, would force the employer to pay the lazy and the industrious equal wages. They predicted that employers would not hire afflicted persons. (An interesting discussion of the effect of the minimum wage on the handicapped, unskilled, and other minority groups appears in "The Minimum Wage - Who Pays", Brozen and Friedman, The Free Society Association, 1966). The merits of applying a minimum wage to agriculture and domestic laborers were debated at length. Some felt the consequent rise in agricultural prices would negate any positive effects of the minimum wage.

The proponents of the measure noted the permissive nature of the proposal and felt the general assembly could apply a law to some groups and not others, as circumstances warranted (i.e. farmers, domestics).

Clearly, the reason for the constitutional provision was to give explicit power to the legislature to pass laws regulating labor conditions. Court decisions in some states indicated that such legislative power was in question. Prior to the 1912 constitutional convention, several cases dealt with the power of the state to regulate the hours of labor in private industry. The U.S. Supreme Court affirmed the right of the state to regulate labor in dangerous employments in Holden v. Hardy, 169 U.S. 366 (1898), by sustaining a Utah statute limiting hours of mine workers. In 1899, the Colorado Supreme Court nullified a similar statute in In re Morgan, 26 Colo. 415 (1899). Through 1915, 10 statutes regulating the hours of labor for women and children were sustained and three statutes were declared unconstitutional. (An extensive listing of the decisions appears in "Hours of Labor and Realism" by Felix Frankfurter, 29 Harvard Law Review 353). The willingness of the courts to accept the right of the state to legislate regarding labor conditions in private employment appears related to the type of industry involved. Courts seemed in favor of statutes regulating dangerous employments and employment of women and children. But in 1905, the New York Supreme Court invalidated a 10-hour law for bakers, in Lochner v. New York, 198 U.S. 45. One justice noted that "to the common understanding the trade of baker has never been regarded as an unhealthy one". The court held the statute an arbitrary restriction of liberty not related to the public welfare, and intolerable to the 14th amendment to the U.S. Constitution. (Recent decisions have been able to make use of more scientific evidence than "the common understanding" in determining dangerous employment conditions.)

Constitutionality of Minimum Wage Legislation - Federal Court Decisions

Much of the debate about the constitutionality of minimum wage legislation revolved around whether such laws interfered with due process and the rights of contract. Originally, state courts upheld minimum wage statutes, especially for

women, until 1923, when the United States Supreme Court handed down its decision in Adkins v. Children's Hospital, 261 U.S. 525, 67 L. ed. 785, 43 S. Ct. 394 (1923). The Court invalidated an act of Congress authorizing a minimum wage for women in Washington, D.C. The act was thought to be repugnant to the provision of the Fifth amendment prohibiting taking of liberty and private property without due process of law. Thereafter, there continued a trend of state courts invalidating minimum wage laws which ended when the Adkins decision was overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. ed. 703, 57 S.Ct. 578, 108 ALR 1330 (1937) which held that a Washington statute based upon a wage sufficient to maintain women in health was valid. The constitutional attack was based on a violation of the freedom of contract, but the Court held that the freedom of contract is a qualified and not an absolute right. The Court also mentioned several economic considerations regarding the class of women workers, such as their lack of collective bargaining powers, and the effect of their unemployment on industry. Although the Court did not appear to base its decision on these economic considerations, the fact that they were mentioned is interpreted by some to be of prime importance. A law review article "Wage and Hour Legislation in the Courts" in 5 Geo. Wash. Law Review 865, sets forth the import of these considerations.

> "The importance of the case lies not alone in its value as a precedent or principle-establishing decision but also in the step it takes toward the recognition of the use of the police power of a state to reach a definite economic goal..."(2)

> "While it (Parrish) emphasizes the importance to society of its women workers and their well-being and health, and perhaps places the decision of the case on this ground, the opinion specifically provides another ground for decision in that it recognizes that industry, the economic condition of the workers, and the effect of unemployment on the state and society at large are of sufficient concern and so intimately tied with general welfare that the state's police power may reach out to correct evils therein." (3)

The U.S. Supreme Court said, in U.S. v. Darby, 32 U.S. 100, 85 L. ed. 609, 61 S. Ct. 451 (1941)

> "Since our decision in West Coast Hotel v. Parrish, 300 U.S. 379, 81 L. ed. 703, 57 S. Ct. 578, 107 ALR 1330, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment."

Constitutionality of Section 34 - Ohio Decisions

The first minimum wage legislation was enacted in 1933 by the 90th General Assembly. General Code 154-45d to 154-45t provided minimum wage standards for women and minors. The law did not itself establish a minimum wage, but it permitted an actual minimum wage to be established by administrative action. The 1933 legislation remained the prevailing minimum wage legislation until repealed in 1973 and replaced by a new law.

The constitutionality of the minimum wage law was upheld by the Ohio Courts in Walker v. Chapman, DC Ohio, 17 F. Supp. 308 (1936). The court noted that the constitutionality of the law rested on the requirement of the law for the payment of a "fair wage" which was defined as "a wage fairly and reasonably commensurate with the value of the service or class of service rendered," whereas in the Adkins case, the decision was based on minimum wage requirements of a sum sufficient to ensure

employees "subsistence, health and morals". The court noted that if the Ohio law were indistinguishable from the law at issue in Adkins, the court would have had no choice but to declare the Ohio law unconstitutional. In fact, however, the two laws were distinguishable, and the Ohio law offered a measurable standard.

Sections 154-45d through 154-45t of the General Code were declared valid in Strain v. Southerton, 148 Ohio St. 153, 74 N.E. 2d 69, (1947). In that case, a challenge was made to the right of the General Assembly to delegate, under law, authority to an administrative agency to investigate and determine minimum wage policy, the party pleading that this delegation violated Article II, Section 26 of the Ohio Constitution: "All laws, of a general nature, shall have a uniform operation throughout the State, nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General assembly, except, as otherwise provided in this constitution." In that case, the Court said:

> "Ohio Constitution, Article II, Section 26 inhibits General Assembly from delegating its power to make a law, but that body may properly enact a law conferring authority or discretion on a designated governmental authority to carry provisions of such law into execution and granting such agency power to inquire into and determine facts under rules of its own creation which conform to standards and policy contained in law."

Current Laws

Chapter 4111. of the Ohio Revised Code, entirely rewritten by the 110th General Assembly, defines the minimum fair wage standards and related regulations. All employers and employees are governed by the minimum wage laws set forth in this chapter, except for these persons: federal employees; baby-sitters and live-in companions who are not housekeepers; outside salesmen compensated by commission or in a bona fide executive, administrative or professional capacity; agricultural employees working for an employer who during any calendar quarter of the preceding calendar year did not use more than five hundred man-hours of labor, of an agricultural employee working for a member of his immediate family; persons doing charitable service; students employed part-time by political subdivisions; member of police or fire protection agency; employee of non-profit camp or recreational area for children under eighteen.

State, county and municipal employees were formerly exempted from the minimum wage laws, (138 OAG 2979) but are included under the current statutes. Many state and local employees and public institutional employees are covered by the federal minimum wage law now, as well.

Minimum wage rates have changed over the years, and the newly revised sections fix the minimum wage in the statutes at $1.60 per hour, except that employers employing persons in counties of less than three hundred thousand population may pay employees an amount equal to $140 per hour until January 1, 1975. Persons who are classified as "learners", during the first 90 days of their employment, and some agricultural workers who are paid on a piece-work basis, may earn less than minimum wage according to the law. The significant change in the new law is that the minimum wage rate is fixed in the law as opposed to the former law which just granted the authority to an administrative agency to convene a board to fix wages for a particular industry under specific conditions.

Other chapters of the Revised Code regarding employment of minors (Chapter 4109); Division of Workshops and Factories (Chapter 4107); Division of Elevator

Inspection (Chapter 4105); Division of Boiler Inspection (Chapter 4104) appear, in a tangential way, to have emerged from the legislature's authority, by virtue of Article II, Section 34, as well as Article II, Section 35 (examined in another memorandum) to regulate safety and other conditions of employment by law.

Conclusion

Section 34 is a statement of the policy of the state of commitment to regulate labor conditions for the welfare of the citizens. Some constitutional revisionists argue that when a policy is deeply imbedded, there is no longer any need for constitutional support of the policy. On the other hand, revision must be approved by the voters, who might be reluctant to delete the specific references from the Constitution.

At the time the section was drafted, there was debate over two questions: whether such regulations intefered with other constitutional rights; and whether it was possible to implement minimum wage legislation so that it would be beneficial rather than harmful to both skilled and unskilled labor.

Regarding the first question, the courts have upheld the right of the state to regulate labor to sustain the welfare of its citizens. Secondly, the desirability of minimum wage legislation is still being debated today, and there are some who feel that such laws work to the detriment of a large sector of the labor class. In spite of this, however, minimum wage legislation has been operative, as have other laws regulating labor in the state, for a number of years, and the fears of the delegates in 1912 for farmers and domestic workers appear to have been resolved in the present laws. It is significant to note that the language of Section 34 is permissive - should the legislature desire to implement legislation, it has the power. Our research has not uncovered problems which appear to emanate from the constitutional language of Section 34.

II. Section 37

Early History

Proposal No. 209 (now Section 37) to regulate the hours of employment on public works, was commented upon by its author, Delegate Tetlow, as follows:

> "it is quite evident that we desire this proposition to become a constitutional provision to safeguard this right, and to circumvent the decisions rendered by the courts of this state." (4)

Mr. Tetlow refers to the case of City of Cleveland v. Clements Bros. Construction Co., 67 O.S. 197 (1902), in which the Supreme Court of Ohio declared null and void an act limiting the hours on public works. In that case, the city of Cleveland withheld money from a contractor because the contractor let his men work more than eight hours per day, in times when no emergency existed, which action was contrary to an Act of 1900 (94 Ohio Laws 357) limiting the service of all laborers, workmen and mechanics on public works for the state or a subdivision by contract or otherwise to eight hours a day. The law required contracts to contain a provision stipulating that, under penalty of law, not more than eight hours of labor may be permitted or required, The plaintiff claimed that being a mere subdivision of the state, the legislature may stipulate what contracts it may make and what provisions the contracts shall contain. The Supreme Court responded:

"The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of purely local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly." (p. 211)

The court held the statute unconstitutional, noting that it violates and abridges the right of parties to contract; invades rights of liberty and property; and denies to contractors, subcontractors and municipalities the right to agree with employers on terms and conditions of contracts.

In an earlier case, Bramley v. Norton, 5 ONP 183 (1897), a Cleveland city ordinance prescribing a minimum wage of $1.50 per day and a maximum of eight hours on public works and improvements was declared unconstitutional, violating Section 19 of Article I of the Ohio Constitution and Section 1 of the 14th Amendment to the U.S. Constitution.

Mr. Tetlow observed that at the time of the convention, eight states had adopted constitutional and statutory provisions regulating the hours of labor on public works, and that a federal court had declared in a Kansas case, similar to the circumstances in Clements Bros. Construction Co., that the state had the right, under its police power, to regulate the hours of labor for workmen engaged on public works. In that case, Atkins v. Kansas, 191 U.S. 207 (1903), the court's reasoning appeared to finally resolve the question of the state's power in this regard, for all future questions.

"It is within the power of a state, as guardian and trustee for its people and having full control of its affairs, to prescribe the conditions upon which it will permit public work to be done on behalf of itself or its municipalities.

In the exercise of these powers it (the state) may by statute provide that eight hours shall constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities and making it unlawful for any one thereafter contracting to do any public work to require or permit any laborer to work longer than eight hours per day except under certain specified wages. And one who after the enactment of such a statute contracts for such public work is not by reason of its provisions deprived of his liberty or his property without due process of law nor denied the equal protection of the laws within the meaning of the Fourteenth Amendment even where it appears that the current rate of wages is based on private work where ten hours constitute a day's work or that the work in excess of eight hours per day is not dangerous to the health of the laborers." (p. 207)

The proposal considered by the standing committee on labor read as follows:

Proposal No. 209. Not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, on the construction, replacement, alteration, repair, maintenance and operation of all public works, buildings, plants, machinery at which laborers, workmen and mechanics are employed, carried on or aided by the state or any political subdivision thereof, whether done by contract or otherwise, except in cases of extraordinary emergency.

In the debate, the view was offered that the subject matter of Proposal No. 209 was

already covered by Proposal No. 122, which was adopted by the committee earlier, since the legislature was thereby authorized to regulate labor for both public and private industry. The proponents of the measure regulating the hours of public work feared that the proposal adopted earlier might not pass, due to the minimum wage clause, and wanted to protect themselves, by getting this more specific proposal adopted. The consensus of the convention appeared to be that if Proposal No. 122 passed, Proposal No. 209 should become null and void, if it, too, passed. A suggestion was made that the two proposals be combined, if the committee on arrangement and phraseology felt that was necessary. The language recommended by the committee on arrangement and phraseology was substantially different from what the committee on labor proposed. The committee on arrangement and phraseology proposed:

> "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 laborers engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

The revised proposal was not debated, except that a recommendation was made to change the word "laborers" to "workmen", and that recommendation was approved. The proposal was approved by the convention, adopted by the voters, and is now Section 37.

Among the earliest cases relating to this section was Stang v. City of Cleveland, 94 Ohio St. 377 (1916). The court held thatSection 37 of Article II

> "...was not self-executing within the definition that a self-executing provision is one which supplies the rule or means by which the right given may be enforced or protected or by which a duty enjoined may be performed. But nevertheless, after the adoption of that provision in the constitution, the legislature was without power to affirmatively make lawful a working day of more than eight hours." (p. 380)

Pursuant to the requirements of Section 37 of Article II, adopted in 1912, the General Assembly in 1919 adopted General Code Section 17-1:

> "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 subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or direct and control the services of such workmen, to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall be construed not to include policemen and firemen."

The section was amended in 1941, adding after "firemen", "in cities and villages and policemen in villages."

In 1925, the Director of Public Service in Akron was charged with unlawfully requiring and permitting a laborer to work on the operation of a waterworks plant more than forty-eight hours during a week when no emergency existed. In State v. Peters, 112 O.S. 249, the Court found that the original and final versions of the 1912 constitutional convention with respect to Section 37 differed regarding construction and maintenance of a public utility.

The original proposal (No. 209) was deemed to be much broader in coverage, and the Court held the view that the language as adopted should not be broadened beyond the natural import of the language.

> "Section 17-1 General Code, has no application to the employment of labor by a municipality. The expression "workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise, relates to the construction of public improvements and not to their maintenance or operation." (5)

Clements v. Sherwood, 70 Ohio App. 266 (1942) held that persons employed in the operation of state institutions were not under Article II, Section 37 and General Code 17-1, which apply only to construction.

Current legislative action

Section 4115.01 of the Revised Code (formerly GC 17-1) implemented the constitutional provisions of Article II, Section 37, limiting the hours of labor on public works and later excluding policemen in villages and firemen in cities and villages from its restriction. The section was repealed in 1969 by House Bill 436. The reason for the repeal is given as follows:

> "Repeal of working hours specifications. The bill repeals section 4115.01 which provides that, except in extraordinary emergencies, eight hours constitutes a work day and forty-eight hours a work week for persons employed on any public work carried on or aided by the state or any political subdivision. The stated purpose of this change is to allow working hours more in accord with current practices in the construction industry." (6)

After the repeal of section 4115.01, no new law was passed implementing the provisions of Article II, Section 37. The Ohio Supreme Court, in Stang v. Cleveland, 94 Ohio St. 377 (1916) said that Section 37 of Article II is not self-executing and was not carried into effect until the adoption of G.C. 17-1 (R.C. 4115.01). The Court added, however, that the legislature did not have the power to make lawful a working day of more than eight hours after the adoption of Article II, Section 37. By virtue of the Stang decision and the repeal of section 4115.01, the constitutional section is inoperative at the present time. Section 37 refers to a six-day work week and was incompatible with the hours of construction workers. In addition, there is some ambiguity in the language "not to exceed eight hours shall constitute a day's work..." and as to whether that provision actually limits the work day to eight hours. The legislature, realizing the inherent difficulties in Section 37, and noting that the section would be ineffective without further statutory implementation, chose to resolve the problem by repealing the law and rendering the section inoperative.

Conclusion

There appear to be several good reasons for repealing Article II, Section 37. The proponents of the section, in 1912, clearly believed that section 37 granted no additional power than was permitted the legislature by the adoption of Article II, Section 34. Judicial interpretation has limited the application of the section to construction of public works and held that it does not apply to maintenance and operation of them, as was anticipated by the committee on labor at the convention. More recently, the repeal of the state implementing the constitutional provision reflected the attitude of legislatures and members of industry alike that the provisions of Article II, Section 37 were not desirable.

If the constitutional language were repealed, what might happen if the legislature desired at some future time to adopt legislation limiting the hours of labor on public works? It would appear that absent the specific constitutional grant of authority in Section 37, the legislature would still be recognized as having the power to regulate hours of labor on public works, particularly if Section 34 is retained. Both state and federal court decisions have upheld the right of the state to make such regulations, and have denied that these regulations intefere with the right of contract in a manner intolerable to the constitution.

FOOTNOTES

1. Ohio Constitutional Convention of 1912; Proceedings and Debates. page 1328.

2. "Wage and Hour Legislation in Courts", George Washington Law Review, Volume 5 page 865.

3. op. cit., "Wage and Hour Legislation in Courts". page 877..

4. op. cit., Debates, p. 1339

5. State v. Peters, 112 O.S. 249 (1925)

6. Legislative Service Commission Analysis, Sub. H.B. 436 (1969)

APPENDIX

Constitutional Provisions - Other States

Hours of Labor

Arizona - No child under 16 shall be employed for more than eight hours a day. (XVIII, 2)

Louisiana - For women and girls not engaged in agriculture or domestic employment, the legislature or a commission may regulate hours. (IV, 7)

Michigan - The General Assembly may enact laws regulating the hours and conditions of employment. (IV, 49)

Colorado - Legislature to provide for period of employment not to exceed 8 hours in 24 (except in emergencies where life or property in imminent danger) for persons employed in mines, blast furnaces, smelters or other branches of industry or labor that legislature may consider dangerous. (V, 25a)

Montana - Eight hours to constitute day's work in all employment except farming and stock raising, legislature may reduce hours constituting a day's work but denied the power to increase hours. (XVIII, 4)

Oklahoma - Except in emergencies, 8 hours constitute a day's work in underground mines. (XXIII, 4)

Wyoming - Eight hours constitute a day's work in mines. (XIX, 1)

Hours of Labor on Public Works

Arizona - Eight hours to constitute lawful day's work in employment by state or subdivision. (XVIII, 1)

California - Eight hours to constitute day's work, not more than 48 hours a week's work on all public works. Legislature to provide that stipulation be inserted on all contracts for public works. (XX, 17)

Idaho - Eight hours constitute day's work on state and municipal works. (XIII)

New Mexico - Eight hours constitute day's work on state, county, and municipal works. (XX, 19)

Minimum Wage

California - General Assembly may provide for women and minors. No provision of the constitution may be construed as a limitation on the power of the general assembly to appoint a commission to carry out the provisions of the section. (XX, 17½)

Kentucky - Mandate to general assembly to provide minimum wage for children employed in places dangerous to life, health, or injurious to morals. (Sec. 243)

Nebraska - Permits legislature to provide minimum wage for women and children. (XV, 8)

Utah - Permits legislature to regulate minimum wage for women and minors. (XVI, 8)