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Ohio Constitutional Revision Commission
Judiciary Committee
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Summary

The Judiciary Committee met at 10 a.m. on Tuesday, July 23, 1974 in Room 10 of the House of Representatives. Present were Chairman Montgomery and committee members Mansfield, Cunningham, Guggenheim, Skipton, Representatives Norris and Roberto and Senator Gillmor. Also present were Judge William Radcliff, Administrative Director of the Courts, his assistant Coit Gilbert, Judge Robert Leach, Special Consultant to the committee, Mr. Allen Whaling, Executive Director of the Ohio Judicial Conference, Mr. Robert Manning of the Ohio State Bar Association, Bar Association Consultant E. A. Whitaker, and Mrs. Elizabeth Brownell of the League of Women Voters. Representing the Commission staff were Mr. Nemeth, Mrs. Evans, Mrs. Hunter, and Director Eriksson. Speakers included Mr. Bruce I Petrie, attorney from Cincinnati and member of the OSBA's Modern Court Committee; Mr. Glenn R. Winters, Executive Director of the American Judicature Society, Chicago, Illinois; Mr. William W. Milligan, U. S. Attorney and member of the OSBA's Modern Court Committee; Mr. Robert D. Schaefer, Springboro, business executive and member of the judicial nominating council of the First Appellate Court District; and Mrs. Beverly Sidenstick, Cincinnati, Director of the Ohio League of Women Voters Constitution Study Committee.

Chairman Montgomery convened the meeting and announced that the committee would hear from proponents of the merit plan of judicial selection. He introduced Bruce Petrie as the first speaker.

Mr. Petrie - Thank you. I am a member of the Cincinnati Bar Association. I am here as a citizen of Ohio,however. I happen to be a practicing attorney, and I suppose that my credentials are as a long-time member of the judicial selection committee of the Cincinnati Bar Association and, as the Chairman has said, as a member of the Modern Courts Committee. Let me say something about the other speakers and in particular about the gentleman who will follow me. Mr. Glenn R. Winters is Executive Director of the American Judicature Society, a post that he has held for more years than he likes to remember, I suppose. He is approaching official retirement and is, in fact, now on vacation, doing what he has done since 1940, and that is trying to advance the cause of improvement in the administration of justice in this country. I think it is fair to say that there is no man in the United States who has done more in that cause than Glenn Winters. And I am terribly honored to be united in common cause with him and gratified that he would take some of his vacation time to come down here. He told me that this is scheduled to be his last appearance as Executive Director of A. J. S. because he will retire next month, and I am very much honored to be involved in that. He is a noted figure across these United States, and he has been honored in international legal circles. He is an author and a complete authority on the subject of judicial selection, among many other subjects.

The speaker following Mr. Winters will be William Milligan, U. S. Attorney for the Southern District of Ohio and chairman of the Modern Courts Committee. Then we have asked Bob Schaefer to speak. He is a layman from Warren County--production manager at Monsanto Research Corporation--and member of the Governor's voluntary council on judicial selection for the first appellate district. He has had experience as a layman member in the voluntary procedure that Governor Gilligan established in 1972. Finally, Beverly Sidenstick will be speaking on behalf of the Ohio League of Women Voters.

Our appearance is the most recent of a long series of appearances in our attempts to persuade the General Assembly to put the merit plan for slection on the ballot in Ohio. You all know that the subject has been up many times--at perhaps the last four or five sessions of the General Assembly--to try to persuade that body to put before the voters of this state the question of whether we should substitute for the present elective system a merit plan of judicial selection. The elements of the merit plan call for submission of a short list of carefully screened names, studied and analyzed by a nominating commission, to the governor who then makes his choice and fills the vacancy on the bench from this list, typically composed of three names. The judge serves to the end of his term and, if he cares to serve again, he submits his name to the voters on the question of whether judge so and so should be retained in office. If he gets the required vote, he is retained in office; if not, there is a vacancy, and the nominating commission goes to work again. Those are the essential features of the merit plan.

As I have already indicated, there is very substantial, and I hope you agree very responsible, support for this proposal. I mention endorsements of the American Bar Association, the American Judicature Society, the 30 or more jurisdictions that have already adopted the plan, Cincinnati and Dayton and other local bar associations in Ohio, as well as the endorsement that is implicit in the Governor's having established a voluntary plan for councils on judicial selection. Literally hundreds of citizens to whom we have spoken over the years support the plan. I would like to suggest that there are many, many less important constitutional revisions that have been put on the ballot in Ohio. Therefore, we are hoping that this Commission, with its ability to study carefully the pro's and con's and and with the influence that it brings to the legislative process, will be successful in seeing that the matter is put on the ballot.

Ohio has some 545 judges or thereabouts, working every day in courts ranging from county courts to the Supreme Court of Ohio, making absolutely critical decisions that affect the life, liberty, and property of the people of this state. I'd like to suggest to you that they are not engaged in the shaping of broad social policy that goes on in the legislature and in the executive branch. Instead, they are trying to apply the laws of this country in a way that will insure that this is indeed a government of laws and not of men. I think that if you would peruse, as I do regularly, an issue of Ohio Bar (published by the Ohio State Bar Association weekly, giving advance sheets of court opinions in Ohio) you would find the "nitty-gritty" of what might seem to be rather mundane case law. The cases reported here are terribly important to the litigants. They never get into the newspapers, however. Ohio Bar may not report many opinions dealing with broad social issues--such as school desegregation--but instead you see, in this issue for example, a case decided by the Ohio Supreme Court dealing with the establishment of county roads, a habeas corpus case involving a mentally ill person, one involving transfer of a minor under juvenile court procedure, and one dealing with the interpretation of an automobile liability policy. There are school cases, criminal law cases, partnership cases, negligence cases--matters that judges are called upon to decide day in and day out. There is no one on this committee, I'm sure, who doesn't realize how important it is that those cases be decided on the basis of law, precedent, and common sense, applying competence, integrity, fairness, independence, diligence--all of the qualities in the judge that you would want to be there if you were faced with some test of your own rights or freedom.

We all tend to defer to judges, and lawyers especially tend to defer to judges. Lawyers do not like to be in a position that appears to be critical of our judiciary. It strikes too close to their livlihood. But as we are all honest, we have to say that mediocrity on the bench of Ohio is not uncommon. I hasten to say that there

are many fine judges, and I hasten to say, also, that in our own county the situation is improving. But I am not afraid to say that there are many mediocre judges in southwestern Ohio, and I think that if I can believe my brothers at the bar there are mediocre judges in all corners of the state. They are not venal; they are not dishonest--but they are not the very best that the bar of Ohio has to offer. We can't be satisfied with mediocrity on the bench. It's ludicrous to put freedom and property and what one holds dear in the hands of a fellow who is less than a leader at the bar.

I ask whether or not we need judges who will apply the law without any appearance of favoritism--who will be free of political pressures, who will not have time taken up in campaigning for office while litigants suffer more of the seemingly endless delays of justice, who will not have to take campaign contributions from lawyers who practice before them, who will not have to list the names of lawyers who support them in a newspaper advertisement or in the election for the public to wonder about. We have a well-known situation in our county in which one of the judges keeps in his desk drawer a list of lawyers, not who supported him, but who supported his opponent.

It seems to me we need a system that attracts men who would be willing to leave a successful law practice without fear of losing their job to someone who happens to make a good television appearance or who happens to have the name of Brown, O'Neil, Schneider, Herbert--you all know the good political name. We need men who have devoted their life at the bar to professional excellence and perhaps have not had the time or inclination to become involved in partisan politics.

We have a so-called nonpartisan ballot in Ohio. What that means is that the name of the party isn't listed on the ballot next to candidate's names. But here is a flyer (and I hasten to add that I have no bias for one party or the other here--this happens to be a Republican flyer, and I hope that the Republicans here will forgive me because the Democrats put out the same kind of thing) that lists "man for man better candidates" and shows presidential and state candidates with the advice to vote for "these Republicans" on the separate, nonpartisan judicial ballot. This is illustrative of the nonsense involved in the nonpartisan ballot.

I have indications of how politics intrudes in this matter when campaign funds are solicited from lawyers who are obliged to practice before the judge, in this interesting stack of letters. So you will not think me too platitudinous, I'd like to mention the details of a few to you. Here's one for a Judge H--no longer a judge, having been removed by the Supreme Court of Ohio--but this gentleman sent a letter to me some years ago, asking me to support Judge H. because "we all know what a terrific job he's done" and asking me to "pass the bucks" to Judge H. Here is a letter from Gordon Scherer, longtime Republican chairman in Hamilton county and a man for whom I have much respect for his political acumen. He is a man who has done great and effective work in Hamilton county in the very necessary game of politics, but when it comes down to judicial candidates, here's what Gordon Scherer has to say about a candidate for whom he was soliciting funds: "In all probability the man who will seek to defeat Judge K this fall will have only one advantage--a politican name. Unfortunately, the public generally pays little attention to the qualifications of judicial candidates and knows even less about them. They vote for familiar names. Judge K is not a political name. Consequently, we must conduct a vigorous and costly campaign to inform the voters of his outstanding attributes."

Then, here was a judge who sent around a little card to all the lawyers in the county asking lawyers to indicate what they would do for him--work at polls, send him some money, or do this or do that--and then he was so bold as to ask that lawyers who couldn't help check the appropriate square and return the card to him. No one has the nerve to tell the judge that he won't help the judge.

Here is an invitation to a luau, with free beer and set-ups, and with a contribution to the campaign comes a chance on a free bottle of whiskey!

These letters and devices are typical of what one encounters in a judicial campaign, at least in our county. I don't blame the candidates for participating in such things, but I don't think that it tells the voters much about their qualifications for the bench. But the system requires them to get those votes; this is what is demanded of them, and there seems to be no satisfactory way of avoiding such practices.

I think that we know, however, that most Ohio judges are not selected by the voters in the first instance. We know that at least half of them come to the bench initially by gubernatorial appointment. In June, 1972 Governor Gilligan adopted a so-called voluntary plan for judicial councils on judicial selection, with whom he is willing to share his appointive authority to the extent of letting these councils screen the qualifications of applicants. Until that time it was common knowledge that a judge received an appointment by first getting a recommendation of his party chairman in the county. In the case of a Republican governor, the Republican county chairman's recommendation was required. With a Democtatic governor, the Democratic chairman had the privilege. Unless Hamilton County is different from the rest of the counties in Ohio, this was a uniform practice. I once talked to the late Judge Carson Hoy, a very fine judge, a product of the elective system, and a candid and forthright man. He told me that the criteria applied by the county chairman in our county, when considering making a recommendation to the governor were: (1) What's he done for the party? (2) Can he get elected, once appointed? and (3) Can he do the job well enough so that he won't embarrass us?

An incumbent---especially one with a good political name--can usually get himself re-elected, although there are exceptions to that rule. But when he is ousted, it is usually not because he has done a poor job but because he faced an opponent with a better name, or at least with a more appealing name at that time. In November, 1972 there was an election for three positions on the Ohio Supreme Court. The six protagonists included three judges named Brown, two of whom ran head to head. All three incumbents were defeated, and it seems to me that almost speaks for itself. There is the further well-known instance of Judge James Bell, of London, Ohio, who ran for the Supreme Court of Ohio and ran incredibly well in Hamilton County. He readily admitted, however, that it wasn't because the voters in Hamilton County had somehow managed to discern his wonderful qualities for judicial office, but instead because Charles Bell, a long time common pleas judge in our county, was almost a household word.

Another illustration--and I hope that I'm not dwelling on this theme too long, but I think that it is important--is that of Judge H to whom I referred before, who acquired a reputation as a "law and order" judge. When he ran for the domestic relations bench against Judge Paul George, he ran a "law and order" campaign, and it was very effective, because he won. Judge Paul George couldn't figure a way to counter that approach, I suppose.

In the summer of 1972 the Cincinnatus Association (a civic organization of which I'm a member) conducted a study in Hamilton County about the judiciary.

We hired some law students and solicited the help of Professor Harold Weese, who's a professor of political science at the University of Cincinnati, and who's had some experience in political campaigning and political polling. We polled 300 registered voters. When asked if they could remember the names of any of the 28 judges currently serving in Hamilton county, 52% of the registered voters could not name a single judge. Only 12 out of the 300 voters could name more than 4 judges. When given the names of seven common pleas judges, only 8% indicated that they knew or either favored or opposed as many as 6 of those judges. And only 18% knew as many as three of the judges' names. When asked which court Chief Justice O'Neil sits on, only 18 could name the Supreme Court of Ohio and only 20% could identify by name any of the courts in Hamilton County. Of those 300 people, 76% believed that judges should be elected without regard to political party affiliation; 11% didn't know; and only 13% were in favor of election with regard to such affiliation. Ninety-three per cent of the voters said that they were not familiar with the Missouri plan or merit plan of judicial selection. But when a brief description was given of the plan without any attempt being made to explain its advantages, 49% said that they would favor such a system in Ohio; 38% said that they would not favor such a system; and 13% said they didn't know.

We polled the 28 or so judges in Hamilton county. We asked them their thoughts with respect to filling interim vacancies, and only 6 thought the governor should act alone or with only his party's help. Four others favored the governor's consulting with the state or local bar association, one wanted the advice and consent of the senate, and 10 of the 21 judges who responded to the question favored appointment from lists submitted by nominating councils consisting of lawyers and laymen (the most important element in the merit plan). As for selection of judges other than for interim appointment, only five judges favored the present method--that is periodic, popular elections in a race against an opponent. Three favored appointment for life or during good behavior, and 14 favored periodic votes of confidence by the electorate in a race without an opponent. We asked these judges to state the number of the 28 local judges whom they would classify as superior, qualified, or unqualified. Many declined to make ratings. But 10 of them did. Two of the judges thought that all 28 judges (and I assume that includes themselves) were possessed of superior qualifications. The other eight judges thought that some of their fellow judges were superior, the number ranging from 3 to 9. The number they rated as well qualified ranged from 3 to 10. The number rated qualified ranged from 6 to 20. Seven of the 8 thought that some of the judges are unqualified. The numbers that they thought are unqualified ranged from one, two, three, three, three and seven. Twenty-three of the 28 of our judges in Hamilton county at that time came to the bench by appointment to fill a vacancy--they weren't elected in the first instance. And those appointments were made so far as I know and believe solely on the basis of a recommendation by the county chairman.

There has been another local study of some interest here. It was conducted by the Cincinnati Post in 1972. It asked a variety of people, including judges what qualities they thought were most important for judicial office. I'd like to mention what they thought of prior political experience. The judges ranked it as one of the least important attributes for judicial office--far below moral courage, decisiveness, reputation for fairness and uprightness, patience and good health. The same results were reached in a sampling of 144 trial judges from the National Conference of State Trial Judges in 1965. The idea that prior political experience is a qualification for the bench is not supported by the public or by judges.

Glenn Winters is far better qualified than I to talk about the history of judicial selection in this country. I'm sure you realize that in Ohio the election of judges was never extant until the Constitution of 1851. They were appointed. The Founding Fathers of this country adopted an appointive system for the federal judiciary, and the elective method came along as a result of the Jacksonian trend which swept the country in the 1850's. It seemed to have as one of its tenets that everyone, from the county recorder on up, should be elected. Consider the success of the 1968 Modern Courts Amendment (for which our committee and Bill milligan can take some credit), providing for mandatory retirement and putting rule-making authority in the Supreme Court. The fact that ir received a substantial endorsement by Ohio voters should say something to this committee, to the Commission, and to the General Assembly. I believe that the voters of Ohio are ready to consider this kind of improvement in their court system.

I've alluded to the federal system, but I don't want you to think for a moment that I see it as comparable to the merit plan, because I do not. The differences are fundamental. Under the federal system there is a submission of names by the President to the Senate and to a screening committee that the American Bar Association has adopted. It does not involve the receipt of applications by a commission, as under the merit plan. Instead of screening by a body in the first instance, the reverse is true. Moreover, as you know, there is no practical way of removing a federal judge short of impeachment, unlike the merit plan, which has a system that permits voters to express their choice. As Glenn will tell you, that prerogative of the voters has been used in increasing instances.

I think you will also learn from Glenn that the adoption of the merit plan is a trend in these United States. I think that it is time for Ohio voters to have an opportunity to express themselves on the proposition. That is the plan before the General Assembly. It isn't a perfect plan. A better plan might be devised sometime. But it has been said that the dream of a perfect plan is the greatest enemy of a good plan, and this is a good plan.

Thank you. I'd like to introduce Glenn Winters at this time.

Mr. Winters - Mr. Chairman and members of the committee, I appreciate very much the invitation to be here. I have many Ohio friends and I am glad to have the opportunity to congratulate the bar and the people of Ohio on the passage of that fine Modern Courts Amendment, updating organization and administration of Ohio courts, and I am happy to commend Governor Gilligan for his establishment of a voluntary plan of judicial councils. The American Judicature Society has worked with his office and the Ohio Bar in conducting institutes to help the members of such councils to better understand and carry out the important job that they do. It is a logical step to consider here and now the possibility of making such councils a permanent feature of the Ohio judicial system.

At your last hearing a couple of weeks ago several people spoke in favor of the elective and appointive system and against the nominative-appointive or merit plan. Your staff has prepared a good document in Research Study No. 36, summarizing the pro's and con's of the elective and the merit plan, and I've read it as well as the summary of presentations made here on July 8. I am an out-of-stater, and it is not for me to dwell on the situation in Ohio, as Bruce has done. I'd like to use my portion of the time to comment on some of the points that have been made in light of the experience in the more than two dozen states which now use all or part of the merit plan with respect to some or all of their judiciary.

One of the first things that I noted about the statements made at the July 8 meeting was the frequency with which it was predicted that if the merit plan were adopted, something or other "would happen." That was permissible back in 1938 when the first merit plan campaign was conducted in Ohio, and there was not any experience to which to refer. The campaign didn't succeed in Ohio. Missouri's a couple of years later did, and today it is possible to say that there is more than 30 years experience in one state, and that all or part of the merit plan is now in use with respect to all or part of the judiciary in more than half of the states of this country. No state that has ever adopted the merit plan has dropped it. A number of states have adopted it, at first on a partial basis, and then extended its coverage. And, since Missouri's adoption of the merit plan 34 years ago, no change in the method of selecting judges has been made in any state except to the merit plan.

In particular, I'd like to correct one statement that I believe was made more than once at your meeting two weeks ago, and that was that the original Missouri plan had not been extended in that state beyond its original application. The fact is, it has been extended four times--to additional courts in Kansas City and to three additional counties, two near Kansas city, and one near St. Louis.

Initial voluntary plans have been given constitutional status, as now proposed here, in Colorado and in Florida. And plans adopted by constitution or statute have been broadened to cover more courts in Missouri, Alaska, Colorado, Indiana, Nebraska and Oklahoma. I think that this is quite an unmistakeable record of public support and voter approval in all parts of the country and among all types of people.

So how does the merit plan stand today? Defining it as Bruce did, as a system under which judicial vacancies are filled by appointment from nominations submitted by a nonpartisan nominating commission, with tenure subject to voter approval in a noncompetitive election, I can report that there are 30 states in which some part of that definition applies. In some states it applies to all judges, in others, to only one court. In some the plan is constitutional, in some it is statutory, and some states, like Ohio, have instituted the plan by voluntary action of the governor. A rough diagram will help to visualize and simplify this rather complex picture.

(Mr. Winters then described a diagram of jurisdictions, as follows:)

	States where authority is by Constitution or Statute	States where adopted by Voluntary Action of Appointing Authority
Plan applies to all major courts. (e.g. in Ohio it would cover supreme court, courts of appeals, and common pleas)	11 States Alaska, Colorado, District of Columbus, Florida, Idaho, Iowa, Montana, Nebraska, Utah, Vermont, and Wyoming	8 States Arkansas, Delaware, Maryland, New Jersey, New Mexico, Ohio, Pennsylvania, Puerto Rico
Plan applies to only certain designated courts.	6 states Indiana, Kansas, Missouri, Oklahoma, Tennessee and Alabama	2 states Georgia and New York

This diagram accounts for 25 states and the District of Columbia and Puerto Ric jurisdictions. 30 states have some form of the merit plan

The other three states, he continued, have to be put in another category. One is Louisiana, where there is statutory provision for a merit plan nominating commission for local traffic courts in the city of New Orleans. The authority has never been used, and nobody there seems to know about it. Therefore it doesn't really count. California and Illinois have the retention election of the merit plan but neither has nominating commissions, generally thought to be the heard of merit plan selection. California does have confirmation commissions. in 27 of the 30 states, then, the judges are being selected by merit plan procedures.

Other states are going to be added to this list. Arizona is going to be voting this next November on a true merit plan. Michigan is going to have a variation of it. Other states have voted and come close, but not close enough. That includes my own state of Illinois, where in 1970 a merit plan carried Cook County but lost downstate.

One of your speakers at the last meeting spoke of accountability and independence as important requisites for judicial office. To those I would add a third one, and that is judicial qualifications. What are they? Basic integrity of character, a good general education, a good legal education, understanding of people and of life. These are the kind of attributes that are hard to find and harder to evaluate. People who have them may never be candidates. They have to be sought out and persuaded to take this kind of job. The finding of such people is one that is made to order for group action--for the same reason that a church entrusts the finding of a new minister to a pulpit committee, which has very much the same type of job.

As for that point of accountability--those speakers, according to the record that I saw, fairly well demolished each other, one on behalf of the federal type plan and the other for the elective plan. Accountability to the voters in an open election is all too likely to be decided on a host of irrelevant factors that have little or no relation to the way the judge has performed the job. And in spite of one witness to the contrary, there is a chorus of protest around the country that federal judges are not accountable enough. The merit plan offers a reasonable middle ground. A judge is not going to be turned out under the merit plan because of a sweep of national politics. But neither can he ignore the voters, as the life-time judge may. Something like a dozen judges have been voted out of office on merit retention ballots in several states. And that is over a period of 30 years and after hundreds and hundreds of judges have been re-elected. And that is just about right--because it gives the lie to the assertion that the retention election is only an empty gesture. But it is few enough to give substantial assurance to the lawyer who gives up a good practice that if he does his job well, he will have substantial security in the job as judge. If he doesn't have such assurance, nothing may induce him to take it.

Let's face it--the voters are not able to do a very good job on accountability. And that is why, even in merit plan states, there has been a landslide trend during the last decade for the adoption of commission plans for the discipline and removal of judges. The job of that sort of commission is quite different from that of the nominating commission--it is to review charges against judges, give them some kind of a quasi-judicial hearing, and protect the honest judge while disposing of the judge who ought to be put out of office. In recent years two judges of the highest court of my own state of Illinois were removed by such a procedure, and the voters could never have handled that. As the voters see judicial discipline and removal being adequately covered by the quasi-judicial procedure, as they see that it is fair and effective, they are going to be less and less inclined to try to vote that judicial ballot. A considerable point was made of the fact and traditionally and irreversibly in all states it is hard to get the voters to vote the judicial ballot. They do not know the names and tend to move on to the interesting races about which they know something. It was forseeing that development that led me to suggest in my Duquesne Law Review article, quoted last time, that the retention election with the coming of the judicial discipline and removal commission, might be expected to

decline in importance in future years. However, its existence does represent genuine participation by the voters at the point where they are most able to make a contribution. As long as that is true, it should not be discounted. The dayis going to come, by the way--although many federal judges will resist it--when some kind of commission is going to be established for discipline and removal of federal judges. And when that day comes, there is going to be less arbitrariness and indifference to the public on the part of judges.

I think we need to take another look at the idea which seems to pop up more or less continuously that there is something dangerous and un-American about nonelected public officials. Certainly, the ultimate power of the electorate has to be protected, if government of, by and for the people is going to be preserved. But we must remember that it is actually undemocratic and inimical to the interests of popular self-government to impose upon the democratic process burdens that it is not equipped to bear. There is a limit to the number of names that can be put on a ballot without defeating its purpose. Voters should be given the opportunity to vote for a relatively few visible candidates, running on announced policies. Those candidates who are elected should have the power to appoint a team of people who can do the job of effectuating those policies. That is the way to make popular self-government work. To the extent that judging involves policy making, that is the only sound approach to it, as one of your speakers suggested at the last meeting. But, it was rightfully pointed out that judicial candidates lack issues upon which they can announce policy. And the whole elective process is basically unsuited to finding the right person for a judgeship. A judgeship involves skills, and only those persons familiar with those skills can make informed judgments about them.

I'd like to add a word about "bar politics," something always heard about when merit selection is discussed. It is so often said that the merit plan only substitutes one form of politics for another--bar association politics for political party politics. In an agreeable sense every governmental function is political in nature. And selection of judges by any method is essentially a political operation. However, most of the argument about bar politics stems from a book that you have all heard of--the Watson and Downing book on the Missouri plan. Watson and Downing are political scientists, and their book was not entitled "A Study of Judicial Selection." It was entitled "The Politics of the Bench and the Bar." Politicians--political scientists--they were looking for politics. They look for politics under every bed. And, if you look at some pages of their book, you find it. If you go on and read other pages of the book, you will find a basic inconsistency, for on one page they use expansive words about "rigging," "stacking," and "wiring" of the commissions. Elsewhere in the book they present an impressive array of testimony from members of those commissions that as a matter of fact when they met, politics--party politics and bar politics--were forgotten, and they sat around the table and did their best to find the best person they could for that job. There are direct quotations in the Watson and Downing book from nominating commission members to that effect, and you are going to have the privilege this morning of hearing from a member of one of the Governor's commissions. His appraisal of these factors will be interesting.

In some states there are all-lawyer commissions. And in some compilations these are not counted as merit plan commissions even though they are nonpartisan and serve a true nominating function. I have personally felt that if they are nonpartisan and if they do nominate, not screen, they ought to be counted, however.

In the bast majority of the nominating commissions the lawyers have the respect of the lay members of the commission. This is so because they deserve it. They have the professional competence and knowledge that the commission needs, and both lawyers and laymen would be indignant at the thought that politics--bar politics or otherwise--constituted a factor in their deliberations. Before you accept everything that Watson and Downing darkly suggest, you should hear commissioners directly on this point.

No human institution is perfect. Mistakes have been made in the setting up of the commissions--in manning them and in procedures employed. Some mistakes have been made in nominations; some judges have been rejected who should have been re-elected, and the reverse. But corrections have already been made to take care of some of these mistakes. I used to live in the state of Missouri, which was rather backward in road construction. I also used to live in the state of Illinois, which way back in the 1920's was very forward looking in highway construction. Eventually Missouri got around to paving its roads, too, and the result today is that Missouri has fine, wide, well-banked highways, while Illinois has many narrow, unbanked roads. Why? Because Illinois was first. The ones who followed have profited from the experiences of the first ones. That's true in selection as well. That is why when Ohio gets a judicial selection plan, it probably be a better one that that of Missouri or Alaska.

Within the last year the American Judicature Society's research department has completed a ntioonwide survey of the operation of all of the merit plans in this country, and a thorough study of five of them--Alaska, Colorado, Kansas, Alabama and New York--flaws in their operation and design have been noted and examined, and remedies have been suggested. This book is at the printer's now. It will be published within the next few weeks. It will be of great value to those who plan future merit plan extensions in new as well as present merit plan states. There are going to be more and more new states--that you can count on--and Ohio one day will be one of them.

Mr. Chairman, Thank you. I will be available for questions at the end of the program.

Mr. Norris asked if the committee would receive copies of the American Judicature Society study of the merit plan operations and was assured by Mr. Montgomery and by Mr. Winters that copies would be available. Mr. Montgomery then introduced Mr. William Milligan, Chairman of the Modern Court Committee.

Mr. Milligan - I don't know what I can add to what has already been said by the two impressive speakers that you have heard today, but I will try. The Modern Courts Committee of the Ohio State Bar Association has, of course, been working for a number of years in the area of court reform. We have had some successes and some disappointments, but we persevere. We realize that merit selection is never going to be adopted in Ohio just because the Ohio State Bar Association has been in favor of it for 30 years. It's going to be adopted because it is a forward step and because the general public of the state recognizes that.

Our committee has adopted what you might call an agreed position on certain questions, and I'd like to read some of these to you.

Q. What is the main argument for merit selection?

A. That it produces better judges.

Q. How do you know that?

A. Experience of states that have adopted merit selection is clear. (You have heard some confirmation of that point here this morning.)

Q. Don't we have good judges under the elective system?

A. We have many good judges in Ohio.

Q. Then what is the problem?

A. The problem is that some who manage to get elected would not have been selected under merit selection. (I might put it this way: it is our feeling that if merit selection were adopted, the best judge in Ohio as chosen under merit selection would not be any better than the best judge in Ohio today. But the worst judge would be much better than the worst judge today.) Experience has shown that merit selection tends to screen out the potentially mediocre and bad judges.

Q. What attributes should a good judge possess?

A. Most people agree that a good judge is open-minded, has knowledge of the law, is willing to listen to both sides, has common sense, and is courteous to lawyers, witnesses and others.

Q. State legislators (and as most of you know I was once a state legislator and proud to be one) have to stand for election. Why should judges be any different?

A. All policy making positions should be directly responsible to the public. In policy making positions party affiliations are relevant in the public's choice of officials. Judges, on the other hand, should be professionals in administering the law. They require technical competency and judicial temperament in a learned profession.

Q. Are you suggesting that politics be eliminated from the judicial selection process?

A. No, as Mr. Winters has said, any governmental function, including the selection of judges, in the broad sense has to be political. I don't consider politics a bad word. Politics, in the good sense of the word, is not eliminated by adoption of this plan. The question is the mode of participation in judicial selection. Merit selection expands participation in judicial selection from its present base. Expanded in what direction? The traditional political interests will still participate, but the base would be expanded to include legal, judicial, and attentive public participation.

Q. How about the governor?

A. The governor continues to play a vital role inasmuch as it continues to fall upon him to make the selection for judicial appointment. Under merit selection, that choice is controlled to the extent that the selection must be made from candidates found by nominating commissions to be qualified for the office. It should be noted that about half the judges currently sitting in Ohio first came to the bench by gubernatorial appointment.

Q. Isn't it likely that selection under the merit plan will be dominated by the large, so-called "blue chip" law firms?

A. It has not worked out that way in Missouri nor other states which have merit selection.

Q. Doesn't merit selection tend to put more conservative judges on the bench?

A. No, experience in Missouri and elsewhere shows that judges under merit selection are no more conservative. Public service organizations support merit selection, as does the press.

Q. Is there something unconservative about the Missouri plan for the selection of judges?

A. Apparently not. A leading conservative spokesman, William Buckley, has endorsed the plan.

Q. Doesn't the plan tend to establish de facto tenure on the bench as opposed to the elective system where incumbent judges are often defeated.

A. That is true. If merit selection works, good judges are put on the bench and allowed to continue their judicial careers. Also, merit selection encourages qualified persons to seek judicial appointment, where the test of their tenure is competence.

Q. What interests might minority groups have in merit selection?

A. The record indicates that members of minority groups have a better chance of selection under the merit plan than under the elective system.

Q. Doesn't merit selection deprive the people of a right which they now have?

A. A hard look at the realities of the situation suggests that voters do not now select judges. As has been indicated to you by Mr. Petrie, in Cincinnati only 13 per cent of the voters interviewed in one study could identify the position now held by the Honorable C. William O'Neil, undoubtedly the most outstanding jurist in our state system. Selection is now a combination of party selection (which sometimes works well, and sometimes does not), money, and pure chance.

Some have expressed the view that merit selection might be satisfactory for appellate judges but is not appropriate at the local level, where people do have the chance to know the judges and make decisions about them. The merit plan proposed for Ohio (by the Bar Association) would mandate merit selection of judges at the appellate and supreme court levels only. There could be no extension to other courts unless and until experience proved that merit selection should be so extended.

Q. I, as a citizen, have tried to judge this issue fairly and am still not sure what position to take. Do you have any suggestions?

A. There has been substantial and serious support for merit selection in Ohio for many years. Perhaps the general public should be given the chance by ballot to choose or reject merit selection, a system which gives demonstrated promise of improving the administration of justice in this state. Thank you.

Chairman Montgomery thanked Mr. Milligan and introduced Mr. Robert Shaefer.

Mr. Shaefer - Mr. Chairman, ladies and gentlemen, many people believe that the judicial system in Ohio is in need of reform. Such a statement can probably be made about most of the other states also. It is true today, and as a dynamic creation of man, the courts will always be in need of modernization and reform.

It is not realistic to assume that the people of Ohio do not share in the widespread growing distrust, and even contempt, for local, state, and federal institutions of government. Where this attitude applies to the laws and to the judicial system the need for action is even more urgent. The people of Ohio want and deserve the most efficient operating system that can be provided. In the case of the selection of the judges for the courts of Ohio, I believe that the appointive-elective, or merit plan, provides the best technique for blending the will of the people, the skill and experience of the legal profession, and the speed of the governor's appointment to deliver able and competent men to the bench.

Merit plans utilize several of the main advantages of other selection systems. First, the screening of candidates by a committee whose professional, social and civic experience can be applied, is much more likely to supply able candidates than the present system, where the general public is poorly equipped to know of and evaluate qualifications of the candidates. The assignment of members to this committee is crucial to the credibility and success of the plan. The statement that "good appointments make good politics" certainly applies to the nominating committee, no less than to appointments to the bench for which it was intended.

Secondly, the merit plan retains participation of the general public in the noncompetitive election and reserves to them the final decision on how long a judge remains a judge. I believe that this can have a stimulating effect upon the nominating committees, the governor, and the communications media. It is impressive that in the last 25 years about 50 per cent of the states have adopted some version of the merit plan. No state has changed its method of selection to other than the merit plan, and none have reverted from it. I think that one can assume that the political organizations in these states have found accommodation with it, even though they are theoretically less involved than in the elective process. I believe that even they recognize the compelling need to remove the judicial system as much as possible from the vagaries of partisan politics.

I would therefore like to commend the merit plan to your attention as the best method for attracting, selecting, and maintaining excellence on the bench. I have been involved for two years as a lay representative on a nominating council for the First Appellate Court District. I've seen the merit plan begin to work. It isn't perfect nor does it solve all the problems. But I suggest it as a very strong step in the right direction. Our council is an example of one operating without political pressures. I've felt absolutely none. Most of us do not have the time nor the inclination to serve on a council that does. Thank you very much.

Mrs. Sidenstick of the League of Women Voters was the final witness for the afternoon. A copy of her presentation to the committee is attached to these minutes.

Chairman Montgomery then announced that this completed the formal presentations and invited questions from committee members.

Mr. Guggenheim - How are the nominating commissions chosen?

Mr. Milligan - The councils presently operating in Ohio, of course, are appointed by the Governor. There is nothing sacred about that feature and variation among the states does exist. For example, in Missouri, the lawyer members of the Commission are elected by the bar. That is at the root of the alleged politics of the bar in the Missouri plan. The proposal that has been made that is pending in Ohio would leave the details of how the commission is to be selected to the legislature. Presumably the legislature would continue the present system by which the governor appoints the nominating commission members for staggered terms.

Mr. Guggenheim - Does the Bar Association have a recommendation on this point?

Mr. Milligan - If forced to make a recommendation, I suppose that we would favor retaining the current plan for gubernatorial appointment, but I'm equally sure that there are other alternatives that the Bar would not oppose, if the legislature so desired.

Mr. Skipton - I was hoping that Mr. Shaefer would take us through the process and show us how it actually operates in a specific case.

Mr. Shaefer - I wish that I could take you through the many evenings that the nominating council has spent in the operation. In the first place, I received a letter from the governor, asking if I would serve. I believe that my name was submitted by an appellate court judge from my county. I represent Warren county on our five-county council. We were the first one to meet, I understand. By and large we wrote the by-laws for the operation of the council that I believe the other councils are now using. When our council has been advised by the governor that an opening exists, we are convened by the governor. An announcement is made to the public at large that there is an opening to be filled by appointment by the governor. This constitutes a solicitation of the lawyers in the area that they may apply. We then have our meeting--after the applications have come in. We review the applications. Our commission operates on a team basis of one lawyer and one layman to review each application. The application asks for certain information--e.g. what judges has the lawyer appeared before, the names of five co-counsel, the names of five adversary counsel etc., and we are free to use these people as references. We telephone them and meet with them privately. Then we have a meeting with the individual applicant. We have a list of criteria--an informal list--and some of us add embellishments which we think are relevant. We ask the candidate: "Why do you want to be a judge?" One young lawyer I recall--34 years old--responded to that question that he felt that it was the culmination of a legal career that he sought and that he hoped to be a judge for the rest of his legal career. We then meet and we review with the whole council our findings in an open and frank exchange. A secret ballot is taken. The top three vote-getters are submitted to the Governor, not in order of our choice. Then we read in the paper what happened.

Mr. Petrie at this point pointed out that the application form which is used requires the applicant to state that he will accept the appointment if given to him and that it also contains a release by which he authorizes the local bar association to release his file. If there have been grievances against him, that fact is thereby available to the commission. The application is exhaustive, he said, and gives the council a very complete picture of the candidate. The procedure followed, he said, is similar to that which was followed by the judicial selection committee of the Cincinnati Bar Association.

Mr. Petrie - May I make another comment here on the nominating councils? I have been privileged to sit with the First Appellate District council as secretary and as I was remarking to Bob this morning, I have no idea of what his politics are, and I would be hard put to identify the politics of the others on that ten-member commission. Five are lawyers and five are laymen. I have never once heard anything that sounded to me like political bias creep into their deliberations. They have been amazingly fair and thorough. I would also say that rather than being intimidated by the lawyers the laymen are very vocal and play a vital role in the deliberations. I have found it an inspiring sight to observe.

Mr. Norris - I am interested in finding out more about how the council works because here (in Franklin county) we have no vacancies so it has not begun to operate. Mr. Petrie, you have said that you do not know the politics of the members--do you know

the politics of the members--do you know the stated political balance? Are both parties evenly represented, or do you know?

Me. Petrie - I don't believe that there was an attempt to evenly balance the council with five Democrats and five Republicans. I do think that you have to recognize that this was a major step forward, and the Governor acted upon the recommendation of the Ohio State Bar Association, which proposed two plans to him. We have had so little success with previous governors in this area that the plans we submitted were very broad as to what the governor might do in appointing the councils. All that we required in the draft plans submitted was an equal number of lawyers and laymen. S.J.R. 10, as you know, provides further for a bipartisan commission. As these councils are now constituted, I am fairly sure that they contain more Democrats than Republicans. On the other hand, in our First Appellate District, we have some rather strong Republican figures on our council. I think that the point was made by an opponent of the system that the Governor has appointed nothing but Democrats since he set up the system. I don't think that that is literally true. I think that he appointed Judge Bunyon, for example, in our county, who is a Republican. In any event, I think that it must be kept in mind that the system is just getting underway. Public skepticism being what it is, we have had relatively few Republicans apply. Most applicants have been Democrats, and we've had some good ones and some bad ones.

Mr. Norris - Do you have the feeling that applicants come to you voluntarily or are some pushed by the governor or party headquarters to come forward, or is there other political motivation for their doing so?

Mr. Petrie - That is a hard question to answer. I have no feeling that people are pushed into making application. There are undoubtedly many lawyers who want to be judges, and they may be encouraged by their fellow lawyers or by fellow party members to apply for these offices.

Mr. Norris - Does the party suggest some names? Is the bar involved?

Mr. Petrie - In a few instances--for municipal court, I believe--we wished that we had more applications and that we could set up a system to go out and solicit applications from good people. But I can't think of a case where there has been an active campaign for anybody.

Mr. Norris - You alluded to a further question I have. Has your council actively sought out anyone?

Mr. Petrie - We haven't done enough of that. It is important. We have wrestled with the problem of whether commission members should actively go out and seek people directly. The fear we have is that this is tantamount to promising a vote for the applicant. This is a procedure that we are now discussing. We think that it is highly desirable that any nominating commission or council recruit, because I know from my experience with the bar association's judicial selection committee that there are lawyers in Cincinnati who would like to be judges. Permit me to use another name to illustrate this point. We tried to persuade John K. a noted trial lawyer in Hamilton County, to be considered for a common pleas judgeship. He refused because he felt that he didn't have the name to be elected subsequently.

Mr. Norris - Has the judicial selection committee of the bar association been active in submitting names?

Mr. Petrie - It has. We have a bank of information on people in our county who would like to be judges and that information is available to the nominating council. Several active trial lawyers are on the council and on the judicial selection committee. So there is liaison between these groups. There should be better communication between the two, however, and I am working on a committee for this purpose.

Mr. Norris - Is there never any discussion of the politics of the applicant?

Mr. Shaefer - I think that members of the council feel so strongly and are so impressed with the merit plan that they do not want to see it destroyed. They realize that overt political actions could ruin it. On your question before about whether there are group movements to push candidates forward, I have not been aware of any political group movements, but in at least two cases where I've called up lawyers to inquire and have identified myself, I've heard a response such as "oh, yes, I wondered if he'd make application. A group of us at the club the other night were talking about it and we spoke to him and told him we thought he ought to do it." I have seen this kind of group support--by fellow lawyers, who evidently felt that the applicant had credentials.

Mr. Norris - Is there no talk about being certain that there is one qualified Democrat on the list?

There was general discussion on this point. Mr. Petrie said that he hoped that the Governor would lay this matter to rest by appointing some Republicans. Both he and Mr. Shaefer reiterated that politics is not discussed. Mr. Petrie added that he is eager for the system to be in operation for a sufficient time to encourage lawyers to apply. Mr. Norris stated that the council in his district is not yet in operation and that a vacancy had arisen prior to creation of the council. He said that in that instance the Governor submitted three names to the judiciary committee of the bar association--for which, Mr. Norris, I commend him. "We were permitted to rank the three. While we weren't permitted to select, we were permitted to say no. We rejected one and called the other two qualified, and the Governor made a selection from the two," Mr. Norris said.

Mr. Petrie - On this point I would like to mention the experience of the judicial selection committee of the Cincinnati Bar Association. It is analogous to the nominating council, I think, because we do the same kind of investigating. The committee is made up of some Democrats and some Republicans and a few of our 25-member committee are very strong political figures. I can honestly attest to the objectivity. Party leaders have called party members unqualified.

Mr. Montgomery - I'd like to ask Mr. Winters if he would care to respond on this point. The plan in Ohio is, of course, voluntary and not constitutional or statutory.

Mr. Winters - I think that that point has to be borne in mind in looking at Ohio councils. They are only in aid of the governor's unfettered power to appoint whomever he chooses. Good appointments are good politics, and indeed they are in the 10 or 12 states where the governors have voluntarily established commissions to help them do their job. Nevertheless, under the present constitutional set-up

the power is the governor's alone, and he cannot divest himself of it. Therefore, you have to be very tolerant if a Democratic governor makes Democratic appointments. He doesn't have to appoint anyone he doesn't want to, and he is going out of his way to live up to the spirit of merit selection.

A point to which I was very sensitive when Mr. Norris mentioned it, is the possibility that somehow, perhaps even under the table, the governor's favorite names are steered through. In other states that issue, of course, has arisen. There were efforts by the Missouri governors to do that. People like Mr. Shaefer took such a dim view of it at that time that it wasn't successful. The response was similar to that given by Mr. Shaefer to the effect that "if this is going to be done, we don't have the time or energy to contribute. We're willing to do this job in good faith, but we are not willing to participate in something that is going to be perverted in that way." That has been the almost invariable reaction by commission members. I mentioned earlier that some people classify California as a merit plan state. We at the American Judicature Society used to on the basis of the rather elaborate system of commissions that Governor Ronald Reagan set up. But we have taken the state off the merit plan list because we have learned that you have to go through the governor's office to get on those lists. And unless the commission can pick the names it will submit to the governor, it is not a merit plan.

Mr. Shaefer - Mr. Chairman, I'd like to suggest further that part of the reason for the absence of politics, at least in our council, is that it is made up of members from five different counties. I have little interest in or knowledge about internal politics of other counties.

Mr. Mansfield - I would like to comment on Mr. Norris's remarks. I sit on the judicial nominating council of the Ninth Appellate District. While I think that this plan is a good step in the right direction, the fact remains that lawyers who think they have little chance of receiving the governor's appointment don't make application. I think that we must be realistic on this point. In the second place, while it is never talked about, I am sure that those of us who sit on that council are well aware of the politics of a particular applicant. We submit three names, but we don't rank them. With respect to the question of Mr. Norris, it would be interesting to see if the Governor would pay heed to rank. I think that it is wise that we do it this way, at least for the first "go-round".

Mr. Guggenheim - Mr. Shaefer, or anyone else--if you don't get three people that you consider qualified, do you still send up three names?

Mr. Shaefer - We had an instance where we were unable to come up with three names, so we readvertised, so to speak. We repeated the whole procedure.

Mr. Petrie - The plan specifies that the council can submit only candidates that it ranks as qualified. It does create a problem in the rural counties, and this is another matter to which we must give attention.

Mr. Mansfield - The merit plan proposal has been before the General Assembly about five times. If it is so obviously good, why hasn't it been successful in that body? How do you explain this?

Mr. Petrie - As someone who believes in the American system , I find it hard to explain. It is frustrating and disappointing. I can give you a couple of observations about a couple of specific instances. On one occasion when the plan was before the legislature, the Honorable Fred Hoffman from Cincinnati was chairman of the Judiciary Committee. For one reason or another, and in good faith Fred Hoffman was bitterly opposed to the plan. As chairman of the Senate Judiciary Committee,

he did a brilliant job of keeping it in the Senate. When it was finally brought out, he had 26 of his own amendments tacked on it. If you want my candid view as to why we failed on that occasion, I would have to give credit to Fred Hoffman. I know that there are other legislators who would not vote for the system because they want to be a judge some day. They are reluctant to change the system because they think that they can be elected to a judgeship.

Mr. Mansfield - If the electorate can't vote intelligently on judicial candidates, how can it judge the merits or demerits of the plan?

Mr. Petrie - I think that it is going to be up to the Bar Association, the League of Women Voters and others to educate the public on the merits of this plan. It is incredible to me that in Indiana this proposal got through the legislature twice, as required, and was passed by the voters with a plurality of 57 per cent. I know that there are members of the legislature who oppose the plan in good faith but I think that the Bar Association must do a better job of selling the plan so that it is not lost in the legislative shuffle.

Mr. Mansfield - Isn't it almost as easy to educate the people on the qualifications of particular judges?

Mr. Petrie - I don't believe so. Both the Cincinnati and Cleveland Bar Associations try to educate the voters on the qualifications of judicial candidates but in both places judges have been elected by handsome votes against bar association ratings. The bar's rating of "unqualified" seemed to mean very little where the candidate had a good political name.

Mrs. Sidenstick - I think that educating voters is a problem when there are so many judicial candidates on the ballot. With the merit plan the number would be reduced. Voters could then give more attention to all the candidates.

Mr. Norris - Mrs. Sidenstick, in your comments on behalf of the League, you made a point of emphasizing that the selection commission should not be dominated by lawyers. I assume that you mean that there should not even be a simple majority of lawyers in your view. Why this emphasis?

Mrs. Sidenstick - Our members were aware of the Watson and Downing study, and I think were very conscious of the fact that there might be a problem with bar politics. I'm not sure that they would object to a majority--I think that they were concerned about domination.

Mr. Norris - The reason I ask is that there seems to be a basic inconsistency if we say that voters are not competent to select judges because they do not know who is qualified. We seem to be saying that only a lawyer who practices before the judge can evaluate qualifications. Yet we would have those same lay voters play a major role in the nomination process. I don't understand the rationale for saying that those best qualified to judge ought not have even a simple majority on the commission.

Mrs. Sidenstick - I think, however, that the laymen we are talking about are going to be exceptional persons who will have put in time investigating the applications.

Mr. Montgomery - The question suggests that technical competence is the only quality considered. Laymen can talk about character, integrity, and basic honesty.

Chairman Montgomery then announced that the time for the meeting has expired. He thanked participants and announced that the next meeting of the committee would be on August 13 at 10 a.m. At that time a summary of the testimony pro and con will be considered. He expressed the special gratitude of the committee to Mr. Winters for having attended.

Ohio Constitutional Revision Commission
Judiciary Committee
August 27, 1974

Summary

The Judiciary Committee met at 10 a.m. on Tuesday, August 27, 1974 in House Room 11 of the House of Representatives. Present were Chairman Montgomery, Dr. Cunningham, and Rep. Roberto. Also present were Judge William Radcliff, Administrative Director of the Courts, his assistant, Coit Gilbert, Legislative Service Commission representative Don Robertson, Ohio State Bar Association representatives Robert Manning and E. A. Whitaker, League of Women Voters representative Elizabeth Brownell, and George Vukovich of the Common Pleas Court Clerks Association. Staff representatives present were Director Ann Eriksson, Craig Evans, Julius Nemeth, and Sally Hunter.

Chairman Montgomery convened the meeting. A motion to approve the minutes of the last meetings was made, seconded and passed. He then asked Mr. Nemeth to review some topics from the judicial article that the Committee has not yet considered.

Mr. Nemeth: Several items in our study outline have already been researched and materials have been given to you. Judicial removal is covered by Research Study No. 33, given to the Committee in February of this year. Judicial compensation is the subject of Research Study No. 40, given to the Committee in August. And, of course, we also have some unfinished matters dealing with Court of Appeals structure. Revised proposals on that are about ready for mailing. The methods for judicial removal, in particular, will merit some Committee time. There are, I believe, two constitutional methods prescribed for the removal of judges, two additional methods prescribed by the legislature, and a method by which judges can be removed by Court action. So there are five methods by which judges can be removed from the bench in Ohio.

Judge Radcliff: There are really six methods - two in the Constitution, two in statutes, and the Court has two methods available to it.

Mr. Nemeth: It would seem appropriate that the Committee review whether or not there should be some constitutional changes in particular in regard to this question. The paper on compensation, also, should be looked at in some detail. I think, for example, that there has been the suggestion for the establishment of a Judicial Compensation Commission. These matters ought not be skipped over, and the research has been done. The material is in your files, and we should spend some time in the near future in discussion of the alternatives available.

The main topic of discussion today is judicial selection. We are particularly concerned with trying to synthesize the testimony received during our last two meetings. At the first of these we heard from proponents of retaining the present elective system of selection or some alternative of it, as well as proponents of appointment, and the second of these meetings was devoted to a discussion of the pro's and con's of what has come to be called merit selection, of the Missouri plan. We plan to begin this morning by a review of the pro's and con's of the various methods of selection as they are set out in the Judicial Selection Summary dated August 5. At this point I will turn things over to Sally.

Mrs. Hunter: The paper to which Julius referred has been mailed to you and as you may have noticed is fairly long. The purpose of having it so detailed is to make certain that all views expressed are included in this summary. By way of introduction, Professor Barber made the point that two important criteria are involved in picking a selection plan: 1) accountability, because, after all, judges are to a degree makers of policy and to that degree should be accountable, and 2) independence, because

judges must be impartial and not be beholden to any group.

Mr. Winters cautioned that we must not lose sight of the fact that we want to be certain that the selection plan that is adopted is one that picks the candidates with the best judicial qualifications. He enumerated some - competence, integrity, fairness, diligence, understanding, courtesy, decisiveness - these various objective qualities that have so often been discussed in the literature of judicial selection.

I have tried to review what the various proponents had to say with respect to accountability and independence and their varying views on the problems of judicial campaigning and the recruitment of able attorneys to be judges. I would like to begin by reviewing the points made by the proponents for <u>retaining the present elective system</u>. They stress accountability. They argue that judges are involved to an <u>increasing</u> extent in making social policy and that therefore it is essential in a democracy that the voters should have a say in their nomination and election. And, in fact, it was pointed out that trial courts are less policy relevant than appellate courts - that the more policy making power the court has, the more vital it is that people have a say in the selection of judges. So it was asserted that the Bar Association plan, which applies to appellate judges only, should be revised perhaps so that trial judges might be selected by another method of selection but that the appellate judges, who are making important policy making decisions, should continue to be accountable to the people through the non-partisan election process. At least this was one position advanced.

Along this same line, it was urged that the right of the people to retain or reject a judge is an important check on conduct on the bench. Several proponents of the elective system felt that if voters give up this control, they have only "technical" controls over the quality of the judiciary because to remove a "bad" judge requires proof of a breach of law or ethics. They argued that while it is true that legal mistakes are corrected on appeal, there are some errors that are not strictly legal but that have political and social overtones and that can be corrected only through electing another judge. Finally, it was urged that there is no practical way, short of impeachment, of removing an incompetent judge under any variation of the appointive system. And the proponents of retaining the present elective system saw little difference between the appointive system and the merit plan.

In summary, (and I refer you to page 2 of this summary) the proponents of continuing the elective system say that when it comes to accountability no differentiation exists between an appointive system and the merit plan. All of the above points stress the importance of electing judges to avoid "locked in prejudice" and concern about what Mr. Lloyd called "judiocracy" - a term applied to what he sees happening when two trends coalesce, the expansion of an appointive judiciary and the emergence of the courts, more and more, as a dominant force in remolding of the social order. Accountability was stressed.

So far as independence is concerned, it was argued that the present system is quite effective. Judges are by and large impartial, so what is the rationale for changing the system? I believe that it was Mr. Wolfe who said that people <u>are</u> aware of the decisions being made by judges, favoring one group or another, and that they <u>are</u> quite well equipped to participate in judicial elections, contrary to the position often asserted that voters don't know enough to vote intelligently in such races. It was acknowledged by everyone, however, that in a multi-judge county the judges have less visibility so that I think that even the proponent, Mr. Wolfe, would admit that his assertion is not as valid in large, metropolitan counties.

He also stated that it is his view that the non-partisan ballot works and he pointed out that in his county, one which is over 60 per cent Republican, a Democratic judge had been elected and re-elected. Mr. Wolfe also reported upon a poll of Ohio judges concerning selection systems that establishes support for the present system by Ohio judges. Therefore, it was his view that campaigning is not the burden that some of the opponents of the elective system would maintain.

The main points, then, that were made for retaining the present elective system

are (1) it provides more accountability -- judges do play an important policy making role; (2) no need for change has been demonstrated and (3) merit selection is, in a sense, a ruse for the appointive system.

At the same meeting we heard from a proponent for switching to the appointive system of judicial selection, whereby the governor makes appointments to judicial office. The proponent for the change felt that such a system provides the most in the way of accountability. Acknowledging that the values of decision makers shape policy in the courts, Professor Barber felt that people who are voting for governor consider among gubernatorial qualifications the kinds of appointments that he or she is going to make to administrative posts, as well as to the bench. Therefore, accountability is provided through the indirect control of electing the executive.

The non-partisan ballot, in particular, she found to be objectionable because the values or policy preferences of candidates are best measured by party affiliations. When people vote on judges they have no idea from the ballot of whether or not they are voting party preferences. The non-partisan ballot deprives the candidate of an opportunity to communicate the significance of his election to the voters in terms of policy preferences and therefore is lacking in accountability.

It was also pointed out that in Ohio in particular the non-partisan system has not worked in a non-partisan way. According to social science studies it has a partisan bias to it - illustrated by the fact that the Republican party is the dominant winner in judicial races in this state, whereas, other state races are highly competitive.

Dr. Barber also argued that judges have no visibility in the larger counties. It is virtually impossible for voters in Cuyahoga, Franklin, and Hamilton counties to know what judges have made errors and what kinds of errors. Practically speaking, such errors must be corrected on appeal. She also felt that the removal methods in the Constitution, statutes, and Supreme Court rule are adequate for the judge who is doing a poor or inadequate job.

In summary, appointment provides accountability because of the indirect control of the electorate through election of the appointing authority. Moreover, the present non-partisan system is deficient on accountability because the candidates lack party labels by which policy preferences are identifiable, and, in Ohio, the system is not working in a non-partisan manner.

As far as independence is concerned, appointment assures independence because of the security of "good behavior" tenure.

On evaluation of judicial qualifications, the point was made that success in a judicial campaign is too often based on having a good judicial name and not upon having particular qualifications for the bench because these cannot be communicated to the electorate. There are many examples of popular names across the state and in particular counties that were pointed out to this Committee.

Proponents for merit selection as well as for an appointive system pointed out the real problems in judicial campaigning. Judges must run in partisan primaries in Ohio and yet the party furnishes little help. Campaign finances are a problem. As you know, Professor Barber spoke of the fact that lawyers may not donate to judicial campaigns. That happens to be true in Cuyahoga county if a judicial candidate is seeking bar association endorsement. It is not a rule across the state. It affects judicial candidates in Cuyahoga county who naturally want the local bar association's endorsement. In order to get it, they must sign an agreement that they will not accept contributions from lawyers, and this means that instead they accept contributions from lawyers' spouses, making the practice a face. There is the further difficulty that lawyers have no issues. They cannot make promises of more convictions or less convictions. Yet Mr. Petrie pointed out that despite this fact sometimes a candidate who comes out as a strong "law and order" candidate is difficult to combat. Thus it was agreed by the proponents of merit selection and for an appointive judiciary that campaigning for judicial office is difficult, demeaning, costly, and adds to delay in the administration of justice in some cases.

Finally, it was asserted and disputed with equal strength that the federal judiciary under an appointive system is superior in competence and fairness to local and state judges.

In summary, the main points made for adopting a purely appointive system for the judiciary are that it is a more accountable system in that accountability is not dispersed -- i.e. the gubernatorial candidates promise to make certain kinds of appointments and the governor alone is held responsible for these appointments. The accountability is not divided between the governor and a nominating commission. Non-partisan election is bad because policy preferences are not made known to the voters, and it would do no good to switch to a partisan system because of the problems of judicial campaigns, the lack of issues, and the other difficulties involved in running. Even if they may accept campaign contributions from lawyers, this puts the candidate in a bad position because the lawyers who support a candidate are going to be appearing before the successful candidate.

Finally we get to the matter of merit selection, and I have on pages 4 and 5 of this memo tried to set out the many points pro and con for that system. Merit selection has been defined as a plan under which judicial vacancies are filled by appointment from nominations submitted by a permanent non-partisan nominating commission, with tenure subject to voter approval in a noncompetitive election. This was the definition furnished by Mr. Winters in his presentation. The principal points on both accountability and independence were that the merit plan offers a reasonable middle ground between election and appointment. A judge is not going to be turned out of office because of a political sweep, but neither can a judge ignore voters, as a lifetime judge may do.

Mr. Winters pointed out that experience in other states has demonstrated that a proper percentage of judges has not been retained -- 12 or so out of some hundreds of judges in merit plan jurisdictions have not been retained in noncompetitive elections. This percentage he called sufficiently high to refute the claim that the retention election is meaningless but sufficiently low to give assurance to a lawyer who gives up a good law practice to assume judicial office.

In response to the argument that the retention election is a meaningless gesture and that in fact it is put in as an appeasement to proponents of the elective tradition, Mr. Winters pointed out that a far more effective way of dealing with the ineffective judge is another kind of commission -- separate and apart from the nominating commission-- but one that is established for the disciple and removal of judges. Such a commission is a more adequate way of dealing with the poor judge, he asserted and for this reason is becoming popular, even in merit selection states. However, the retention election continues to represent participation by voters at a point where they are most able to make a contribution.

The recap, as far as accountability is concerned, proponents of an elective judiciary say it is accountable to the people. Proponents of an appointive system question accountability where the ballot is non-partisan and disparage partisan election because of campaign difficulties. Merit plan advocates claim that experience has demonstrated that candidates are still accountable and that highly qualified candidates are attracted to the bench because of the job security. They claim that the retention election system works.

Merit selection in practice, according to what Mr. Milligan told us, has produced neither more conservative nor less conservative judges and he pointed out that mixed support for the plan supports this claim. He also told us that members of minority groups have fared better under the merit plan.

The non-partisan ballot, it was agreed by proponents of merit selection, is a sham to the degree that political parties do indeed campaign for judicial candidates. Mr. Petrie gave us some examples of that in political literature.

Independence of the judiciary is certainly endangered in situations where judicial candidates do rely on the held and contributions of lawyers who will be practicing before the successful candidate.

Proponents of merit selection say further that evidence exists that nominating commissions have ignored party politics and bar politics in evaluating the qualifications of candidates for office. Experience of other states demonstrates that efforts of the appointing authority to sabotage the plan have not been successful, and in fact in its comprehensive study of how the merit plan works in various jurisdictions, the American Judicature Society does not count states where it found that the nomination process involves participation of the governor's office. States noted by AJS as having successfully adopted merit selection do not include states where there is any effort by the governor's office to take an active role in the nominating process. Thus it was asserted that experience has shown that in a sufficient number of jurisdictions over a sufficient number of years the merit plan has been successful.

As far as getting good candidates to run for judicial office, the argument was made that the merit plan assists in the recruitment of good judicial candidates. It was pointed out that lawyers in small counties in a multi-county appellate district have a better chance of being nominated than they do under the elective system.

Merit plan selection, it was said, enhances overall quality on the bench because of the security of tenure it offers and also because the nominating commission is so structured that it is able to screen out mediocrity. It is able to present to the governor a list of qualified candidates.

It was pointed out that at the present time many Ohio judges were selected by the Governor in the first place to fill vacancies; they were not elected in the first instance but rather were appointed to a position when a judge died or retired and were subsequently elected as incumbents. In the absence of a merit selection plan what is commonly taken into consideration is the recommendation of the party county chairman, and the criteria used by the county party chairman happens to be party service as well as chances for re-election. It was thus argued that the nominating commission will do a much better job because party service and loyalty to the party will not be the considerations but rather those objective qualifications for successful judicial experience. Prior political experience for judicial office ranks low in the minds of the public and judges who were polled on the question, according to Mr. Petrie, yet it is necessarily very valuable in the elective system.

Finally, screening of candidates by a nominating agency is more likely to supply able candidates than does a partisan primary because the public is poorly equipped to evaluate judicial qualifications and such evaluation is particularly appropriate for a small group, able to examine and interview the candidate, look into references, and so forth.

Proponents of merit selection agree that the elective system places undue campaign pressures on the judges, particularly in metropolitan counties, that campaigning is demeaning, costly, and time consuming, and that judicial candidates have no issues.

In quick summary, then, the main points made for merit selection were (1) it provides a reasonable middle ground on accountability and independence, (2) that it assures more qualified candidates, (3) that experience over some 30 years has shown that it works, and (4) that with respect to removal of the inadequate judge the retention election is a valid aspect of the plan, but nevertheless it would be valuable to incorporate a discipline commission along with the retention election.

In opposition to the merit plan points made earlier are repeated to a degree because proponents of retaining election and proponents of adopting an appointive judiciary both opposed merit selection. One argument was that of dispersal of authority-- the merit plan lacks accountability because the responsibility for appointments is dispersed; the electorate loses the indirect control it has in being able to point to the single, elected executive as appointing authority.

The merit plan was criticized because nominating panels meet in secret and the public has little idea of how the system works.

The retention election was condemned as not being an election. As one party put it, why would anyone vote for a change when the change is unknown?

The retention election was called an appeasement.

It was of great concern to both the proponents for keeping the present elective system and also the proponents for an appointive system that the nominating commissions are easily "stacked" and "rigged", so that in essence the merit plan is an appointive system but with disadvantages to proponents of appointment. One concern was that because the nominating commission is in most states made up of half lawyers and half laymen, this results in the institutionalization of a private interest group - namely the bar - in a public selection process. The plan, it was further argued, politicizes the bar which gets involved in political ways in the selection process. They way that happens is that there are plaintiffs' attorneys on one hand versus defendants' attorneys on the other hand vying for positions on the nominating commission so that they can have a say in getting the kinds of candidates for the governor to select that will be most responsive to the clients whom they represent.

According to Dr. Barber's studies in Ohio, merit selection has political bias through lawyer endorsements which favor the Republican party in this state. Bar associations in Ohio endorse Republicans, according to her findings.

Mr. Wolfe pointed out that one problem that he could see with nominating commissions is that within a particular district there might be envy among the bar, rivalry among attorneys, that could result in denial of selection to some of the more successful attorneys. This was a point against merit selection in his view. A further point made concerned the complexity of the system.

This summary is, as I said earlier, an attempt to present as many points as possible for and against the various selection systems and notes were they coalesce. The last two pages of your summary of August 5 contain a short recapitulation of the positions taken and I direct your attention to these pages. I would now open up the discussion for comment or question.

Mr. Montgomery: Dr. Cunningham, have you any comments?

Dr. Cunningham: I think that this was a fair presentation of both sides.

Mr. Montgomery: Do any of our guests wish to be heard? If not, let's proceed to a discussion of the makeup of nominating commissions.

Mrs. Hunter: You have all received material from the American Judicature Society - a table really, showing the various states with nominating commissions, the type of plan (whether constitutional or statutory), the offices encompassed by the plan, and the selection and tenure of commissioners. (The material referred to is entitled "JUDICIAL NOMINATING COMMISSIONS," dated August 2, 1974, and was reproduced from a AJS publication.)

One of the concerns expressed, particularly by Professor Barber, is the domination of lawyer members on a nominating commission. This has been the concern of many critics as well. The Missouri commission is made up of a judge and an equal number of lawyers and non-lawyers, and most states have followed Missouri's lead. There are various ways of selecting the lawyer members. In some states lawyer members are elected by local lawyers or local bar associations; in some states lawyer members are appointed by the bar association governing body; and in some states lawyers are elected by designated state officials. There are some variations. It is, however, very common to have half of the members of the nominating commissions to be members of the bar.

Mr. Montgomery: Could we take a poll on this point? How do members feel about lawyer membership. If we recommended merit selection, how should the split be -fifty-fifty, a majority of non-lawyers, or what?

Dr. Cunningham: I have a strong feeling about representation by the laity. I would leave it to the professionals - the judiciary, bar representatives, judicial groups of some sort, but no laymen. I think also that you must distinguish between whether we are talking about a statewide commission or district commissions.

Mr. Montgomery: You favor judges on a commission as well as practicing attorneys?

Dr. Cunningham: Oh, yes. Perhaps the commission could be made up of presiding judges in our unitary system. From appellate on down to common pleas.

Rep. Roberto: I don't have strong feelings, but I guess that my preference would be that members of the bar and the professionals are not particularly best suited to make all the judgments on the various criteria upon which selection might be made. There are a lot of qualities for a judgeship on which I think that a layman can pass judgment, and I would prefer to see a mix, whether that is fifty-fifty or some other proportion. I would object to all professionals.

Mrs. Hunter: Another question that might be examined is the method of selecting the lay members. Gubernatorial appointment of lay members has been the subject of criticism on the basis that this contributes to "stacking" and "rigging" of a commission. In most states the governor does appoint lay members. In some states such appointments are subject to legislative confirmation, or confirmation by the senate, at least. In one or two states the lay members are selected by a legislative body. In another few states the lay members are selected by other members of the nominating commission.

Mr. Montgomery: How about secret meetings? Can that be avoided by requiring at least one open meeting where any member of the public can be heard?

Neither Mr. Nemeth nor Mrs. Hunter were familiar with any constitutional or statutory provisions on this matter and supposed that it would be controlled by commission rule. Chairman Montgomery invited further comment and question on nominating commission makeup.

Mrs. Hunter: There is some variation on the judicial membership.

Mr. Nemeth: Yes, in many instances, as Dr. Cunningham has stated, a judge by virtue of his office becomes the presiding officer of a particular commission. However, there are also a few instances in which the judicial member of the committee, usually the chairman of it, is elected by his collegues, either by fellow members of the supreme court if we are talking about a supreme court or appellate nominating commission, or by the judges of the intermediate appellate courts and the district courts if we are talking about nominating commissions that covers trial courts. These are two variations.

Dr. Cunningham: It also depends upon whether you are dividing nominating and discipline. The commission could have simply nominating powers or both disciplinary and nominating powers.

It was agreed that in most instances the two functions are separate and that two commissions exist for the two purposes.

Mr. Montgomery: Have we exhausted all of the potential witnesses who wished to be heard on this subject?

Mr. Nemeth: To our knowledge there are no more who are waiting to say something at this stage. It may be that when the matter gets to the Commission there will be additional testimony.

Mr. Montgomery: This would be an appropriate time to take not of the number of letters we have received from the various local leagues of women voters across the state. The mail is running 100% in favor of merit selection. We are grateful that the leagues are making their views known to us. Julius, are you ready to discuss proposed drafts that were distributed today?

Mrs. Hunter: I would also just add that there is a lot of variety as to how much detail is spelled out in the constitution. The Ohio State Bar Association proposal, for example, (former SJR 10) provides that the commission be bipartisan, be composed of half lawyers, and that terms be staggered. It says further that selection, compensation, expenses, qualifications, terms, all the rest be provided by the legislature. Some constitutions are more detailed. (Mr. Nemeth noted that Colorado is an example.) The question of how much should go into the constitution is another one that could be addressed.

Mr. Nemeth: Also, as Missouri's provisions illustrate, it is possible to have a constitutional provision that would mandate merit selection for certain areas of the state, as Missouri does for St. Louis and Jackson county, I believe, while it makes merit selection optional for the other judicial districts in the state, requiring the legislature to enact enabling legislation to have the question submitted to the voters. Missouri, having started it all, doesn't necessarily for that reason deserve special consideration, but this is a variation worth considering.

Mr. Montgomery: Dr. Cunningham has made his view known that he does favor merit selection in some form. Do you, Mr. Roberto, wish for us to proceed to draft a proposal for the committee's consideration?

Rep. Roberto: After a quick reading, I believe that I would support Draft No. 1 (of the two drafts distributed at the meeting).

Mr. Montgomery: Then it is in order that we put something on the table. The chair is also in favor of merit selection in a suitable form for Ohio.

Mr. Nemeth: You have two draft proposals before you - Draft No. 1 and Draft No. 2. They both have several common ancestors --namely SJR 10 of the 1973-74 General Assembly, secondly the Constitution itself, and thirdly, Section 6 of Trial Court Draft No. 3 which this committee itself worked out. The principal difference in approach between Draft proposal No. 1 and Draft Proposal No. 2 is that Draft 1 would apply merit selection only to the Supreme Court and the Courts of Appeals, and give the General Assembly the option to provide by law for merit selection of trial court judges if it should so desire. And it could do so for any or all trial court judges, so that it would not be a matter of "all or none". Draft proposal No. 2 would apply merit selection to all three levels of courts and give the General Assembly the option to provide by law that common pleas judges be elected in any or all of the trial courts of the state.

In other words, the first proposal (Draft 1) makes it mandatory to select judges by nominating commission method only so far as the Courts of Appeals and Supreme Court are concerned and provides that the judges of the Common Pleas Courts be elected. But it also gives the General Assembly the option to provide by law that common pleas court judges be nominated by nominating commissions, i.e. come under merit select on.

Mr. Montgomery: It would be required for Supreme Court and Courts of Appeals, but the legislature could do whatever it wanted with trial courts, is that correct?

Mr. Nemeth: Well, Draft No. 1 would say that Courts of Common Pleas are elected. But it would give the General Assembly the option to adopt merit selection instead. Draft proposal No. 2, on the other hand, would apply merit selection to all levels of courts and, notwithstanding that requirement, give the General Assembly power to provide that the judges of any or all of the Common Pleas courts be elected.

Mr. Manning: As I understand what Julius is saying, I think that Draft No. 1 says that at the trial court level you have to opt in if you want merit selection. Draft No. 2 says that you must opt out if you don't want it.

Mr. Nemeth: That is correct.

Mrs. Brownell: What would happen in the transition period? If it were suddenly mandated?

Mr. Nemeth: That would have to be worked out by the provisions of the law.

Mr. Montgomery: I don't understand the logic of amending the Constitution, by vote of the people, and then allowing the legislature to undo what the people just provided for. Wouldn't either opting out or opting in pervert the people's wishes?

Judge Radcliff: It would be better to take the option out of Draft 2 entirely.

Mr. Nemeth: But the problem seems to be that it is unlikely that there will be sufficient voter support for mandating merit selection across the board at all levels. And that in order to implement merit selection at any level it is necessary to provide some flexibility in the Constitution for those people, mostly in the smaller counties, who favor retention of the elective method. If we mandate merit selection across the board at all three levels of courts and don't give a constitutional "way out" from a practical point of view, we have to face the fact that any proposal for merit selection would have difficulty because of the opposition that this would generate. It's a practical consideration.

Dr. Cunningham: Merit selection, if it is favored at all in this state, will be at the Supreme Court and Court of Appeals levels. The real fight will be with respect to the trial courts. An option for Common Pleas seems desirable for this reason.

Judge Radcliff: I think that there should be an option in Draft 1, but I don't think that there should be an option in Draft 2.

Mr. Montgomery: It seems to me that the most logical approach is to have the option to opt out rather than to opt in. This way, after the electorate has spoken for merit selection as a concept, then those counties which are particularly affected by the "small county syndrome" can lobby their legislators to set up something special for the trial judges. I like opting out better than opting in.

Mr. Nemeth: Opting out is expressed by Draft No. 2. In some ways the approach presented here is an attempt to deal with the same kind of problem which must have existed in Missouri. There were some areas in which there was strong support for merit selection, and then there were others in which there must have been opposition. In order to get merit selection started at all on a constitutional level, they compromised.

It was pointed out in discussion that the State Bar Association proposal resembles Draft No. 1. Mr. Whitaker noted that its provision would mandate merit selection at the appellate levels and allow extension to trial levels. It seemed to him a more evolutionary way to go about it.

Dr. Cunningham: That is the way it was developed in California. It was permitted to be opted by counties.

Mr. Whitaker: Missouri does that also.

Mr. Manning: As a practical matter, if you favor the concept of merit selection, and if you favor it for all courts, then assuming that it can be passed by the electorate, the better way is to have it apply across the board and require opponents to come to the legislature to opt out, if you really want merit selection as a uniform method across the state. Because it is going to be more difficult to opt out.

Dr. Cunningham: But you may have a higher hurdle to clear in the first place to get it passed in that form.

Mr. Manning: That is correct, and this involves a policy decision.

Mr. Montgomery: Shall we review the terms of these?

Mr. Nemeth: Before we do that, I would like to briefly summarize how both of these drafts differ from SJR 10 - the OSBA proposal during the last session, applying merit selection to the Supreme Court and Courts of Appeals. It died in the legislature. The material in capitals in Drafts 1 and 2 - i.e. the new material - owes its linneage largely to that joint resolution, SJR 10. But there are a number of important differences that should be pointed out:

a).In Section 6 (A) (1) - the OSBA proposal would have made all judicial terms 6 years in length. That has been changed in both our drafts to say that judicial terms shall be not less than six years. This is somewhat more flexible and is, as a matter of fact, more aligned with the present Constitution.

b).The second major change is in Section 6 (A) (2). The original OSBA plan called for the submission to the governor of a list of qualified persons. It did not specify what number of persons should be on the list. Both of our proposals do specify that there should be not fewer than three qualified persons.

c).The next major policy change occurs in Section 6 (A) (4). There would be a provision that less than half the members of a commission shall be members of the bar of Ohio. SJR 10 provided that not less than half of the members shall be members of the bar, so this represents a 180 degree change.

Mr. Montgomery: Does this mean that the nominating commission could be made up of judges as well as practicing attorneys?

Mr. Nemeth: There would be no prohibition against judges being appointed to a seat on a nominating commission, but there would be no constitutional provision mandating it. That would depend upon the terms of the implementing law. Furthermore, SJR 10 in Section 6 (A) (4) did not have the last sentence: "HOLDERS OF PUBLIC OFFICE MAY SERVE ON THE JUDICIAL NOMINATING COMMISSION." SJR 10 said nothing on that point. This would be the provision under which if the legislature so decided, judges and other office holders, such as legislators, might be appointed to judicial nominating commission. This kind of provision is contrary to what most other states have done, either by constitution or statute.

I should also mention that in both of these drafts we have attempted to incorporate the language of Section 6 (A) (1) as this committee developed it in Trial Court Structre Draft No. 3. That is, we have gone through and removed references to "divisions" and "subdivisions" from the Constitution. These two drafts, then, represent an amalgamation. The choice of Draft No. 1 or Draft No. 2 involves the questions of which is better for the state and which is more saleable.

Mr. Montgomery: I am concerned about the provision for public office holders. I think that it is controversial - the governor might appoint his lieutenant governor, etc. Such questions could arise. But, by the same notion, to disqualify everyone who sits on a school board or city council seems ridiculous, too. So how do you solve such a dilemna?

Mrs. Brownell: The only question I have is about the provision requiring three qualified persons. I sat in on the judicial nominating counsel's meeting, and there is a problem in some counties finding three qualified lawyers. So if this extends to common pleas it could constitute a problem.

It was pointed out in the ensuing discussion that this could be another argument for district court development. If the base of participation were broadened the problem would be lessened. It was noted that the Committee has already endorsed the district concept, so that the three qualified persons provision might not constitute the problem that it was feared.

Mrs. Eriksson: May I respond to the prior question about the holders of public office? The legislature would determine exactly what the qualifications would be of persons to serve on nominating commissions. We added this provision because although it does not mandate any judicial appointees, and a question occurred whether if the constitution were silent you could have judicial appointees, this provision would answer that question. But it would still be up to the legislature to make the final determination on that.

Mr. Nemeth: It would make such appointments possible without freezing anyone's right into the Constitution by virtue of office or position.

Mr. Montgomery: I take a position somewhat different from Dr. Cunningham in regard to commission membership, in that I feel fairly strongly that the commission should be comprised of a majority of laymen, with members of the bar and judiciary having input into it but not dominating it or having the appearance of domination. I think that it would be much more politically saleable. It's rather like civilian control of the military at the national level. I think that it would be more palatable. I think that laymen can make judgments about judicial qualities that do not all involve legal skills. Integrity, character, other factors play an important part. I am inclined to think that members of the bar should not even comprise one half.

It was noted that both draft proposals so provide.

Mr. Montgomery: That gets around the problem of the domination by the bar. How do you respond to that argument, Dr. Cunningham?

Dr. Cunningham: Well, I believe in the British system, first, last and all the time, I think that the theory is predicated on the philosophy that it is a matter that the populace have nothing amounting to an input to contribute. It is a matter of qualification, and I use the analogy of one who has a pain in the stomach. He doesn't go to a tradesman to find out what is wrong. He goes to a surgeon of eminence. He expects someone with the qualifications of a surgeon to take care of him, and he doesn't ask the tradesman or the working man next to him whether the surgeon is good or bad.

Mr. Montgomery: You are talking about technical skills, aren't you?

Dr. Cunningham: I don't think you care about his religion, race or how nice a person the doctor is -- you want to get the pain taken care of. Only his competence is relevant.

Mr. Montgomery: However, we are saying that with the retention elect on people have the capacity where there is visibility to pass on judicial conduct. It is only that there is no visibility in the selection process. But I never bought the argument that people aren't qualified to pass on judicial candidates. They are qualified, but they have never taken the time to become informed about the issues and the qualifications. That's the difficulty, as I see it. I don't think that we can assume that the electorate isn't qualified if conditions are right.

Dr. Cunningham: I think that that is a moot question too. Probably the man at the lathe would be qualified to be a surgeon if he had the education. But you haven't time to find out.

Mr. Montgomery: Julius, what 's next?

Mr. Nemeth: Do you wish at this time to go through the drafts line by line?

Mr. Montgomery: What is the pleasure of the committee? We have about 20 minutes.

It was agreed that Mr. Nemeth could go quickly through the drafts. He pointed out that they are similar except that one (Draft 2) contains more references to the common pleas courts.

Mr. Nemeth: Section (A) (1) would apply to the term lengths for all judges. There would be no other provision in this section pertaining to length of a judicial term.

(A) (2) provides that the vacancy shall be filled by the Governor from a list of three qualified persons whose names are submitted by a judicial nominating commission..

Division 3 in Draft No. 1 provides that common pleas judges be elected from the county or district in which the court is located, except as otherwise provided in Division 6 (A) (5).

The last paragraph of division (3) provides for the procedure to be followed if a judge who is in office under a merit selection plan wishes to remain in office. Not less than 60 days prior to the holding of a general election, the judge must file a declaration of candidacy to succeed himself. At the retention election, if a majority of people voting on the question vote to retain the judge, he shall continue in office. If not, the vacancy shall be filled at the expiration of the judge's term by the Governor, through the mechanism provided for with the nominating commission.

Mr. Montgomery: Is this pretty standard in states that have merit selection?

Mr. Nemeth: Yes. And this paragraph also provides that if any additional judgeships on the Supreme Court and Courts of Appeals are established by law, that they shall be filled by the nominating commission method.

Division (4) is a rather broad one, giving the General Assembly the power to determine the number of nominating commissions and their organization, method of selection, compensation and expenses, qualifications and terms of office of members. This division also contains the provision calling for less than half of the membership to be members of the bar of Ohio. It also contains the provision allowing holders of public office to serve on a commission.

Division (5) would be the "escape clause". It reads, in Draft proposal #1: "NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION, THE GENERAL ASSEMBLY MAY PROVIDE BY LAW FOR THE NOMINATION OF THE JUDGES OF ANY OR ALL COURTS OF COMMON PLEAS BY JUDICIAL NOMINATING COMMISSIONS, AND FOR THEIR APPOINTMENT BY THE GOVERNOR, PROVIDED THAT SUCH LAWS SHALL COMPLY WITH THE REQUIREMENTS ESTABLISHED IN THIS ARTICLE FOR THE NOMINATION, APPOINTMENT, AND RETENTION IN OFFICE OF JUSTICES OF THE SUPREME COURT AND JUDGES OF THE COURTS OF APPEALS." The intent of this provision is to give the General Assembly the option of including the trial courts under merit selection and mandating that if it does so the same procedures for nomination and appointment as well as retention in office be met in regard to common pleas judges as are mandated for justices of the supreme court and judges of the courts of appeals.

Division (B) is the paragraph now in the Constitution, modified only to the extent that this committee has previously agreed to its modification by the removal of "divisions" and so on. Division (C) continues the present mandatory requirement without change. (It was noted that there is a paper discussing compensation and retirement that will be discussed by the committee at a subsequent meeting.)

Division (D) is new, providing that the judges in office at the time this section would go into effect would continue to serve until the end of their term and be eligible for retention, and would not be <u>ipso facto</u> removed from office by the changeover.

Section 13, having to do with the filling of vacancies, by gubernatorial appointment, would be modified to the estent that in that level of courts where merit selection is in effect, the vacancies would have to be filled from the list submitted by the com-

mission.

Mr. Montgomery: Do any members of the Bar Association have any comments on our departure from SJR 10?

Mr. Manning and Mr. Whitaker indicated that without having examined the drafts they had no comments.

Mr. Whitaker: I have one question. Has there been incorporated in any of the language a provision permitting the first term when a judge is appointed to be a short term of 2 or 3 years after which time he would stand for a full term? Retention thereafter would be for a full term.

Mr. Nemeth: We have not so provided.

Mr. Montgomery: Is that used elsewhere?

Mr. Nemeth: Yes. in some states it is. It is a kind of trial or probation term.

Mr. Montgomery: But that isn't the norm?

Mr. Nemeth: I would say that there are as many states as provide for that as do not. If anything, the ones that provide for it are in the majority.

Mr. Montgomery: That might make it more palatable to opponents.

Mr. Manning: The only other question I would ask re SJR 10 is with respect to judicial representation on the commission: would these individuals count as members of the bar? Most judges are now members of the bar. The other question is, I suppose there are a few lawyers around the state who aren't members of the bar.

Judge Radcliff: This refers to the bar of Ohio and not the Ohio State Bar Association. We do not yet have an integrated bar.

Mr. Manning: Okay.

Mr. Nemeth: That is the same phrase that was used in SJR 10.

Dr. Cunningham: One more question-- with respect to disciplinary powers of the commission. We mentioned the commission, and we stopped. Would disciplinary powers be added, or is that still open?

Mr. Nemeth: Neither of these drafts incorporates such powers in the nominating commission.

Dr. Cunningham: I'd like to propose it, either as a separate commission or as one commission with added disciplinary and removal powers. I would prefer that to impeachment or removal for cause by other methods now in existence.

Mr. Montgomery: What is our present disciplinary situation?

Judge Radcliff: To do that you would have to change the language of Section 5 of Article IV which vests the entire control over the profession in the Supreme Court and pursuant to this constitutional provision, the Court has created a Board of Commissioners on Grievance and Discipline, which handles both judges and non-judges. It has also provided in Rule 6 of the Supreme Court rules for the Government of the Bar of Ohio the provisions for the removal, suspension, and retirement of judges. The

language is set out, with the Board of Commissioners on Grievances and Discipline serving as a grand jury which recommends to the Court that action be taken. The Court then names a commission in each case to examine whether the judge's conduct should result in his being removed, suspended or retired.

Mr. Montgomery: How has this worked?

Judge Radcliff: It works so well that we usually get a resignation.

It was noted that there was a judge in Hamilton county who did not resign, but Judge Radcliff also pointed out that he was disbarred pursuant to Rule 5 rather than the removal procedure under Rule 6 because his conduct didn't necessarily involve judicial conduct but other conduct.

Mr. Montgomery: Dr. Cunningham, would you like to submit something to the committee for consideration?

Dr. Cunningham: My questions have been answered.

Judge Radcliff: I will see that you receive a set of those rules and the code of judicial conduct, as well as the code of professional responsibility, so that you will have all documents in one place. It is then a matter of choice as to whether the Commission feels that it should continue the present practice or go to the disciplinary commission.

Dr. Cunningham: I will appreciate having that to study. I am satisfied.

Rep. Roberto: I feel that disciplinary procedures ought to remain within the courts, as presently structured.

Although Mr. Nemeth had gone through only Draft 1 on a line by line basis, he explained the difference and similarities between the two. Draft 2 has many more references to courts of common pleas because of the difference in options.

It was agreed that the Committee would meet on September 19, 1974, the same day that the Commission plans a day-time meeting. It will be a luncheon meeting at the Athletic Club. The tentative agenda includes the Court of Appeals structure, merit selection (hoping that as many members as possible will commit themselves on the concept so that a good draft can be honed). It was agreed that a merit selection decision would be of primary importance. In response to question it was announced that it would be an open meeting. If time allows court of appeals structure could be discussed and maybe tenure and compensation as well as removal. Mr. Nemeth counseled that removal discussion could take some time, however. It was also agreed that the staff would prepare an alternate paragraph providing for a short term for a first term, along the lines of Mr. Whitaker's question. It was also agreed that a memo on commission make-up and differences - as short and clear as possible - would be prepared in advance of the luncheon meeting so that the committee could better discuss commission make-up questions.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
September 19, 1974

Summary

The Judiciary Committee met at a luncheon meeting at the Athletic Club in Columbus, Ohio on Thursday, September 19, 1974 at 12 noon. Present were Chairman Montgomery, Mr. Norris, Mr. Guggenheim, Mr. Roberto, Mr. Mansfield, and Mr. Skipton from the Committee. Also present were Judge William Radcliff, Administrative Director of the Courts, and his assistant, Coit Gilbert; Allan H. Whaling of the Ohio Judicial Conference; William Milligan of the OSBA Modern Courts Committee; Elizabeth Brownell of the League of Women Voters; Legislative Service Commission representatives Clara Hudak, Don Robertson, and Richard Merkel; E.A. Whitaker, consultant to the OSBA; Judge Robert Leach, Special Counsel to the Committee; Robert Hyatt, representing the Ohio Prosecuting Attorneys Association; and Judge Paul Perkins, representing the Ohio Council for Local Judges, Judge Edward Mosser of Harrison County, and Attorney Richard Stephenson on behalf of the Tuscarawas County Bar Association; and staff representatives Nemeth, Hunter, and Evans.

Chairman Montgomery convened the meeting and asked each person present to give a self introduction, and association represented, if any.

The minutes of the last meeting were unanimously approved.

Mr. Montgomery: The agenda today is for the Committee to consider two primary questions on judicial selection, the first being: "Does the Committee wish to recommend no change from the present elective method for judges, or does it wish to recommend a change to an appointive-elective (or merit) system, or any other method?" I am glad that we have such good attendance of the Committee at this meeting because I feel that the Committee must address this issue. The tentative view of those members who have been in attendance at the last few meetings is to favor some form of merit selection. However, the full sub-committee has not had the opportunity to take a position on the subject. Julius, would you like to say anything at this point?

Mr. Nemeth: No, except that I think that we have to get past these two first questions - whether the Committee wishes to pursue merit selection, and secondly if so, to what courts does it wish to apply merit selection. The Committee must, I think, answer these questions before we can profitably get into a discussion of the Revised Draft Proposal #1, which has been mailed in advance of the meeting. Once we get past the two primary questions, and assuming that most of the Committee members favor some form of merit selection, we will take up the Revised Draft Proposal #1, in conjunction with the check list which you have before you on alternatives for merit selection systems. The check list consists of alternatives, not all of which would necessarily have to be incorporated into a constitution. It was compiled from reading the various appointive-elective systems prescribed by other state constitutions and statutes and from some collateral reading. These are matters that could be, but need not necessarily be, incorporated into the constitution. In some instances, they could be the subject of statute or even supreme court rule.

Mr. Norris: We must determine our direction here. Therefore, I move that the Judiciary Committee recommend a change in the system of selection to a merit system--to get us started.

Mr. Guggenheim seconded the motion.

Mr. Mansfield: I assume, Mr. Norris, that the first question is worded deliberately so that an affirmative vote on it does not necessarily imply to what portion of the judiciary it would be applicable.

It was agreed that this is the case. The question was then called, and all members present voted in favor of the motion, except Mr. Skipton, who abstained from the vote.

Mr. Montgomery: This takes us to the second question.

Mr. Norris: Mr. Chairman, I move that the merit selection plan be limited to the selection of judges of the Supreme Court and the Courts of Appeals.

Mr. Mansfield seconded the motion.

Mr. Roberto: Mr. Chairman, I think that the specific application of that motion would preclude the various options that have been suggested for some sort of permissive adoption of the plan at the common pleas level - by local option or otherwise. I personally have no objection to considering the merit plan for the Supreme Court and the Courts of Appeals, but I would like to see some kind of option with regard to the common pleas courts. If the people should choose through their representatives in the General Assembly through some sort of referendum process to include common pleas courts, I don't see why they should not have that opportunity in whatever recommendation we adopt. If that motion means that common pleas are not included, I would not want to support the motion.

Mr. Norris: I think the point is well taken. Let me re-phrase the motion. I would have a mandatory merit selection plan apply only to the Supreme Court and Courts of Appeals.

Mr. Mansfield again seconded the motion.

Mr. Montgomery: We are talking about mandating merit selection in the Constitution. The option question for common pleas court is still open. Is there more discussion on this amended motion?

The question was called, and the vote was in the affirmative by all members of the Committee, except Mr. Skipton, who abstained.

Mr. Montgomery: What is the pleasure of the Committee for handling the common pleas level?

Mr. Roberto: Mr. Chairman, wasn't it Draft No. 1 that provided the option for common pleas courts?

Mr. Nemeth: We're past Draft No. 1 at this point. The draft that should serve as the basis of discussion today is this Revised Draft Proposal #1. (Extra copies were distributed).

Mr. Norris: Mr. Chairman, don't we need another statement of principle - along the lines of Mr. Roberto's suggestion?

Mr. Montgomery: I would agree that we should take some position on whether there should be some sort of option, and then we can decide how it ought to be implemented.

Mr. Mansfield: If it is in order, I will move that the Committee adopt the position

that would provide in effect that the merit plan not be applicable to courts of common pleas or inferior courts unless the referendum of the people so required.

Mr. Norris: I second.

Mr. Montgomery: You may be making the option overly tight.

Mr. Mansfield: I don't mean to - that is why I said "in effect."

Mr. Roberto: Mr. Chairman, I think that that is overly tight, if the referendum is to be limited to a constitutional process.

Mr. Mansfield: That is what I intended.

Mr. Roberto: In other words, you would preclude the process of adoption of the merit system by the General Assembly.

Mr. Mansfield: Yes.

Mr. Norris then suggested that "vote of the people" might be better used in the pending motion than "referendum" and that probably Mr. Mansfield had not intended the use of that term as a word of art. It was so agreed, and Mr. Mansfield acknowledged that what he might, in fact, be referring to should more properly be designated as the initiative because it involves a vote initiated by the people.

It was agreed that the term "referendum" in the motion would be replaced by a provision that would call for a "vote of the people."

Mr. Mansfield: I don't want the vote of the people to be "yes or no" to some proposition advanced by some self-interest group. There are various ways, as we all know, to get something on the ballot. For this purpose I'll accede to your request and simply say "by vote of the people".

Mr. Montgomery: Is there a second?

Mr. Roberto: I understand the desire to make the provision as tight as possible. However, I think that the stage in which we now are is that of putting forth a statement of principle, and I don't think that we should preclude the alternatives at this point. I would like to hear the arguments with respect to the referendum process, as opposed to some other alternative method.

Mr. Montgomery then asked if the staff could outline some of the alternatives. He referred to the two drafts presented at the last meeting that contained an "opt out" and "opt in" provision concerning common pleas court.

Mr. Norris: Mr. Chairman, if I may at this point interject a comment - the issue at this point is that since the legislature reapportioned, "farm boys" are outnumbered. When you get to trial courts, these rural counties are going to have a difficult time if the metropolitan counties decide that there should be a merit selection of trial judges. These rural counties aren't going to have anything to say about it, but in these rural counties the trial courts are close to the people. The move to make those trial courts selected by a merit plan ought to come from the people and not from Cuyahoga county representatives, or Hamilton or Franklin county representatives. I think that what we are saying is that the General Assembly method of opting for merit selection is simply not fair to the rural counties.

Mr. Montgomery: So that what we are faced with is either to have the General As-

sembly do it or provide for it by vote of the people. There are no other alternatives.

Mr. Nemeth: If I may interject a comment. In Revised Draft Proposal #1, in paragraph (3) (B), near the bottom of page 1, the draft proposes to give the General Assembly the power to provide by law for the selection of judges of "any or all" courts of common pleas by merit selection. So there is an option in the draft. It would not be an "all or none" proposition. This is one way in which we could leave the basic question up to the General Assembly but not tie the hands of that body to the extent of having to put either all common pleas courts under the merit system or keeping them all out.

Mr. Norris: I think that that is an attractive theory, but if you give the General Assembly the option to mandate that all trial courts may be included, that is the option I think will be taken. Otherwise, you have the dilemma of the representatives of each county pressuring for "my county only"--and I don't think that this is a very workable alternative.

Mr. Roberto: I appreciate Mr. Norris' remarks. But it seems to me that the difficulty of selling a merit plan, whether for Supreme Court and appellate courts or otherwise, is not exactly a novel question before the legislature. I think that he overly fears the action of a legislative body in creating merit selection just as a principle. Maybe we ought to be talking about something that will sell in the legislature. If the people feel strongly about merit selection and there is a provision that the common pleas portion ought to be tightly drawn so that you don't raise the initial fears that people have about merit selection and improve its chances of moving through the legislative process, then I have no objection to that approach, if such is the rule of the Committee. But I really think that both approaches ought to be discussed at length before a decision is made, and one ought not to be precluded right now. I think that Julius' point is well taken. To say that the legislature is going to mandate the merit selection plan for all common pleas judges is, I think, overstating what will happen. If the language is permissive, then it can be accomplished on a county by county basis. I think that there are sufficient protections in the political process that the will of one section can't be imposed on the other.

Mr. Montgomery asked for further discussion. Mr. Guggenheim asked if Committee guests were going to be permitted to speak, and Chairman Montgomery said that this would be permitted at the wish of the Committee.

Mr. Mansfield: May I make a suggestion, Mr. Chairman. I don't think that it is appropriate to have further testimony - we've had that- but I do understand that the Modern Courts Committee of the Bar Association has recently made some change in its recommendation. If so, I think that this committee should be made aware of the change and the position of the Modern Courts Committee.

Mr. Montgomery: We received a letter from Robert Manning, counsel for the Bar Association, stating that he would be unable to attend today. He also explained that the material recently circulated with respect to SJR 10 - i.e. with regard to local option for common pleas courts, is only a recommendation of the Modern Courts Committee and it is necessary that it be brought before the House of Delegates in November for action before it can be considered the official position of the Ohio State Bar Association.

Mr. Roberto asked for an explanation of the change. Mr. Nemeth said that there had been a change permitting the General Assembly to decide whether or not

there should be merit selection in any trial court to requiring that this be decided on a local option basis.

Mr. Guggenheim: Then that is the precise issue we are discussing here.

Mr. Mansfield: What I was trying to do was to make my motion reflect what I understood to be the position currently taken, subject, of course to the vote of the delegates, but that of the Modern Courts Committee.

Mr. Montgomery: I think that we should take note of the fact that this modified version of SJR 10 refers to county option, right? (This was confirmed.) The Committee already has taken a position on district courts.

Mr. Nemeth: And the present constitution, as a matter of fact, permits trial courts to be organized on a district basis.

Mr. Mansfield: I understand that it does. On the other hand, I also understand that there is nothing to preclude the Constitutional Revision Commission from recommending that that section be changed.

Mr. Montgomery: All that I am pointing out is that we may, down the road, be considering whether the vote of the people be on a county-wide basis or on a district-wide basis.

Mr. Mansfield: My own preference is that it be county-wide, but I can't get there from here, at this particular time, so I have to take this one route first.

Mr. Guggenheim: Would there be problems in having a popular vote by district?

It was agreed in the ensuing discussion that creation of courts on a district basis could create problems but neither they nor questions about voting on a regional basis are insurmountable.

Mr. Nemeth: But I do not believe that the vote could be on a district basis, assuming that the present language of the Modern Courts Committee recommendation is adopted as it presently stands.

It was agreed that the Committee was not bound by the Modern Courts Committee language. Mr. Nemeth agreed, and said that it was only his purpose to point out the inconsistence in the language of that recommendation and the language in the existing constitution.

Mr. Mansfield: However, Julius, I believe that the Modern Courts Committee is fully cognizant of this, and if and when the present language is approved by the delegates, this would infer further amendment of the provisions about districts.

It was agreed that this was an alternative, as is the possibility that the Modern Courts Committee language may be changed to conform with the present constitutional provisions on districts.

Mr. Montgomery: Is there more discussion on the question, which is to not make it mandatory in the Constitution for common pleas courts to have merit selection but to authorize it by vote of the people?

Mr. Roberto: Because I am not familiar with the initiative or referendum process,

I'm still not completely clear about this. Technically, how would that process work with regard to initiating a change at the local level? The power to initiate or refer laws refers to some political entity, as I understand it.

Mr. Mansfield: No, the people have the right to have a matter put on the ballot if they gather enough signatures for the purpose.

Mr. Roberto: Is that possible under the existing law and existing Constitution?

Mr. Mansfield: Yes.

Mr. Roberto: Okay, the other question I have is with regard to the change in the position taken by the Modern Courts Committee. Would it be appropriate to hear some of the reasons that persuaded them to change from their General Assembly approach to the initiation approach?

Chairman Montgomery called upon a representative of the Modern Courts Committee to respond to this inquiry.

Judge Milligan: One of the reasons for our Committee's change was the presentation by Judge Perkins. He pointed out problems involved in allowing the legislature to make the changes in selection method at the county level. He pointed out that it is the desire of the smaller counties to retain the elective system for common pleas judges, at least in the absence of a vote of the people of that county. The judge was quite persuasive and had a great deal of influence on the committee. Also, I would suppose that there are some on the committee who really are worried about what the legislature might do. This is not a worry that has bothered me very much. It is only a committee recommendation, and while I assume that the Council of Delegates will approve it, the members of the council will have to make up their own minds on the subject.

Mr. Mansfield: Mr. Chairman, in light of the last question and the response, would it be out of order to suggest that the Chairman permit Judge Perkins to say a word or two.

Mr. Montgomery agreed.

Judge Perkins: I would be glad to. I thank your staff for sending me your minutes because we have gotten all your minutes now, and we like to keep in touch. I appeared before the Modern Courts Committee on behalf of the Ohio Council for Local Judges. We are a group of trial judges, mainly in the one and two-judge counties. There are 56 one-judge counties in the state and 23 two-judge counties in this state. And the balance are the multi-judge or large counties. We have felt for some time (and organized our group in March) that the same reasons for opting for merit selection for Supreme and appellate courts simply do not exist as far as the trial judges are concerned. I am not going to go over all of the reasons that I gave to the Modern Courts Committee. We have a group that is organized in 39 counties for two purposes: (1) to retain the residency of trial court judges within the county - which districting destroys and (2) to retain the election of the trial court judges by the people. We did not approve of the method of opting by the legislative method. There are several reasons for this. Mr. Norris has pointed out perhaps the most cogent one. In Carroll county, we have ½ of a legislator, and we know very well that in any districting proposition, it will be the legislators from the large cities who will control our courts. The second reason is that the name voting syndrome that we recognize to be quite a bad thing on the statewide level simply does not exist on the local level.

Nobody on the local level ever gets elected or defeated because of name.

We are a council for local judges, so we made clear to the Bar that we take no position with respect to merit selection at the Supreme and appellate levels, We hoped that the Bar would listen to our views about letting the people decide whether we should be elected or appointed. One of the important reasons -- and I don't think that anyone thought of it before -- if you would opt to appoint local judges in most small counties, no lawyer on the commission to nominate that judge (remember, this would be a political act of nomination and not an advisory act of advising) -- no lawyer could escape a conflict of interest. Because he would be voting to nominate somebody before whom he was going to have to appear for the rest of his life in the trial court -- every day of the year. This poses a highly sensitive situation. Now when the bar recommends, that is o.k. because there is a secret vote and no one knows quite who recommended for and who recommended against. But no lawyer could escape the knowledge that he voted for or against somebody on that local level. You will not have the problem with the nominating commission so far as the Supreme and appellate courts are concerned.

Now, we approved of what the Modern Courts Committee did. In other words, to let the people of our county, or subdivision, as the case may be, decide. Why? If you are going to have a constitutional revision in which you put everything in one ball of wax, the people will not have a voice. If they now elect their judges, they should have the right to decide whether they are going to appoint the judges. I can concede that some counties may opt to do so, others may not. Our Council will disapprove a proposal whereby it is left to the legislature.

Mr. Montgomery: You are saying that you would favor an "opt in" proposal.

Judge Perkins: By the vote of the people, yes.

Mr. Montgomery: The Committee has received testimony on the political question, and it appears that some of the larger, metropolitan counties are not in the same position as the smaller counties so far as identification is concerned. There are some real problems in large counties, even with judges.

Judge Perkins: That is true, but we think that with the present makeup of the legislature and the fact that we are only represented by one-fourth or one-fifth of a legislator we are not willing to let the legislature decide the matter. I hope that you will let us talk about districting later on, because that is very important to us, too.

Mr. Montgomery: Mr. Roberto?

Mr. Roberto: I have a hunch there is no small proportion of opinion in the direction of Judge Perkins' expression of opinion here, and I will support the amendment on the floor for the purpose of getting a package before us.

Mr. Montgomery then asked for a vote on the motion and all who voted voted in favor of the motion.

Mr. Nemeth asked for a restatement of the question.

Mr. Montgomery: The question was that the Committee go on record as favoring an "opt in" arrangement for common pleas judges by vote of the people. We did not wrestle with the question of whether it be a county-wide or district-wide vote.

The Chairman then proposed going through the check list on alternatives dated September 19, 1974 and distributed in advance to committee members. Mr. Nemeth suggested going through the Revised Draft Proposal No. 1 with the check list beside

it, to get expressions of opinion from the Committee on the draft. Mr. Nemeth then said that he would not discuss the derivation of the draft because the Committee was familiar with it and it was pretty well covered in the minutes of past meetings. He suggested focusing on some particular provisions in Revised Draft Proposal No. 1.

Mr. Nemeth: Section 6 (A) (1) would provide that the terms of all judges and justices would be for periods of not less than six years, except as provided in division (A) (4) (a) of this section, which refers to the initial appointment of a judge under merit selection. Section 6 (A) (2) would provide that when there is any vacancy in the office of the Chief Justice or of any justice of the Supreme Court or the Court of Appeals that the Governor shall fill the same by appointment from a list of not fewer than three qualified persons whose names shall be submitted by a judicial nominating commission.

Subdivision (B) would provide that any additional judgeships on the Supreme Court or the Court of Appeals created by the legislature would be filled in the same manner - i.e. on the merit selection basis.

Section 6 (A) (3) (a) would provide that except as otherwise provided in the next paragraph down, judges of the courts of common pleas shall be elected by the electors of the county or district. The "county or district" language which the, Committee previously agreed upon and is taken from the Trial Court Draft No. 3. And a judge would have to reside during his term of office in the county or district from which he was elected.

Subdivision (3) (B) is the controversial paragraph. It would give the General Assembly the power to put any or all judges of courts of common pleas under merit selection. This will have to be modified in accordance with the Committee's present wishes.

Section 6 (B) (4) (a) would provide for an initial period -- a provisional term of two years for any judge who was appointed for a vacancy from a list submitted by a nominating commission, in other words, anyone who was initially appointed under a merit selection plan.

Mr. Montgomery pointed out that this subparagraph is new and was based on a thought expressed at the last meeting. Mr. Nemeth agreed, and suggested the reading of the subparagraph (on p. 2) word by word. The idea was, he said, to make the initial term to be served shorter than a full term, and he read the paragraph in full. In response to a request from the chair for comments, Mr. Norris questioned the use of the word "provisional" as a description of "term", and said that he felt that the word "initial" would be more descriptive.

Mr. Norris: "Provisional" might lead some governor to believe that he could withdraw the appointment.

Mr. Norris then moved to substitute "initial". The motion was seconded by Mr. Mansfield and received the affirmative vote of all who voted.

Mr. Mansfield: I'm not sure that I understand the procedure we're engaged in, in that I'm not sure that this draft represents Committee thinking so far. That is to say, apparently this draft contains some matters that the Committee has agreed to and some items which it has not discussed.

Mr. Nemeth explained that it is an evolution of the two previous drafts.

Mr. Mansfield: As far as our discussion is concerned, I have no objection to proceeding in this manner, except that I'm wondering, coming back to division 3 (A), for example, where we say "county or district", I question whether this is a matter

that has been decided.

Mr. Montgomery: Yes, the Committee has acted upon this provision and the Committee would have to undo its previous action to make changes there.

Mr. Mansfield: My question is one of procedure. Presumably no one member of the Committee who did not vote in favor of that could raise the question. It would take some member of the committee who did vote for that to ask for a reconsideration. Am I correct?

Mr. Montgomery: I don't think it makes any difference who voted for it. If a Committee member wants it to be reconsidered, I think that he should make such a motion and the Committee as a whole decide whether it wishes to reconsider.

Mr. Mansfield: If it is in order, I would like to move that the Committee reconsider the language in 3(A) with respect to including "or districts."

Mr. Roberto: I will second that for the purpose of the courtesy of letting Mr. Mansfield express his position in the issue. I'm not sure that I either agree or understand it yet.

Mr. Montgomery: I don't think that it would be an appropriate topic for our discussion today. I think that it would have to be put on the agenda for another meeting. It's been moved and seconded that the Committee reconsider its decision to provide for the districting of courts at the common pleas level. Any discussion?

Mr. Norris: I would part company with Mr. Mansfield on this point. I think that districting is necessary. For us to make a recommendation to reverse what the people have just done by statewide vote, it seems to me, would be ill-advised. I do think that we need to preserve local option in this area of selection of judges. But I practice in rural counties, also, and I find that this idea of each county having its own judge is illusory. Those judges are very frequently absent. Practicioners will tell you that they don't have a judge many days of the year, and the reason is that judges are so underpaid that they have to sit by assignment in the urban counties.

(A protest was registered at this point that this is no longer true.)

I just finished some litigation in a rural county next to mine, and we were three weeks finding a judge. The probate judge was trying cases in one county, the common pleas judge in another county. I don't blame them. They don't have any work. They should be sitting by assignment. I just think that this concept of having to have your judge there is illusory. It can't be supported by caseload; and the lawyers don't have their judge there much of the time in many instances now. When we finally get to the place where we can district logically, so that we have uniform salaries paid by the state for all judges, with consistent caseloads, and we combine the municipal and county courts with common pleas -- at this point we will have a lot better use of judicial manpower.

I think that the proposal to eliminate the provision goes backward. Let me give you an example. In some of the rural counties, you have a minimum of three judges. Suppose you have an emergency motion. The common pleas judge isn't there -- he's on assignment. The probate judge doesn't get along with him or else he is somewhere else. Across the street or in the basement, as the case may be, is a municipal or county court judge. He's hearing the traffic cases, and he can't do anything for you. So you have to get a judge in by assignment or run down a judge, for a hearing on a motion that demands an immediate hearing.

We utilize judicial manpower so poorly in this state. This is the position that the General Assembly took. It is scandalous. We have enough judges in this state. The problem is that we don't utilize their time. And the only way that we are going to be able to do that, in my opinion, is by districting. I know that this is upsetting to my rural brethren, but I think that I understand problems there too. We must allow the General Assembly, on a case by case basis, to provide for districting and better utilization of judicial manpower.

Mr. Guggenheim: I rarely disagree with Mr. Mansfield, for whose opinions I have a high regard. But I would like to say this -- I hate to re-open something on which we have already voted. First of all, this matter will come up before the full Commission, and there will be another full discussion of it. Secondly, I don't believe that this section makes it mandatory to district. It merely authorizes districting, is that not so? (It was agreed) My main point is that this should come up before the full Commission instead of our going backward at this point to reconsider.

Mr. Mansfield: I don't think that Mr. Norris and I are in complete disagreement. What I am driving at is not to avoid districting for purposes of administration or for trying cases. I'm suggesting that any common pleas court have jurisdiction district-wide. What I am trying to suggest, however is that each county have a common pleas judge, and I don't think that this represents a conflict. That common pleas judge may have jurisdiction throughout the district.

Mr. Norris: I follow what you are saying. The question is whether to open up the issue.

Mr. Mansfield: I'm not suggesting the abolition of districts per se.

Mr. Montgomery: You're not advocating anything but reconsideration. Does any member of the subcommittee wish to be heard on this motion? That the Committee reconsider the vote on districting.

Mr. Mansfield asked if a member of the Committee could still ask a visitor to speak. Mr. Montgomery replied that he could. Mr. Mansfield then asked the chairman to recognize Judge Perkins for this purpose. The Chairman asked Judge Perkins to confine his presentation to five minutes in view of the lateness of the hour.

Judge Perkins: I'm not going to speak on the merits or demerits of districting. I am going to speak forcefully for permitting a discussion. Most of you know about the midnight maneuver that was conducted in the legislature at 11 p.m. of the last night of the session when the districting was for the first time put in, without any committee hearings, without any public input, without any discussion whatsoever. We have been against this concept since it came up. This is the first forum where we are asking for a discussion. We have prepared a caseload per judge study for every common pleas court in the state of Ohio. I'll tell you just one fact about it. You would think that most of the caseload per judge problems were in the big counties. Of the ten highest caseloads per judge, five were one-judge counties, three were two-judge counties, and only two were the metropolitan counties. There has been no justification in fact for districting. We have facts that we would like to present. All we are asking is permission to present our side of the case. This would require you to vote in this Committee for reconsideration.

Mr. Montgomery: Thank you, Judge. I don't think that it is fair to say that the Committee did not entertain or solicit all viewpoints on the subject. We made an exhaustive search.

The motion to reconsider was defeated. Mr. Mansfield asked if a member could file a dissenting opinion and was assured that he could do so.

Mr. Montgomery announced that there would be two meetings in October, and that one would probably coincide with the October Commission meeting. The meeting adjourned at 1:55 p.m.

Ohio Constitutional Revision Commission
Judiciary Committee
October 9, 1974

Summary

The Judiciary Committee met at 1:30 p.m., Wednesday, October 9, 1974, in Room 10 of the House of Representatives. Present were Chairman Montgomery, Dr. Cunningham, Senator Gillmor, Mr. Guggenheim and Mr. Norris. Also present were Judge Robert Leach, Committee Special Consultant, Robert Manning and E. A. Whitaker representing the Ohio State Bar Association, Judge William Radcliff, Administrative Director of the Courts, Elizabeth Brownell representing the League of Women Voters, and from the staff Director Eriksson, Mr. Nemeth, Mrs. Hunter and Mr. Evans.

The minutes of the last meeting were approved. Mr. Montgomery asked Senator Gillmor if, not having been present at the last meeting, he had any questions about action taken. He explained that the committee had endorsed merit selection at the supreme and appellate levels, with an optional provision to apply at the common pleas level. Senator Gillmor indicated that he had read the minutes and understood the action taken.

Mr. Montgomery - We will turn to section 6(A) (3) (b). A question raised at the last meeting by a guest and by Mr. Mansfield is whether we want to take another look at districting. The committee voted that we would not as a committee review our districting decision, but that anyone who wished to be heard on the subject could be heard at the regular Commission meeting. As things now stand, the committee's decision to endorse districting is still operative.

Mr. Montgomery then asked Mr. Nemeth to explain the Substitute for Section 6 (A) (3) (b) of Revised Draft Proposal #1 (Sept. 19, 1974), the substitute bearing the date of October 9, 1974.

Mr. Nemeth - One of the decisions made by the committee at the last meeting was to provide for an "opting in" procedure relative to merit selection for common pleas courts that involved a vote of the people living within the jurisdiction of each court. The previous draft proposal provided for "opting in", but it would have been accomplished by law, passed by the General Assembly. There was a change in policy here that required a rewriting of that portion of the draft referring to opting in for purposes of merit selection at the common pleas level.

Mr. Montgomery - We dodge the county versus district problem by using the terminology "territorial jurisdiction."

Mr. Nemeth - Yes, that was done deliberately because of the committee's decision not to reverse its districting position. It will be permissible in the future to create common pleas courts on the district basis as the Constitution now provides, if the General Assembly decides to do so. And in order to accommodate both that provision and to permit voting by the electors who live within the jurisdiction of a particular common pleas court, we have selected general language for this substitute.

Mr. Nemeth then read the proposed new language as follows: "JUDGES OF ANY COURT OF COMMON PLEAS MAY BE NOMINATED, APPOINTED, AND RETAINED IN OFFICE IN THE SAME MANNER

AS JUSTICES OF THE SUPREME COURT AND JUDGES OF THE COURTS OF APPEALS, UPON THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS WITHIN THE TERRITORIAL JURISDICTION OF A COURT VOTING ON THE QUESTION. THE GENERAL ASSEMBLY SHALL PROVIDE THE METHOD OF SUBMISSION OF THE QUESTION."

Mr. Guggenheim then asked if it would be appropriate to make a suggestion for rephrasing the language for clarity. His suggestion affected the following portion of the substitute (his additions underlined and deletions stricken through): ". . . UPON THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION WITHIN THE TERRITORIAL JURISDICTION OF A SUCH COURT ~~VOTING ON THE QUESTION~~ . . ." It was agreed that his suggestion was nonsubstantive. A motion to revise was made and seconded and the amendment was adopted by vote of the committee. Mr. Montgomery asked for additional comments on the substitute. He said that he felt that the committee should take action on it. Mr. Nemeth commented that adoption of the language will require some rewriting of Revised Draft Proposal #1 for compatibility but the re-writing will not involve any more changes in substance.

Mr. Montgomery - Are there any more comments on the overall desirability of the paragraph?

Senator Gillmor - I think that the wording is good for what you are setting out to accomplish, but I will note "no" because I do not favor the concept.

Mr. Montgomery - However, at the last meeting we passed on the concept and simply asked the staff to come up with appropriate language. As I see it, then, we will be voting on the form and not the substance.

Senator Gillmor said that he would have voted "no" on any merit selection had he been present at the last meeting and wished to record his sentiments on this matter. Mr. Montgomery asked if there were Commission rules governing sub-committee action, and Mrs. Eriksson responded that there are no rules. The practice has been to adopt by majority action of members present at a meeting. Senator Gillmor could be recorded as a "no" vote. Mr. Montgomery asked that the minutes of this meeting reflect Senator Gillmor's "no" vote.

He then asked for a motion to approve the language as submitted to the staff in response to committee directive at the last meeting. Mr. Guggenheim moved adoption of the language as amended and Dr. Cunningham seconded the motion. The substitute as revised was adopted.

Mr. Montgomery asked if there were additional matters to be discussed having to do with merit selection.

Mr. Nemeth - There are some matters that the committee should be aware of even though they may make no difference in the ultimate outcome of how this section is handled. Section 6(A) (3) (b) was drafted in very general terms, and the General Assembly would have a number of alternatives under its provisions. One possibility is that the General Assembly would provide for an initiative procedure by which the question of merit selection would get on the ballot. Another is that the General Assembly could provide for a referendum procedure. Also, the language that you have adopted leaves open the question of whether or not the General Assembly

shall mandate that there be a vote statewide on the question, or whether it is submitted only within the territorial jurisdiction of a particular court. There are a number of options for the General Assembly under this rather broad language.

Judge Leach - Do you mean a vote statewide as to whether a vote will be permitted anywhere in the state? I don't understand.

Mr. Nemeth - No, a vote statewide by the electors within the territorial jurisdiction of each court to whether or not merit selection should be adopted within that particular jurisdiction.

It was explained further that what would be involved would be a vote in all common pleas court districts at the same time. This is at least a possibility.

Judge Leach - In other words, say to each common pleas court area "Do you want to adopt merit selection?" If the voters of the area say "yes," they are in; if they say "no," they are not. This would not involve initiative petition.

Mrs. Eriksson - That is right.

Senator Gillmor - I would be opposed to that alternative. I could favor a procedure that would make it relatively easy to get the question on the ballot in any area if that is desired, but I am not in favor of forcing the vote.

Mr. Montgomery - However, Mr. Nemeth is just pointing out questions that the legislature will have to think through in implementing the provision as we have adopted it. We think that these alternatives should be mentioned for the record. Senator, would you care to give us views on the whole matter?

Senator Gillmor - Well, I do not approve of the direction that we are going in--approving a modified Missouri plan. I think that with all the evils of the elective system I prefer it. Once the decision has been made to proceed in the direction you have chosen, however, I think that the committee is doing a good job going from there. I would like to be helpful in devising the form for these recommendations even though I do not agree with them.

The committee then turned its attention to Court of Appeals Draft No. 2, dated August 29, 1974.

Mr. Nemeth - This Draft No. 2 is the result of instructions issued at the June meeting of the committee. There are three major changes from the first draft.

First, the principal seat provision has been made permissive instead of mandatory. This is in Division 3 (A) on page 1 of Draft #2. Second, the reference to an administrator within each appellate district has been removed. There has also been a substitution of two alternatives on the employment of personnel. The first refers to employees of the courts of appeals only; the second applies to all personnel of the judicial department. The first such alternative is found in Division (E) on page 2. The second is found in Division 5 (B) on page 4. The third substantive change is to preserve the proposal for allowing the lateral transfer of cases but dropping vertical transfer and the requirement that the parties consent to the transfer.

This is found in 3 (D) on page 2.

Mr. Montgomery - What is the status of our resolutions for recommendations to the Commission on the Court of Appeals? Have we simply received testimony and debated it, or have we passed a resolution?

Mr. Nemeth - I believe that the committee has adopted certain specific provisions. I'll have to check the minutes to make sure. I believe that the concepts that were put forward in Draft No. 1 (dated June 4, 1974) were approved by the committee and the staff was directed to make the changes that I have just outlined and that are here in Draft No. 2.

(Mr. Montgomery asked that the minutes be checked on this point. The minutes of June 17, 1974 do disclose that the committee approved certain portions of Draft No. 1 and asked for redrafting of other portions.)

Mr. Montgomery then asked Mr. Nemeth to go over the provisions of Draft #2 on a line-by-line basis.

Mr. Nemeth - Section 3 (A) reads: "The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of A MINIMUM OF three judges. (The addition of "A MINIMUM OF" eliminates the necessity of the second sentence in the section.) UNLESS THE PARTIES AGREE, PRIOR TO HEARING, TO HAVE A CASE HEARD BY TWO JUDGES, three judges shall participate in the hearing and disposition of each case.

Judge Leach - May we discuss this line by line? (It was agreed to do so.) My question at this point is, suppose that on the day of the hearing one judge is ill and the parties show up and all agree that the case can be heard. Why should they have to agree "prior to hearing"?

Mr. Nemeth - Well, that would still be prior to hearing-prior to oral argument.

Judge Leach - Well, suppose after oral argument, one judge drops dead--why shouldn't the parties be able to agree that the two judges go ahead with decision?

Mr. Guggenheim - You are suggesting that "prior to hearing" should be deleted?

Judge Leach - That is the issue I raise.

Mr. Guggenheim - I don't see that it would hurt.

There was discussion of the point. A parallel situation occurs when a juror dies in the middle of trial. The point that was urged is that if the parties agree, the case should be able to go on to disposition. Mr. Guggenheim moved to delete the phrase ", PRIOR TO HEARING," Senator Gillmor seconded the motion, and it was adopted.

Mr. Nemeth - "THE JUDGES OF EACH COURT OF APPEALS SHALL SELECT ONE OF THEIR NUMBER, BY MAJORITY VOTE, TO ACT AS PRESIDING JUDGE, TO SERVE AT THEIR PLEASURE. IF THE JUDGES ARE UNABLE BECAUSE OF EQUAL DIVISION OF THE VOTE TO MAKE SUCH SELECTION, THE JUDGE HAVING THE LONGEST TOTAL SERVICE ON THE COURT SHALL SERVE AS PRESIDING JUDGE UNTIL SELECTION IS MADE BY VOTE. THE PRESIDING JUDGE SHALL HAVE SUCH DUTIES AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY RULE OF THE SUPREME COURT."

This procedure for the selection of a presiding judge and the description of his powers and duties parallels that which is now provided for common pleas court judges and that, as far as I understand it, was the only intent of the committee in approving this language the first time around.

"THE COURT OF APPEALS MAY SELECT ONE OF THE COUNTIES IN ITS DISTRICT AS ITS PRINCIPAL SEAT." This is a change from Draft #1 where the selection of a principal seat would have been mandatory. The committee voted that it did not wish to make it mandatory.

The last sentence of 3 (A) would read: "Each county shall provide a proper and convenient place for the court of appeals to hold court, AS PROVIDED BY LAW."

The next to last sentence is the same as in the present Constitution: "The court shall hold sessions in each county of the district as the necessity arises."

Mr. Montgomery - If we have districts for our common pleas courts, and all the records are in district offices, aren't we going to run into trouble here on record keeping? Or will there always be a court site in every county? Judge Radcliff?

Judge Radcliff - There will be until such time as the old courthouses disappear by lack of use because of the consolidation of districts. But for the next twenty years there will be a courthouse in every county.

Mr. Montgomery - Let's suppose that there are no records in a particular county . . .

Judge Radcliff - By that time, when you have district courts, you will have a clerk of a district who shall also be the clerk of the court of appeals in which that distrist is located--an appointive clerk.

Mr. Montgomery - And he would have to go along with that court -- take the documents to that county?

Mr. Guggenheim - The sentence says "as the necessity arises." The situation might become so onerous that the situation wouldn't arise.

Mr. Montgomery - I simply wanted to raise the question.

Mr. Nemeth then returned to the last sentence of Division (A), which he had read aloud. The change involves reference to the county commissioners and their duty to provide a place for court. The change is to the effect that a place for court would be established "as provided by law." The change in this sentence is merely one of clarification, said Mr. Nemeth, because providing space for a court is a county responsibility, not that of any individual body. It is possible that at some time in the future county governments will change in structure to charter form or in other ways, he explained.

Mr. Nemeth - There is no change from the present Constitution to this Draft in Divisions (B) and (C). These divisions refer to jurisdiction and the number of judges needed to decide a case. (It was pointed out that (B) (3), third sentence, contains a reference to "three judges" in a provision for concurrence and that the three is stricken to comport with the change in (3) (A) about the number of judges required to decide a case.)

Paragraph (D) would read: "CASES MAY BE TRANSFERRED FROM ONE COURT OF APPEALS TO ANOTHER AS PROVIDED BY RULES PROMULGATED BY THE SUPREME COURT." There could be an optional clause attached to this. It would read: "PURSUANT TO ITS POWER OF GENERAL SUPERINTENDENCE CONFERRED BY DIVISION (A) (1) OF SECTION 5 OF THIS CONSTITUTION." This is a policy decision that the committee will have to make. Whether or not this clause is inserted may make a difference in the way the section is interpreted. There are rules that the Court has to submit to the General Assembly. These don't include the rules of superintendence. If it is desired to make the rules concerning the transfer of cases part of the supreintendence rules it might be advisable to say so. The rules of superintendence are not subject to review by the General Assembly.

It was agreed that if the optional clause is not included there may be a question about whether or not this power falls under the superintendence power or whether it falls in the rule-making power that is subject to review.

Senator Gillmor - What is the situation now?

Judge Radcliff - You can't transfer cases laterally. You can transfer judges but not cases. This is an additional tool that the committee felt might be advantageous in getting backlog reduced in busy courts by transferring cases to courts that aren't so busy.

Judge Radcliff was asked his opinion about the clause. He stated that he felt it is purely a matter for the General Assembly to decide. "If they feel that this is procedural and should be subject to their review," he said, that is fine. If they feel its superintendence, then it is not subject to submission to the General Assembly. The Court does not want to get into the position of appearing to gather more powers to itself. I would leave it to the legislature."

It was pointed out that the authority for the movement of judges is in the Constitution itself. That is not the subject of rule--the Chief Justice has the constitutional power.

Senator Gillmor - Might it not be better tactically not to get into an area that may potentially be a conflict?

There was discussion about the tactics of putting in the optional clause versus omitting it. One position expressed was that its inclusion might appear to be pushing through an unpopular idea. Another idea suggested was that it be included so that it could be deleted by the legislature. In any case the optional clause could be explained in supporting memoranda, giving the General Assembly the greatest leeway. Some consideration was given to presenting the paragraph in two optional forms to the legislature. Senator Gillmor thought that it might not meet the favor of some members of the legislature if it were submitted in a form that would not make the rules subject to review by the General Assembly. It was decided that the optional clause would not be included in the section as submitted in the recommendation but that it would be suggested and explained in the committee commentary.

Mr. Nemeth was asked to read Section 3 (E), as follows: "THE SUPREME COURT MAY PROMULGATE RULES GOVERNING THE EMPLOYMENT AND DUTIES OF PERSONNEL EMPLOYED BY THE COURTS OF APPEALS"--with again, an optional clause--"PURSUANT TO ITS POWER OF GENERAL SUPERINTENDENCE CONFERRED BY DIVISION (A) (1) OF SECTION 5 OF THIS CONSTITUTION."

Mr. Nemeth - This provision would best be discussed in conjunction with the second personnel alternative, which appears on page 4 of this draft in the next to last paragraph. This second personnel alternative reads: "THE SUPREME COURT MAY PROMULGATE RULES GOVERNING THE EMPLOYMENT AND DUTIES OF PERSONNEL IN THE JUDICIAL DEPARTMENT." Agsin, there is an optional clause: "AS LONG AS THE OFFICE OF CLERK OF COURTS IS AN ELECTIVE OFFICE, SUCH RULES SHALL NOT EXTEND TO THE CLERK OF COURTS OR TO PERSONNEL EMPLOYED IN THE OFFICE OF THE CLERK OF COURTS, WHICH SHALL BE GOVERNED AS PROVIDED BY LAW." The two alternatives are self-explanatory. The first one refers only to personnel employed by courts of appeals. The second alternative refers to employment of all personnel within the judicial department, except judges.

Mr. Montgomery - We have two questions: Do you favor a broad approach or narrow approach to personnel? And, again, should these be by rules under the superintendence power or should the rules be approved by the legislature?

Again, the matter of tactics came under discussion. Would the inclusion of a reference to superintendence make enemies in the legislature? Senator Gillmor said that his view was pretty much the same as on paragraph (D) of Section 3--that the inclusion of the optional clause might make the provision less palatable. It was agreed by consensus that the optional clause in 3 (E) would not be included.

Mr. Montgomery - The other issue is, do we want a general provision for the entire judicial department rather than for the court of appeals only? If so, we take the suggestion on page 4, in place of the language on page 2. It seems logical that if we are going to have such a provision it should apply to the entire judicial department, as clearly and succinctly as possible.

Mr. Guggenheim - If we adopt the provision for the court of appeals only, what happens to the rest of the courts and personnel?

It was agreed that they would each be handled separately in that event. It was suggested that to have rules applying to all personnel within the judicial department is more compatible with an integrated court system, a concept that the committee has endorsed. The import of the option was discussed--whether without the reference to superintendence it is clear that the legislature reviews rules governing personnel. Judge Leach suggested that to make the language specific on this point there could be a reference to the provision calling for legislative review of rules. A question was raised about the optional sentence relative to the clerk of courts on page 4. Mr. Nemeth explained that its inclusion is based on recognition of the fact that the clerks of courts are independent elective officers. As long as they are elected, he explained, there would probably be a built-in resistance to accepting any rules from the Supreme Court as to the type of personnel, and so on.

Judge Radcliff - The clerk exercises two important functions, as you all know--a title department and licensing.

Mr. Norris - Wouldn't this language better fit on page 3, just preceding the sentence that reads: "Proposed rules shall be filed . . . with the clerk of each house of the general assembly . . . not later than the fifteenth day of January?" Placement there would eliminate any question about whether the rules are subject to legislative review.

It was agreed that this would eliminate the question.

Mr. Norris - I have another question about the first paragraph on page 4. As I recall we ended up saying that the Court should be in position to advise the legislature on redistricting. The Court would recommend; the legislature would have to take action by statute. Is that correct?

Mr, Nemeth - That is my understanding.

Mr, Montgomery - Can we agree then that there should be one paragraph on judicial personnel? And shall it be moved to 5 (B) so that it is clearly not within rules of superintendence? It would then precede the sentence that begins "Proposed rules . . "

Mr. Norris moved for the repositioning. Dr. Cunningham seconded, and the motion was adopted. It was agreed that paragraph 3 (E) in page 2 would be deleted completely. The committee then turned its attention to the optional sentence concerning the clerk of courts on page 4. Mr. Guggenheim asked why it could not be removed? Wouldn't that question be taken care of in the rules promulgated by the Court and approved by the legislature, he asked.

Again, there was a discussion of tactics. It was felt that its inclusion would help to get the whole section passed. The idea was expressed that without such protection the whole package runs the chance of opposition from the clerks. Similar questions were met in the writing of the Modern Courts Amendment when it came to the probate court, which was being deleted as an independent court. For example, the probate judge was allowed to remain as his own ex officio clerk to lessen opposition.

Mr, Montgomery - This is offered as an optional clause, so we should have a resolution to include it.

Senator Gillmor moved to include the sentence. Mr. Norris seconded the motion, and it was adopted.

Mr. Manning asked if the optional sentence about the clerk would also re repositioned on page 3 in 5 (B). It was agreed that it would also be moved.

A question was asked about why the last two and a half lines are deleted on page 4.

Mr, Nemeth - The sentence refers to courts established by law, and there will be no such courts. The sentence is limited to such courts and therefore it is unnecessary. It was agreed that the Court has power without this provision to adopt rules for hearing disqualification matters involving judges of courts established in the Constitution, so that it can be deleted and not simply amended.

Mr. Montgomery reviewed the changes that had been agreed to: provision for two judge hearing by agreement of the parties at any stage of the proceeding; deletion of county commissioners in provision for establishing a place for court; provision for transfer of cases laterally without approval of the parties by rule that would have to be approved by the legislature; and finally, the article on personnel.

Mr. Norris, who had not been present during the two-judge panal discussion, asked about the intent of that provision. It was explained that to allow such a disposition could amount to a big time saver.

Mr, Montgomery - We have also made the establishment of a central headquarters optional. We are ready for a motion to accept or reject this amendment package relative to the court of appeals.

Mr. Guggenheim so moved, and Mr. Norris seconded. The Draft as amended was adopted.

Senator Gillmor reminded the committee that the Commission was originally charged with shortening and modernizing the Constitution and he wondered if the amendments adopted didn't have the effect of lengthening instead of shortening the Constitution. He pointed to the first paragraph on page 4 as an example. Is it necessary that this be in the Ohio Constitution, he asked, if the Constitution is to be a fundamental document? He said that this kind of question bothered him about other Commission recommendations as well.

There were various responses. It was pointed out that the Commission was attempting to remove material that could be categorized as surplusage. Mr. Norris said that he did not see how a new department of government could be established (as it was, he said, a judicial department) without adding some words. He continued: "There are other portions of the Constitution where we can do some editing and take out unnecessary language. But what we are doing here, it seems to me, is adopting a new department of government. Courts before didn't do anything but decide controversies among the parties, so all that had to be done was to provide for the courts. Here the judicial department of government is going to have other responsibilities. We almost have to spell some of this out. The other alternative is to say that the legislature may by statute grant the authority to recommend districts and so forth."

Mr. Montgomery - This takes us to judicial terms. We still have some time.

Mr. Nemeth - Judicial terms are on the schedule for the next meeting, as you have noticed. However, because of some discussion at the last Commission meeting we wish to point out a conflict and the discussion that took place. The question arose because Section 2 of Article XVII (Elections) has reference to terms of some judges. (At this point Mr. Nemeth referred to Research Study No. 40 in which judicial terms are discussed.) The Elections and Suffrage Committee is recommending the repeal of this particular sentence. Since part refers to judicial terms, there was some feeling expressed that the matter ought to be put before the Judiciary Committee also. In the draft on trial court structure this committee has agreed to a provision which would establish terms of not less than 6 years for all judges, including supreme, appellate, and common pleas. That is what the present Article IV provides. So the committee has recommended no substantive change from Article IV, Section 6. But there is a conflict between that section and Section 2 of Article XVII, because the latter fixes the terms of common pleas and probate judges at six years. This conflict has never been litigated, probably because of the fact that the length of term provided in both of these sections is exactly the same. But there would appear to be a conflict in that Article XVII limits terms of common pleas judges to six years and Article IV says that the terms shall be not less than six years. There was some sentiment expressed at the Commission meeting to the effect that some members would not like to see the General Assembly have the power to provide a twelve year term, for example, for common pleas court judges. So this is a consideration for this committee. Does it wish to change its prior recommendation in light of this or not?

Mr. Montgomery - Certainly there should not be more than one pronouncement on judicial terms in the Constitution.

Mr. Nemeth - If the Elections and Suffrage recommendation is adopted there will not be.

Mr. Montgomery - How do we handle the provisional or initial term provision that we adopted?

Mr. Norris - Executive and legislative terms are set in the Constitution. We don't give the General Assembly any option. Why shouldn't we take the same approach with the judiciary--six years?

Mrs. Eriksson - For all judges--or just for common pleas?

Mr. Norris - All judges.

Mr. Nemeth - I think that philosophically speaking there can be some arguments made for permitting the terms of appellate judges, particularly, to be lengthier than the terms of trial judges.

Mrs. Hunter - It was the Modern Courts Amendment that made this provision uniform for all three levels of courts. Prior to the Modern Courts amendment Supreme Court terms could be in excess of six years, but court of appeals and common pleas were fixed at six years.

Judge Leach - Isn't it true that historically the language has read "not less than six years" but the terms have not been increased? It has been more academic than practical.

Mrs. Eriksson - For the Supreme Court it has been in the Constitution at not less than six years, but for courts of appeals and common pleas the terms were set at six years prior to 1968.

There is no history of change, it was agreed.

Mr. Norris - It seems to me that the ability to lengthen terms runs contrary to the merit selection concept. One of the purposes of merit selection is security of tenure. Why increase the term also?

The suggestion was made that this could be used as an effective argument against merit selection--i.e. that the legislature could lengthen terms. Mr. Norris felt that the provision invites opposition to merit selection. He stated that voters must be convinced that they have a real opportunity to remove a judge. There was consensus that the Constitution should provide for six year terms, but Mr. Montgomery said that the staff should work out the language with respect to full terms and problems that might arise in the provision governing initial terms under merit selection.

Judge Leach - One more thought. I'm not sure of the exact language, but some of the language re initial terms, as I recall it, raises a question in my mind that I illustrate by a hypothetical case. "A" is retained for a full 6 years. He then dies or resigns in the first three years. The way this is worded now, the man who takes his place would initially come in for two years, then run for the last two years of the man's term whom he followed. In other words, he has a 2, and a 2, and then a 6. It seems to me logical that if you are simply trying to accomplish the initial two year trial period, and after that give him six years, you don't pick up another man's term, but simply provide that his successor begins with his full six years after the initial two years. Historically, the reason we have had the pick up the other term idea in Ohio is so that we wouldn't have too many people all being elected in the same year, although the legislature has gotten around that. For example, in the municipal court in Columbus, 7 of the 10 judges come up all at one time, two at another time, and one another time. But this would not really affect it, and I think that the language should quite appropriately be adopted by changing it to provide that when a new man comes in, he goes for two years initially (with whatever added months you'd need to have that equal out for an even numbered year), and after that he goes in for six.

Mrs. Eriksson - I think that the reason the draft was done this way is because the Constitution already provides that the General Assembly should fix the beginning and ending dates of terms and we were retaining this provision. That is carried forward in the present statutory law, which does say which judge's term begins on which day. That would have to be changed if you were going to have a flexible system. The terms would be constantly changing. However, if there is no objection to that, of course it can be changed.

Judge Leach - It seems odd to me for a man in private practice, considering appointment to a judgeship, to have to say "I'll be in for two years, then I have to run for another two before I begin my six."

Mr. Norris - Why not have him run for four?

Mr. Guggenheim - Did we not give up the two year trial period in voting for six year terms?

It was agreed that this had not been done. Mr. Montgomery asked the staff to take these comments into consideration to see if the present language is sound or if there is an alternate.

Several hypothetical situations were discussed--e.g., if one were appointed to fill a judgeship with 5 years remaining in the term, he would serve a two-year provisional term, plus whatever months are necessary to get to an even-numbered year (at least 2 years away--3 even) and then pick up the balance of the term under the present language. Mr. Montgomery expressed interest in finding out how other states handle the situation where a provisional term is provided. Mr. Nemeth said most permit the terms to float. Mrs. Eriksson said that she thought probably that in those states statutes do not establish specific fixed terms as in Ohio.

Mr. Montgomery asked the staff to review this subject. He announced that the next meeting of the committee would be a dinner meeting on October 23 at the Athletic Club. Matters to be taken up will include those left pending from this meeting, plus compensation, terms retirement, and related matters, removal, and any new matter than can be worked into the meeting.

Ohio Constitutional Revision Commission
Judiciary Committee
October 23, 1974

Summary

The Judiciary Committee convened for a dinner meeting which began at 6 p.m. at the Athletic Club in Columbus on October 23, 1974. Present were Chairman Montgomery, Dr. Cunningham, Mr. Guggenheim, and Mr. Skipton. Also present were Judge William Radcliff, Administrative Director of the Courts, Allen Whaling, Executive Director of the Ohio Judicial Conference, Judge Robert Leach, Committee Special Consultant, E.A. Whitaker and Robert Manning, representing the Ohio State Bar Association, Mrs. Hilliker, representing the League of Women Voters and Robert Hyatt of the Ohio Prosecuting Attorney's Association. Staff representatives included Mr. Nemeth, Mrs. Hunter, and Mr. Evans.

Mr. Montgomery opened the meeting by stating that minutes of the last meeting had been received and asking for a motion that their reading be waived. Mr. Guggenheim so moved, Dr. Cunningham seconded, and the motion was adopted. He then asked Mr. Nemeth to discuss judicial terms, a subject that was touched upon at the last meeting. There it had been noted that there are two conflicting provisions in the Constitution with respect to terms and Committee consensus had been expressed that terms should be expressed in fixed numbers of years rather than on a "not less than" basis. The further question had been raised about initial terms under merit selection.

Mr. Nemeth: The Committee came to the general conclusion that it wished to limit judicial terms to six years. A further question raised at that meeting is addressed by the memorandum entitled "Terms in Merit Selection Jurisdictions," dated October 23, 1974. This has to do with the fact that the draft now pending before the Committee provides for an initial term of two years for any judge appointed under the merit plan, at which time he must stand for retention in office at a general election for the remainder of the term to which he was appointed before he is eligible to run for retention for a full term. There was a question raised as to the advisability of electing a man or women only to the remainder of the term to which he or she was appointed, if there is a remainder, instead of giving such person a full term at the first retention election. The staff was asked to investigate the question of how the matter is handled in jurisdictions that presently employ merit selection. This memorandum is a summary of what we found in an examination of 7 of the states which have merit selection across the board, that is, at every court level which exists from the supreme court on down to the trial court of general jurisdiction. There may be a few more states where the plan has been recently adopted, but we did not have the opportunity to investigate that. The starting point for this particular memo was the information which we had last April when we first started reading on the question of merit selection. The states of Alaska, Colorado, Iowa, Missouri, Nebraska, Utah, and Wyoming at that time applied merit selection to every level of courts. Among these seven, the first five solved the problem by in some way or another creating a "floating" term. All seven of them provide for an initial term of some length, at least one year and some three years plus. Of the seven states only two -- Utah and Wyoming -- elect a man or women only to the remainder of the term to which he or she was appointed initially. In the other five states, the judge in question is retained for a full term, if at all.

Page 2 of the memorandum shows a break-down, state-by-state.

Mr. Montgomery asked about the specific provisions before the Committee. Mr. Nemeth replied that Section 6 (A) (1) on page 4 of the consolidated draft reads as follows: "The terms of the Chief Justice and the Justices of the Supreme Court, of the Judges of the Court of Appeals, and of the judges of the Courts of Common Pleas shall be six years and, except as provided in division (A) (4) (a) of this section, shall begin and end on the days fixed by law."; and Division (A) (4) (a) reads as follows: "ANY JUSTICE OR JUDGE WHO IS APPOINTED TO FILL A VACANCY FROM A LIST SUB-

MITTED BY A JUDICIAL NOMINATING COMMISSION SHALL SERVE AN INITIAL TERM OF TWO YEARS, AND THEN UNTIL THE END OF THE TERM OR THE FIFTEENTH DAY OF EEBRUARY FOLLOWING THE NEXT GENERAL ELECTION, WHICHEVER OCCURS FIRST. NOT LESS THAN SIXTY DAYS PRIOR TO THE HOLDING OF SUCH GENERAL ELECTION, ANY SUCH JUSTICE OR JUDGE MAY FILE A DECLARATION OF CANDIDACY TO SERVE THE REMAINDER OF THE TERM OR TO SUCCEED HIMSELF, AS THE CASE MAY BE." From there on the section provides for the mechanism of submitting the question. So Ohio would stand with Utah and Wyoming on the matter of retention.

Mr. Montgomery: It seems to me that the decision we must make is that either we opt for something that is convenient for the candidate or we opt for a system of terms that is rational for the state as a whole. Do we want an irregular term situation for expediency of the candidates or do we want to establish a more rigid system?

Mr. Nemeth: This is not only a matter of convenience, because it may also influence a man or women trying to decide whether or not to seek nomination or appear on a slate. Such a person may be subjected to two elections within a 12 to 24 month period in some circumstances.

Mr. Montgomery asked if anyone had any idea of how these provisions have worked in other states, or whether a trend is discernible. Mr. Nemeth said that this would be difficult to state but that he would point out that Wyoming was the latest of the states to adopt the plan. He did not think, however, that this fact evidences a trend. Mr. Montgomery asked for Committee views.

Mr. Montgomery: There is something to be said for terms beginning at a fixed time and yet it can cause a hardship in individual cases.

Mr. Nemeth: You will notice that in Nebraska the solution is interesting. For those judges who were carryovers from the elective system, terms begin and end as fixed by the law when they were elected. But for those judges who are initially appointed under the merit system (effective there in the early '60's) terms run from the date of their appointments. So, in that state there are two ways of determining terms. Carryover judges have terms fixed by a statutory date and the others vary according to appointment.

Mr. Nemeth indicated further that he was not aware of any criticism in jurisdictions that allow terms to "float". It was agreed that record-keeping for the Supreme Court in such instances would be somewhat more difficult.

Mr. Skipton noted that the question is a political one. Mr. Guggenheim stated that he felt that it is hard on a person to go in for two years and then not be able at that point to run for a full term, but that he wasn't sure whether sympathy for such a situation ought to influence the Committee. Mr. Nemeth explained also that incumbent judges, under the proposal, would be entitled to stand for retention for full terms when their present statutory terms expire.

Judge Leach: I raised this issue at the last meeting because I personally feel that there is something totally inconsistent with the two year probationary concept, and still sticking to the concept of serving the remainder of the term of someone now out of office. I think that there is a philosophical inconsistency here. I feel personally that if you have a two year probationary term, at the end of that term, the person should run for a full term.

Mr. Montgomery: The fact that we would have lots of different terms for judges doesn't bother you?

Judge Leach: But under present statutes there is no consistency as to what judges run when -- even between the February dates and the various dates in January. I could go back historically to cite an instance where two judges of the courts of appeals were running against one another. There has been a sloppy way of handling the matter. I don't think that there is any pattern today that each two years an equal number of judges are running. Terms were established by happenstance -- depending on when jobs were created.

Judge Radcliff: Except -- all probate judges run the same year. That is the only consistency.

Mr. Montgomery then asked if these statutory provisions had created a great deal of trouble. It was agreed that they had not, although Judge Leach expressed the view that an even-numbered year concept should definitely be retained. It was agreed that this is essential -- to separate common pleas elections from municipal elections. Historically in Ohio, the even-numbered year has been the county and state election. Judge Radcliff cited the instance of a provision for the election of a judge in Perry County in November, 1976 who takes office in July, 1978 as a further example of inconsistency.

Mr. Montgomery invited Committee comment.

Mr. Skipton: We ought to strive for consistency, and have some rational plan. Certainly there ought to be staggered terms of some sort.

Mr. Montgomery: I think that what we are contemplating at this point is adopting a "floating term" provision.

It was agreed that this was the case.

Mr. Montgomery: Is there a motion to request the staff to draft such a provision?

Mr. Skipton: I'm not ready to do that because there is another question that interests me and it is this question of informing the public. If we are going to have people stand for election, I believe that we must provide some means for informing the public about the people they will be voting on. Just as we have created a commission to tell the people about issues that are going to be on the ballot, there must be a way of reporting to the public and informing the public about the performance of judges if they will have no opposition. How will this job be performed if we have a "floating term" provision?

There was general discussion on this point including the need for and feasibility of coming up with an appropriate informing device. Mr. Montgomery asked about the bar association's role in states with merit selection -- specifically with respect to monitoring judicial performance. Mr. Nemeth reported that in Missouri a periodic poll of the bar association is taken (statewide in the case of supreme court justices and district-wide as to trial and appellate judges) and that the results of such polls are publicized in the press. Wide distribution of poll results in Missouri has been said to have had considerable effect upon incumbents.

Judge Leach: It seems to me that if the plan is explained to the public - that judges serve a probationary term of two years in which performance will be tested before they come up for retention election for a full term - the public relations job has been done. The problem is that if we have a situation where two judges on the same bench resign or die on the same day and one has five years of a term to run while the other has 18 months, the Governor then appoints two individuals. Each comes in, and at the end of

two years one comes up for three years and the other for six years. I don't see what goal has been served by such a plan. The point is that we don't presently have a uniform system anyway. Take, for example, Cuyahoga County, with 6 Court of Appeals judges. Four come up for election this year, I believe. It is not as if we have 2 judges coming up every two years. Instead the statute calls for the election of 4 in one year, one in another, and one in another. In the Columbus municipal court, 7 judges are selected in the same year, two in another and one in another year. There is no distribution. I still cannot see why the terms sought should have anything to do with the term of the judge who preceded an appointee.

Mr. Skipton said that he was not in disagreement with the points made but that he felt that the situation should be cleaned up, extending terms if necessary. It was moved by Mr. Guggenheim, seconded by Mr. Skipton, that the staff be directed to draft a new provision to provide for a floating term. (It was agreed that the term "floating term" would not be used in publicity because it is unclear and may carry unintended connotations.) The motion passed.

Mr. Montgomery: The second item on our agenda is the Consolidated Draft for merit selection.

Mr. Nemeth: This consolidated draft is dated Oct. 23, 1974, and is labeled Consolidated Draft No. 1. I will not spend long on this. It looks longer than I think it will take to discuss because there is not much here that is new. This is the first attempt on our part to weld together the drafts on structure and selection into one unit. Consolidated Draft No. 1 contains all of the redrafting of those provisions which we have been instructed to redraft as of the October 9, 1974 meeting. There are a few points that I would like to bring to your attention. In regard to the Court of Appeals, the Committee has concluded to recommend that the Constitution contain a provision allowing lateral transfer of cases as an alternative to the assignment of judges out of their district. And, in order to make the remaining constitutional provisions consistent, particularly the one relating to the jurisdiction of the Court of Appeals, we felt that it would be advisable to insert some additional language regarding jurisdiction. And this you will find in Section 3 (B) (2) on page 2 of the Consolidated Draft. This would read:

> "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district. AND IN CASES TRANSFERRED FROM ANOTHER COURT OF APPEALS DISTRICT PURSUANT TO A RULE OF THE SUPREME COURT, and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify or reverse final orders or actions of administrative officers or agencies."

Here we have constitutional recognition of the fact that there will be the possibility of lateral transfer, and we want to make sure that the Constitution makes it clear that the courts of appeals shall have jurisdiction over transferred cases. This is a point for the Committee to discuss, I believe, as to whether the Committee believes that such a provision is necessary.

There was general discussion concerning this proposal and its necessity in view of the Committee's endorsement of the lateral transfer concept. The intention of the language was to clarify or "tighten" the original provision for lateral transfers. Mr. Skipton questioned the necessity of the addition in (B) (2) of material legislative in character. Mr. Montgomery said that he felt that jurisdiction is fundamental and is traditionally constitutional. Judge Leach suggested that the new language was an essential provision because the provision presently refers to courts "within the district."

Judge Leach: The present provision must be changed in some manner. Section (B) (2) now

says that courts of appeals shall have jurisdiction to review what -- final orders of courts inferior to the court of appeals -- and where -- within the district. If you allow transfer of cases without making some revision in this section, there will be a dilemma.

Mr. Skipton's suggestion that the Supreme Court could be empowered to make rules on the subject was discussed. Some objection was expressed on the basis that the Court should have constitutional guidance and on the further basis that the Court would soon become over-burdened if additional administrative responsibilities are assigned to it.

Dr. Cunningham moved that the language be adopted so as to clarify jurisdiction in transferred cases. Mr. Guggenheim seconded the motion. Mr. Manning asked if an alternative were adopted to drop the provision "within the district" in the present language, would the result be the same. The point was discussed that one goal of revision is to shorten not lengthen the Constitution, and the alternative suggestion would be in keeping with such a goal. On the other hand, the view was expressed that because the idea of transferred cases is a new concept, the jurisdiction question ought to be "crystal clear." Judge Leach stated that he felt that the same result could be reached by deleting "within the district" as that sought by the additional language proposed. Judge Radcliff observed that he would not like to see any doubt go unresolved. Mr. Nemeth asked, "If the language 'within the district' is simply removed, could it not then be argued that a court of appeals has jurisdiction over a case arising in an inferior court anywhere within the state?" It was agreed that a court of appeals might accept a case from any area if the language were changed in this manner. It was decided that the proposal in the consolidated draft ought to be considered instead, and the motion made by Dr. Cunningham was adopted.

The further suggestion was made by Judge Radcliff that the language "PURSUANT TO A RULE OF THE SUPREME COURT: be changed to "PURSUANT TO SUPREME COURT RULE," and it was agreed that the substitution would be made.

Mr. Nemeth: The next major item that you ought to take a look at in this draft is what we've done with Committee instructions to make certain that the newly created rule-making functions of the Supreme Court be subject to review by the General Assembly. This is found on page 3 in Section 5(B). I will read only the capitalized material: "THE SUPREME COURT MAY PRESCRIBE RULES GOVERNING THE ESTABLISHMENT OF SUBJECT MATTER DIVISIONS OF THE COURTS OF COMMON PLEAS AND THE ASSIGNMENT OF JUDGES THERETO, THE TRANSFER OF CASES FROM ONE COURT OF APPEALS TO ANOTHER, AND THE EMPLOYMENT AND DUTIES OF PERSONNEL IN THE JUDICIAL DEPARTMENT. AS LONG AS THE OFFICE OF CLERK OF COURTS IS AN ELECTIVE OFFICE, RULES GOVERNING THE EMPLOYMENT AND DUTIES OF PERSONNEL SHALL NOT EXTEND TO THE CLERK OF COURTS OR TO PERSONNEL EMPLOYED IN THE OFFICE OF THE CLERK OF COURTS WHO SHALL BE GOVERNED AS PROVIDED BY LAW."

Mr. Montgomery: What is new since our last meeting?

Mr. Nemeth: Providing here for the transfer of cases and employment and duties of personnel in the judicial department, as well as the exclusion of the Clerk's office, are new. Although these matters were discussed at the last meeting and there were alternatives in the draft then before you, the matters of lateral transfer of cases and the employment of personnel would not have been subject to review by the General Assembly under the previous drafts. They will be under this one. This was drafted according to the Committee's instructions.

Mr. Montgomery: Then the Committee has already adopted the substance?

Mr. Nemeth: Yes.

The last sentence, pertaining to the clerk of courts, was discussed, and concern expressed that it would antagonize both opponents or proponents of retaining the clerk as an independent elected officer. For this purpose Judge Leach suggested that the sentence be changed to read as follows: "RULES GOVERNING THE EMPLOYMENT AND DUTIES OF PERSONNEL SHALL NOT EXTEND TO THE ELECTED CLERK OF COURTS NOR TO PERSONNEL EMPLOYED IN THE OFFICE OF AN ELECTED CLERK OF COURTS WHO SHALL BE GOVERNED AS PROVIDED BY LAW." This would accomplish the same purpose, he said, without the dangling clause "AS LONG AS."

Mr. Guggenheim said that he was going to propose the same change. Mr. Skipton moved that the paragraph be redrafted accordingly, Mr. Guggenheim seconded the motion, and it was adopted.

Mr. Nemeth: The other changes in this draft are for the most part corrections of purely mechanical mistakes, without change of substance, so they are not worth taking up the Committee's time.

Mr. Nemeth also pointed out that there would be a final document which the Committee would be considering in full at the end of the study.

Mr. Montgomery then asked Mrs. Hunter to discuss judicial compensation.

Mrs. Hunter: I will review the document labeled Research Study No. 40, dated August 5, 1974. I will hit the highpoints of this study only. There are no drafts being proposed in this Research Study, but there are some general directions, perhaps, that the Committee might wish to endorse. It may wish to ask the staff to draft something in accordance with directions suggested under the heading called "Committee Alternatives."

Section 6 of Article IV deals with several subjects -- judicial compensation, judicial terms (upon which the Committee has already reached a consensus), mandatory retirement, and the prohibition against other positions that might represent conflict of interest with judicial position.

Compensation is covered by paragraph 6(B), which prohibits diminishing compensation during term. (It was pointed out by Judge Radcliff that the prohibition on increases during term was removed by the Modern Courts Amendment of 1968.) The prohibition against diminution goes back to 1802. This section provides that the compensation of all Supreme Court justices except that of Chief Justice shall be the same and that the compensation of judges of the courts of appeals shall be the same. However, there is no guarantee that the common pleas judges receive an equal salary.

Judge Radcliff: That is borne out by the fact that common pleas judges are paid salaries ranging from $23,500 to $34,000.

Mrs. Hunter: Yes, and that is because a portion of the common pleas salaries is paid by the state and a portion by the county, according to a population formula. One of the considerations for the Committee is whether or not common pleas judges should receive an equal salary across the board. Such a recommendation from the Committee would be consistent with its other positions. I'd like to review very briefly the compensation history for you as a background for consideration of such a recommendation.

On page 2 of this study there is a review of the recent changes in the compensation schedule for the Ohio judiciary. Prior to the recent increases in compensation there was a study done of judicial compensation in this state as it compared to neighboring states. And there was a finding by Professor of Economics John P. Henderson that Ohio's judicial salaries were quite out of line. One of the recommendations made in that study was that it is imperative that judicial salaries be evaluated frequently --yearly or at

least biennially. One of the ways in which some other states and Ohio, too, have met this demand is to create a commission. In Ohio it is the Elected Official and Judicial Compensation Review Commission, which is charged with the responsibility of evaluating judicial salaries as well as salaries of other public officials. In Ohio the Commission is advisory only. It makes recommendations to the legislature, which is not required to act upon them. It recommended in addition to the increases that were made that retirement benefits ought to be increased. It also called for equalization of the salaries of common pleas judges. It was critical of the provision whereby compensation is based upon population. Compensation should, instead, it urged, be related to the responsibility and dignity of the office. The recommendation to the legislature on this score was not followed, however. The increases in compensation are included here - in Table A - for your perusal. The legislature increased substantially the state portion and also made changes in the computation of the county portion. The state base was increased from $11,000 to $20,000.

Mr. Montgomery asked if the Commission is still viable and working in other areas. It was indicated that it is still in operation and is presently working in the area of salaries of county officials. Mr. Whaling pointed out that in the judicial increases that were made in 1973 the disparity in salaries was reduced appreciably. The legislature has at least moved in the direction of uniformity, he added.

Mr. Skipton: Isn't the question before us whether we would recommend uniform salaries for all judges across the state? Doesn't that get immediately into the question of uniform salaries for other county officers? The reason that judges are paid as they are is that the county officials are paid on the basis of county population. A principle that I see here is that the Commission either says that all county officials should be paid the same or not. I cannot see the rationale for singling out judges. I could go for this Committee saying that all county officials salaries should be the same, county to county.

Mr. Montgomery: Is there any other constitutional involvement on this point?

Mrs. Hunter: Well, the Committee has recommended a unified trial court at the county level and payment of all salaries by the state so uniform salaries would seem to be consistent with its position so far.

Mr. Montgomery: What other major points are involved here. Are there any?

Mrs. Hunter: The only other matter that I would point out at this point is whether or not the compensation commission should be a constitutional body and whether or not it should have powers that go beyond merely being an advisory agency. In a couple of states, for example, such a commission proposes salary scales which become effective as law unless rejected by the legislature. In other states the legislature is at least <u>required</u> to act upon the recommendations of a salary commission.

Mr. Montgomery: And what about pensions -- and whether or not they should be dealt with at all.

Mrs. Hunter. Yes, that is another matter also for Committee consideration. At least one model constitution suggests a floor on pensions for the retired judiciary.

Mr. Skipton: You can't deal with that subject in terms of the judiciary alone. It is acceptable for this Committee to state what its views are, but I would certainly disagree with singling out the judiciary in this area.

There was general discussion concerning the Committee's prior action to recommend a unified court with salaries of all judges payable from the state general fund. The Committee concluded that it was in keeping with its view of the court of common pleas as a state court to include a recommendation for uniformity of compensation, and the staff was instructed to include such a provision in the Committee draft. The Committee rejected the idea of a constitutional salary commission, reasoning that the present commission, recently created, should have a chance to be tried.

Mrs. Hunter then reviewed the section on judicial terms in Research Study No. 40. The present Constitution provides that all three levels of judges shall serve for terms of "not less than" 6 years. However, at the last meeting conflict with Article XVII was pointed out, and at that time Committee consensus was that terms should be fixed at six years for the reasons expressed at that meeting -- i.e. as part of the merit plan package, it makes the new method of selection more palatable if the General Assembly cannot lengthen terms. There was some discussion about judicial terms in other states, particularly about the fact that 35 state courts of last resort have longer terms than six years. The Committee decided not to change its present stand on judicial terms.

The staff was instructed to draft the appropriate language for the Committee recommendation on terms.

Mrs. Hunter: The third topic in Section 6 that should be called to the attention of the committee, we believe, is the provision that says, "Judges shall receive no fees or perquisites, not hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void." What we are dealing with here is a prohibition against conflicts in position or office. A question that might be examined is whether this language should be retained in its present form. The Model State Constitution prohibits anyone who holds judicial office from holding any other "paid office..." The Ohio provision is not so limited -- it prohibits the holding of an office "of profit or trust." Whether the present language goes beyond the necessities of conflict of interest might be discussed here. Comparable provisions from a number of other states are included in this report. Many of them regulate the practice of law, public employment, public office, and so forth. In its study of the legislative article the Commission made some changes in the comparable provisions affecting members of the General Assembly. Section 4 of Article II used to restrict eligibility to the General Assembly in terms of holding office "under the authority of the United States or any lucrative office under the authority of this state." That was changed to prohibit simultaneous holding of a "public office" as more concise and less ambiguous.

Mr. Montgomery: I don't think that we can equate judicial office with the history and traditions of a citizens' legislature. But I'm concerned about "perquisites".

Mr. Guggenheim: Have we had any problem with this provision?

Judge Leach: There was one, I believe, but it was resolved. A judge in Cuyahoga county headed up a commission for the allocation of federal funds in the law enforcement field. He raised the question sua sponte about whether there was a constitutional conflict.

Judge Radcliff: He is continuing to hold the position -- it is not a paid one and is not considered to be "an office of profit or trust". These are words of art that have become accepted, and I think that out of respect for the old monuments they should be retained. There was a problem in World War II as to whether or not being commissioned an officer in the army of the United States constituted the holding of an office of

profit or trust under the state or U.S., but it was held that when one was serving his country in time of need, no conflict existed, and that 15 days of active duty out of any one year didn't make a conflict situation. That has been resolved.

Mr. Montgomery: But I can see where an unpaid chairman of a committee or commission could wield a great deal of influence that could represent a conflict.

Judge Radcliff: We don't find judges in such positions, however, principally because it is considered inappropriate. I see no problem with the present language -- it is so well understood.

Mr. Montgomery: Are we kidding ourselves on this word "perquisites"? Does the Chief Justice have a limousine, for example?

The response was to the effect that he does not (he has a Ford) and that a car is available to every member of the Supreme Court who wants one.

Mr. Montgomery: Then such things, as well as free parking space, expense accounts, and so forth are perquisites. If they are being provided (and I'm not saying that they should not) maybe the Constitution ought to be amended accordingly, because it does prohibit perquisites.

There was agreement to the effect that the language does deserve some consideration on this score. Mr. Guggenheim said that he hesitated to tamper with the language but that it could be revised to add words to the ban on perquisites to the effect of "except as provided in connection with their office by the General Assembly," or of similar import. It was agreed that judges have special problems of private interest when matters come up before them, and was agreed that judges are required in designated instances to disqualify themselves - again under the Code of Judicial Conduct. Judge Leach pointed out that historically the Constitution was not aimed at any other <u>private</u> employment but solely towards other <u>public</u> office or employment. He suggested that if the language "under the authority of the state or the U.S. " is deleted, the prohibition would go beyond even the Canons of Judicial Ethics and could prohibit activities in connection with a private trust, or serving as family executor. It was agreed that the Committee did not want to prohibit a judge from being executor of his father's estate. Dr. Cunningham moved and Mr. Guggenheim seconded the motion to add language "as provided by law" (or of similar import) after the prohibition on "perquisites". The motion was carried.

Mrs. Hunter: Is there any value in adding an exception for "reserve status" in the military?

It was agreed that this is not necessary because of holdings on this question.

Judge Leach then raised an additional question about the language as follows: "All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void." He said: "The Canons prevent a judge from running for any other office, including U.S. Senator, which is not "under authority of this state." Historically, when Judge Day was a member of the Supreme Court, he ran for the U.S. Senate. He said that the constitutional inhibition doesn't apply because a United States senator is not an office under the authority of this state. Today he couldn't run because of the Canons of Judicial Ethics -- without resigning the judicial position first.

Mr. Guggenheim: Do the Canons of Judicial Ethics have the force of law?

Judge Radcliff: Yes, for members of the bench.

Judge Leach then suggested deletion of everything after "except a judicial office" and before "shall be void." Dr. Cunningham so moved, Mr. Guggenheim seconded, and the motion was adopted. The staff was instructed to make changes in accordance with this discussion and motion.

Mrs. Hunter then reviewed the history of mandatory retirement and the criticism of the inadequacy of retirement benefits. She cited the ABA provision to put a floor on benefits. (See page 24 of Research Study No. 40). There was unanimous agreement that retirement benefits should not be a constitutional matter.

Craig Evans was then introduced to discuss judicial removal. Despite the lateness of the hour, it was agreed that Mr. Evans could summarize alternatives rather quickly for the Committee to think about.

Mr. Evans: This matter is discussed in Research Study No. 32, prepared in February. The study is an attempt to review and present to the Committee the available methods for the removal of an unfit judge. It excludes his removal for ill health and his stepping aside in a particular case because of some conflict. There are four ways of removing a judge -- or six if you count a couple of approaches under the rules. The Constitution provides the grounds for each of the four ways and sets out in some detail an impeachment provision (Article II), a separate provision applicable to judges only that can be characterized as "an address", whereby a concurrent resolution of the two houses of the General Assembly will suffice to remove the judge from office. There is also in Article II, Section 38 a mandate to the General Assembly to provide statutes for the removal of judges, and there have been statutory methods set up whereby a judge suspected of inappropriate conduct can be brought before a court on petition of a certain number of electors (percentage of those voting in the last gubernatorial election) and there is a commission of judges set up as well. Under the rules of the Supreme Court for the governance of the bar of Ohio, Rule 5 applies to removal of judges and sets forth the procedure under which a complaint can be brought.

There are many issues that present serious constitutional questions. We do not have time to get into them tonight. One is the matter of grounds for impeachment in Sections 23 and 24 of Article II, in that our Constitution specifies that judge (or Governor or other officer) can be removed for a "misdemeanor in office". As we are all aware since February 5, when the paper was written, just what a misdemeanor in office might be and what constitutes grounds for impeachment involve problems of some difficulty. Historically, "misdemeanor in office" was not and has not been used in the context of impeachment, and I think that it is fair to say that it is not defined. One would have to go to other terms of impeachment, perhaps in the federal language, or some synonyms that might be used.

Mr. Montgomery: Are there any major issues that occur to you as you go through this?

Mr. Evans: Well, that is one, I think -- i.e. what are the grounds for impeachment of a judge. I don't know that there is any good way to deal with that but it is an issue. Another issue is: Is there a point in having two methods by which the General Assembly, essentially on its own action, can remove a judge? They can impeach him; they can also remove him in this address-like manner. That procedure is available only to remove a judge. Research indicates that it has never been used since it was adopted in 1851. There have been judicial impeachments in Ohio, I would add parenthetically -- judges of the Supreme Court.

Dr. Cunningham: How does the address-like method work?

Mr. Evans: It is based upon a concurrent resolution of two-thirds of each house of the General Assembly. It requires that notice be given to the judge and that he be given an opportunity to express his position. There is no indication as to grounds that are required.

The opinion was expressed that such a method is much easier than impeachment. The political implications were noted -- and the difficulty of getting a two-thirds vote.

Mr. Evans: It is conceivable under the provision, although it has never been tested, that the legislature could throw a man out for any frivolous reason -- a whim.

Questions of due process were raised. Apparently they would not apply to that procedure, since there is no appeal from legislative action.

Mr. Montgomery: Assuming that we go to merit selection -- this puts a somewhat different light on the question of how long a judge should be retained, the reasons why he should be removed, and by whom.

Dr. Cunningham: The alternative procedure in such states that have that, such as California, is to have a commission which sits as a judicial body and passes upon qualifications and the fact of competence.

Judge Radcliff: The most common way of removal of judges in this state in the last 20 years has been by resignation under threat of disciplinary action.

It was agreed that this is a spin-off of the"rule" approach.

Judge Radcliff: Right. The constitutional means have not been used very often -- the address provision, never.

Mr. Evans: In light of federal developments in the last year, there is a strong argument on behalf of retaining impeachment. There are a lot of good arguments to retain it. I'm not so sure about address.

Judge Radcliff: The easiest way is by recall petition. That is statutory, but it hasn't been used.

Judge Leach: With merit selection, what is the effect of the recall provisions?

It was agreed that there is a question to be pursued as to why there should be so many ways to remove a judge and so few to remove other officials.

Mr. Montgomery: Obviously, this is going to take some time. We've identified the Study Report -- No. 32 -- and we will return to these issues. We will pass them for tonight, but they will be first on the agenda at the next meeting. At that time, we will also take up the matter of the grand jury, which is somewhat controversial today in that there are people who think that it has been abused. We will continue the posture of having an open forum. That will pretty much take up our next meeting. After that we ought to have a draft of our full report pretty far along.

Several other topics were mentioned as being ones that the Committee would consider and for which the staff would present material. They include: claims against the state, petit jury (size, etc.); and whether there needs to be any constitutional change with respect to administrative procedure or adjudications. There may also be ancilliary questions in the clean-up process, according to Mr. Nemeth.

Mr. Montgomery announced that the Committee would probably meet in the morning on the day of the next Commission meeting. He anticipated that it would be set sometime in the first two weeks in November and said that he contemplates two meetings in November. In December, he stated, the Committee should hopefully be looking at the draft of a complete report.

Mr. Nemeth, in response to question, indicated that there would be some discussion on jurisdiction of the Supreme Court and acknowledged that the staff is aware of questions about limiting some direct appeals from certain administrative agencies.

Ohio Constitutional Revision Commission
Judiciary Committee
November 26, 1974

Summary

The Judiciary Committee met at 9:00 a.m., Tuesday, November 26, 1974 in Room 10 of the House of Representatives. Present were Chairman Montgomery, Dr. Cunningham, Mr. Guggenheim, Mr. Roberto, and Mr. Skipton. Also present were Judge William Radcliff, Administrative Director of the Courts, Allan Whaling, Executive Director of the Ohio Judicial Conference, E.A. Whitaker, representing the Ohio State Bar Association, and Elizabeth Brownell, representing the League of Women Voters. Staff representatives were Director Eriksson, Mr. Evans, and Mrs. Hunter.

The minutes of the October 23, 1974 meeting were approved unanimously. Mr. Montgomery introduced Craig Evans to discuss judicial removal.

Mr. Evans: At the last meeting of this Committee, on October 23, 1974, we reviewed Research Study No. 32 which directs itself to the subject of the removal of judges in situations where for some reason they become unfit--incapable of meeting the standards expected of judges. It does not deal with removal because of sickness or age. We have today a review of both the research study and the conversation which has taken place among Committee members with respect to removal. This review raises the issues and capsulizes some alternatives for Committee consideration today. If it is agreeable, I will go through this review and stop at whatever points the Committee wishes to discuss.

Three areas of the Constitution speak to removal of this type and are the impeachment remedies, concurrent resolution or address-like proceeding, several statutory approaches, and then under a separate heading, we find removal by courts.

The impeachment provisions are set forth in Article II, Sections 23 and 24. They prescribe that the House of Representatives has the sole power of impeachment. It may impeach upon majority vote. The Senate must try each impeachment passed by the House. A two-thirds majority of the Senate is required to convict on impeachment. The common law relative to impeachments indicates very clearly that upon the finding of a conviction the person is automatically removed from office without any further required formal action. Article II, Section 24 goes on to state the officers subject to impeachment as well as the grounds for impeachment. Judges as well as all other state officers are subject to the impeachment removal. The grounds in the constitution are any misdemeanor in office. It is also specific that impeachment does not affect liability to indictment, trial or judgment. Is there discussion at this point about the substantive points of impeachment?

Mr. Montgomery: Any misdemeanor is a pretty broad statement, in view of our recent education on the subject.

Mr. Evans: I think that it is relatively clear from the last months that misdemeanor, when used in the context of an impeachment removal, is a great deal different from a criminal misdemeanor. The specification of grounds in the Ohio Constitution is somewhat different from the specification of grounds in the federal Constitution, which although unclear is somewhat clearer than the provision in the Ohio Constitution. Impeachments are rare in Ohio, but there have been two judicial impeachments, neither of which resulted in conviction. There isn't any evidence indicating what sort of problems were had in deciding what constitutes a misdemeanor in those cases.

Mr. Montgomery asked if the provisions applied to misdemeanors committed in the conduct of judicial duties. Mrs. Eriksson said that she felt such an interpretation would be borne

out by the language "any misdemeanor in office." Mr. Evans said that discussion of misdemeanor in the impeachment sense requires examination of historical precedents that provide some definition of what is thought to be grounds of impeachment.

Mr. Evans: The term "misdemeanor" in the law of impeachment predates the term "misdemeanor" in the criminal law by some 250-300 years. That of course is in the English law. While the subject is argued at length in the literature as to whether it ought to mean a crime, it is my opinion that a misdemeanor in impeachment terms is something very different from a crime and that an impeachable, convictable misdemeanor can occur without any crime in the sense that we normally use that term. The federal Constitution says "high crimes and misdemeanors." That phrase has a lot of history and precedent to it.

Mr. Roberto: I can understand the context of the term historically -- i.e. that something is wrong with one's demeanor in office and therefore he is a misdemeanant. There is however a very fixed meaning of the word "misdemeanor" in everyone's mind today. It has grown to mean a minor crime. It might conceivably be better to use a phrase that people understand in the context of today's language because most people are not historians.

Mr. Evans: I think that that is a very good point. The next problem is, however, what term will be used. If the specification were to be revised, we would want to satisfy ourselves that we keep what has been learned from the past as well as provide for future situations. I am not saying that there isn't a better term. The problem is what it is. There is considerable discussion in the debates that resulted in our federal Constitution as to what sort of term is appropriate. The framers studied and wrote at a time when impeachment was a little more common in England but they were not faced with this problem involving the definition of misdemeanor in a criminal sense. Terms like malfeasance, misfeasance, and misbehavior were all discussed heatedly, and it was decided that there was adequate precedent in the common law to retain the phrase adopted. Maybe there isn't at this point, but I do think we then confront the very serious problem of what term can be used in substitution.

Mr. Montgomery then asked Craig if from his review of the law of impeachment he felt that errors in judgment or mistakes in office could result in impeachment.

Mr. Evans: The possibility exists. I am equally sure however that if impeachment were contemplated in Ohio it would be very carefully considered. In the two Ohio impeachments I think that it could be said that they were impeached for what the legislature (or House, anyway) thought was an error in judgment because the judges thought differently from the General Assembly on the question of jurisdiction of justices of the peace.

Concern was expressed about impeachment on such basis. It was also noted that the impeachments did occur a long time ago and that the same thing might not happen again. Mr. Roberto asked how long it has been since the impeachment process has been used for the judiciary. Staff indicated that some 164 years have elapsed -- the impeachments occurred early in Ohio's history. Mr. Evans said that Justices Todd and Pease of the Supreme Court were impeached in 1810. They had on circuit found the statute on jurisdiction of jp's to be unconstitutional, and the House found that to be unbecoming and they therefore impeached. The Senate failed to convict.

The Committee agreed that a trouble spot had been identified.

Mr. Evans: To continue, the concurrent resolution procedure is found in Article IV, Section 17. It is clear that this procedure applies only to judges and that they may be removed upon a two-thirds resolution in each house of the General Assembly. The proeedure calls for the filing of a compalint and notice to the subject judge with opportunity for a hearing. What constitutes cause for removal under this procedure is not specified. (He

indicated in response to question that the method has never been used.) It requires greater agreement among the General Assembly than does impeachment.

The statutory approaches are authorized by Article II, Section 38. They are in fact mandated. The legislature is required to provide methods for prompt removal of judges and all other state officers. The provision does indicate that misconduct involving moral turpitude will be grounds for statutory removal but it isn't limited to that. In accordance with the mandate statutes have been passed for the removal of judges and other public officers. It is required that there be a public trial and that a complaint be filed. R.C. 3.07 to 3.09 indicate that a complaint may be filed in the Courts signed by 15% of the electors who last voted in a gubernatorial race. This will bring a judge to trial for misconduct. Upon conviction such judge is removed from office.

There is also provision in the statutes for a commission of five judges who may find that another judge should be removed when an event listed in the statute as being just cause is found to have occurred. Most important, with respect to removal, is removal under court rules. This is the most common method. This method is recognized in Title 27 of the Revised Code (pursuant to Article II, Section 38) and of course, under the rule making power of the Court in Article IV, Section 5. The Supreme Court Rules for the Government of the Bar of Ohio provide procedural details for the removal of judges by the statutory five judge commission. Violations by judges of the Code of Professional Responsibility or the Code of Judicial Conduct when found to exist may constitute grounds for removal and, perhaps, work a forfeiture of the office.

Mr. Montgomery: Has this ever been tested as an unconstitutional delegation of legislative power?

It was agreed by several participants, including Judge Radcliff, that it had been so tested and had gone to the U.S. Supreme Court. The judge in question wasn't removed under Rule 6, according to Judge Radcliff, but rather he was indefinitely suspended under Rule 5 for violation of the Code of Professional Responsibility. However, the same procedure was used with the Board of Commissioners on Grievances and Discipline, and the same authority was the basis for it.

Mr. Evans: We have attempted to summarize points on judicial removal that have been raised by Committee members in meeting or in asides to the staff. They are listed on page 2 of the Review.

On Impeachment - Impeachment is a traditional method of removal available under the federal constitution and in approximately 40 states.

Many people have commented that recent national events have caused a public understanding to some degree and most certainly a respect for the impeachment process.

While no Ohio judge has been removed in this manner, two have been impeached but none for more than a century.

Very importantly - grounds must exist for impeachment removal. The question was raised in the federal proceedings recently and is applicable to the Ohio procedures about whether there is a judicial appeal to impeachment conviction. This may be a moot point. It would be hard to find a judge convicted on impeachment wanting to appeal it. It is my opinion that an appeal would exist. I don't think that it needs to be specified.

With respect to concurrent resolution or addresslike removal proceedings - this method requires a greater concurrence among members of the General Assembly than an impeachment and conviction.

Theoretically the concurrent resolution provides for a quicker removal than one by the impeachment process. That statement is based on the theory of address removal and is hard to square with the greater majority required.

The Constitution neither specified grounds for removal by this process nor even that any must exist. Here is the real problem with the address removal procedure. Due process might be hard to find.

The concurrent resolution has never been used to remove a judge during the 123 years it has been available.

The concurrent resolution gives the General Assembly a second direct method for removing judges whereas only one method, impeachment, is available to the legislature for removing other state officers. This, too, is an important point that I believe argues for revision of this particular provision.

On Statutory Approaches

Article II, Section 38 applies to all state officers as does R.C. 3.07 et seq.

The statutory approach of R.C. 3.07 through 3.09 gives the electorate a direct input into the removal process. This is because of the complaint that is filed bearing signatures of 15% of the electors.

It does provide for complaint and hearing.

It does allow the General Assembly freedom to specify grounds for removal.

It gives the basic direction followed in R.C. 2701.11 and 2701.12 and in the Supreme Court Rules for the Government of the Bar of Ohio.

The entirely statutory approach (complaint and trial under R.C. 3.07-3.09) has been used, but not in recent years. It has been about 40 years, at least.

On Removal Under Court Rules

This method is very much the currently preferred approach to judicial removal.

It can progress quickly yet protect the privacy and rights of the judge in question.

A broad variety of misbehavior which can constitute cause for removal is covered under the Rules themselves and the Code of Professional Responsibility and the Code of Judicial Conduct. The removal process under the Rules can be changed to meet the current needs more easily than any of the other methods of judicial removal.

Having reviewed both the substance and the points that were made in discussion I call your attention to three paragraphs on page 3 of the Review that relate to alternatives.

Mr. Evans then read aloud the alternatives.

1. Retain impeachment as a constitutional method of removal of judges, as well as other state officers. Sections 23 and 24 of Article II could be consolidated, as both deal with aspects of this subject, but there is no great necessity for this.

2. Amend Section 38 of Article II to make judges subject to removal by statutory methods only in conjunction with Supreme Court Rules such as provided by Sections 2701.11 and 2701.12 of the Revised Code. It should be noted that this would exempt judges from the only method now available under Sections 3.07 and 3.10, inclusive, of the Revised Code, for the removal of state officers upon the direct complaint of citizens.

3. Repeal Article IV, Section 17, providing for removal of judges by concurrent legislative resolution, because it has never been used and because it provides the second legislative method for the removal of judges whereas only one method, impeachment, is available to the General Assembly for the removal of officers in the other two branches of government. But if the concurrent resolution method of judicial removal is to be retained: (a) specify what cause for removal must exist before a judge may be taken from his office upon a concurrent resolution; (b) reduce the proportion of each house of the General Assembly which is required to make a removal to a point at which the concurrent resolution will in fact, as well as in theory, be easier than an impeachment and removal upon conviction, if that is its intended function.

Mr. Montgomery suggested that the Committee begin by first considering the possible

repeal of Article IV, Section 17. Mr. Roberto said that he had no opposition to such repeal although he wanted to retain impeachment but he agreed that it makes little sense to have two legislative methods for removal. He noted that the provision has never been used and expressed the view that it is not likely to be used. Other members of the committee expressed agreement. Mr. Roberto moved that the Committee go on record as favoring repeal and was seconded by Dr. Cunningham. The motion carried.

Mr. Montgomery: We still have an additional way of removing judges that is not used for other public officials inasmuch as Supreme Court rules affect judges and not other public officers.

Judge Radcliff: One reason for the existence of the rule on removal, suspension, or retirement is that the Constitution gives to the Court complete control over the profession, and every judge has to be a lawyer, and amenable to the rules that control the profession, befor he can be a judge. The reason is not to single out judges but to control the profession of law. The basis for removal by the Court is quite different from the basis for removal by impeachment.

Mr. Montgomery: And the standards of conduct likewise can be higher. Can anyone make a case for exempting judges from the other removal procedures? Should they be in addition to one another?

There was discussion about the advisability of retaining a statutory method for removal in addition to removal under the rules and most who spoke to the issue favored retention. Committee members agreed that the repeal of Article IV, Section 17 takes care of surplusage. The method under Revised Code sections 3.07 to 3.10, applicable to all state officers, would continue to apply to judges, in addition to removal under the rules of the Supreme Court. Mr. Roberto asked if there were authority, statutory or constitutional, for removal of judges by executive action. There was agreement that no such authority exists. Mr. Evans said that under address type procedures in some states the Governor is involved but this is not the case in Ohio.

Mr. Montgomery: Except for the possible redefinition of impeachable offenses there does not seem to be much reason for tampering with the constitution. And I suspect that any attempt at redefinition will create more problems than it will solve. Is there a motion that we recommend allowing the rest of the Constitution to stand as is on the matter of removal?

Mr. Robert: Then we are recommending no change in the approaches 1 and 2, is that correct?

It was generally agreed that impeachment ought to be retained, that removal under rules works well in Ohio, and that the retention of another method creates no problems. Mr. Montgomery invited observers in the room to participate.

A motion was made that except for the repeal of Article IV, Section 17 no change be recommended.

Mr. Roberto: We are not recommending that Section 38 of Article II be amended, as stated in paragraph 2, is that correct?

It was so agreed, and the motion was adopted.

Mr. Montgomery then stated that the Committee would be hearing from two speakers on the subject of the Grand Jury but that first Mrs. Hunter would introduce the subject with a brief overview.

Mrs. Hunter: I will call your attention to Research Study No. 42 on the Grand Jury, which provides a historical review of the institution from the common law to the present and describes its operation in various states. It also presents some criticism currently being made of the grand jury as an institution. Historically, the function of the grand jury has been to protect the accused from unfair and politically motivated charges. The function of the grand jury is not to try the accused but rather to determine whether enough of a case can be made to bring the accused to trial -- in other words, to establish whether probable cause exists.

However, the secrecy of the proceedings has been called by some critics inherently unfair.

The applicable provision in the Ohio Constitution is Section 10 of Article I: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or other infamous, crime, unless on presentment or indictment of a grand jury..." Both the presentment and indictment of a grand jury are formal accusations of a crime. The presentment is made at the instance of the grand jury itself, and the indictment at the instance of the prosecutor.

Cases are discussed in this memorandum relative to the federal standard for due process in grand jury proceedings. Because the grand jury proceeding is not a trial but rather an inquest to establish probably cause, no Supreme Court decision has held that the basic rules of evidence -- or the right to counsel while under interrogation, the right to face one's accuser, the right to testify on one's own behalf -- applicable to grand jury proceedings. However, there have been some cases which suggest that some of these rights will be extended to grand jury proceedings. The decision in a preliminary hearing, for example. that an accused has a right to be represented by counsel would seem to foreshadow the possiblity of extending such a right to the grand jury proceeding, particularly where the prosecutor has some leeway as to whether to go through a preliminary hearing or to go directly to the grand jury for an indictment, as in Ohio.

I'll conclude my remarks with what will hopefully be background to our speakers today, one of whom will present a pro position with respect to the grand jury and one whom will present a con position. Traditional arguments for, and recent criticisms of the grand jury system are summarized on page 6 of the Research Study.

Some of the reasons to justify secrecy in grand jury proceedings have been said to be (1) to prevent the possible escape of one who may be indicted; (2) to free grand jurors from possible harassment; (3) to encourage witnesses to disclose evidence voluntarily; (4) to prevent possible tampering with witnesses; and (5) to prevent the defamation of an accused who may be subsequently be found innocent. These are the traditional arguments.

Many believe that each of these arguments is rebuttable. As to the possible escape of the accused, in most cases an accused has already been arrested and has appeared at a preliminary hearing, and either been imprisoned or released on bond, before the grand jury deliberations begin. Secondly, strict laws forbid the harassment of grand jurors. Additional answers are: (3) reluctance of a witness to disclose evidence before a grand jury is not dispelled by secrecy because a winess must realize that evidence or testimony he provides must eventually be made public at a trial; (4) tampering with witnesses is, likewise, prohibited bt law. Furthermore, since a defendant has a right to obtain a list of witnesses before trial, it is a simple matter to approach them, and the secrecy of grand jury proceedings will not prevent a potential defendant who is adamant about it from doing so; (5) the good name of an accused will not, in the majority of cases, be protected by secret proceedings,

since most cases presented to a grand jury result in true bills, and while an individual may have a good defense at a public trial, he will nevertheless suffer the social stigma of having been indicted.

The arguments often advanced in favor of the grand jury are: (1) first that the grand jury system does stand as a shield between the individual and the government; (2) that grand jury reports (or indictments) have been a means by which widespread and serious disorders have been corrected and civil improvements achieved by the power of public opinion activated by public knowledge; (3) that grand juries are, in fact, answerable to the law, in that various procedural devices exist for challenging both the make-up of a grand jury and the regularity of its proceedings; and (4) that it increases citizen participation in the dispensing of justice.

I call to your attention the discussion in this Research Study of provisions in other states limiting the grand jury. We will not get to the specifics of them at this time. They limit if not abolish the grand jury. The Illinois Constitution of 1970 permits the state legislature to abolish the grand jury.

Mr. Montgomery: What is the status of the interpretation of the federal Constitution as it applies to the state constitutional provisions?

Mrs. Hunter: The Supreme Court has held that the only due process required by the 5th and 14th Amendments to the federal Constitution relative to grand jury proceedings is that grand juries be unbiased and constituted according to law. Other safeguards - right to counsel, to confront one's accusers, etc. have not been held to apply to the grand jury stage of the proceedings.

Dr. Cunningham: California went to the Supreme Court on the question of whether a substitute process of information in lieu of grand jury indictment in murder cases is permissible. That substitution was upheld a long time ago.

Mr. Montgomery: Due process so far applies only to trials or preliminary hearings.

Dr. Cunningham: So far as the Constitution is concerned the grand jury is a supernumerary.

Mr. Montgomery then introduced Judge Fred Shoemaker from the Franklin County Common Pleas Court.

Judge Shoemaker: Somewhere along the line we are going to have to face the fact that there is a limit to what we can ask citizens to do. In our society today we are putting so much emphasis on the rights of the defendant that we have completely forgotten about the victims of crime. And the grand jury is another example. People do not get practical on some of these things. They read the books, and they get theory. But judges have to work with the realities of life, which are as follows. If your daughter is raped, a preliminary hearing is going to be set up in municipal court. If the defendant comes to that hearing and asks for a continuance, he has a right to a continuance. The prosecutor has the girl there in the event he doesn't ask for it. She may have stayed out of school to attend, and her parents come with her - much time is involved, but there is no trial. They return, and the girl is put on the stand and her testimony is taken in order to make a determination as to whether a crime has been committed, as to whether there is probable cause to believe that the accused committed it. Assume that the judge finds it indeterminable and it is bound over. The next step is the time required to go before the grand jury. The docket is heavy, and it takes some time to get the case submitted. (The legislature and the Court have required the speeding up of cases, of course.)

Now, let's take the guy in custody. The case is bound over to the grand jury. The family come back and go to the grand jury, again to be heard. This is the third time. Assuming that they do not have to come back to the grand jury - the next step is the indictment. Assume the grand jury returns an indictment. From the trial judges viewpoint, we have to worry about the date of arrest. We know that we have to get that guy to trial in 90 days. Some time is taken up in the typing of the case coming from the grand jury. Additional time is taken getting the foreman to sign it.

Let's say that the grand jury brings in a true bill. Then the defendant is called for arraignment. At this point some 50 to 60 days have been used up. Now a trial is set. It must be within 30 days. It is difficult to do this, but it can be done. Now the trial begins. The defendant comes in with various motions. A hearing is set for the motions, and we must have the witnesses there for the motion hearing. Assume the motions are overruled. Now the case is set down for trial, and we are still struggling to get it within the 90 days. At that point it is possible that the defendant's attorney will ask for a continuance to get additional witnesses, for example, having expected another ruling on the motions.

What I'm trying to demonstrate by this story is the burden that is imposed. We have to start thinking about people who we are requiring to take the time to return so frequently. They are losing confidence in the courts as a result of what they are put through. They distrust the judges and the lawyers.

Because a practice was instituted two hundred years ago doesn't mean that it is still best for the times. No profession in the world changes as slowly as the legal profession. Our whole system of thinking is keyed to the past. We are all so worried that the Supreme Court will say something is unconstitutional. I guess that my reaction is that first of all we should decide whether elimination of the grand jury is wise. I think that it is wise to do so, and while I haven't done extensive research, I think that it would be constitutional. What I am talking about is trying to improve justice, both quality and speed of it. Let's just take the difference if we eliminate the grand jury.

What are some other weaknesses of the grand jury? Anyone who works for the grand jury knows that in our system of justice we expect people to come down to court with no background, experience, or training and deal with complicated statutes and return indictments. Now who are they going to rely on? Naturally on the prosecuting attorney. If the prosecuting attorney wants an indictment, he will get it. If he doesn't want an indictment, he can ask for a no bill and blame it on the grand jury.

The realities of life are that you don't accomplish that much by having the grand jury. All you do in effect is to slow down the whole process. Consider the costs. We have to operate the courts efficiently and economically. We must do the best we can at the least possible price.

In my opinion the grand jury does nothing but hold back the system. If a prosecutor is politically motivated there is the possibility of abuse because of the large degree of control that he exercises over the process. Secrecy protects him. Some cases clearly come out of the grand jury that I do not think would come out if opposing counsel had the right to cross examine the witnesses and bring out the weaknesses in the case. The grand jury is basically one-sided.

I think that trials are going to have to be expedited. The grand jury step gets in the way. Think of the number of subpoenas that have to be sent out for the grand jury. Think of the costs for jurors. The Supreme Court by the Rules has reduced the number, but still the cost is a significiant factor.

My point is that the grand jury does not for all of this serve a vital purpose. I think a preliminary hearing where counsel have a right to examine is to be much preferred. What is the different test that a trial judge adopts than a grand jury does? I ask myself, does the grand jury look for "probable cause"? In reality, they don't hear the defense evidence, so they are hearing the same evidence the judge hears basically. It is a case of straight duplication of effort as I see it. Under our system if the judge finds that there is insufficient evidence, the prosecutor if he doesn't like the result can take the case to the grand jury and get an indictment. I have had that happen more than once.

These are the reasons that I think the Constitution should be amended to eliminate the requirement. I am happy to answer questions.

Mr. Montgomery: You say that if at the preliminary hearing no probable cause is found that the prosecutor can turn around and go directly to the grand jury?

Judge Shoemaker: Yes. It can be taken to the grand jury then. Just this morning when I told some attorneys that I was coming to testify here I was urged to press for elimination of some of these steps because of the duplication.

Mr. Robert: For my own clarification, so far as you are concerned, Judge Shoemaker, the preliminary hearing and the grand jury represent duplication. There is nothing that the grand jury does, for example, that couldn't be handled by a preliminary hearing?

Judge Shoemaker: That is substantially correct. Sometimes the grand jury will call in different witnesses, who are not present at the preliminary hearing, but sometimes witnesses appear at the preliminary hearing who do not appear before the grand jury. What I'm concerned about is taking out the mandatory aspects of the grand jury. Amend the constitution so that it is not required. If not mandatory, there may be some reasons, in limited cases, on investigations, let's say, where there might be some advantage in maintaining secrecy. The grand jury could conceivably perform a useful function in a narrow category of matters. In examining the whole operation I ask the questions whether the grand jury should be secret as well as whether there should be more than one judge at the preliminary hearing. In this area I have a tendency to think differently from many of my colleagues. In a matter of substantial importance, I prefer a three judge panel. If there is any benefit to the grand jury proceeding, it may well be the secrecy, because sometimes an investigation has to be very long and detailed. In some cases you do need some vehicle that permits you to make an inquiry. I certainly like to hear some exchanges of views on matters such as whether the preliminary hearing ought to be closed or open, as well as whether it should be conducted by one judge or three. In routine matters, I'm inclined to think that one judge is sufficient. If there is something such as a scandal requiring investigation the procedure might be changed to meet the needs. The balance is important -- secrecy when needed. Because I think that our society has a tendency to be too secret. Preliminary hearing should similarly be open, I think, unless there is a complete showing of the necessity of having a closed hearing. Sometimes, too, secrecy is violated. I have seen more than one instance.

In some cases, the grand jury might simply be dealing with the record of the preliminary hearing. This happens in some counties. The grand jury is not viewing the people on whom it is making judgments in such cases.

I am sure that in most cases the grand jury substantially follows the advice of the prosecutor. And when you think about it, if you were on the grand jury and were a non-lawyer you would, too. Statutes can be complicated and involved. The questions include what will happen if this goes to trial, what is the possibility of conviction and so forth. I don't think that it is wrong to rely on the prosecutor.

Mrs. Eriksson then asked Judge Shoemaker if the grand jury is told that there was a

finding of no probable cause at the preliminary hearing where that is the case.

Judge Shoemaker: I don't really know. I think that if they wanted to ask, they could. I would guess probably not in most cases. And the reason for that is that there is a right to take the case there. The prosecutor is not in bad faith by doing so. And of course there are differences in judges. One may bind over while another refuses to bind over. The law enforcement people as well as defense lawyers know the judges.

Mr. Montgomery: Judge, have you had any experience with judicial over-influence of the grand jury through court appointment of the foreman?

Judge Shoemaker indicated that he does not feel that such appointments are political and that in his own experience the choice of competence is based on competence and interest.

Mr. Montgomery then asked about cases of great public interest.

Judge Shoemaker: I've never had the feeling of improper conduct by appointment. The thing about the Crofters case, for example, that upset me was all of the news leaks, especially when the grand jury is supposed to meet in secret. I guess what I am so concerned about judicial reform in this respect is that I see the lack of confidence in the judicial system. This is the tragedy of our times. Chief Justice O'Neill has done more to aid judicial reform than anyone that I know of in my time on the bench.

Mr. Montgomery: Your recommendation to eliminate the grand jury would take citizens out of the judicial process and would tend to leave the elitists, who are equipped by training and experience, wouldn't it. If this were followed to its logical conclusion, I suppose that we could eliminate the petit jury on complicated matters.

Judge Shoemaker then discussed the petit jury and its function, noting that historically it is a valued institution. The defense bar, he said, can play upon various sympathies of the jury to win a case that should not be won. Any good lawyer can persuade a jury to believe that minute details are of great importance. People may not want to admit that this is the case, however, he said. He described how the jury can be manipulated by a seasoned trial attorney. A lawyer always has a chance within the jury (which might not exist with trying the case to the judge) and it is extremely important to the trial bar.

Mr. Roberto: The most serious defect with the grand jury system is the fact that the prosecutor leads the jury. What would be your reaction to permitting defense counsel in grand jury proceedings?

Judge Shoemaker: I don't think that that is the principal objection to the grand jury system. The principle objection, as I see it, is the delay, cost and inconvenience to all of the witnesses. What you say about the prosecutor is true, I believe, but that is not my principle objection. I really have not considered the matter of allowing defense counsel to be present for this reason.

Mr. Montgomery: Judge, if my recollection serves me correctly, I think that on accasion where the accused has asked permission to appear before the grand jury, it has been granted, hasn't it?

It was agreed that the accused may appear but that rarely is defense counsel permitted. Judge Shoemaker said that he does not think that permitting defense counsel answers the main objections to the system. It was also pointed out in the discussion that an accused

has a right to consult counsel at any time.

Mr. Montgomery then introduced Mr. William McKee, Prosecuting Attorney for Richland County, President of the Prosecuting Attorneys Association.

Mr. McKee: I will say at the outset that I am a firm believer in the jury system, which includes the petit jury as well as the grand jury. I think that it is safe to say that the Prosecutors' Association also backs that stand in the sense that when the new rules were being provided, the prosecutors in waiving the jury wanted the consent of the prosecution as well as the defense. I know that we have endorsed and do believe in the grand jury system. There has been some fact and a great deal of fiction that has come out in the media concerning the grand jury recently. It is understandable because of all our judicial functions it is the least understood. The only ones who have any real understanding of what goes on in a grand jury are prosecutors and those who have served on grand juries, which constitute a very small segment of the public. It is not a vocal segment. They are sworn to secrecy.

I believe that to say that grand jurors don't understand what they are doing underestimates the average citizen. They are a good cross section of the community, and to believe otherwise is, I believe, doing grand jurors a disservice. Because of the lack of understanding a number of points have arisen. We must consider the move to "speed up" the judicial system. I fear that speed for the sake of speed and not quality is becoming an obsession. To respond to the judge's example of the rape case where parties come in for preliminary hearing twice, then for the grand jury and a number of times for the trial -- the fact is that in most situations of a rape case, we go directly to the grand jury rather than to preliminary heating in order to protect that witness. Certainly if we go to preliminary hearing and it is continued once on us, we would go to the grand jury and not have to go back to municipal court. The secrecy of the proceedings is beneficial not only for the witness but also for the accused in rape cases. I think that secrecy and lack of change is ignored in some instances in getting statistics together that label the grand jury as the prosecutor's rubber stamp. This comes out without actually looking at what happens to cases in Ohio.

Grand juries were considered by a committee comprised of 9 prosecutors -- representing big counties, middle sized counties (as ours is), and small counties. Of that in 1973 those 9 counties returned 2,998 indictments. They also had 400 no bills. So this means that about 12% of the cases in a cross section of our cases resulted in no indictment. In our own figures -- and this doesn't reflect the number of cases which are considered where no indictment is returned and there is never any accusation against the individual -- in Richland county in 1972 there were 241 total cases, 86 in which the defendant proceeded immediately on a bill of information, waiving grand jury, 155 which were considered by the grand jury. Of that 155 the grand jury indicted 112; they released 43, a substantial portion, which rebuts the claim of rubber stamp. Of the 43 released, 16 were considered secretly. There had never been any charge. These individuals are without blight of charge because of the fact that criminal activity was considered directly by the grand jury. There are 16 people in Richland County who do not even know that this happened. That is about 10% of the cases. In 1973 there were a total of 197 cases, 89 in which the defendant waived indictment by grand jury and proceeded directly, and 108 considered by the grand jury. Of the 108, 78 were indicted, and there were 30 no bills, or almost a third of those were released. Seven were released secretly. So in two years there are 20 people that directly feel the benefit of the grand jury system.

The alternatives are two. One is that we proceed directly on a bill of information by the prosecutor. This is not only unfair in that it gives too much power to one person but in that it throws the burden to make decisions on one man that he should not have. I

don't think that this alternative should be considered seriously by those who are considering other possibilities. The other is that a preliminary hearing should replace the grand jury. To say that this should occur and that one man should decide what 9 are presently doing is throwing the case into municipal court (an area currently under study by the Supreme Court of Ohio), and it should be pointed out that our municipal court is much in arrears. There are some 328 jury cases pending in the Mansfield municipal court. To say that we are going to give up on grand juries and throw the cases into Mansfield municipal court is increasing the problems faced by that court. To say that one judges is going to do a better job than 9 collective citizens has not been our experience. We have had numerous cases in which the municipal court has found no probable cause, has not bound the defendant over, we have gone to the grand jury (and we always give them the background as to whether it is a bind-over), the grand jury has returned an indictment, and in every instance the defendant has entered a plea of guilty. Our most recent one was an escape from the reformatory. In that case the municipal court refused to bind over the defendant (found in New York) and he was indicted and plead guilty. I think that relacing one judge for nine people adds an undue burden to the court.

If we are interested in speed, we can speed up or drop preliminary hearings. Probably the one thing that would assist our justice system more than anything else is to go to the system used by many counties (Montgomery and Richland to name two), and that is instead of having a municipal prosecutor start a file through preliminary hearing and bind-over, to have the county prosecutor assume felony jurisdiction from the beginning. This, however, is not the constitutional question, but it is a practical solution that the Legislature should consider.

A number of points were made that are true. The grand jury does rely on the prosecutor, not as to what they should do but as to what the law is. Actually they get a better understanding of the law than the petit jury in that they see a number of burglary cases, they hear the elements of burglary a number of times, and if they have questions they can ask the prosecutor. This is in opposition to the petit jury, which hears the charge onee and may or may not catch it all.

The cost argument is not valid. We spend as much for one acting municipal judge for a day as for 9 grand jurors. That may be a case of overpaying acting judges and underpaying grand jurors. By way of case disposition a grand jury can dispose of more cases than can a municipal court.

Certainly an ambitious prosecutor may go after more indictments than he can chew. I would suggest that a prosecutor take a look at those indictments or he is going to be a loser in the long run. There are faults in all individuals comprising the system, but it is not wise to abandon the system because of that.

With regard to the "rubber stamp" or defendants testifying, we have had considerable experience with having testimony of the accused. Here we do not go to the accused - we go to the counsel for accused and ask if the accused wishes to testify. In probably 60% of those cases where there was a possible or probable defense the request has been made that the client testify. And in about 90% of those cases the grand jury returns with no indictment. Accused are not abused, and certainly where they have a story to tell, they are the ones telling the story, not the attorney. They are of course free to leave to consult with an attorney, but we have never had an accused feel badgered.

I will close with one point that I feel is significiant. I picked up the 1970 Judicial Statistics for the entire state of Ohio. Later years are not yet available. In 1970 throughout the state in 18,097 cases there were 2,423 defendants released by ahgrand jury--

13.4% of those considered. Out of those 18,000 odd cases only 428 were found not guilty by a jury or court. I think that those figures themselves speak more eloquently than anyone else as to the protection that the grand jury offers the individual.

Mr. Montgomery then invited questions.

Mr. Skipton: What is a "run away" grand jury?

Mr. McKee: We never had one. What one would be is, I assume, the result of some corruption in law enforcement or in government that law enforcement is not touching that the grand jury decides to ask for special counsel because of a feeling that the prosecutor is not giving them good advice. They take matters in their own hands. I don't think that we have had the need for one in most of Ohio, although there may have been instances where they were desirable. They are more to be praised than condemned.

Mr. Skipton: This seems to indicate that the prosecutors have a pretty good hold on the jury.

Mr. McKee; I think that though one man may be trained, you underestimate the 9 people sitting there if you think that they are going to do everything the prosecutor tells them because we don't tell them what to do. We tell them what the law is. I'm not saying that we don't "hint" at times -- and those juries don't always do as we hint. We've had indictments in cases where we didn't want them, and we have had no bills in cases where we wanted indictments.

Mr. Montgomery: What is the involvement of the judge after he appoints the foreman? Is there any opportunity for the foreman to consult with the judge, or does the judge ever appear at the grand jury?

Mr. McKee; I furnished to your staff the judge's charge to the grand jury from Richland county. The judge does name the foreman and in picking the first 9 names participates in the process of deciding who will be excused for cause. He does charge them as to the law. He advises them that he is available for further questions. At the conclusion he does receive the indictments and no bills and final reports.

Mr. Montgomery: Is that some protection against prosecutor domination or the run away jury?

Mr. McKee: I know that there have been instances where the judge has furnished special counsel to the grand jury, which is within the judge's province. A judge is a check in that respect.

Mr. Skipton: The newspapers in the past few days have reported on the bombing of a pub in England. Already there is a trial going on of the people responsible. Why can't we move that expeditiously in this country?

Mr. McKee responded that to the best of his knowledge about that case the police would have been hard pressed to sort out the evidence. He suggested that any trial in process already was probably not a trial on the merits. He said that there were two murders in Richland county in January, that by February an arrest had been made, and that by May the convicted accused was in death row. He also defended such a case as the "norm" in Richland county.

Mr. McKee then discussed trial delays at greater length. He blamed defense counsel in many instances for seeking continuances and said that one factor for the difference is that the defense has an appeal if they lose in trial court and the state does not. He said

further that the state is getting better response on motions to suppress because now the state has an appeal as well as the defense.

Mr. Roberto then asked Mr. McKee about his statistics on the number of accused who request participation (60%) and his statement that of these about 90% were no billed. "Does that mean," he asked, "That you have no objection to defense participating in the grand jury proceeding?" Mr. McKee said that he did not. In response to question he said that counsel is not allowed, but that the prosecutor discusses the case with defense counsel and both defense counsel and prosecutor advise the accused of his rights.

Mr. Montgomery: What has been your experience with defendants who ask to appear?

Mr. McKee: About 90 per cent of them are no billed. The guilty do not wish to appear. We've had a very few claiming self defense where the jury did not find self defense.

Mr. Montgomery thanked the speakers and announced that the next order of business would be the consideration of Consolidated Draft No. 2, dated November 4, 1974.

Mrs. Hunter: This is a putting together of the prior decisions of the Committee and incorporating therein two items that were decided upon at the last meeting -- to equalize the salaries of the common pleas judges and to change the provisions on perquisites in the provisions having to do with perquisites for the judiciary.

She then indicated that most of the new language in the draft had already been approved by the Committee and that she would point out any portions that were reworded as well as new changes proposed.

Mrs. Hunter: The first change is on page 5 - a minor change. This is the provision that gives constitutional recognition to lateral transfer of cases from one Court of Appeals to another. At the last meeting there was discussion about whether the phrase "within the district" in the present section could simply be eliminated and the same purpose accomplished as the addition of new language about cases transferred. It was agreed that this could be risky in that it could be interpreted as meaning that a Court of Appeals would assume jurisdiction over a case arising in an inferior court anywhere in the state. The other change has been to substitute "SUPREME COURT RULE" for "RULE OF THE SUPREME COURT," a non-substantive change.

The next change occurs on page 7. This is the provision recognizing the Supreme Court's authority to prescribe rules governing the employment and duties of personnel in the judicial department. Consolidated Draft No. 1 provided as follows: "AS LONG AS THE OFFICE OF CLERK OF COURT IS AN ELECTIVE OFFICE RULES GOVERNING EMPLOYMENT AND DUTIES OF PERSONNEL SHALL NOT EXTEND TO THE CLERK OF COURTS OR PERSONNEL EMPLOYED IN THE OFFICE OF THE CLERK." The last sentence is revised as follows; "RULES GOVERNING THE EMPLOYMENT AND DUTIES OF PERSONNEL SHALL NOT EXTEND TO AN ELECTED CLERK OF COURTS OR TO PERSONNEL EMPLOYED IN THE OFFICE OF AN ELECTED COERK OF COURTS, WHO SHALL BE GOVERNED AS PROVIDED BY LAW." This is a non-substantive change that was made because it was felt that the revised sentence would antagonize neither opponents nor proponents of retaining an elected clerk as an independent officer. It was decided several meetings ago that rules governing the employment of personnel in the clerk's office would not be prescribed by the Supreme Court - so long as the clerk is elected.

The next change occurs on page 10 of this draft, in Section 6, having to do with terms of judges of all three courts. The change made is to incorporate the Committee recommendation that the terms be fixed at 6 years in the Constitution. The present provision says

that judges of all courts shall be chosen for terms of "not less than" six years. As you recall, there was a conflict noted between Section 6 and Section 2 of Article XVII, the elections article. This conflict was one that had to be resolved, and the Committee decided to resolve it in favor of a fixed term.

On page 11, the last paragraph (4(A)) has been revised. As revised it provides for an initial two-year term under the merit system, then a full term, not the remainder of the first term, under the first draft considered. There was a great deal of discussion on this point and the fact that it means giving up the set terms fixed by law. This embodies the "floating" term.

Mrs. Hunter then read aloud the new Section 6 (4) (A) on page 11 of the Consolidated Draft. The first draft recognized the possibility of a judge having to run for the balance of an unfinished set term after serving a provisional two-year term . This has been eliminated, she said.

Mr. Montgomery: Why do we deal with the Supreme Court and the Court of Appeals in the Constitution on this point and with the Court of Common Pleas by statute?

Mrs. Hunter: This is because the Constitution provides for an appointive - elective system for the Supreme Court and Court of Appeals, but not for Common Pleas. Common Pleas districts must adopt it by local option, and the legislature can then provide the mechanics. Because the system is required for the other two levels, the details are appropriately included in the Constitution.

Mr. Montgomery: It seems awkward. If by local option the plan were adopted why couldn't it adopt what is provided by Constitution for the other two courts? Why must its procedure be statutory?

Mrs. Eriksson: I think the reason is that theprovision as to what the General Assembly provides says that it shall provide an appointive-elective system for common pleas courts, but it would not have to necessarily follow all of the details except for the provision for a provisional term. Presumably, because that is required, the General Assembly would be required to provide for the fixing of the subsequent term of those Common Pleas judges. One problem here is whether it becomes necessary to spell out in greater detail the judicial nominating commission provisions. The General Assembly could want to set those up on a district basis if some Common Pleas courts came into the system, or might want to set up a statewide one if there was only one Common Pleas court within the system. It seemed simpler to leave these matters to the General Assembly since the Common Pleas courts were not being mandated to change.

Mr. Roberto then asked how the name appears on the ballot in merit selection and whether there is a blank for writing in the name. Mrs. Eriksson said that there is no write-in except that she noted the fact that there is one state with merit selection that does allow a contested election to be incorporated within the plan. In most states the question is "Shall Judge Jones be retained in office?"

Mrs. Hunter then resumed, pointing out new language on page 12, in Section 6(B) that equalizes the compensation of all judges of the courts of common pleas. This reflects the Committee decision at the last meeting.

Mrs. Hunter: The next change is in the next sentence, which at the present time says that judges shall receive no fees or perquisites. An exception has been incorporated -- EXCEPT SUCH PERQUISITES AS MAY BE PROVIDED BY LAW -- in recognition of the fact that certain

perquisites are in fact provided such as parking space, use of automobile, expense accounts, etc. This puts the Constitution in harmony with actual practice.

Another change in the same division (B) occurs in the last sentence. It presently reads: "All votes for any judge, for an elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void." The language "under the authority of this state, given by the general assembly, or the people" has been removed. This was deleted by action of the Committee at the last meeting after Judge Leach pointed out that the Canons of Judicial Ethics prevent a judge from running for any other office (including that of U.S. Senator, which is not under the authority of this state). Because he could not run without resigning judicial office, under the Canons, it seemed appropriate to have the constitutional language reflect the situation.

There was discussion about whether the Canons supersede the Constitution. Judge Radcliff pointed out that the Court has adopted the Code of Professional Responsibility and the Code of Judicial Conduct. The latter is much more stringent and strict than the Ohio Ethics Commission Law or even the constitutional provision.

Mr. Roberto said that he assumed that this means a Judge could not sit on a county charter commission and the response was in the affirmative - that he could not run for such a position. He then asked wherein lies the conflict in such a situation. Judge Radcliff pointed out that a judge could serve on an appointive commission but that he could not run for an elective one. It was agreed that even the appearance of impropriety should be protected against.

Mrs. Hunter: There are no changes in Sections 7 or 8. The consolidated draft furnishes a full view of the article as it will look under the Committee's recommendation. The last two pages talk about some sections in Article IV that ought to be considered for repeal to be consistent with the Committee's other recommendations,

She went over the sections noted. Section 13 has to do with the filling of vacancy in the office of any judge. This is already incorporated in Section 6(A)(2), making Section 13 unnecessary. Section 6(A)(3) incorporates this language for Courts of Common Pleas. Section 6(A)(2) applies to vacancies and their filling under the merit plan for the other two courts.

Section 15 concerns laws passed to increase or diminish the number of judges. A special 2/3 majority is needed in certain instances. This section was recommended for repeal by the Committee styding the legislature. There is no reason why it should apply to the Supreme Court and to the Court of Common Pleas and not to the Court of Appeals. It is obsolete, at odds with the 3-tiered concept, and was contrary to the spirit of the Modern Courts Amendment of 1968. The recommendation for repeal of this section from the Commission to the Legislature was not adopted in the Legislature. It would seem to be an appropriate recommendation for this judicial article.

Section 18 contains a reference to "such other courts as may be created." This language is contrary to Section 1 of this Draft because Section 1 adopts the three-tiered system, envisioning the creation of no other courts. There is a reference to having and exercising power and jurisdiction. This is an unnecessary section. The jurisdiction of the three courts has been covered. Judge Radcliff/was asked if he felt that the reference to power and jurisdiction "at chambers" was important to retain, and he did not think so. The section is surplusage.

Section 19 authorizes the establishment of courts of conciliation. It conflicts with Section 1 as amended and should be repealed. The question was raised as to whether the

Ohio Civil Rights Commission is a Court of Conciliation(because of the procedures for conciliation provided in the statute) but there was consensus that it is unlikely that the statute would be interpreted as having created a new court.

Section 20 provides for the style of all process. Indictments must conclude "against the peace and dignity of the State of Ohio." If this section is to be retained it can be moved to Section 9, not a blank. There was some discussion of the historical basis for such a provision. It was pointed out that the first thing to be attacked in an indictment is the imprimatur if the words in Section 20 do not appear exactly as there stated. It was pointed out that the provision is an anachronism. Still it was acknowledged that the style of legislation is constitutionally prescribed. Moreover, what is to be the style if this provision is dropped. Such a phrase, whether judicial or legislative, signals the purport of any document carrying it. It doesn't pass the "compelling reason" test -- i.e. there is no compelling reason to change it. Mr. Roberto suggested that the section should probably be retained so as not to trouble anyone. It was agreed that the section would not be repealed.

Mrs. Hunter: There are two more sections - Section 23 in the draft and in addition, Section 22. The latter provided for the appointment of a Supreme Court Commission to help dispose of the accumulated business of the Court. This was done in 1876, and the Commission expired by terms of the provision three years later. There is additional authority for the creation of such commissions, their creation limited to once every 10 years and their term limited to two years. A second commission was appointed in 1883, and there has been no more use of this section. It was recommended for repeal as obsolete by this Commission, It was separated from the other legislative recommendations on the ballot and was defeated by the electorate. It should be again recommended for repeal as obsolete.

Judge Radcliff: That section dates to the days before discretionary appeals, when the backlog was terrific, and the Court was composed of six people. The need for it is long gone.

Mrs. Hunter: There is one more section - Section 23, authorizing the same person to serve as judge of various courts by local option in counties of less than 40,000.

Judge Radcliff: I hate to see this section go, but it must. There are now 7 counties in the state that have combined their courts in the manner allowed. Two of them -- Morgan and Noble county -- combined this last election.

Mrs. Hunter: The section serves no purpose of the three tiered concept is adopted.

Judge Radliff: The counties that have combined are Adams, Morrow, Wyandot, Henry, Carroll, Noble and Morgan counties.

Mr. Montgomery asked if there were a motion to recommend repeal of the sections in the concluding comment except for Section 20-i.e. 13, 15, 18, 19, 22, and 23. Mr. Roberto asked what would result if other recommendations for three tiers fail and this recommendation succeeds. Are we then prohibiting counties from consolidating? It was pointed out that the General Assembly could pass such laws without the authority. Judge Radcliff noted that there is a statute that permits integrity of the courts to be maintained in counties of less than 60,000 by vote of the people, but that permits one man to occupy the office of municipal, probate, and common pleas court judge.

The motion to repeal was made and seconded and unanimously adopted. Mr. Montgomery announced that the next meeting of the Committee would be December 12, 1974 at 10 a.m. at which time the Committee would be ready for final action on Article IV, delve briefly into the administrative law problem, and take a look at the subject, sovereign immunity. Judge Radcliff said that he hoped by that time to provide the Committee with Rules for the Court of Claims. The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
December 18, 1974

Summary

The Judiciary Committee met at 10:00 a.m., December 18, 1974 in Room 7 of the House of Representatives. Present were Chairman Montgomery, Messrs. Mansfield, Norris, Roberto and Guggenheim. Also present were Judge William Radcliff, Administrative Director of the Courts, Coit Gilbert, his assistant, Allen Whaling, Executive Director of the Ohio Judicial Conference, Judge Robert Leach, Committee Special Consultant, E. A. Whitaker, representing the Ohio State Bar Association, Charlotte Eufinger for the Ohio Council for Local Judges, and Elizabeth Brownell for the League of Women Voters. Staff representatives present were Mr. Evans, Mrs. Hunter and Mr. Nemeth.

The minutes of the last meeting were agreed to. Mr. Montgomery introduced Mrs. Hunter to discuss the subject of sovereign immunity. Mrs. Hunter said that she would review that portion of Research Study No. 44C that deals with the subject and discuss committee alternatives set forth on an accompanying paper entitled "Court of Claims" dated December 9, 1974.

Mrs. Hunter - Sovereign immunity is dealt with in the Bill of Rights of the Ohio Constitution. The section in Section 16 of Article I with which we are concerned is the following: "Suits may be brought against the state, in such courts and in such manner, as may be provided by law." It was added to the section in 1912. The history of the addition of this provision is reviewed in the Research Study. Sovereign immunity is traceable to the common law and the notion that the kind can do no wrong. Actually some writers have said that what this expression really meant was that judgment against the kind could not be enforced. This was subsequently changed and judgments against the king were allowed. But the doctrinf of sovereign immunity was adopted in the American colonies for the practical reason, according to commentators, that the early states had little revenues and large debts. Sovereign immunity was recognized in case law in this country from an early date. The rationale of an English case was adopted that it is better that an individual suffer injury than that the public suffer an inconvenience. The rule was adopted in 1812 and subsequently followed in most jurisdictions.

The Ohio Constitutions of 1803 and 1851 were silent on the question of governmental immunity, but case law shows that it was recognized from an early date in this state.

In the Constitutional Convention of 1851 there was a proposal to abolish sovereign immunity. The constitutional history of sovereign immunity is discussed in a very recent case which grew out of the Kent State conflagration in May, 1970. Here one of the many challenges to the doctrine was made, and the Court of Appeals for the 8th Appellate District held that the doctrine was contrary to the Due Process Clause and the Equal Protection Clause of the 14th Amendment to the U. S. Constitution. However, the Supreme Court of Ohio reversed the Court of Appeals and upheld sovereign immunity. The opinion gives a summary of the arguments for retaining sovereign immunity. The proposal in 1851 would have added language that provision shall be made by law for the prosecution in the courts of law and equity of all claims or demands against the state. At that time claims against the state were submitted to the legislature by petition. The proposal would have changed that

practice. The opposition to abolition of the doctrine was strong. The opponents argued that the state would always be "plucked" in the absence of protection in some shape.

However, in 1912 another attempt was made to deal with governmental immunity, and the provision that we are now dealing with was added to Section 16. At that time claims against the state were recognized in two ways--by special legislation permitting suit and special appropriations.

Mr. Montgomery then noted that the first sentence of Section 16 originated in the Constitution of 1803 and asked if the argument had ever been advanced that the expression "in such courts" means all courts. It was pointed out in discussion of this point that the second sentence has been construed as not being self-executing and that "in such courts" is modified by the phrase "as may be provided by law." It was agreed that it could be argued that "such courts" could mean all courts but that this is not the interpretation that has been accepted by the Ohio Supreme Court.

Mrs. Hunter - Debates of the Convention of 1912 reveal that the question was raised at that time as to whether or not the incorporation of this language conferred the right to sue the state. The idea was expressed that it did for the first time confer the right to sue the state. However, subsequent case law established the rule that although the amendment conferred the right to sue, it could not be exercised without the General Assembly's providing the courts and methods by which this right might be exercised. This language has been the subject of much litigation, and the doctrine of sovereign immunity has been the subject of much criticism nationally as well as in Ohio.

The pending Kent State case was briefly discussed, and it was noted that the immunity of individual officers of the state is involved in the present case sent back to District Court by the U. S. Supreme Court in April, 1974.

Mrs. Hunter - Ohio courts have taken a narrow view of what constitutes consent to sue. The rationale for this has been that the rule of construction applies that statutes in derogation of the common law are to be strictly construed. Since consent to sue is in derogation of the common law Ohio courts have been reluctant to find consent in the absence of clear and express language to that effect. A case in point is discussed on page 6, and there, too, are listed some Revised Code statutes in which the legislature has expressed consent to sue the state or to effect an appeal where none would have been possible otherwise.

This same immunity from suit extends to political subdivisions. The county as an agent of the state shares the immunity of the state to suits in contract or tort. The doctrine does not protect municipalities as fully as it does counties and townships, however. The courts have recognized a distinction between governmental and proprietary functions of the municipalities and have said that a municipality may be liable for acts done in a proprietary capacity. As can be expected, this distinction has resulted in much confusion and lack of certainty.

Prior to the recent legislation that we will be dealing with, claims against the state were met by the Sundry Claims Board. This board was created in 1917 and was composed of the auditor, attorney general, chairman of the House finance committee, chairman of the Senate finance Committee, and director of the state office of budget and management (formerly the director of finance). The procedures of the Sundry Claims Board were the subject of considerable criticism over the years for a number of reasons. It was criticized because it had inadequate staff and budget, because of the delays inherent in this kind of procedure where the state agency had first to investigate a claim, and the inadequacy of investigation reports. The chief objection from many sources involved the lack of court procedures, the use of hearsay, and the uncertainty

about legal standards and precedents. Furthermore, if a claim were found to be valid, payment could be made only if the amount involved were $1,000 or less and then only if an appropriation had been made. Other claims went into a sundry claims appropriation bill. Although the claims in that bill had been acted upon by the Board, the bill was subject to change through the legislative process and was also subject to veto by the Governor. After many years of criticism of this system and after many attempts to introduce legislation to change it, 1974 House Bill 800 abolishes the Sundry Claims Board and allows claims to be made against the state through the mechanicm of a new court, called the Court of Claims. Some of the main points concerning the new Court and the new procedure are discussed at pages 8 and 9 of Research Study 44C. The state specifically and in these terms "waives its immunity from liability and consents to be sued, and have its liability determined in the Court of Claims . . ." with the same rules of law applicable to suits between private parties, subject to limitations set forth in the new law. The defense of sovereign immunity is, however, still available to political subdivisions under this legislation.

The new court is designated as a court of record and it is to be staffed on a case by case appointment by the Chief Justice of the Supreme Court from the ranks of incumbent judges of the Supreme Court, Courts of Appeals, Courts of Common Pleas and the retired judges who may be used for active duty. The court is to sit in Franklin County although the Chief Justice may direct it to sit in any county upon a showing of substantial hardship and "whenever justice dictates." A case will normally be heard by only one judge, but may be heard by a panel of three if a claim presents "novel or complex issues of law or fact."

The Supreme Court appoints the clerk and deputy clerks, who must be attorneys. The clerk's offices are in Columbus. The general operation of the office is subject to Supreme Court control. There is one principal departure from the rules of civil procedure. The law recognizes suits in both contract and tort. However, in the case of tort claims involving personal injury or property damage there is a requirement that the claimant give notice of intention to file a claim to the state within 180 days after the cause of action arises. The statute of limitations for the commencement of the suit still applies, but the notice of intention to file a claim must be given. There is also special provision for administrative determination of claims--mandatory for claims involving less than $100 and if the claimant agrees where the claim is for less than $1,000. The administrative determination is handled by the clerk of the new court. There is provision for the removal to the Court of Claims from other courts as a matter of right by a party in another court who names the State in a counterclaim or who makes the State a third party defendant.

Several exceptions to other civil actions are to be noted. There is a provision that except for third party or counterclaim actions not against the state, there is no jury trial. One of the objections over the years to abolishing sovereign immunity had been that juries would make large awards against the state that would affect its fiscal integrity. Also, the procedure provides that any awards to a claiment shall be reduced by the amount of insurance the claiment receives. There are limitations about the amount of interest that may be included in judgments.

There is a provision for transition from the Sundry Claims Board that results in retroactive waiving of the doctrine for specific purposes, based upon the statutes of limitations that apply to the various kinds of actions that may now be brought against the state.

The study includes some of the pro's and con's that have been advanced concerning perpetuating sovereign immunity.

Mr. Mansfield said that he assumes that if insurance proceeds are to be deducted, the insurance company is not subrogated for its claims. It was acknowledged that this is a question that is possibly subject to litigation. Mr. Montgomery then asked Mrs. Hunter to state the issues before the committee.

Mrs. Hunter - The specific issues before this committee are reviewed on the page headed "Court of Claims". The problem is that the creation of this new Court of Claims is contrary to this committee's endorsement of a unified, three-tiered court structure. As you all know, its recommendations to date would vest judicial power in a judicial department consisting of the Supreme Court, Courts of Appeals and Courts of Common Pleas. We would recommend deletion of the language "and such other courts inferior to the Supreme Court as may from time to time be established by law." If the committee's recommendations were adopted, the Court of Claims as presently constituted would likely be held unconstitutional. The committee in discussing the transition has assumed that the minor courts, municipal and county, would be absorbed into the single trial court, perhaps as subject matter divisions of the one court at the county or district level. A constitutional amendment to implement the committee's recommendations would necessarily have to provide for the transition from the present statutory courts into one constitutional trial court. We believe that this committee must consider a couple of options. One is whether to amend Section 16 of Article I to change that last sentence so that the doctrine of sovereign immunity would continue to be abolished but that it would be a self-executing provision and not require further action by the legislature. The committee could, of course, as a second alternative, recognize a constitutional Court of Claims and thereby put in an exception to the unified, three-tiered structure that it has endorsed. Some of the points that have been made for a separate court by commentators responding to the new legislation have been that having a new court will not contribute to the already overcrowded dockets in metropolitan courts, that this new court will enable a special expertise to be developed dealing with claims against the State, and that a uniformity of judgment will be assured by having a separate Court of Claims. However, one difficulty with recognizing an exception to the unified court is that this opens the door to other exceptions. There have been frequent references in this committee's deliberations to the call for housing courts around the state, for example. The need for a specialized court seems to be a popular cry, yet it is at odds with what is trying to be established by having a uniform court. This committee has committed itself to the position that structural specialization in the court system sacrifices economic benefits, efficiency, and particularly flexibility that are available in a single three-tiered system. The same goals of uniformity and expertise that have been recognized with respect to having a Court of Claims can, of course, be recognized through the creation of subject matter divisions. And this is what the committee has contemplated with respect to the absorption of the minor courts.

Mr. Montgomery - How could a subject matter division handle cases against the state?

Mrs. Hunter - I think that here we have to be concerned with the subject matter of the litigation and not so much with the identity of the defendant. The subject matter might be more logically developed along lines of the kind of case that is involved. This is what the Commission on Standards of Judicial Administration has noted in its recommendation that there be trial court unification. It has pointed out: "It is evident, to mention extremes, that products liability and antitrust cases cannot be prepared and tried according to rules that are also appropriate for small claims cases in which the parties are not represented by counsel. Indeed there is a growing recognition that 'big' and 'small cases are themselves of a variety of types that may require different procedural formats. A unified trial court does not preclude adoption of different procedural formats for different types of cases." The separation need not be on the basis of defendant.

It can be argued that efficiency of the use of judicial manpower is not so much affected by the Court of Claism, inasmuch as it is to be staffed on a case by case basis and therefore is not going to result in the creation of new judgeships. It may not be subject to as much criticism as creating additional municipal courts, for example. Nevertheless, there is duplication--of filing systems, clerical staffs, court room reporters and personnel, motion calendars, trial lists, and financial records. And the valid criticism still applies that if one exception is recognized, there is bound to be a feeling that other exceptions are equally valid.

One of the areas that I did not review in the Research Study has to do with what has been happening in other states. In other states the doctrine of sovereign immunity has been subject to as much criticism as it has in Ohio, and it has been ameliorated, abrogated or abolished either by legislative action or by court action or by a combination. Where governmental immunity has yielded to allow suits against the state, the most common arrangement has been to allow such suits to be heard in the trial court of general jurisdiction. There are courts of claims as well. New York has long had one.

Mr. Montgomery asked if jury trials are commonly allowed and Mrs. Hunter replied that there is often a provision for trial of such suits by the court rather than a jury even where the trial court of general jurisdiction is used. She added that there was an extensive study done in California where jury trials are allowed and it has allayed some of the fears that jury trials would result in enormous awards against the state. Mr. Mansfield asked about venue provisions in other states, and Mrs. Hunter replied that this is not a matter specifically researched. Mr. Norris noted that Georgia has just established a court of claims and stated that it was his belief that both California and New York have such courts. Illinois, too, has a court of claims. Mr. Norris said that legislative research had indicated to the contrary that the movement is towards establishing courts of claims.

Mr. Montgomery - Is there any chance that, regardless of what we recommend, the legislature will change its mind on a court of claims?

Mr. Norris - I have strong feelings on this point. I think that this is a good example of where theory runs headlong into practice. The concept of a unified court system is a very good one, and is one that I support. But I don't think you can erect an altar about it once you have decided that this is to be the pattern. Like many good concepts there must be exceptions to prevent bad results, and I think that this is one of them. The legislature has tried for 30 years to replace the Sundry Claims Board. We abolished sovereign immunity in 1917 in essence so so far as the state is concerned by creating the Sundry Claims Board. The problem was that there was never a suitable forum. It never worked right. When Frank Lausche was Governor both houses passed a bill waiving sovereign immunity and putting jurisdiction to try claims against the state into the courts of common pleas. Until this past session this was the closest that the legislature ever came. The practical hurdle has always been one with the executive branch of government also. I was convinced as we went along that the only practical way that we would ever come up with an acceptable forum was to come up with a special forum because the state had an interest in not having venue in all the 88 courts of common pleas. Staff all around the state creates an intolerable burden from an administrative standpoint--this has always been the powition taken. Some of the strange provisions that you see in HB 800 are the result of compromise and the give and take involved in certain classical positions having been taken. The administration as well as the legislature has a unique interest in this matter. In my judgment the legislature because of this great concern of the administration is never going to buy the idea of having jurisdiction to hear claims against the state in the courts of common pleas. We have tried before without success, and I don't think that we can get that done. You might be interested to know that the special committee of both houses of the legislature met yesterday to formulate its recommendations. Its recommendation was that while we go for a unified court

system we should also provide for courts of special subject matter jurisdiction as an exception. In other words, it favored allowing the legislature to create courts of special subject matter jurisdiction.

Claims against the state simply don't fall into subject matter divisions of the courts. I don't think that the housing court analogy is accurate. I think that a housing court could become a subject matter division of common pleas court. I don't think that the legislature would consider a statewide housing court. But there are special subject matter areas that lend themselves particularly to a statewide court of special jurisdiction. This is one of them. Another is a Tax Court. We are going to have to have a Tax Court in this state some day. But if we draw a wall around the unified court system we are not going to be able to have a court of claims. To have the Court of Common Pleas handle such matters is not an acceptable alternative in my view. One of the practical problems is that we are never going to sell it to the legislature. My feeling is, why try to sell a bad concept--at least an alternative that is inferior? I think that it can be solved very quickly by changing Section 1 of Article IV. After "courts of common pleas" I would add "and such special subject matter courts having statewide jurisdiction as may from time to time be provided by law." That would require a court of special subject matter jurisdiction to have statewide jurisdiction. I don't believe that this would result in the creation of lots of special courts. The only two that I can think of at the moment are the Court of Claims and a tax court. You would still avoid the multiplicity of lower trial courts that we seek to avoid. You would still have a unified court system with these exceptions, and remember the exceptions would have statewide jurisdiction.

Mr. Montgomery asked if there were other views to be expressed. The language of Mr. Norris' proposal was discussed. Mr. Montgomery said that apparently there was consensus to make some change along the lines suggested by Mr. Norris and asked for specific language in a motion. He noted that the committee was very close to having its final report ready.

Mr. Norris - I will move that in Section 1 of Article IV we make the following changes: delete the capitalized AND in the second line; after "pleas" reinsert the word "and" and insert in all caps "SUCH SPECIAL SUBJECT MATTER COURTS HAVING STATEWIDE JURISDICTION" --then reinsert "as may from time to time be established by law." I have no pride of authorship on these words, so if the staff has some other idea of how to express it, I am agreeable. I do want to tie it down to special subject matter jurisdiction and to statewide jurisdiction, to avoid the problem of local branch courts.

Mr. Montgomery - Do we then have to alter Section 16 of Article I to read in such "state courts" as may be provided? I guess not.

Mr. Mansfield - I have a question. I am all for this, but I assume that appeals go from the Court of Claims to the Supreme Court.

It was agreed that appeals would go to the Court of Appeals, then the Supreme Court, and it was further agreed that Mr. Norris' amendment would not change that procedure. Mr. Mansfield seconded the motion. Mr. Montgomery asked Judge Leach if he had any comments. Judge Leach said that he was in basic agreement with the concept and was wondering if "exclusive jurisdiction" would be more definitive. However, he added that he would not want to change the appeals procedure so that he would not propose change in the language at this time. Mr. Montgomery then

asked Judge Radcliff if he had any observations. There was no further discussion on the motion, and it was adopted. It was agreed that staff would look over the whole package to see if the committee's intent had been implemented. Mr. Montgomery then asked Mr. Nemeth to discuss the delegation of quasi-judicial power, the second item on the agenda.

Mr. Nemeth - This topic is of interest because we felt that since the Constitution was going to specify the courts in which the judicial power would be lodged, there is the possibility that someone would raise the question of whether the General Assembly, or anyone else, would have the power to confer any other judicial or quasi-judicial jurisdiction on anyone else. We thought that the question ought to be raised and explored to some extent. The problem of administrative adjudication has become more and more acute in the 20th century as government has become more complex, and administrative adjudication has become a practical necessity. At the present time, the question of who may delegate quasi-judicial power and under what conditions it may be delegated seems to be fairly well settled. The general rule seems to be that absent a specific constitutional provision, investing certain judicial powers in specified courts, it is the legislature's prerogative to delegate quasi-judicial power to administrative agencies and officers to such an extent as may be necessary for them to carry out their functions, as long as there is provision made for the review of any final administrative determination by the judicial branch. This was the holding in an Ohio case, Stanton v. State Tax Commission, a 1926 case. Considering the state of the art at that time, the case must be considered a forward looking one. This holding still represents the law in Ohio and it is consonant with the holding in other states and also of the federal courts. There does not seem to be any reason for recommending a change in the Ohio Constitution in regard to this matter at this point because all Ohio courts, by Constitution or by statute, have the requisite jurisdiction to review the proceedings and the determinations of administrative agencies and officers. The 1970 federal case of Goldberg v. Kelly is a cornerstone case in the area of administrative due process, which of course is an implied condition either under the state or Federal Constitutions. In Goldberg, which applied the concept to the question of the termination of a welfare recipient's payments, the Court in effect set the ground rules or basic standards for this process, including: (1) adequate and timely notice, (2) the opportunity to retain counsel, (3) the right to oral presentation, (4) the right to confront and cross-examine adverse witnesses, (5) an impartial hearing officer, and (6) a reasoned decision on the part of the agency or officer. It is a question which deserves consideration whether a state constitution ought to contain these standards as constitutional requirements or whether the meaning of administrative due process ought to be implemented as it is developed through court decisions. The Commission's Bill of Rights Committee might want to consider this question and this committee may wish to bring it to their attention and refer it to them, even though it is our conclusion that there is really nothing for this committee to do in this area.

Mr. Montgomery -As the situation now stands, the whole subject of administrative law is not dealt with in the Constitution, is that correct? (It was so agreed.) And is there a compelling reason for us to deal with it?

Mr. Nemeth - No, although it may be something which the Bill of Rights Committee will want to consider. It may wish to consider whether the standards for administrative due process should be incorporated into the Bill of Rights. But so far as Article IV is concerned, there seems to be no reason either to include the standards or to include anything else on administrative officers or agencies in the article at the present time.

Mr. Montgomery - Is the Bill of Rights Committee dealing with the subject of administrative due process?

Mr. Nemeth - I personally am not aware whether they are or not, but it may be desirable to bring to their attention some of the potential problems in this area.

Mr. Mansfield said that he would accept Mr. Nemeth's suggestion and refer the matter to the Committee on the Bill of Rights, and he so moved. Mr. Norris seconded. Mr. Montgomery invited comment from committee members as well as members of the audience. The motion was adopted. The third item on the agenda was then announced--the proposed draft of Article IV, dated December 12, 1974. This is the latest draft, Mr. Nemeth said.

Mr. Nemeth - There are two changes from which Draft #2 which the staff considered nonsubstantive and I would like to call them to your attention. The first is on page 8. In the first sentence of the last paragraph, all in caps and referring to uniform criteria by the Supreme Court, we discovered on repeated reading that in Draft No. 2 we has given the Supreme Court the power of making suggestions as to increasing the number of judges twice. There was a needless repetition in the sentence. This has been corrected in Draft No. 3. The words in the third line of Draft No. 2 "NECESSITY FOR INCREASING" have been removed. Draft No. 2 read as follows: "THE SUPREME COURT SHALL ESTABLISH BY RULE UNIFORM CRITERIA FOR THE DETERMINATION OF THE NEED FOR ADDITIONAL JUDGES, EXCEPT SUPREME COURT JUSTICES, AND FOR ADDITIONAL MAGISTRATES, THE NECESSITY FOR INCREASING OR DECREASING THE NUMBER OF JUDGES OR MAGISTRATES AND FOR INCREASING, DECREASING, OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS . . ." I think we are all aware that there is a duplication there. The third draft, which removes this infirmity, simplifies the matter, and reads as follows: "THE SUPREME COURT SHALL ESTABLISH BY RULE UNIFORM CRITERIA FOR THE DETERMINATION OF THE NEED FOR ADDITIONAL JUDGES, EXCEPT SUPREME COURT JUSTICES, AND FOR ADDITIONAL MAGISTRATES, THE NEED FOR DECREASING THE NUMBER OF JUDGES OR MAGISTRATES AND FOR INCREASING, DECREASING, OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS."

Mr. Mansfield - What is a magistrate?

Mr. Nemeth - A magistrate is a judicial officer who, according to another provision of the draft as it now stands, will be appointed by the common pleas court under Supreme Court rule to handle minor matters, such as traffic violations. They will be judicial officers whose main purpose will be to relieve common pleas court judges of the necessity of taking time with matters that could be readily disposed of in this manner.

Mr. Mansfield - The word "magistrate" is a word of art. Has it an established meaning?

Mr. Nemeth - I believe so. It is used in several other state constitutions.

Mr. Mansfield said that he remained concerned that the word is sui generis. Mr. Nemeth said that he thinks that a definition can be found in case law or legal dictionaries. He stated that he felt that "magistrate" had an established meaning. Mr. Mansfield asked whether it does not have different connotations. It was agreed that this is so, but pointed out that in American law at the present time it refers to an officer who exercises judicial powers but is not a judge. Mr. Mansfield asked Judge Leach if he were satisfied that the word is self-defined.

Judge Leach noted that the duties of a magistrate would be prescribed by the Supreme Court. There was general discussion about the difference between a referee and the contemplated magistrate, and agreement on the point that a judge can reverse a referee but that from the decision of a magistrative one goes to the Court of Appeals. Mr. Mansfield said that he was satisfied, particularly with the provision on specification duties by the Court.

Mr. Nemeth - The second change from Draft No. 2 is on page 12. It occurs at the beginning of the first full paragraph, paragraph (B). Draft 2 at the first (B) read as follows: "THE CHIEF JUSTICE, ANY JUSTICE OF THE SUPREME COURT, OR ANY JUDGE OF A COURT OF APPEALS WHO IS SERVING A FULL TERM OR THE REMAINDER OF A TERM ON THE EFFECTIVE DATE OF THIS AMENDMENT IS ENTITLED, UNLESS REMOVED FOR CAUSE, TO REMAIN IN OFFICE." Upon re-reading that we have concluded that the phrase in the second line of what I have just read--"A FULL TERM OR THE REMAINDER OF A TERM"--is unnecessary. The third draft would read as follows: "THE CHIEF JUSTICE, ANY JUSTICE OF THE SUPREME COURT, OR ANY JUDGE OF A COURT OF APPEALS SERVING ON THE EFFECTIVE DATE OF THIS AMENDMENT IS ENTITLED, UNLESS REMOVED FOR CAUSE, TO REMAIN IN OFFICE." It doesn't matter whether he is serving a full tiem or the remainder of a term.

A question was raised about whether the Chief Justice is a Justice of the Supreme Court and if so, if the word "other" should be inserted. It was agreed that the Constitution creates a Chief Justice"and six justices." Mr. Nemeth pointed out another minor change in the same paragraph from the second to the third draft--in the 6th line the word "continuance" is changed to "continuing." the sentence commences "THE QUESTION OF HIS CONTINUING IN OFFICE . . ." The reason for the change is to make the language parallel with language that refers to the Court of Appeals. It is for consistency.

Mr. Montgomery then asked for committee approval of the nonsubstantive editorial changes in Draft No. 3. A motion to that effect was made and seconded and adopted by the committee. Mr. Montgomery then announced that the floor was open for further remarks or suggestions.

Mr. Norris - I think that this committee ought to be aware of what the legislative committee did yesterday. In our draft we talk about the ability of the Supreme Court by rule to set up subject matter divisions--see page 7 of Draft 3. The Court may also by rule assign judges thereto. On the establishment of subject matter divisions, it was the feeling of members of the joint legislative committee that this should be done in partnership between the Supreme Court and the General Assembly. When you consider the Modern Courts Amendment and the provision here on districting, we have two ways already of partnership. Under the Modern Courts Amendment the Court proposes and the legislature rejects. Under this new draft on districts we have a new way of partnership--and that is that the Court suggests and the legislature either adopts or rejects. Or ignores--the Court doesn't have to act. The committee yesterday thought that we ought to do something in the middle in this area of subject matter divisions. We felt that the Court should still take the initiative in the area of subject matter divisions and we would use a procedure analogous to what goes on under the Modern Courts Amendment, whereby the Court submits a proposal which becomes law within a certain amount of time unless the legislature rejects and we would add "or amends." The legislature couldn't ignore the proposal.

The reason for thinking that there ought to be a partnership was that we have seen a lot of pressures for subject matter divisions in recent years. We created small claims divisions because they were appropriate under the old court structure--they may no longer be appropriate. The suggestion of a housing division is one we've heard. I can see pet projects continuing to be a matter proposed for subject matter divisions, so that I can see that the legislature is capable of making mistakes in that area. On the other hand, I can also see the Supreme Court making mistakes because it doesn't arrive at decisions the same way that the legislature does. It is not really suited to make legislative decisions, and this is really a kind of legislative decision. On the other hand, I think that Court involvement is important in making decisions about subject matter divisions. The joint committee's rationale, then, was that the matter falls in the legislative domain--i.e. is suited to the legislative process--but on the other hand the Court has a particular expertise, and it ought to be involved. So let's put them both together. The joint committee did not discuss the matter of how judges are assigned to subject matter divisions, assuming that that were done by statute. That could be done in a number of ways--e.g. election to a special division, or choice of the judges in an election among them. If you allow local judges to make the decisions, they are going to rotate. No one wants to stay in the criminal area. There are advantages and disadvantages both ways. But I disapprove of rotation on the domestic relations division. That takes expertise. Probate is the same. So the committee did not decide this matter. To me personally the decision that the Supreme Court assign judges to divisions is really unwise. Of the three alternatives I think that it is least advisable for a court in Columbus to decide what judges should sit where in Cuyahoga County.

Mr. Montgomery - I don't think that is what is intended. We are talking about rules by which the choice is made--e.g. by the Chief Justice of the common pleas court at the local level.

Mr. Norris - That brings me to my next point. If what we mean is that the Supreme Court is to prescribe rules as to how the local courts will handle the matter, let's make that clear. I'm not sure that the present language doesn't also say that the Supreme Court could by rule say that it would do the assignment.

Mr. Montgomery asked Mr. Nemeth about committee intent in the drafting of this provision. He said that he did not believe that it was ever the intent of the committee to provide for direct appointment from the Supreme Court to a division on the local level. Mr. Montgomery added that he felt that the committee had realized the difficulty of working out difficulties that might exist in a particular area such as Cuyahoga County and that it was his understanding that the provision was not written contemplating central assignment from Columbus.

Mr. Norris - I think that there was a feeling that there has to be a rule established because if there no rule, eventually, I suppose, there would be anarchy. There should be a standard established by which the assignment is going to be handled so that it doesn't depend on the whim of individual judges.

Mr. Norris - I think that it should be done in one of two ways--either on the local level by the local judges pursuant to rules established by the Supreme Court or it's done some other way, provided by the legislature, which could include direct election. I don't care. If what the committee has decided is that it wishes the Supreme Court to make rules for this purpose, I am agreeable.

Mr. Montgomery recalled the testimony from Illinois which he noted had impressed the committee members because of the flexibility that is provided in the system that operates there. It was the intent of the committee to have a like procedure--i.e. let this be done at the local level, but done in a logical, proper manner as the Court might opt. Mr. Norris said that he would like to see the language clarified. He reiterated his support of a partnership for the setting up of subject matter divisions and asked committee comment. Mr. Nemeth pointed out that a departure at this point by the committee would be a departure from the standards adopted by the American Bar Association in February, 1974. Both the creation of subject matter divisions and assignment of judges thereto, he said, are under the standards internal matters for the Court. Mr. Montgomery asked Mr. Norris if he had the joint committee's proposal in writing, but Mr. Norris said that he did not. Mr. Nemeth then pointed out that the rules governing the establishment of subject matter divisions and assignment of judges thereto would under the draft be subject to review by the General Assembly.

Mr. Nemeth - Would you wish to recommend change in the entire last paragraph at page 8--to provide not only for legislative veto of all rules but also amendment?

Mr. Norris said that he would personally approve of such a change and that it would make the job an easy one, but that he felt that it would stir up much controversy. If the Court has no objection, he said, he would like to do it that way.

Mr. Mansfield asked to what rules the expression "Proposed rules" applies in the paragraph at the top of page 8 and Mr. Nemeth replied that it refers to all rules covered by the first three sentences of Section 5 (B). Mr. Norris then said that he felt that if the Supreme Court has authority to prescribe rules by which subject matter divisions are established, that this is comparable to empowering the Court to establish the subject matter divisions and it is this that concerns him. He added that he thinks that rather than prescribe procedures for the establishment of divisions that it is more likely that the Court would create the divisions--e.g. "There shall be a housing division and this is how you set it up." Mr. Mansfield asked Mr. Norris to set forth the language of amendment to make the change he favors.

Mr. Norris - We could do it two ways--as Julius suggests we could insert the ability of the General Assembly to amend all rules by changing the sentence at the top of page 8 that begins "Proposed rules . . ." This opens up a can of worms on all the rules of civil and criminal procedure. All I am asking this committee to do is to apply the amendment procedure to the determination of subject matter divisions.

Mr. Montgomery - What is the matter with rejection or adoption by the General Assembly? If the legislature rejects, the rule goes back to the Supreme Court for modification, doesn't it?

Mr. Norris - The problem is that the rule the way it stands mandates a confrontation between two branches of government. We had such a confrontation on the criminal rules the first time around. My concern is that there is no reason for the Court and the legislature to fight. But there was no alternative in that situation, and it was bad. We established a principle there. Since that time the Court and the legislature have tried to work together closely. But I am concerned about opening up another area of possible disagreement.

If I had it to do all over again I would have opted for having the Modern Courts Amendment allow amendment. Let's not forget that the legislature gave the Court the authority.

Mr. Mansfield - I favor limiting the "amendment provision" to creation of subject matter divisions and assignment of judges.

Mr. Nemeth - Then the simplest thing to do would be to remove the creation of divisions and assignment of judges from this paragraph and write a separate paragraph.

Mr. Montgomery - Would you propose that we do that? Will the staff take a look at some new language and see how best this can be accomplished?

Mr. Norris moved that this be done. Mr. Mansfield seconded the motion. Mr. Montgomery invited comment from the committee and the audience. The motion carried, and the staff was instructed to do appropriate drafting in accordance with the change adopted.

Mr. Roberto then pointed out a proposed amendment to Article IV that had been distributed by Mrs. Eufinger.

Mr. Roberto -As you might expect, we have not fully satisfied some of those people who are concerned with the creation of the district concept. What this amendment attempts to do is to preserve the concept of a unified trial court and efficient administration on the district level and yet to avoid the problem that we have acknowledged exists when a judge has to run in a district in which there is a large metropolitan area. When judges from smaller counties are attached to districts in which there are large cities, they can be expected to have a very difficult time trying to be elected. The language of this amendment tries to create administrative districts of two or more counties yet retain the election of judges on the county basis and retain the court on the county basis. I would like to move the amendment.

Mr. Mansfield seconded Mr. Roberto's motion to amend Sections 4 and 6 of Article IV to provide for administrative districts but election by county. Mr. Roberto said that his motion encompassed the language of the draft amendment for purposes of discussion, but that it would be subject to redrafting to accord with total committee report. Mr. Montgomery invited him to speak on the motion.

Mr. Roberto described the changes proposed in Section 4, found on page 6 of the committee's third draft. Section 6 (P. 10) would also be affected in 6 (A) (3) (A) and 6(A) (3) (B) on page 11 would be replaced by 6 (A) (3) (b) in the amendment. Some capitalization changes might have to be made, he pointed out. He then requested that people present have an opportunity to speak on behalf of the amendment.

Mr. Norris - The amendment last made here, embodying the district concept, is one that I had a lot to do with. Its purpose was to provide for the more efficient use of judicial manpower, a matter of great concern to many of us for many years. The assignment system has never really eliminated the problems of inequality of burden. I still think that districting is necessary. I do, however, concede, that the judiciary in these rural counties has a legitimate concern. They have taken it to the full body of the Association of Common Pleas Judges, and it is my understanding that they have the tentative support of all their brethren, including their urban brethren. They are concerned that they will be "gobbled up" in the urban counties. I think that in the first presentation before this committee the supporters of this amendment wanted us to drop districting altogether and this was an inreasonable

proposition that we could not endorse. I have spoken informally with many of these judges, encouraging them to come up with a workable proposal, and I think that they have done that here. What they are asking for is administrative districts. This would allow us to draw together a number of counties for purposes of administration. There could be a single docket and a single clerk, single assignment clerk, and single assignment system. Under the language proposed (which I would change somewhat) there could be assignment within the district. There would be no need to go through the Supreme Court and make it more complicated. Yet it would preserve the minimum of one common pleas judge in each county. I think that we should go one step further--and these judges tell me that they are ready to support me legislatively--and that is that we mandate by statute the consolidation of probate and common pleas courts in the small counties. This, too, was endorsed by the joint committee yesterday. If we were to combine those courts in all smaller counties and adopt this proposal for administrative districts, I think that we will have solved most of the problems that we sought to solve by districting. We still will have problems--in Southern Ohio, for example, where there will be difficulties in drawing districts other than in areas involving very small counties but I think that we can work out these matters. The name of the game is compromise. I think that the complications are minimal.

In response to a question Mr. Norris noted that the amendment would make no change in the merit selection proposal because although there would continue to be one common pleas judge in each county, how such judges are selected is determined by other provisions in Article IV. The county could opt for merit selection under our draft, he said.

Mr. Norris - Let me propose some alternative language for this amendment--on page 6 of the Draft #3 before us. In Section 4(A), line 5, after "resident judges" change "or" to "AND"; at the end of the line, after "into" insert "ADMINISTRATIVE"; in the next line, after the word "districts" delete the rest of the line (having one or more judges resident in the district and serving the common pleas); in the next line delete "courts of all counties in the district"; at the end of that line the language reads "Judges serving" insert "IN"; at the end of the next line at the end of the line substitute "DISTRICT" for "court"; in the next line, after "In" insert "counties of ADMINISTRATIVE districts and delete "COURTS OF COMMON PLEAS". The language, disregarding capitals, would then read as follows:

> "There shall be a court of common pleas serving each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges and two or more counties may be combined into administrative districts, as may be provided by law. Judges serving in a district shall sit in each county in the district as the business of the court requires. In counties or administrative districts having more than one judge the judges shall select one of their number to act as presiding judge, to serve at their pleasure."

The section goes on. What we are really saying is that these districts are administrative districts. They are not districts set up for the purpose of electing judges from the districts. Judges would still be elected from counties.

Mr. Montgomery - Could a judge elected from a rural county be assigned to a subject matter division by the Chief Justice or the justices of the district? How far does administration go?

Mr. Norris: Well, let's assume in Franklin County where there are 14 judges. Those 14 judges select a presiding judge and an administrative judge; they assign judges to subject matter divisions. The same think would happen in an administrative district. All the judges of that administrative district would be the selecting group. They would select their administrative judge and presiding judge and they would assign judges to subject matter divisions. You are treating a group of counties for purposes of administration just the same as a group of judges in a multi-judge county. They would have the same docket, assignment commissioner, and the same clerk. The idea is to get the advantages of districting that come from unified administration. The retreat is that you don't get 100% maximum use of judicial manpower that is theoretically possible with the district concept when it extends to election of judges from a district only. The thought there was that if you combine six counties that together need only four judges, you elect only four judges. You could not do that under this proposal. That is the one small concession that is being made. I'm not convinced that there will be many examples of that. Such loss of efficient use of judicial manpower will be minimal, especially when we go to the abolition of both a probate judge and common pleas judge in counties that cannot justify two such judgeships.

Mr. Nemeth - What is the answer to the question posed by the possibility of a judge sitting in judgment over people who did not elect him under this scheme?

Mr. Norris - It is done today by assignment.

Mr. Nemeth - It is provided for in the machinery, and does constitute an exception. But even that practice can be criticized on that basis.

There was some discussion of this point and of the fact that there is a holding that the one man one vote rule doesn't apply to judges. Mr. Nemeth agreed that the courts have held that such a concept doesn't apply when it comes to numerical equality--i.e., there is no requirement that each judge serve the same number of people--but he suggested that some may argue that there is a basic inconsistency between having a judge elected and then not having him serve the people who elected him. It was, he said, a philosophical point he felt should be raised.

There was some discussion on the point of having one judge serve as probate and common pleas judge in rural counties and the fact that this is the subject of both Constitution and statute. Mr. Norris reiterated that he felt such a combination is very appropriate for a small county where no justification can possibly be made for electing two separate judges, in addition to county judges. Recruitment of judicial candidates is a problem, too, he added. Pay is a problem--there is little for such judges to do in very small counties. Assignment from the Supreme Court has been the only evening mechanism, he pointed out. Mr. Norris said that it is perfectly conceivable that within administrative districts there could be subject matter divisions, and named a juvenile division as an example where a judge might there ride circuit. Such an arrangement might well be the result of a Supreme Court rule, he stated.

Mr. Montgomery invited further comment from anyone with a contrary point of view. Elizabeth Brownell expressed what she said was a personal and not necessarily a League position of disappointment that some good concepts previously adopted were abandoned. She expressed her hope that the Commission would make recommendations along the line of what it considered ideal rather than to make compromises. A disclaimer of compromise was expressed.

Mr. Montgomery stated that he felt that the staff should examine the language in the motion and that he felt action on the precise language was premature. Mr. Roberto agreed that the proposal should be examined and that the staff should draft what the sense of the committee appears to be on the basis of the discussion. Mr. Roberto then withdrew the precise motion and with the consent of his second requested the staff to embody the substantive idea in the sections involved in conformance with the committee's Article IV. Mr. Montgomery asked if he would have objections to the setting forth of pro's and con's on the subdtantive idea and he said that he would not. Mr. Norris suggested talking to judges for their pro views. A rephrased motion to the effect that the staff examine language and make a report in accordance with discussion was adopted. The staff was so instructed. Mr. Montgomery announced that the date of the meeting would be set sometime after the first of the year and that probably two more meetings would be necessary, to consider the matter at hand and the final product of the committee. He expressed the hope that the committee's final report could be finished as soon as possible.

(Council for Local Judges)

PROPOSED AMENDMENT TO ARTICLE IV

ARTICLE IV - Section 4

(A) There shall be a Court of Common Pleas in each county of the State. Any judge of a Court of Common Pleas may temporarily hold Court in any county. Each county shall have one or more resident judges and two or more counties may be combined into administrative districts as may be provided by law. Judges resident in each county shall sit in each county in the district as the business of the county requires.

In counties or administrative districts having more than one judge of the Court of Common Pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure.

Remainder of 4(A) is unchanged.

ARTICLE IV - Section 6

(A) (3) (a) Except as otherwise provided in (A) (3) (b) of this Section, judges of the Courts of Common Pleas shall be residents of and elected by the electors of the counties, and each judge of a Court of Common Pleas shall reside during his term of office in the county from which he is elected.

(A) (3) (b) The judges of any Court of Common Pleas may be nominated, appointed and retained in office in the same manner as Justices of the Supreme Court, and Judges of the Courts of Appeals, upon the affirmative vote of a majority of the electors voting on the question within the county in which said Court has territorial jurisdiction. The General Assembly shall decide the method of submission of the question.

December 18, 1974

Ohio Constitutional Revision Commission
Judiciary Committee
January 30, 1975

Summary

The Judiciary Committee met at 1:30 on January 30, 1975 in the Commission office conference room. Present were Chairman Montgomery, Mr. Roberto, Dr. Cunningham, Mr. Guggenheim, Mr. Norris, Mr. Skipton, and new member Mr. Maier. Also present were Judge Robert Leach, Committee Special Consultant; Allan H. Whaling, Executive Director of the Ohio Judicial Conference; Ohio State Bar Association representative Robert Manning; William Steritt of Clerk of Courts Association; Miriam Hilliker from the League of Women Voters; Charlotte Eufinger, Representing the Ohio Council for Local Judges, as well as speakers John C. Wolfe, Frederick N. Young, and John J. Duffey. Staff representatives included Mr. Nemeth, Mrs. Hunter, Mr. Evans, and Director Eriksson.

Mr. Montgomery convened the meeting by explaining that the matter before the committee was a suggestion for administrative districts for common pleas courts and the reinsertion of a requirement into Article IV that there be such a court in each county. At the last meeting, he explained, Mr. Roberto had made a suggestion for such a change in the sections having to do with districting and Mr. Norris had offered specific language for that purpose. The business of this meeting, he said, was to hear from opponents and proponents of the suggestion.

The first speaker was John J. Duffey of Columbus, former member of the Commission, who came to speak on behalf of retaining the present constitutional provision.

Mr. Duffey - Mr. Chairman, Ladies and Gentlemen, I am appearing on my own behalf and not representing anyone else. I do have reasonably extensive background in this whole field of judicial reform in Ohio. I have been a member of the Modern Courts Committee and other committees of the State Bar on this topic for many years.

The whole subject of districting has been investigated very thoroughly by a number of groups, such as the bar and the Legislative Service Commission. I am sure that you will recall this report issued in 1961. (Mr. Duffey referred to the Legislative Service Commission Staff Research Report No. 47, The Ohio Court System: Its Organization and Capacity.) It dealt with problems of judicial reform and substantially with the districting proposals that were incorporated in the 1968 amendment. I recall extensive discussion at a meeting of the Legislative Service Commission study committee at Green Meadows when Chief Justice Taft and the representatives of a number of other interested groups from bench and bar attended, about the whole matter of districting and the election of judges on a county basis, as well as organization of the courts and the idea of a unified court system. That was a three day meeting when many views were aired on the subject. A number of studies have been conducted. This particular study is probably one of the best. I suggest that you re-read it in connection with the subject at hand.

I want to point out to you that there was much time and effort spent in examination of the problems of judicial reform that led up to the 1968 amendment. The districting concept has received much study and was adopted by the people in the most recent constitutional amendment. As I read the minutes of your meeting of December 18, Mr. Roberto and Mr. Norris have suggested a proposal that would return us essentially to the previous constitutional provision, somewhere between the previous one county common pleas court with the judge elected in each county

and the situation we had in Ohio prior to 1880, which was sort of a limited districting system but requiring the election of judges in the district from each county.

I think that I ought to start out by suggesting that a basic concern I have in reading the comments of Mr. Norris and others. Material that I have received from the Local Judges Association indicates a deep concern for accessibility of the court to the people who use it, in terms of distance, filing, ability of people to appear, and so on. Secondly I see a rather deep concern that judges whom we elect in Ohio should reasonably reflect the entire population in Ohio. They should represent the various portions of the population of the Ohio and the interests of the various portions. These are two legitimate concerns and are concerns which I share. I think that in all the years that I have been involved in the study of districting, those concerns have been important, highly considered concerns. I don't think that any of us who have advocated districts over the past 15 years and who supported the recent constitutional change to allow districting have ever disputed those concerns. We want people in judicial offices to reflect the entire spectrum of our state. There are many differences between the attitudes, the concerns, the kind of lawsuits that arise in urban and suburban areas as opposed to rural areas. I think that these differences must be reflected.

It doesn't seem to me, however, that this is the real problem that this Commission is facing or that this is the question that this committee should be looking to. The question is how you go about under a constitutional system in the operation of an efficient governmental system to reflect those kinds of concerns in your legal system and in your administrative structure of that legal system. I'd like to point out that those concerns as well as each of the concerns pointed out by the Committee for Local Judges can under the present constitutional framework be well considered by the General Assembly and reflected by the structure which they eventually decide to put into the districting system. As I pointed out, prior to 1880, the common pleas courts were structured on a district system; there were requirements that a district be subdivided for election purposes. Those subdivisions for purposes of election were based on county lines. I see no reason why the most recent constitutional amendment wouldn't fully authorize the General Assembly to structure the common pleas system to reflect both the problems of the accessability of the court system to the litigants, attorneys, and public at large, and that of reflecting that identifiable, recognized portions of our population have a significant voice in who sits in judgment on their problems.

It seems to me that the real question is, is this an appropriate subject for constitutional restriction? Do you wish to put into the Constitution of Ohio a restriction on the power of the representatives of Ohio to structure an administrative system for the operation of our judicial system? Pardon me if I review some fundamental notions of what a constitution is all about, how we should be using it, and how we ought not to be using it. We all start with the proposition that all the sovereign power rests in the people. Everyone who serves in government is a servant of the people. All power and authority rests in the 11 million people. The Constitution is fundamental, I think we all agree. It is simply a device by which the people themselves try to define who is going to exercise the powers which they possess and how they are going to be exercised. I think that it is important to remember that the Ohio Constitution is not a delegation or grant of authority to anybody. It is a limitation on the exercise of the power of the people. It is an allocation of authority, not a delegation of authority. It's a limitation on power, not a grant of power to anybody. Fundamentally you are dealing with three things in the Constitution--structure of the government, allocation of that power within that structure, and the prevention of abuses by that government of the

rights of people, either individually or collectively. It is at that point, too, that we would acknowledge that we have all agreed on a fundamental philosophy of democracy which incorporates basically and fundamentally the concept of majority rule. We have also adopted the proposition that it is going to be a representative form of government. We are going to have all ultimate power in the hands of elected representatives--and I use "ultimate" advisedly. At this point people begin to diverge very much in dealing with constitutional proposals because here you run into two rather deep lying conflicts that any of you on this Commission must encounter. That is the conflict that on the one hand you know very well that to have an effective, efficient operation of a governmental system, the people who are going to assume the responsibility for governing must be given the power to govern. If you don't give them the power, you can't blame them if they do a miserable job or fail to correct the problems. The moment you put a restriction in the Constitution of any kind you are at least to some extent diminishing the power to covern. You are to some extent pulling back from the flexibility and opportunity to respond to changing circumstances, the opportunity to structure and tailor our laws to meeting changing times and needs.

At the same time, I don't think that there is one of us who doesn't run into a conflict when you deal with a specific problem, whether it be districting or budgeting, or something else--and that is that while we may accept those basic necessities and the basic concept of majority rule, there isn't any one of us who doesn't distrust our representatives to a certain extent. Perhaps even more fundamentally we individually distrust the concept of majority rule. We get concerned about protecting certain kinds of ideas against majority tyranny. This is human and understandable. When you get down to the kind of specifics that you are dealing with today, I would remind you that the system can't function if we don't give it that flexibility--if we don't give the power with the responsibility to the General Assembly to do the job. And to reflect it in the laws of Ohio, which can be changed in our political processes. Those political processes are not very easy to change. As I am sure Mr. Norris will agre, the enactment of a bill is a very difficult process. Certainly it is where there is any significant opposition. So we have built into our political processes quite a few things, but it still has the basic power in our elected representatives to structure our system. That flexibility, I suggest to you, is a terribly important thing. If we tie the hands of the General Assembly, we can't blame them for not being able to deal with the problems. For the last 170 years in this state on the subject of judicial administration and on the structure particularly of our trial court system that is exactly what we have done. We have tied their hands repeatedly and put them in a position where they were unable to create an efficient use of the judicial manpower. We have created a situation where the people themselves are receiving neither the quality nor the quantity of judicial services that they ought to be getting. And that is not true just of the urban areas--it is equally true of our rural areas. It has ramifications across the line in the quality of representation the people receive, in their judicial system, and the quality of judgments that they are receiving.

Each time we seek a constitutional provision to prevent this or that error or that possible abuse, we run the risk that we are perpetuating that which eventually turns out to be an error, or that which by changing conditions no longer remains a valid solution. Today's solution becomes tomorrow's straitjacket. I'm a "bare bones" theorist about constitutional law. Basically, I trust the concept of representative government and of majority rule. When I say that I trust it, I don't mean that I agree with Mr. Norris or the Republicans very often, and I don't mean that I always agree with the Democrats. I mean that I trust the system. I trust the proposition that when problems become severe enough the legislature does respond to them.

I don't trust that they will not commit error--I think that they commit a lot of errors--but, of course, I have to remember that an error can be properly defined in terms of constitutional law, and the concept of democracy, as someone's opinions who doesn't have the majority of the votes. That is what we mean when we say minorities--we mean the people who don't have the political authority to get their particular point of view across. When we say that it is an error for the legislature to structure it this way or not to change it that way, we're saying that we haven't developed enough public support or enough legislative support for our view.

I think that with the theory of a "bare bones" constitution, we don't put in it broad restrictions and limitations. We don't put detail into a constitution. And especially we do not put into a constitution provisions that deal with basically administrative problems, or administrative structure in the operation of our government. This is our conflict--we are unwilling to stick to fundamentals out of distrust for the wiscom of present and future General Assemblies to see the right approach as we see it in today's circumstances and conditions. We basically distrust our own political processes as we set them up and as, I submit, they have been operating efficiently over the years. There is a compulsion to see to it that the legislature comes out with the solution which we see, based on present analysis, as the best one.

With these thoughts in mind, therefore, I am fundamentally opposed to the proposal that has been made by Mr. Roberto. I think that one violates the fundamental purposes of a constitution by burying into a constitution those kinds of administrative structures and solutions to particular prbblems. To give you some idea on that and to refresh your memory on some things, let's go back to that 1961 report.

The statistics given there are very fascinating. I want to update them a bit for you. I checked the statistics that are available in the reports of the Supreme Court. You will find that in the 1974 statistics of the Supreme Court, the basic trends and the basic problems that the Legislative Service Commission laid out in 1961 haven't changed a bit in the intervening 14 years. They are basically the same structural problems. At that time you had 65 counties with one judge--you now have approximately 56. If you check the population, we find that we added a judge in a couple of counties where there was a small population change. You'll find that on the average throughout the state the number of judges is about one per 60,000 and, as we had in 1961, we have 9 counties in which the population is well under 20,000. We have 24 or 25 counties where the population is under 30,000. We have something like 59 counties in which the population is under 40,000. And yet we have 1 judge, for the common pleas court alone, without getting to the fact that we have structured into those counties all kinds of additional judges. In addition, as is reported in the 1961 Report, when you look at caseloads of judges in those counties, you mustn't look just at the fact that in Pike county, for example, or Vinton or Monroe or any of those smaller counties, the judge has a certain caseload. If you look deeper, you find that in many of those counties there is no municipal court. A lot of the caseload in Franklin county, for example, is siphoned off into the municipal court. The caseload in the small county includes the municipal court cases involving less than $7,000. Even the 1961 Report points out that a lot of that caseload is comprised of misdemeanors and small claims. These cases are not remotely comparable in terms of the difficulty of cases heard by judges in the larger counties, by and large. The common pleas judge in the small county is handling common pleas work, misdemeanors, and small claims. Look at the 1974 Supreme Court statistics that break out the caseload by types of case--domestic relations, general, juvenile, misdemeanors, small claims. You begin to get a good picture of the fantastic maldistribution of common pleas judges throughout the state.

Mr. Duffey then reiterated that the 1961 Report should be re-read and compared with the 1974 Supreme Court statistics. They re-emphasize and pin down, he said, many of the general observations made in that report.

Mr. Duffey, continuing: I believe that there is a real problem before you. Mr. Norris commented in the December 18 meeting that he didn't think that there could be many instances in which there is a severe problem that the total number of judges on a one judge per county system would be substantially out of line with the total number of judges necessary for the district that was created. I suggest that you go back and take a look at the actual statistics available in the Report and at the map there and where those areas of population are located. You will find that there is indeed a severe problem--that we have a fantastic surplusage of judicial power in our small, low-populated areas. In 1961, and again now, I think that you will find that for 10% of the population 25 or more per cent of the judicial manpower is concentrated. You know that the assignment system doesn't solve that problem. I am not suggesting that any General Assembly dealing with the problem of districting is going to be highly aware of the very important considerations that these gentlemen are concerned with. I am sure that they will be reflected in the structure that they finally put together. And I would expect (and looking at the map I'm sure you'll find) that the most probable districting is likely to be not that you group the court system of small populated areas into a court system of some major municipal or urban area so as to bury the political interests of the low population area, but that, on the contrary, when you look about the state, particularly in the southeast portion, logical analysis calls for districting based on linking together a number of counties which are all of comparable kinds and conditions. Secondly, it's not going to happen. We have enough representation for these people in the General Assembly that they are going to have a voice, they are going to be represented, and they are going to have these concerns reflected.

Finally, I submit that it is totally wrong to put into our Constitution an administrative structure, no matter how legitimate the concerns may be in 1975. Administrative structure should not reflect those concerns in the Constitution. Those are the kinds of things for which we elect our representatives. We should give them the responsibility. If ten years from now population shifts and the courts have to be relocated to make them accessible to people, allow the General Assembly to make the needed changes.

Mr. Montgomery then thanked Mr. Duffey and asked that questions be deferred until after all three witnesses had been hears.

Representative Frederick N. Young was then introduced. As Chairman of the Legislative Service Commission study Committee on Judicial Organization, he appeared by invitation and said that he would be happy to discuss the recommendations of that committee or to respond to any questions asked of him.

Mr. Young - I might point out for the record that the Constitution is now in the position, insofar as districting is concerned, because of the passage of Issue 3, which I had a hand in writing. (He was then shown a copy of the proposal before the Committee.) Our judicial organization committee studied this as well as other matters. One of our recommendations is that for now we move to a plan whereby the General Assembly would establish some kind of districting for administrative purposes only. This is purely a statutory change as we see it. It allows the General Assembly time

to continue the study of districting. We propose no change in the Constitution at all. I don't believe that our committee ever considered changing the Constitution in this respect. We support the possibility of the General Assembly having the freedom to move to a district system for the courts if they so wish after due deliberation. I would simply report to you that this is one of many recommendations made by this particular study committee. I do not think that the General Assembly's hands should be tied in the manner proposed, and I would have to be opposed to any such proposal. I have spent some time on this, and I think that the nature of the problem requires that the General Assembly have that freedom.

Mr. Montgomery then invited Mr. John Wolfe, spokesman for proponents of the proposal, to make a presentation. Mr. Wolfe is from Ironton and is the President of the Council for Local Judges.

Mr. Wolfe - I am here to talk of facts, not theory. Administrative districting is not a "cure all" for all of the problems confronting the judicial system. Nor is districting. The problems run much deeper. I addressed the Council of Delegates of the Ohio State Bar Association just this past winter. They did not even know that it was represented to the legislature when Issue 3 was before it that the Ohio State Bar Association allegedly endorsed it. And, therefore, the Ohio State Bar Association has referred this question back to both of its committees.

I don't know if you are all aware of the history of this provision. The same kind of provision was proposed as part of the Modern Courts Amendment in 1968 and was rejected. It was adopted as an amendment.

In his last report, Mr. Nemeth stated that the people adopted this. Gentlemen, I think that this is a totally inaccurate statement. The only thrust of Issue 3 as it was presented to the voters of Ohio was the municipal judges pay bill equalization. I do not think that one out of ten voters considered this. As a matter of fact, it has been my experience with members of the bar that not one out of ten members of the state Bar Association or any bar groups recognized the import of this because, like the average citizen, they are a little lazy about reading constitutional amendments. The attitude was, "It's going to equalize the pay of the municipal judges--fine, we'll vote for it."

There are other ways to achieve caseload distribution, and when we talk of economy, that is all that we are talking about. There is a unified trial court system. Now, Mr. Young says that in some counties judges serve more than one purpose. (The reference to Mr. Young was intended to be to Mr. Duffey and was later corrected.) Now, that is correct. I would submit to you gentlemen that there is not one county in this state, even with the lowest caseload, that does not need at least one full time resident judge. I'm talking about the entire caseload within a county. I think it would be impossible to refute that. We know that the system we have now is bad because you get a judge based on population. The way that works out is that, in Cuyahoga County, the judges average out 900 and some cases per judge; down in Lawrence county, where we have one common pleas judge, one county judge, and one municipal judge, our common pleas judge has a caseload of 1285. We don't have a big enough population to get a second judge.

But what we are talking about is that each county's problems are different. If the whole problem were approached through caseload equalization, whether through administrative districting or whether through a unified trial court system, then it

would be more equitable for all the judges who are serving on the particular benches, regardless of their particular designations.

There are only 12 counties in the state with less than 300, and in most of those, I think all of those counties, there is more than one judge--not necessarily more than one common pleas judge, but more than one judge. Five of the ten heaviest caseload counties in this state are rural counties. They are not metropolitan counties. I don't think there is any risk of my county losing a resident judge. As a matter of fact, in districting, we'd elect all the judges for the entire district because we've got the population to swing the vote. It doesn't make any difference whether you attach Jackson, Meigs, Gallia, or Vinton county or all of them--we'd elect every judge. Gentlemen, that is not right. These people have a right to a say as to who is going to administer their judicial system. I think that this is why it was in the Constitution--as a protection for the people. Some of the questions brought up I'd like to comment upon. Most of the problems would be the same with districting as they would be with administrative districting. The only question is, whom are we going to eliminate? Are we going to eliminate the clerks in every county--and the bailiffs--with the idea that money will be saved? I don't see how you can say that we save money by a judge not having to more from county to county when you are going to have fantastic witness fees, jury mileage fees (assuming that the jury is all going to be from the district), the transportation of the county sheriffs for arraignments, preliminary hearings, and for trial.

Then what about the poor client? I guarantee you that there are not many lawyers who are going to spend two or three hours traveling for free. The client is going to end up paying for that. So therefore it is more economical to have one judge move than all of these people. So this is just one more attempt to centralize government and leave the poor guy at the bottom of the stick, where he has nothing going for him.

You gentlemen probably aren't familiar with southeastern Ohio. There is only one county seat that I can get to from my county seat in less than an hour. There are only three that I can get to in between an hour and an hour and twenty minutes. So when the need for injunctive relief arises--I'm talking about emergency injunctive relief where you have a labor dispute or other volatile situation such as a domestic situation where a man is threatening to kill his wife and you need an injunctive order signed--where are you going to find a judge? You are going to find him wherever he is resident, certainly.

These are some of the reasons that the Ohio Council for Local Judges--of which I am president--feels that it is necessary to maintain at least one judge resident in each county, with general jurisdiction. There are not just a couple of us any more. Last year there were 5 or 10 of us. Now we have representation from 34 counties and we have over 500 attorney members of our association. We have a sprinkling of judges, although not too many. It is surprising that the three judges who have taken the most active part cannot run for office. They are not trying to protect a job--they are trying to protect the people they represent.

The idea that the people passed Issue 3 sticks in my craw. My wife voted for it because I hadn't taken the time to explain it to her before we went into the voting booth. She said that it looked good and that it is supposed to be for improvement. I agreed that it was supposed to be, but I think that there are other problems that arise. If you have court districting, will be have a centralized court, or will we still maintain a clerk and a court in each county? And separate dockets? I submit to you that if we don't then you have a real bag of worms for anybody involved in real estate.

Dr. Cunningham - This brings up a question that was raised by the gentleman who preceded you. Is this really a constitutional question, or is it a legislative question? Should you not be talking to the legislature with reference to the Code?

Mr. Wolfe - Yes, sir, with regard to the matters that go into the administrative make-up. The only thing that we're speaking of as a constitutional question is whether or not the electorate in each county is going to have the right to have an elected common pleas judge , resident in that county. I'm talking about a constitutional safeguard. That is the only question. The other things are administrative problems that arise from the lack of having a resident elected common pleas judge.

Dr. Cunningham - It seems to me that 90 per cent of what you have said is administrative and could be taken up with the legislature, and not with the Constitutional Revision Commission.

Mr. Montgomery - If this completes your testimony, I think that we should now address questions to all three speakers.

Mr. Young - I would like to clear up one possible misunderstanding. Did I understand you to say that the Ohio State Bar Association presented the districting plan?

Mr. Wolfe - I was informed that it was represented to some of the legislators, that the Bar Association recommended the provision.

Mr. Young - I don't think that this is true. The State Bar Association never contacted me on the subject or anyone else regarding Issue 3 on that point.

Mr. Wolfe indicated that he was then misinformed.

Dr. Cunningham - Mr. Young, is there anything in the Constitution that would prevent what Mr. Wolfe is suggesting--i.e. that judges be elected in each county?

It was agreed that there was not. Mr. Young indicated that the legislature could do what was suggested under the language presently found in the sections. Mr. Young said that he supposed that it would be some time before the legislature changes the present structure, if it ever does so.

Mr. Norris - For the record, I'd like to make certain of Mr. Wolfe's view about the Roberto amendment. Does your association (Council) favor the amendment or oppose the amendment? Mr. Norris then explained that the amendment of which he spoke would limit districting to administrative districting and still retain the common pleas judge in each county.

Mr. Wolfe - Our Association had an executive committee meeting on this question in Columbus just last week. We feel that as long as the structure of the inferior courts is maintained as it is, that then the administrative district could be utilized to solve the caseload problem.

Mr. Norris then asked if the Association wanted to go back to the language of the Constitution as it existed before Issue 3 or if it wanted to support the Roberto amendment. Mr. Wolfe said that he was in favor of the Roberto amendment, as he supposed the Council is, because he felt that it provides the framework for solving the problem that has arisen with regard to caseload distribution. Yet it does not

destroy, he said, the county boundaries with regard to the judicial system.

Mr. Duffey commented that as he had pointed out there is nothing in the proposal (Mr. Roberto's amendment) or in the existing Ohio Constitution that would preclude the legislature from continuing the present situation. He said that he was not so certain that some of the suggestions made wouldn't raise questions under the Federal Constitution. He added that he was not certain that subdistricting for election purposes could be used if the jurisdiction of the court is co-extensive with a district which all judges serve--i.e. that they serve the entire elected body of that district but use the subdistrict for election. He said that if 10,000 people elect one judge in one portion of the district, and in another portion of the district 20,000 elect another judge, he had doubts about both judges having jurisdiction throughout the entire district. He was not certain that this wouldn't raise a federal constitutional issue. But he emphasized that it presents no question under the Ohio Constitution as presently drafted. If it is constitutional federally, the legislature may continue ir or revert to it, he said.

Mr. Wolfe - I'd like to take issue with one statement. Within the administrative district, assuming that you don't destroy the integrity of the common pleas unit, the judges would function within the district, as I understand the amendment. However, each county's court would maintain its own autonomy. Otherwise you would get into district lis pendens problems. If each county is not going to maintain its own separate court unit, there is a problem.

Mr. Duffey - My only observation is that there is nothing in the administrative district proposal of Mr. Roberto's, nor in the previous Constitution that isn't permitted the General Assembly under the present Constitution. There is nothing to prevent the General Assembly from adopting that proposal or the previous law that says that they can structure the court system within districts. Those districts can be county-wide, less than a county, or more than a county.

Mr. Montgomery - Mr. Wolfe, I was interested in your statement that residents of a rural county are entitled to justice administered by someone that they elected. I wonder if we have that today, with the assignment of rural judges to metropolitan areas. As a resident of a metropolitan area, I have no assurance whatsoever that the common pleas judge who will be hearing my case will be from my county. He will quite likely be from a small county. How do you square that?

Mr. Wolfe - There are a couple of questions that immediately come to mind. That is an administrative problem. I can't understand why Cuyahoga, which has 993 case filings per judge, has so many visiting judges. We have a visiting judge come into our county on maybe three occasions per year to try cases in common pleas court. Yet our judge had a case filing of 1234 in 1973. I don't know why. Perhaps because of the administration within the system, you have to have visiting judges. There are judges with a greater caseload than Cuyahoga or Franklin who seem to manage their dockets. But I don't think that the people in Franklin county, for example, can be acquainted with the performance of their judges and know whether they in the courthouse are doing their job or not.

Mr. Montgomery - But a citizen's right is a citizen's right, is it not? That is, regardless of geography.

Mr. Wolfe - I agree with you, and I think that it is wrong.

Mr. Montgomery then invited questions and comments from the audience.

Mr. William Steritt introduced himself as a representative of the Clerk of

Court Association He indicated that his association's concern with regard to districting is the abolition of the county clerks. He said that a problem with respect to small, rural areas has been lack of finances. But, he added, he wished to point out that he comes from a small rural county with no such problem. In fact, the county has over $100,000 surplus which it must ask the Bureau of Inspection how to handle. He added that he hated to see centralization and noted that when there was an attempt to centralize the certificate of title division several years ago, it was not successful. The legislature found that change to be inoperable, he said.

Mr. Montgomery - You understand the issue before this Committee? We are not proposing that districts be created. The issue is whether we should change the Constitution, which now permits the legislature to district. Your position is that you would support changing the Constitution?

Mr. Sterritt - Yes. We have a very busy court in our county. Back in the 50's we adopted a change that makes the common pleas judge also the probate and juvenile court judge. Sometimes we have two jury trials going on at the same time and have to have a foreign judge come in to help with the workload. And we have a separate municipal and county court.

Further questions were invited. The Committee then turned to the question of the Roberto proposal. Mr. Roberto explained that his proposal was that the staff prepare an amendment that embodies the basic concern of the groups interested,to change the language in the present Constitution to language that would provide for one common pleas court in each county and would provide for administrative districts. He explained that his interest in sponsoring the proposal and the amendment was to bring the issue before the Committee for discussion purposes.

He then indicated that inasmuch as this appeared to be the only matter unresolved and in the Committee's nearly complete report to the Commission, he'd not press for introduction of the amendment before the Committee. He suggested, however, that the amendment be prepared and the arguments pro and con be developed so that they could be presented to the Commission. If, however, the Committee had other matters to consider in Article IV before making its report to the Commission, they he would offer the amendment, he said.

It was suggested that this matter could be prepared and presented as an addendum to the Committee report. Mr. Roberto replied that if the Committee is "ready to go" with Article IV, he felt the matter should not delay the report and that Commission members could be made aware of the question in this manner.

There was further discussion on the procedure to be taken with respect to the question before the Committee. It was pointed out that regardless of the Committee's action on the matter, it would likely come before the Commission anyway. Mr. Roberto added that because this is so, he is reluctant to see the proposal delay the Committee's report. Mr. Norris said that he could see merit in deferring the matter and going ahead with a report to the Commission, to be footnoted in a manner that would call attention to the question involved in the proposal. He would in this way point out that the proposal was presented to the Committee but at such a time that it was unable to give it full consideration. That would alert the Commission to the existence of such proposal. Expressions of agreement with this approach were made. Mr. Montgomery said that he was reluctant to have the Commission, which does not have the benefit of a year and a half of background on the subject of judicial reform, considering an amendment out of hand. He asked staff if there were other matters in

the Judicial Article that remain to be studied. Mr. Nemeth said that no more remains in Article IV to be considered. Mr. Skipton made the point that although the Committee has studied matters already in the Constitution, it should perhaps also take up some matters not covered in the document pertinent to a study of it.

Mr. Norris said that he assumed that at another meeting the Committee would consider the total package, embodying all changes agreed upon, and said that he would welcome the opportunity to review the entire set of amendments in the context of the judicial article prior to a vote on the Committee's report to the Commission. If that is in the offing, he said, perhaps the Committee could have the understanding that at that meeting the proposal could be disposed of one way or another at the outset of such a meeting.

Mr. Montgomery - We will schedule another meeting and have the final report prepared for you. We will also have prepared then a statement which in effect will incorporate information about the proposal and a notation that it was brought to the attention of the Committee. As of now, there is no formal proposal to amend the Constitution in this respect.

Mr. Maier agreed with the idea that the matter should not be left hanging but should be disposed of by the Committee.

Mr. Montgomery - We will have two votes at the next meeting as I see it. We will first vote on the judicial article as it is presently constituted. The second vote will be whether or not we include a statement, which will be prepared and which will be appropriate.

Mr. Norris - Or to amend the report. In other words, the second question will be disposing of this by one means or another.

Mr. Guggenheim - Just so that I am sure that I understand the proposal before us. The Constitution formerly provided for one common pleas judge in each county. This was changed by Issue 3. Would the proposal before us go back to the previous principle?

Mr. Norris - About half way. It says that you go back to the proposition that you have to have one common pleas judge in each county, but those counties may be combined into districts for administrative purposes.

Mr. Guggenheim - So that if elected in a county, a judge would nevertheless serve in the district, is that correct?

Mr. Norris - The reason for the amendment is the fear that the legislature might in its districting proposal eliminate judges by the combining of counties in districts. That is all that the proposal is addressed to.

Mr. Montgomery - What bothers me is the assumption that the legislature and the people in making the change didn't know what they were doing when they adopted Issue 3.

Mr. Norris then asked if Consolidated Draft No. 4 includes all the Committee's actions to date and Mr. Nemeth said that it does. This will be the document before the Committee at its next meeting, and Mr. Norris requested that the meeting notice set forth the two pieces of business that would be before the Committee. On

February 26, there will be a Commission meeting in the afternoon and a legislative dinner at 6:30. It was agreed that a Committee meeting could be scheduled after the Commission meeting, tentatively at 4 p.m.

Before closing, Mr. Montgomery asked if anyone else wished to be heard on the districting question and specifically whether the Ohio State Bar Association wished to be heard. Mr. Manning said that the Ohio State Bar Association has no position on the amendment. It was presented to the Council of Delegates by Mr. Wolfe, he said, on November 2. At that meeting it was referred to the Judicial Administration and Legal Rights Committees with the request that they make a recommendation back to the Council of Delegates. Neither committee has reported back to the Council of Delegates, and Mr. Manning said that he did not expect a report before the May meeting of the Council of Delegates. The official position of the Ohio State Bar Association will then be determined. At this point, the Ohio State Bar Association has no position on districting, he repeated.

Finally, it was suggested that copies of the Legislative Service Commission's 1961 Report referred to by Mr. Duffey be made available to Committee members if possible, or if not that relevant portions be xeroxed.

Constitutional Revision Commission
Judiciary Committee
February 26, 1975

Summary

The Judiciary Committee met at 4 p.m. on February 26, 1975 in Room 10 of the House of Representatives. Present were Chairman Montgomery, Mr. Roberto, Mr. Skipton, Mr. Guggenheim, Mr. Maier, and Mr. Norris, as well as Judge Robert Leach, Committee Special Consultant, Allan H. Whaling, Executive Director of the Ohio Judicial Conference, Miriam Hilliker from the League of Women Voters, and Commission Chairman, Richard H. Carter. Staff representatives included Mr. Nemeth, Mr. Evans and Mrs. Hunter.

Mr. Montgomery convened the meeting. A motion to accept the minutes of the last meeting was adopted unanimously. Mr. Montgomery then announced that the business before the committee would be the consideration of the most recent amended draft of Article IV. He said that he had gone over the draft and that it contained only changes agreed to. He also called the committee's attention to a separate sheet, dated February 17, 1975 mailed out in advance of the meeting and containing a statement on administrative districts.

Mr. Montgomery - The question before us is, is this a proper statement? If not, how should this be changed? Does it state what occurred? Is it a proper addendum to the report?

Mr. Montgomery then asked for comment from Mr. Roberto, who, along with Mr. Norris, had proposed language for administrative districts. Mr. Roberto said that he felt the statement dated February 17 is correct, and he moved that it be accepted. Mr. Skipton seconded the motion, and it was adopted.

Mr. Montgomery then invited comments on the fourth draft of the committee's report. Judge Leach said that he had a couple of questions.

Judge Leach - On pages 18 and 19 are provisions for rule-making. The first paragraph of division (B) says that the Supreme Court may adopt rules governing practice and procedure--this is in the present Constitution--and that they are to be submitted to the General Assembly by the 15th of January. They become operative if not negated by concurrent resolution. Inserted within that paragraph is language with respect to transfer of cases from one court of appeals to another and also with respect to employment and duties of personnel. All three of these sets of rules--rules of practice and procedure, rules pertaining to transfer of cases, and rules pertaining to personnel--fall into the category of rules that become operative unless negated by resolution. Two paragraphs down there is a provision for rules with respect to subject matter divisions, and such rules are filed by the Court. In this situation the legislature can amend the rules. In the next paragraph, also new, there is a new category of rule-making. This is suggestive rule-making only--the legislature accepts the suggestion or not as it wishes. To avoid misconstruction and for organizational purposes my point is to suggest the numbering of these paragraphs, so that there would be references to rules adopted under a specific paragraph. There are three categories of rules, and I'm suggesting they be separated in this way.

Mr. Nemeth asked Judge Leach if he had specific suggestions for how the paragraphs should be numbered. Judge Leach suggested numbering all of the paragraphs in (B)--i.e. (1) through (4), including as a separately numbered division the paragraph about local rules of practice and uniform record keeping. It was agreed that the section would be further clarified by numbering as suggested. Judge Leach noted that this may require some language changes, to refer to rules "adopted under this subsection" or equivalent terminology. It was agreed that the staff would examine the language to make any necessary changes in references to rules adopted under the varying paragraphs. The change suggested by Judge Leach was adopted by the committee.

Judge Leach - My other suggestion might be called flyspecking. On page 33 there is a comment that says "The deletion of language from the last sentence of this division (which refers to votes cast for judge) removes meaningless phraseology from the Constitution. No substantive change is intended." This is a reference to a change made at page 26, in the last line of division (B). It reads "All votes for any judge for an elective office, except a judicial office. . " and it now reads "under the authority of this State given by the General Assembly or the people" and this language would come out. In a very technical sense this is a substantive change of the Constitution. I suggested that this be done, referring to a situation back in the 30's when Judge Day of the Ohio Supreme Court was a Republican nominee for the United States Senate and maintained his seat on the bench because the office of United States Senator was not an office "under the authority of this state given by the General Assembly or the people." This couldn't be done today because of the Canons of Judicial Ethics so the end result is the same whether this amendment is made or not. But the change in the Constitution is nevertheless substantive.

Mr. Nemeth asked for ideas for change. Judge Leach suggested that it could be said that the change expands the office from state office to include any other office, such as U. S. Senator. It was agreed that the reason for the change should be stated and the committee adopted a motion that such a revision be made in the text.

Mr. Norris then said that he had several questions about the draft.

Mr. Norris - I have a question about Section 4. As I understand this change we are abolishing the probate division and substituting a provision that the Supreme Court sets up divisions. (Mr. Montgomery pointed out that the rules established for the purpose would have to be approved by the legislature.) I also have a question on the construction of Article IV, section 6. I refer you to page 25, first paragraph (B), which provides for adoption by counties of merit selection for common pleas courts. Subsequent references to the appointive-elective system, in division 4 (A) for example, speak only of the supreme court and the court of appeals. The same is true of Section (A) (2) (a), which provides for the Governor filling an office by appointment, from a list of not fewer than three qualified persons. We say that the voters can adopt a merit selection system for common pleas judges, but we don't say what happens. I think that what we mean to say is that we treat that system the same as for supreme court and court of appeals.

Mr. Nemeth - There is more liberality so far as what the General Assembly can do in regard to a law implementing an appointive-elective system for common pleas courts than there is for the appellate courts. The only requirement of a law making possible merit selection for common pleas judges is that it provides for an initial term of at least two years from the date of the appointment, followed by a retention election.

There would be no specification in the Constitution as to how long a list of nominees would have to be in case a county adopted an appointive-elective system for its common pleas courts.

Mr. Norris - My concern is that we could have two kinds of appointive-elective systems--one for appellate courts and one for common pleas. The appointment in the latter case could be made by the county commissioners, for example. We don't say who is going to make it, nor what the majority is for retaining judges, nor how the question is submitted to the voters. We could come up with a hybrid, where the legislature sets up a separate merit selection system. I think that when voters of a county vote to adopt, they ought to be adopting "the system." I think that otherwise this provision will give us trouble.

Mr. Montgomery - The systems should be uniform. Judge Leach, do you have ideas on this?

Judge Leach - There should be some cross reference. I agree with Mr. Norris because otherwise the legislature could make itself the appointing body. Or the county commissioners could be so designated--I don't think that this would be done but it could.

Mr. Norris - The provisions authorizing a voted appointive-elective system could have additional language, such as "in accordance with this article."

Mr. Carter then asked if (4) (A) could be amended, to drop the references to the supreme court and court of appeals so that the provision would refer to "any justice or judge."

Mr. Norris - I'm not sure you handle it this way for (A) (2) (a) but . . .

Mr. Montgomery - Would you be satisfied to have the staff study this and suggest the technical changes?

Mr. Nemeth - I think it is a little dangerous to try to redraft this right now, in committee.

Mr. Montgomery - Is it our intention to make the common pleas court selection process the same as the supreme court and court of appeals?

Mr. Skipton - You mean that the Governor appoints them?

Mr. Montgomery - Yes.

Mr. Skipton said that he'd like to consider the whole matter further.

Mr. Montgomery said that he felt that it would be a mistake to have two kinds of systems operating. Mr. Skipton noted that there is no provision for people to change their minds once they have voted to adopt merit selection. Can they go back to election if they wish, he asked? Mr. Montgomery said that this is not included in the Constitution and raised the question of whether it should be covered.

Mr. Nemeth - If I understand your point, Mr. Norris, it is that you would like to make sure that the Constitution states that the Governor makes the appointment.

Mr. Norris - The only problem that I see with conforming it to the one we use for the appellate courts is that we wish to state that the legislature may provide that there be a judicial selection committee appointed for each county that opts to have

the system, as opposed to having the statewide commission serve. It makes sense to allow a local judicial nominating commission in each county.

Mr. Norris then moved that the "local option" provision be conformed to the appointive-elective system at the supreme court-court of appeals level, with the exception that the General Assembly be granted the authority to provide for local nominating commissions for common pleas judges once the option is adopted.

Judge Leach pointed out that (2) (B) says "The number of judicial nominating commissions. . ." and suggested that this provision connotes more than one state nominating commission and suggests that there would be one for each appellate district.

Mr. Norris - If staff determines that 2 (B) handles the problem, fine. I want to be sure that the General Assembly has the option to provide for local commissions.

The motion was adopted.

Mr. Norris - I have an additional point, and I want to raise it in order to see how much support there may be for it. One of my pet peeves about the merit selection plan is that I feel the majority test for retention is not realistic. All you need is 51% of the vote to be retained yet realistically you have no opposition. In 1961 when I filed a minority report with the Ohio State Bar Association on the merit selection plan I did some research as to how many judges had been removed under such a system. Only one had been removed at that point, I think, and I believe that a few more have been removed in the interim. The judge removed, as I recall, was a drunkard in Kansas City, and it took front page editorials to get him removed. Since that time my feelings have been pretty well borne out by the votes of our local bar association. We have an endorsement system that uses various percentage breakdowns. To be endorsed for reelection the judge needs 80% for example. This has been fascinating to observe. I don't know of any vote that I have disagreed with that the bar has cast. If a judge receives under 50% we actively oppose him. We guessed at the percentages, but they worked out well. In one of the proposals before which General Assembly I now forget we called for a 55% majority test. That is, the judge had to get 55% to be retained. I think that you have life tenure under this system, unless you have an extraordinary majority built into it. We can't really hope to get rid of unsatisfactory judges if the judge can stay in with a simple majority.

Mr. Montgomery - That 4% gets to be the difference of whether you're for him or against him.

Mr. Norris - All you do is create a vacancy. The judge in office doesn't make it, so there is a vacancy to be filled, and you start all over again. The whole theory here is that we seek to go down the middle, using the best of the elective system and the best of the appointive system. From a practical standpoint you don't have much of a check with a simple majority.

Mr. Montgomery asked about percentages in the 26 or so other states with merit selection. Neither Mr. Nemeth nor Mrs. Hunter recalled a state requiring an extraordinary majority.

Mr. Montgomery - Your philosophy is that if after thorough screening we get somebody, he must not only be acceptable, he must be pretty good.

Mr. Norris - I'd like to see the percentage raised to 60%, although I'm not sure that this is necessary. I want to assure that the judges are competent. I'm not convinced

you can get rid of an incompetent judge if all he has to do is get 51%.

Mr. Montgomery asked if there were a record of removals from other states. None has been tabulated. Mr. Whaling pointed out that Illinois has raised the majority required to 56 or 57 per cent and did remove some judges last time with this new majority. There was some discussion about whether an extraordinary majority requirement would be constitutionally sustained, with most assuming that because one man one vote rule doesn't apply to the judiciary it probably would be constitutional.

Mr. Montgomery - Isn't there an assumption here that if a judge is properly selected and serves that he is capable?

Mr. Norris - The problem with that presumption is that then you don't need the election--it's a safety valve. The question is what is to be its effect? Is it to be a real check or simply a safety valve in most extraordinary circumstances? I want more of a check than that. I think that anyone who has worked with the federal system will be less than enamored with it. But at least we have merit selection at the beginning, which the federal system does not, and that helps.

Mr. Roberto - Don't we have the usual Rules of Superintendence that will apply? Are you talking about incompetence of the judge in intangible sorts of ways that can't be measured, as some infraction of judicial ethics?

Mr. Montgomery - We aren't talking about removal. We're talking about a retention election.

Mr. Roberto - My first impression is that if we have no experience a simple majority should be satisfactory. If I wanted to get a judge out of office, I'd wage a campaign against him so that even without opponents he doesn't get a majority. At least I'd like to see some more current research on this.

Mr. Norris described his attempts to get some feed-back from other states where merit selection has been adopted but reported that he has had no success.

Mr. Montgomery then asked if Mr. Norris would like the staff to research the questions. He suggested that this could be done while the report is pending with the Commission.

Mr. Norris - I can wait. I would like to have figures. That is an amendment which is easy to draw at some later point. I will be glad to have staff present me with any data available.

It was agreed that this procedure would be followed. Mr. Skipton added that he favors such a step because recommendation of merit selection involves putting faith in a process that relatively little is known about. He is concerned, he said, about the make-up of the judicial nominating commission and about the criteria that such a commission will use. He also raised a question of how the public will become informed about judges running for re-election under such a system. He moved further that the staff draft language providing for a group that will be charged with preparing a brochure relating to the conduct in office, productivity, and qualifications or record of the judge in office, to be submitted to the voters at the time of the retention election.

Mr. Norris - Are you suggesting that the same commission rate the judges when they come up for election. A good idea.

Judge Leach - Would that be a presentation of the pro and con or the commission's view at that moment?

Mr. Montgomery - This would amount to resubmission of the name to the commission to see if the judge still meets favor.

Mr. Nemeth stated that he did not know of another state with such a procedure.

Mr. Roberto - I have no objection to having the nominating commission serve as a review committee. However, I do have some difficulties with the suggestions. At one time, a judge didn't even have to be an attorney. Now we do have statutory qualifications as to years of practice, and so on. I am concerned about going too far in the opposite direction--by requiring that he be above and beyond the character of the ordinary individual. Are we going too far? We have the federal example of putting a judge in office who stays there the rest of his life. This may be upsetting to some of us, but it is a fact. I have no objection to further study, but I will have to be convinced about the necessity of interjecting an additional step. Judges sometimes do make unpopular decisions, and if I wanted to nail someone at the polls because I didn't like a series of decisions, I expect that it would be easier to get 30% than 40%. A judge could be gotten out for a political reason.

Mr. Maier then said that had he been a member of the committee when the issue of merit selection came up he would have been vehemently opposed. However, he added, the decision has been made, and he would agree with Mr. Roberto that if you are going to select a merit selection system, that this is a pretty good one. He would hate to see the subject opened up at this stage of the proceeding. The draft before the committee, he assumed, had been arrived at after lengthy discussion.

Mr. Norris - We are seeking agreement on a draft to go before the full Commission, are we not? (It was so agreed.) What would be wrong with staff preparing for Mr. Skipton, and possibly others, language that would be available to use before the Commission--in the form of an amendment, that would simply provide that the judicial nominating commission review the qualifications of judges at election time and publicize the result. It could be a one line amendment.

Mr. Montgomery - I would like to ask the staff to find out what other states have done along this line.

Mr. Norris added that his last question concerned the repeal of section 17. He then said that a reading of the notes of the Report indicated to him that the reason for repeal is that there is already impeachment under Article II, section 23. Mr. Evans explained that the procedure recommended for repeal is the address procedure. It applies to judges only. Impeachment is unimpaired by this recommendation, he said.

Mr. Guggenheim then moved for acceptance of the Report as amended. (The amendment would be to conform the judicial nominating commission provisions.) Mr. Norris seconded the motion, and it carried.

The meeting was adjourned after Mr. Montgomery asked all members to advise the staff about any questions that they might have about the conforming amendment which will be distributed to them. It was assumed that this would be the last meeting of the committee.

Ohio Constitutional Revision Commission
Judiciary Committee
July 10, 1975

Summary

The Judiciary Committee met at 10:00 a.m. on Thursday, July 10, in the State House. Present were Chairman Montgomery and committee members Skipton and Cunningham. Judge Leach, special counsel to the committee, and staff members Director Eriksson, Mrs. Hunter, Mr. Evans and Mr. Nemeth were also present.

Mr. Montgomery - We didn't think we would have to have any more committee meetings but in some of the discussions which the full Commission had, more details were required. One is the method of appointing the nominating commissions for the merit-selection system and we have found out how it's done in other states.

Mr. Nemeth - You have before you draft alternates A, B, and C, illustrating some possibilities The difference between A and B is that in A the General Assembly determines the number of commission members, while in B the number of members is fixed in the Constitution. In both instances the attorney members are persons admitted to practice in Ohio and living within the territorial jurisdiction of the court. Alternate C, which requires the appointment by the governor not only of the lay members but the attorneys as well, is set forth because there is no practical way of assuring that the political balance among the lawyer members unless they, too, are appointed.

Mrs. Hunter - There is no perfect solution.

Mrs. Eriksson - If you make that decision the legislature doesn't have to. If you don't the same questions will be before the legislature, which is also a political body.

Mr. Montgomery - I suppose a greater safeguard would be to require the advice and consent of the Senate, or some other body which would make some check. Is the senate the confirming body in most cases where the governor makes the appointments?

Mrs. Eriksson - I would assume so - either the senate or the legislature.

Mr. Montgomery - Sally, why do you think there are provisions for a judge to be secretary of such a commission?

Mrs. Hunter, Well, I think it is advisory, for assistance and to perhaps familiarize the members with the duties of the job. At least that was my reaction. This is a very common arrangement.

Mr. Nemeth - Perhaps at this point it should be said that the committee has not been asked to change its recommendation to something else. At this point, the original proposal still stands. The reason for the meeting this morning is the anticipation of the possibility that there may be a request for a change.

Mrs. Eriksson - Well, I believe there's already a very clear indication that the Commission wants to make some changes in the proposal as it now stands.

Mrs. Hunter - Some on the Commission want to be more specific so that it is not left up to the General Assembly.

Mr. Nemeth - There was quite an extensive discussion at the Commission meeting.

Mr. Montgomery - Do you think we should take it to the full Commission?

Mrs. Eriksson - How you want to handle it is up to you, but I would suggest that we have a consensus of committee members who are here as to what your recommendation would be to replace the committee recommendations. There are many things to be decided. Do you want to fix the number of members? Would you recommend electing the lawyer members or having somebody appoint them all?

Mr. Montgomery - We'll see if we can get any consensus on them. What does our report now recommend?

Mr. Nemeth - The details of appointing nominating commissions would be left entirely to the General Assembly.

Mrs. Eriksson - There are only two restrictions as it is presently written. One is that not more than one half be from the same political party; the other is that less than one half may be members of the bar. And holders of public office, other than members of the General Assembly, may serve on a judicial nominating commission.

Mr. Montgomery - The discussion was that we tie it down, be more specific.

Mrs. Hunter - One question is whether the number on the commission should be established in the Constitution or left to the General Assembly.

Dr. Cunningham - It should be left to the General Assembly.

Mr. Montgomery - How do other states handle it, do you know?

Mrs. Hunter - The states in most cases have a specific number.

Mr. Montgomery - What number?

Mrs. Hunter - I would say seven to nine - three attorneys, three nonattorneys and a judicial member is the most common.

Mr. Montgomery - I don't see how we can be specific on any of the other matters because we don't know how many will be elected. The judicial member---is he counted in the number? You would then have eight voting members?

Mrs. Hunter - Right.

Mr. Montgomery - The number of Republicans and the number of Democrats among voting members could be equal in that case.

Mrs. Eriksson - Would you want to discuss the question of a judicial member now - whether you want to have a judicial member, and whether he would be a voting person; Judge Leach suggests he might not want to be a voting member.

Mr. Montgomery - You told us that in most cases the constitutions did allow for a judicial member. Is it an overwhelming majority?

Mrs. Hunter - Yes.

Mr. Montgomery - How do you feel about that? How about the presiding judge of the particular court affected?

Mr. Skipton - I just feel very uneasy sitting here like an arbitrator between two pressure groups as to who has control. We're talking about something that has

always been in the hands of the people, and now we're going to take it out of the hands of the people. I'm very uneasy even to discuss it. We're putting it in the hands of the special interest groups.

Dr. Cunningham - I have no compunctions with having a judicial member on a commission.

Mr. Montgomery - In most cases does the judicial member vote?

Mrs. Hunter - No. In Wyoming the judicial member votes only in case of ties.

Mr. Montgomery - In most cases he can vote to break a tie?

Dr. Cunningham - I would agree with that. I have no objection to the judicial member voting.

Mr. Montgomery - Judge Leach, do you think that's a good idea to have a judge automatically a member?

Judge Leach - I'm not in favor of it.

Dr. Cunningham - I think he has a lot of experience which should be used.

Mr. Montgomery - He's always available. Maybe the commission would be a little freer without a judicial officer.

Judge Leach - You also have this. The chief justice would be a chairperson. Suppose the vacancy is a chief justice. If you're going to adopt the merit-selection plan, the nominating commission should be as nonpartisan as possible. It's going to have to be appointed by someone with some check on the appointment. The extent to which it goes into the Constitution is a policy decision, but I also think the provision should be flexible and not a frozen-in type of thing. That's why I expressed my feelings about the details of the nominating commission not being in the Constitution and being left to the legislature.

Mr. Montgomery - You think we have done it right the first time, leaving everything up to the legislature. It wouldn't bother me any to handle it that way. What other items do we have?

Mrs. Hunter - Well, I guess the decision has already been made about the public officer.

Mr. Montgomery - We decided that members of the General Assembly could not be members of the nominating commission; we didn't decide whether judges could not be members. I don't see any reason why a judge shouldn't be a member.

Mrs. Hunter - We did find that most states have a judicial ex officio chairman. But Florida says that no judge or justice shall be a member of the nominating commission. Other public office holders may be, but not judges.

Mr. Montgomery - I would favor not having judges as voting members, except to break a tie. It seems to me that it is setting it up for dominance.

Mrs. Eriksson - You would eliminate judges - all judges?

Mr. Montgomery - Yes, or magistrates. How about employees of the court, clerks and things like that?

Judge Leach - If you're going this far, you're getting into what I consider basic legislative function. If you keep on going, you're going to wind up with a constitution which is full of legislative detail.

Mr. Montgomery - I agree with you on what a constitution should do, except I think you can make a case for a really fundamental public policy point here. This seems to be one. This nominating commission is a pretty serious matter and something that people are very concerned about. They don't really have any check on the statute. We're dealing with a very fundamental constitutional matter.

Judge Leach - It's simply a matter of philosophy of constitutional government.

Mr. Nemeth - There isn't any provision now, Sally, is there, in any other states that gets as specific as clerks of the court?

Mrs. Hunter - No.

Judge Leach - Judges, children, next door neighbors...

Mr. Skipton - Anybody subject to their influence...

Mrs. Eriksson - Anybody who knows a lawyer...

Judge Leach - We're being facetious.

Mr. Montgomery - All right. What other points do we need to talk about? How about election by the Ohio bar?

Mrs. Eriksson - It was decided not to be specific in the Constitution, but you could still provide for election. We have said that not more than half could be members of the bar.

Mr. Montgomery - Do you want to provide that the bar conduct an election?

Mrs. Hunter - In other words, Alternate A does not set the number nor is it specific, but it does say that the attorney members shall be elected.

Mr. Montgomery - The legislature has only two options, and that is to have the governor appoint the people or to have the bar elect them. If the governor appoints, the legislature has to confirm, so we wouldn't have to worry about that. Would we have to be specific about the legislature not appointing or electing members?

Mrs. Eriksson - You mean a guarantee that they didn't appoint?

Mr. Montgomery - Yes.

Mrs. Eriksson - No, you wouldn't have to be specific about the legislature not appointing as a body because the legislature is already prohibited by the Constitution from making appointments. If you wanted to provide that the legislature could appoint as a body, then you would have to be specific. Under Article II, Section 27, the legislative leaders make many appointments, but it is not the whole legislature, except as provided in this Constitution, so if you want to permit the legislature to make an appointment you must so prescribe.

Mr. Montgomery - We're talking now about members of the bar. I think I would rather be specific and say exactly how it is done.

Mr. Skipton - You haven't decided who's going to conduct that election.

Mr. Montgomery - The legislature would provide for the details according to law. Let's look at other states and see how they conduct them.

Mrs. Hunter - The Supreme Court has a list of who is eligible to vote, and the clerk conducts the election, or the clerks of the various courts do.

Mr. Montgomery - We're only talking about merit selection for the courts of appeals and the Supreme Court, so there wouldn't be that many positions to fill. I would let the governor appoint the public members and have the bar elect the lawyers as provided by law.

Mrs. Eriksson - Wouldn't you want to stick to the traditional Ohio way--appointment by the Governor with confirmation by the Senate?

Mr. Montgomery - The subcommittee, as an alternate, could recommend that the Governor appoint the public members with the advice and consent of the Senate, the usual way of appointing in Ohio, and that the lawyer members be elected as provided by law.

Mrs. Eriksson - Elected by members of the bar.

Mr. Montgomery - Yes, elected by members of the bar, in the territorial jurisdiction affected.

Dr. Cunningham - I agree with it. I'll move it.

Mr. Nemeth - Do we mean all bar members eligible to vote, not just members of the bar association?

Mrs. Hunter - As we had it. Persons admitted to the practice of law in Ohio.

Judge Leach - What about an inactive lawyer or one who doesn't pay the registration fee the court rules will soon require?

Mr. Montgomery - An active lawyer who pays the fee...

Mrs. Eriksson - And who resides within the territory. If you don't pay the fee, you can no longer practice; I think the rationale is that you are not supporting the discipline procedures of the court, and I don't think there would be any problem if we changed the language to "licensed to practice law" or "eligible to practice law."

Mr. Montgomery - What other point do we have to discuss?

Mrs. Eriksson - I think you have ended up with Alternate A, with the elimination of judges. I think the only other point would be, do you want to have a disqualification provision?

Mr. Montgomery - So a member of the commission can't become a judge himself?

Mr. Skipton - I don't think much of the sentence prohibiting people from accepting appointments, but this comes around to the very objection that I have most to this--

that it's going to be an inside operation from the word "go." To put these observations in here is nothing but window dressing, as far as I am concerned.

Dr. Cunningham - I don't feel one way or the other on this point.

Mrs. Eriksson - It was not a question raised at the Commission meeting.

Mr. Montgomery - Now, what else do we have?

Mr. Nemeth - Have we decided on an even-number commission?

Mrs. Eriksson - No, that's going to be left to the General Assembly, but there would be no judicial member.

Mr. Montgomery - This isn't an overwhelming consensus or anything like that, but we do have to propose something and be flexible about it.

Mrs. Eriksson - Some of the people who have not voted may be at the meeting this afternoon, so we may have some additional votes.

Mr. Montgomery - How many do we need?

Mrs. Eriksson - Twenty two.

Mr. Montgomery - It appears that Section 1 and Section 3 are going to be successful. We have 19 and 21 "yes" votes respectively.

Mr. Nemeth - Section 4 and Section 5 it looks at this time are not going to make it. Both have 15 positive votes and 8 negative votes. It appears that the votes on the two sections are tied together. Apparently the principal objection is the matter of where the power to make rules to create divisions and assign judges should be--whether the present system should continue or whether the power should be assigned to the Supreme Court. It's a matter of policy, I think.

Mr. Montgomery - How many sections of the report did we cover at the last Commission meeting?

Mr. Nemeth - I think only the first five.

Dr. Cunningham - No vote on Section 6 or 7?

Mr. Montgomery - No. We'll start with 6 today. The Commission chairman, Dick Carter, also asked us to look into judicial qualifications commissions, in addition to the nominating commissions. It's clear that there's no practical avenue for citizens in Ohio to complain about a judge. They have to work through the bar association. And there are some misgivings about the retention election as an effective way to get rid of poor judges, should an appointive-elective system be adopted. The retention election has only screened out a very small number in other states. California doesn't have merit selection. What it does have is someone to review judicial qualifications. Its state-wide judicial qualifications commission, created by the constitution, can receive complaints directly from citizens and has some lay people as members. If merit selection should fail, this approach may be a compromise.

Mr. Skipton - Whether it fails or not, this could be another way to go. We might even get some better selection of judges.

Mr. Nemeth - In Ohio, we presently have a Board of Commissioners on Grievances and Discipline, established under Rule V of the Rules for the Government of the Bar of Ohio. It has seventeen lawyers members, appointed by the Supreme Court. Initial investigations, however, are conducted either by designated committees of local bar associations or the state bar, and only they can file with the Board. However, I think most of the features of judicial qualifications commissions, such as some lay membership and the direct filing of complaints, probably could be adopted in Ohio by rule and without constitutional change.

Mr. Montgomery - I think we all understand that. I don't believe that we could change the way we discipline our lawyers and our judges. Everyone seems to think that's one thing we do pretty well. There's no compelling reason to set up something different. This question of citizen input I think is pretty gutty, and if we could find something to make our present system a little more responsive--broaden it just a little bit for that point--we can accomplish most of what happens in California and some other states without having to start all over. I don't know that lay participation would add a lot. If you were starting from scratch to design a system maybe you would like to have it that way, but I don't believe politically it could be sold. However, maybe we can make some suggestions that the judicial qualifications commission approach be studied.

Mr. Nemeth - But those suggestions would not necessarily be constitutional amendments. The Court is now in the process of amending the Rules to speed up the investigation of difficult cases through the creation of the office of disciplinary attorney, who would have state-wide jurisdiction to investigate and expedite investigations under certain circumstances, but who would report back to local or state bar committees. This may be a step toward direct filing, and it is being proposed now.

Mr. Montgomery - I don't think the public distrusts judges so much as they did the medical societies or the organized bar. Professional societies have a way of protecting their members--the complaints go through a sieve.

Mr. Skipton - That is the kind of attack that will be made on the judges. If you have a commission filled with lawyers, that agency is going to make sure that we have the kind of judges they like.

Mr. Montgomery - John, what do you think, if we don't get merit selection, or if we do, do you like this California idea?

Mr. Skipton - I guess I have expressed myself previously. There ought to be something that keeps tabs on what goes on. People aren't going to do it with their votes. It sounds to me like too much structure.

Mr. Montgomery - You are not in favor of merit selection. If that is the feeling of the Commission would you be in favor of the California device?

Mr. Skipton - I'd probably be content to just stay with what we have now.

Mr. Nemeth - I should point out on the subject though that an alternative method is to set up two commissions, and that's what they have in Illinois. They have what they call the Judicial Inquiry Board which consists of two circuit judges, appointed by the Supreme Court, and four non-lawyers and three lawyers appointed by the governor. It has an investigatory and accusatory function. It acts like a grand jury to determine whether or not there is probable cause. Then there is the Courts Commission, made up of five judges, only one of whom is a Supreme Court judge. The Courts

Commission passes judgment based on the facts--and its decision is final. In Illinois, in other words, there's no appeal to the Supreme Court. This was set up with the idea of separating the fact-finding function from the ajudicatory function.

Mr. Skipton - I don't see the need for setting up something like this unless something occurred. If you remove the natural safeguards then you have to create some other kind of safeguard. Now, the only reason I can see for it is if there is a showing that we have a poor judiciary or something, and some problem creates the demand. Without that, I'm not even inclined to consider it.

Mr. Montgomery - To complain about elected officials you have to do it by the ballot box. But complaints about appointed officials go to the appointing authority, whoever that is. You can't complain about a judge who was appointed by a previous governor.

Dr. Cunningham - Unless he submits himself every six years for re-election.

Mr. Montgomery - But in some instances that is not sufficient.

Dr. Cunningham - But his record is available.

Mr. Montgomery - His record is available. All judicial statistics are public documents. I'm satisfied if you get the right selection in the first place, you're going to screen out an awful lot of incompetent people and the need for removal and retention elections is going to be less.

Mr. Nemeth - One of the most commonly voiced concerns, particularly about disciplining judges, is that the traditional methods are so cumbersome and involve so many people. Cases where a judge has not committed an act of moral turpitude or a crime but has nevertheless acted in a way which is nonjudicial don't come to the attention of the disciplinary body in sufficient numbers. These cases involve such things as the use of inappropriate language, or a showing of prejudice, for example, against either the prosecutor's office or the public defender's office, or borderline alcoholism. These are difficult to put a "handle" on, and difficult to bring the judge to account for. And the alternatives for discipline are rather limited. I think that if there is merit in the judicial qualification approach, it is that it apparently deals more effectively with borderline cases than the traditional methods do.

Mr. Montgomery - We better go to magistrates.

Mr. Nemeth - In regard to magistrates, again, it is something that the committee has to decide as a matter of policy. We recommended inclusion of magistrates in the judicial system and there seem to be many questions as to what we intend the magistrates to do. There was concern expressed that if we classify magistrates as judicial officers it would do away with people such as referees. I don't believe that that was the intention of the committee in making the recommendation.

Mr. Montgomery - We don't want to create a four-tier court system. We want to create a three-tier system. The only way, we thought, to have some of the minor things handled was to provide for magistrates, but what a magistrate does and does not do isn't clear to everyone. It wasn't intended that he be a substitute for other judicial officers, although he was to be an arm of the common pleas court. We provide that magistrates could be part time.

Mr. Nemeth - I brought along an excerpt from the Idaho code, which spells these things out in the statute more than any other that I know of, and it lists the following

classes of cases, among others, as being assignable to magistrates: actions for the recovery of money arising on contracts; actions for damages for injury to persons, property or reputation; actions for rent; actions for distress; and actions for claim and delivery; proceedings in attachment or garnishment; and actions arising under the laws for the incorporation of cities or counties or any ordinance passed pursuant to such laws. And in these things the limit is $1,000.

Dr. Cunningham - Is this a statute?

Mr. Nemeth - This is a statute. The constitution merely sets forth the judicial officers and the judicial powers vested in them.

Mr. Montgomery - One point we have to clear up is whether a common pleas judge had to sign the journal entry. How do you fellows feel about that?

Mr. Skipton - I was under the impression that their decisions would be final unless somebody wanted to challenge them.

Mr. Nemeth - In Idaho, magistrates' judgments are final unless appealed to the trial court of general jurisdiction. I should point out that in spite of the fact that the Idaho law goes into great detail it also says that the Supreme Court may specify additional categories.

Mr. Montgomery - Do you think that our provision needs alterations?

Mr. Nemeth - Maybe, if there is any concern about whether magistrates are judicial officers who can render final judgments. But a more detailed comment could clear that up.

Mr. Montgomery - Can't this just become a part of a discussion about who shall be judicial officers or who shall be judicial officers of limited jurisdiction?

Mr. Nemeth - I wouldn't fool around with "limited jurisdiction," because that could put a restraint on the Supreme Court as to the types of matters assignable.

Mr. Skipton - We are at liberty, though, to say what the term means.

Mr. Nemeth - There isn't anything in the comments about that now.

Mr. Montgomery - Could we call them "judicial magistrates"?

Mr. Skipton - What is a "magistrate"?

Mr. Nemeth - A person who is not a judge but who exercises judicial powers.

Mr. Montgomery - Well, it's fourth-tier work without the formality of a four-tier system.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
September 8, 1975

Summary

The Judiciary Committee met on September 8 at 10 a.m. in the Commission offices in the Neil House. Committee members present were Messrs. Montgomery, Chairman, Cunningham, Guggenheim, Mansfield, Norris, Roberto, and Skipton. Ann Eriksson, director, Sally Hunter, Julius Nemth and Brenda Avey were present from the staff. William Milligan, United States Attorney and chairman of the Ohio State Bar Association, was in the audience.

The meeting opened with an informal presentation by Julius Nemeth to bring committee members up to date on the results of the voting on the committee's recommendations on the judiciary article and on the possibility of rewriting certain sections or parts of sections which have apparently failed to receive Commission approval.

Mr. Mansfield - You've indicated that you feel that certain changes would be acceptable and others would not be. How did you get this kind of a view?

Mr. Nemeth - From reading the Commission minutes. We have no way of telling, for sure, of course, until we float some of these things as "trial balloons" to see what happens. At the present time, the committee is in the situation that the report has not been remanded to it. We really haven't concerned outselves too much with the parliamentary angle as to how these things would get before the Commission. But it's obvious that the committee is going to be looked to for guidance by the Commission, so there should be some consensus of feeling in the committee.

Mr. Mansfield - It would be helpful if we had the views of those who made up the dissenters, like Joe Bartunek. He dissented to practically everything.

Mrs. Eriksson - As Julius indicated, this analysis is based largely on the comments of the people who did make it to the Commission meetings, and except for his stated opposition to a couple of things, we really don't know what his opposition is.

Mr. Roberto - What do we need for an affirmative vote?

Mrs. Eriksson - We need 22 votes.

Mr. Nemeth - The problem is that the reason for the opposition to some of these things can't be determined from the record. The committee will have to make some policy decisions here. One of the things that has been suggested at the Commission level is that if merit selection fails to receive the required number of votes, then perhaps we ought to go back and take a look at the concept of a judicial qualifications commission. There seems to be some feeling on the Commission that the judicial qualifications approach is more likely than our present system to weed out unfit judges. The staff was asked to look at the literature on the subject and perhaps come up with a draft for submission to the committee and then eventually to the Commission. Mr. Montgomery suggested that we take a close look at California.

Mr. Guggenheim - Is this the kind of thing that we had unofficially under Governor Gilligan?

Mr. Nemeth - No, those were nominating commissions. A judicial qualifications commission would be a commission which would have the power of investigating judges and to discipline them or to make recommendations for discipline to the Supreme Court. In a few states, the nominating and disciplinary functions are carried out by the same commission, but in most states the commissions are separate, and this goes aoso for California which has no merit selection of judges. The idea behind judicial qualifications commissions generally is that there should be no need to go to the bar association to get an investigation started, to lodge a complaint, or to arrive at a basis for a recommendation, either for discipline, retirement, and so on.

Mrs. Eriksson - It seems to me that you might talk about some of the other things first.

Mr. Nemeth - I was going to tell you about some of the meetings that I attended with the Ohio Judicial Conference. The Ohio Judicial Conference happened to hold its meeting here in Columbus this last week. I was invited through MR. Whaling who is the executive director of the conference, to address the Committee on Court Administration and Reform, chaired by Judge Archer E. Reilly, who is a court of appeals judge in Columbus. This was last Wednesday night. As it turned out, I sat around the conference table with the Executive Committee of the Judicial Conference and the court reform committee as well. In other words, it was a combined meeting, and we cleared up some misconceptions and we were told some things which we believe you ought to know. After this Wednesday night meeting, I was invited to come back Friday afternoon to answer questions before a group of judges from all over the state. This wasn't a committee. This was just a group which gathered in a parlor downstairs, after it was announced at dinner that Ann or I would be available to answer questions. And from these two meetings we gathered some impressions. First of all, I'm sorry to report that there are a goodly number of judges who still don't understand some of the main provisions or the logic behind our report as a whole. One specific thing that I would point out is, for example, that many municipal and county court judges were under the impression that we intended to abolish their jobs, and they were very fearful of that. Of course, nobody wants to lose his job. And I received several questions both on Wednesday night and on Friday afternoon on this. I told them that the committee and the Commission never intended for this to happen; that the municipal and county courts would be absorbed into the common pleas courts, and the full-time judges of those courts would become common pleas judges. The part-time judges would be given an option either to retire if they didn't want to or couldn't devote their full time to judicial duties, or they could accept part-time positions, which we were going to call magistrates at one time, and which we will now call associate judges if that is the committee's and the Commission's pleasure. And when I had given this explanation, one of the municipal court judges said if only they had known this in the beginning, probably 90% of those people sitting across the hall, meaning municipal judges, would support our position. And there was also a question which indicated a complete lack of understanding of what merit selection was. One judge spoke for several minutes about why we didn't permit merit selection on the local level, meaning thereby, why don't we permit local judges to be elected, equating election with merit selection. I cleared that up but it's just illustrative of the kind of lack of knowledge or misconception about this whole project. One thing which I very definitely wanted to bring to your attention is something that was said by Judge Milligan, the Chairman of the Executive Committee. He was of the opinion that the judges have not had enough practical input into the development of the proposals. I explained to him that all of the material that we had put out has always

been available to them, and, in fact, a good number of judges are on our mailing list. All of the material that we have put out goes to the Judicial Conference office. Now whether it is distributed or not is another matter, but it has always been mailed. We have not ever done anything without giving prior warning, so to speak. But he said that there is a general feeling among judges that they would like to have an input, through the committee and the Commission, particularly the Commission, after the Commission adopts whatever it is going to adopt. This would, of course, be a departure from practice. We have never done this before with any article. We have always solicited input as the recommendations were being developed by the committees and the Commission, but we have never really said to anybody "Here is a complete package. What do you think of it?" I don't know whether if we did that, that would be workable. That would amount to having someone react to a finished product, and it's difficult to say where that approach might lead eventually. We are under certain deadlines and we have a job to do. But this is a committee and a Commission policy decision to make. It seems to me, however, that that approach poses some serious practical problems.

I told them about this meeting this morning, everybody knew it was going to happen, and you can see how many people came.

Mr. Mansfield - Did you invite them?

Mr. Nemeth - Yes. I'm sorry that more people have not come. I did explain to them, however, that we are now in this position of reassessment, that there is nothing final that we can hand them at this point. We have to make up our own collective minds first, and then go to the Commission with some sense of direction and give the Commission some guidance. There is one option the committee has open, and that is to do nothing. But I'm not sure that that's what you want to do.

Mr. Norris - I have a couple of questions. What is the full membership of the committee?

Mr. Nemeth - In addition to the members here, there are Senator Gillmor and Representative Maier.

Mr. Norris - Are there only 26 members of the Commission?

Mrs. Eriksson - No, there are 32 members of the Commission. Four members of the Commission have not returned their ballots at all. The 26 are all of those who have voted, or indicated that they were passing.

Mr. Norris - So there are really 6 votes out, then?

Mrs. Eriksson - Four votes out. I'm sorry, there should be a total of 28 that's come back. Some of those persons, you see, passed. They sent in their ballots saying they do not wish to vote.

Mr. Norris - I'm thinking here of Sections 4 and 5 that are on the top of the roll calls. In both of those, there are 26 total votes, including "yes", "no" and "passes", and we've got to turn around five votes on section 4. It takes 22, right?

Mrs. Eriksson - Yes, it takes 22.

Mr. Montgomery - We've got this thing structured so that you almost have to have three-fourths.

Mr. Norris - I'm just wondering what we needed. For example on Section 5, we need 6 and there are 6 people who have registered a vote one way or another. When you've

got a pool of 6 there, and you might be able to change a couple of minds, maybe there is some chance. I guess what I'm saying is that if it is impossible, there isn't any sense to even mess with it. If it's possible, let's make a few alterations and pick up some votes.

Mr. Mansfield - I would suppose, Al, that we could pick up a few votes.

Mr. Nemeth - The vote total that you have on Section 5 there, is probably what it is because the passes don't appear to have been indicated in the minutes from which this tabulation was made. On all sections from 6 to 23, there is a more accurate total.

Mrs. Eriksson - Sections 4 and 5 are from the prior meeting and we did not have as many total votes for those sections. There are 28 votes that have been submitted now.

Mr. Norris - Mr. Chairman, why don't we start with all these that have failed and take them in order and see if there is any change of resuscitating them?

Mr. Montgomery - How did you plan to handle it?

Mr. Nemeth - You have drafts before you of Sections 4, 5, 6, and 7. With regard to Sections 6 and 7, you have two alternatives each. Alternative 1 and Alternative 2 indicate two different possible approaches. The redrafts are only for discussion purposes.

Mr. Montgomery - Do you want to discuss Section 4?

Mr. Nemeth - The redraft of Section 4--here we have reinserted the provisions providing for the establishment of common pleas court subject matter divisions by law, which the Constitution now provides, and we have reinserted the provision for the constitutional recognition of the probate court and the requirement that the probate judge be specifically elected to that position, as well as the provision that the probate judge shall control his clerks and other employees, and so on. There is a change in division "C", which is the last paragraph on the first page. This division would read as follows in the redraft: "Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. There shall be elected specifically to such probate division (here comes the new Language) and may be elected to such other divisions as may be provided by law." In other words, it would provide in the Constitution that we have specific elections to all other divisions if the General Assembly provided for that by law.

Mr. Mansfield - That's pretty much the way it is now, isn't it?

Mr. Nemeth - No. Right now there are mandatory specific elections to all divisions.

Mr. Mansfield - Julius, I'm confused, because I was under the impression that under the present Constitution, probate was the only division named in the Constitution.

Mr. Nemeth - It's the only division named in the Constitution, but at the present time, the Constitution also provides that whatever divisions are created, there shall be specific elections to these other divisions, also.

Mr. Mansfield - We would be taking part of it out of the Comstitution and making it statutory.

Mr. Nemeth - Right

Mr. Montgomery - For what reason?

Mr. Nemeth - For a little bit more flexibility than we have now. This is a pretty basic policy decision here, and I think that the judges in the other divisions, particularly the juvenile and the domestic relations division, will probably oppose this quite strongly. If we "go" with this, we will satisfy the probate judges for sure, but it is unlikely that we are going to satisfy those judges in the other divisions who are not in the general divisions. There seems to be quite a bit of feeling on the part of people like juvenile judges, for example, that they ought to be specifically elected, and that's all really they want to do. They don't want to participate, for example, in the disposition of the criminal docket, and so on.

Mr. Mansfield - I think that feeling is pretty widespread among all lawyers, too.

Mr. Nemeth - As far as the judges are concerned, that they ought to stay?

Mr. Mansfield - Yes. Juvenile judges particularly, and domestic relations judges as well as probate judges.

Mr. Nemeth - I personally have not heard anything from attorneys, but that may be.

Mr. Norris - Up in "A", there are a couple of changes made that you didn't mention. Six lines down, the word "compact" is inserted. Is that the result of some agitation?

Mr. Nemeth - That's an amendment which I think the Commission has already agreed to. The differences that I'm raising now are differences which have not yet been passed on by the Commission.

Mr. Norris - How about the change about six lines on down, about whether judges are able to elect their presiding judge?

Mr. Nemeth - That, too, has been agreed to.

Mr. Norris - That's better language.

Mrs. Eriksson - What we're really talking about now are differences between the original committee recommendation, or the original committee recommendation as amended by the Commission, and this draft which is an effort to find out what caused the section to fail, and to see what changes could be made. Now both that "compact" and that language about the equal division of the vote were changes made, actually, by the Commission amendment.

Mr. Norris - Mr. Chairman, with these changes the only thing we are really doing is allowing judges other than the probate division judges not to be specifically elected depending on the other specific divisions and what the General Assembly wants to do with them. I suppose that's worth something. If you take that out, they we will have done nothing. And yet, that's the only change we end up with here. What this says is that the General Assembly could provide that judges of the domestic relations and juvenile judges in populous counties could be assigned by the presiding judge, right? The only judge to specifically be elected would be the probate judge, whereas today both the probatejudge and the domestic relations judge are elected to their divisions.

Mr. Nemeth - And juvenile judges.

Mr. Norris - Yes, depending again on what your structure is like. So I guess this is kind of half a bit. I have no problem with that change.

Mr. Montgomery - If we can get to "to fly" so to speak, we wouldn't have to go back to where we are. If we can't, the second position would be that we just leave it like it is. Which isn't exactly what we wanted, because it locks two more into the Constitution, but if that's the price of getting some of the other proposals through, we'll have to do it.

Mr. Norris - Mr. Chairman, I move the adoption of the redraft of Section 4 in order to get it before the Committee.

Mr. Montgomery - Is there a second to that motion?

Mr. Skipton - I'll second it.

Mr. Montgomery - Any comments?

Mr. Mansfield - Is it clear that people who voted against Section 4 were not disturbed by removing from the Constitution special divisions?

Mr. Montgomery - What do the minutes indicate?

Mr. Nemeth - There doesn't seem to be a great deal of feeling one way or the other evident from the minutes themselves. There was opposition expressed to the idea, I think, of having the Supreme Court create the divisions by rule but not to this particular proposal.

Mr. Montgomery - We haven't solicited any comments from the "no" votes, have we, to see what really bothered them about it?

Mr. Nemeth - No, so far we haven't gone outside the record.

Mrs. Eriksson - Of course the record does indicate Nolan Carson's feelings.

Mr. Nemeth - Yes. I don't think we'll ever get him to change his mind.

Mr. Norris - What's Nolan's problem?

Mr. Montgomery - He thinks all divisions--he's quite strong on the juvenile court division--should have judges specifically elected.

Mr. Norris - I can see why someone would swallow awful hard on this, the way it was before, because actually this is linked up with another provision we are not through yet--and that's the creation of divisions by rule. If that is eliminated, and this is back in, then it represents a very small change. We had a very radical change before the Commission, there is no question.

Mr. Mansfield - I would think, Al, that some of us might consider this as being a radical change, too.

Mrs. Eriksson - If I might interject, it really isn't because this is the way the Constitution was, essentially, before Issue 3.

Mr. Norris - I think we put that in in 1968 through the Modern Courts Amendment.

Mrs. Eriksson - The language "to such other division" was just put in in 1973. Prior to that, the General Assembly was creating divisions and determining special election of judges.

Mr. Norris - With the exception of the probate court.

Mrs. Eriksson - That's right.

Mr. Norris - Because I was surprised to see that clause in there--"other divisions,". I didn't know we had to elect them.

Mrs. Eriksson - You didn't before Issue 3.

Mr. Mansfield - Who pushed Issue 3?

Mr. Montgomery - The Ohio State Bar Association.

Mr. Norris - The purpose of Issue 3 was to allow the creation of districts and I would guess that that clause on special elections got stuck in there by kind of inadvertence. The purpose was to allow the creation of districts.

Mr. Mansfield - We are not talking about districts here, are we?

Mr. Norris - No.

Mr. Mansfield - I don't like to make a fuss but I don't think I could vote for this draft only because I think juvenile court judges ought to be elected.

Mr. Montgomery - Dick, do you care to comment?

Mr. Guggenheim - I have no strong feeling about it. I think that once we get off our original concept we're going to make, as Alan says, very small changes. I can't get excited about it one way or the other. I'm a little surprised at my friend from Cincinnati's strong position when we have just had a disaster there in the domestic relations court. And that's one of the things that convinced me that electing for that particular job isn't such a great idea.

Mr. Norris - Mr. Chairman, if I might explain the reason that I like the flexibility there. I can envision a time when we will want to create some divisions in the Legislature, I don't ever envision a time when we would not want to provide for election of domestic relations judges directly. We have been doing it and it fits. But I can envision a time when we may want to create some special divisions. For example, let's assume that we want to, for purposes of administration, create a criminal division of the common pleas court, a traffic division, or something like that. You don't want to elect a traffic judge. The guy's going to go stir crazy. So you're going to have to rotate them, or you won't be able to set anybody to sit on them. And on the criminal bench, for example, you just don't want to do it either. So my reason for favoring the elimination of the election thing in the beginning was not because I have any problem electing domestic relations or probate judges, either one. That's fine with me, but I think if we lock into the Constitution the requirement of elections then what we'll do is preclude, as a practical matter, the creation of some subject matter divisions in the future.

Mr. Montgomery - We can lock in these three and allow such others as the Legislature may provide by law.

Mr. Norris - You're talking about locking in juvenile and domestic relations. We can do that, I'm not sure. The statutes are kind of messed up, aren't they? Don't we have

juvenile courts in some counties and domestic in other counties?

Mrs. Eriksson - Yes.

Mr. Norris - Domestic has both juvenile and divorce. That might be a way to do it if we could figure out some language. That wouldn't bother me. But you see my problem. I am really concerned, from an administrative standpoint, that sometime we might need to create divisions that might be almost temporary, and we would not want to elect judges to them specifically.

Mr. Mansfield - I suppose there are some counties, there must be, where there isn't any separate domestic relations of juvenile judge.

Mr. Montgomery - The probate judge serves as juvenile judge in many counties.

Mr. Mansfield - I don't know what gives the probate judge the qualifications to serve as a juvenile judge over and above the common pleas judge. You have a common pleas judge in every county.

Mr. Norris - What they do in the single-judge county where we haven't specifically set up a division by statute is that the divorce jurisdiction is of the common pleas judge and the juvenile jurisdiction is with the probate judge, and I suppose that is just a division of labor. No one wants to have to do both of them, anyhow, so the statutes just split the function. But it is very illogical.

Mr. Montgomery - I had a probate judge when I was prosecutor and I got him to transfer all of the juvenile work to a common pleas judge. You can get about any combination you want.

Mr. Norris - In the initial draft of the divorce reform act that Mr. Roberto sponsored, we took divorce jurisdiction out of the common pleas and gave it to the probate judge in the small counties, so he would have both juvenile and divorce, and we figured he needed some relief from the case load anyhow in the common pleas. You can imagine the screams we had. I think they were heard across the state. It should be together.

Mr. Montgomery - You're saying until there is some uniformity in the divisions which we now have, you can hardly put them in the Constitution.

Mr. Norris - I don't want to say you can't. I think it would be a difficult job of draftsmanship. Ann would just have to take a crack at it and see if we could do it.

Mrs. Eriksson - It would be difficult. You would have to have some language saying in those counties where there is a separate division, a juvenile or domestic relations, or a combination or something, because they aren't uniform. But there is a probate division in every case.

Mr. Norris - I'm willing to do that if it will bring about agreement, just because I am concerned about the future of other divisions.

Mr. Nemeth - There is something else here that I see as a potential problem, and that's this: If we lock other divisions into the Constitution by name, judges in those newly "locked in" divisions will say "Why don't you give us the same power to control our employees as you specifically give to the probate court judges in the Constitution?" We've got another bit of fragmentation. I know some people don't like that word but that's what it amounts to, not only as far as the judges are concerned, but the court staff as well.

Mr. Norris - They would be so delighted to be in the Constitution, that they wouldn't complain. That was a real problem with the probate judges for an obvious reason--they have such a huge patronage machinery. But domestic relations isn't that big, although in some counties it's growing.

Mr. Skipton - I'm not in favor of writing in a lot of divisions into the Constitution. Leave it to the Legislature. I'm not going to vote to elect domestic relations judges or juvenile division judges. That doesn't make any sense to me.

Mr. Montgomery - Dr. Cunningham?

Dr. Cunningham - I agree with John. I don't believe in locking in any characteristic or any category in the Constitution. We locked it in by "common pleas" and that's all, as far as I am concerned.

Mr. Mansfield - Well, I suppose it depends on what experience you've had. While he's a great juvenile court judge, a fellow may not be qualified to be a general common pleas judge. HE may be a great juvenile court judge and he may have done that work all of his life.

Mr. Skipton - I have no objection to his being a juvenile court judge, and I have no objection to his being elected, but I don't see any necessity to name him in the Constitution. In fact, our intention originally was to make it as flexible as possible, permitting the Court to establish whatever was necessary to get the job done. I don't believe in putting these things in the Constitution, if it provides any flexibility whatever in how you get the job done. All we've done is created some arbitrary divisions of labor here. We don't know whether they equate with the needs of the people or with the requirements and the capabilities of judges that exist.

Mr. Montgomery - Well, on rereading the minutes, and if you will recall the comments and so forth, the probate people mounted the biggest opposition. I have a feeling that if we could placate that group, we'd probably be . . .

Mr. Mansfield - Well, of course, they have the best argument because they are in now.

Mr. Montgomery - Yes, they do.

Mr. Mansfield - I don't see much wrong with the way the Constitution reads now.

Mr. Montgomery - Well, it does tie it up.

Mr. Mansfield - It ties it up for elected judges.

Mr. Montgomery - It ties the Legislature up, for election purposes, for other divisions. Well, are you ready to vote on this?

Mr. Mansfield - Let me ask a question before we vote. It's my impression that under the present Constitution the Legislature is not required to create a juvenile court judge in every county or a domestic relations judge in every county. But they can if they want to, and it's only after they have done this that we have election of judges.

Mr. Nemeth - That's correct.

Mr. Mansfield - That's what I understand, and I don't see anything wrong with it.

Mr. Norris - I don't know what our time schedule is. I suppose we've got to vote on everything today. If we are not, and if we are anticipating future meetings, the key here is these "no" votes. We already know how two of them feel and if the others feel just as strongly, why, we're in trouble. If they don't, okay. Maybe a telephone poll would be advisable on those "no" votes. But I don't know what the time structure is and if we've got to dispost of it today, well, let's vote on it.

Mr. Montgomery - We don't have to. We're going to try and salvage something out of all this work. That's what we are trying to do.

Mr. Norris - Certainly a call to the "no" votes--we know about Nolan and we know about Bruce, but we've got seven of them there who might vote for it if Ann could run this compromise past themby telephone--that we would still be electing a probate judge but not necessarily an election in the other divisions.

Mr. Montgomery - What do you want to do? Not vote here and take a sampling of the opposition, and if they insist on putting it in the Constitution as it now exists just redraft it then? I'd say that's our second position. This is our first position.

Mr. Mansfield - You are going to take a contingent vote, aren't you?

Mr. Montgomery - Yes.

Mr. Norris - Well, we'd be polling them to see and then we'd have to come back at the next meeting, and tell us the result of the polls. Now we could still be stubborn and vote out something we know would fail. At least we would know better where we were. I guess I'd sort of like to do that before I run something past the full group and lose it again. In that case, I'd be happy to withdraw my motion.

Mr. Montgomery - Does a poll suit everyone? (Those members present indicated that it did.) So we will poll the "no" votes to see which way they want to go, and we will try this first position and if that doesn't "fly," we'll try the second position.

Mr. Skipton - What's the second position?

Mr. Montgomery - The second position is that we would leave the Constitution just the way it is. Let's go on to the next one.

Mr. Nemeth - The next one is a redraft of Section 5, which refers to the Supreme Court's power on rules. We've deleted the provision on the employment and duties of personnel. We've also deleted the establishment of subject matter divisions by Supreme Court rule. We've deleted the requirement in the section referring to the establishment of uniform criteria that such uniform criteria be established "by rule". And we've deleted references to magistrates and inserted associate judges. The deletion of the reference that standards shall be set by rule. We did that because apparently that requirement caused some confusion in the minds of both commission members and some people who read the section. It's not really necessary, because the criteria would not be rules as such, and they would not be binding in the sense that rules are binding on anyone. By removing any references to them, we feel that we simply remove a thorn without really changing the substance of the section. Now, the change from magistrates to associate judges does require explanation, I think, and in connection with that, you might want to take a look at the two alternatives on Section 7, which you have. We recommend a three-tier court structure and I think that there is support both on this committee and in the Commission for the concept that you need some judicial officers

who would do some judicial work who would not be full-fledged judges. The concept of magistrates we apparently didn't explain enough to convince enough members of the Commission, and I think also there was substantial opposition to the Supreme Court prescribing the powers and duties of magistrates. We've done away with the Supreme Court deciding the powers and duties of associate judges the way Section 7 is drafted now, under either alternative of Section 7. This function would be carried out by law, by the General Assembly. So I think the draft would dispose of what was probably the principal opposition to the concept of magistrates. But in addition to that, in going back over this, we came to the conclusion that the whole idea of magistrates may be so foreign to Ohio that we'd better substitute another word.

Mr. Mansfield - Yes. We have a philosophical or semantic obstacle here. The only magistrate we think of in Ohio is a police magistrate and he's not a full-fledged judicial officer. We thought that "associate judges" was a little more dignified and a perfectly acceptable way of describing this part-time judicial officer.

Mr. Mansfield Would these be part-time?

Mr. Nemeth - No necessarily part-time. It would be possible to create full-time associate judgeships, too.

Mr. Montgomery - We're trying to maintain a three-tier court system but really recognizing we have to have about three and a half to make the thing work. This at least eliminates the county and municipal mess.

Mr. Nemeth - Going from this--do you want to stop now and talk some more about the redraft of Section 5 or would you rather discuss the two alternates on Section 7 first and then go back?

Mr. Mansfield - I think it might be smarter to explain the difference between the two alternates on Section 7. Don, I don't understand your comment. Does this section in effect eliminate municipal judges?

Mr. Montgomery - The three-tier court system eliminates judges below common pleas, but we recognize that that work has to be done.

Mr. Norris - It eliminates part-time municipal judges and part-time county judges.

Mr. Nemeth - Yes, and I think that was one of the points of confusion that came out in the series of meetings that I attended. Many county and municipal judges think that we put this business about magistrates in here to "take care" of all of them. That wasn't the way the original comcept ran. It was our idea that the municipal courts and the county courts would become parts of the common pleas courts and the municipal and the full-time county judges--all the full-time judges, whether municipal or county--would become full-fledged common pleas court judges. And this idea of magistrates was inserted here, for one thing, to take care of part-time judges, most of whom I think now are county judges, but also to create a new class of judicial officers operating within the framework of the new common pleas court. It wasn't just aimed at part-time judges.

Mr. Montgomery - And the municipal and part-time county judges didn't want to be magistrates. They wanted to be judges. And that's what we're really getting to.

Mr. Nemeth - That's correct.

Mr. Mansfield - It appears to me that the difference between the two alternatives is that in the first they are elected and in the second they are appointed.

Mr. Nemeth - That's correct.

Mr. Norris - Mr. Chairman, when we leave the one that was defeated for either of these alternatives we just get too darned structured. The concept, as I recall it, was to get a three-tiered judiciary, but then to leave some flexibility to fill in the gaps. But not to create four-year judgeships. That's what we're doing here. We're creating more judges floating around. I don't think that's really what we want to do. We want to be able to replace mayors' courts, and to be able to replace the few police justice courts, where we've got them, in those counties where they need a part-time county judge, for example, whose only function might be traffic, because we've already got a small claims court. And in the common pleas courts we really wouldn't need a division of that, because that's a duplication we now have. The common pleas court judge could appoint somebody, to sit as a judge for those limited functions, whatever they might be, in his county. But now we've got this here . . .

Mr. Montgomery - You're still on alternative 2?

Mr. Norris - Yes, alternative 2. We've got in here a four-year term, and we didn't have that in the first draft.

Mr. Montgomery - We don't have to have a term.

Mr. Norris - I'd think he'd serve at the pleasure of the judge who appoints him. I think that gives us more flexibility.

Mr. Montgomery - Yes, I think that's good.

Mr. Norris - Because he is really a glorified referee and the judge might need to only appoint one for six months to help clean up a docket, for example.

Mr. Nemeth - I hope I'm not cutting you off. I certainly didn't intend to. But the reason that these two alternates were proposed in this form, talking about the first one first and this business about electing a judge--if you are going to elect him, then I think the fact that you give him a term automatically follows. And the reason that this alternative was thought of is because we're going back to the status quo as far as the election of common pleas judges is concerned. And since there seemed to be support for the election of common pleas judges, we thought there might also be support for electing these associate judges. Alternate 1 is philosophically consistent with the election of trial court judges.

Norris - So what you do is you bring every small municipality out of the wood-work because you've abolished the mayor's court and haven't replaced it. They're not going to want to elect a mayor's court judge for four years, and under our original proposal you could, at long last, get rid of mayors' courts by allowing common pleas judges to appoint a magistrate to sit up there in that municipality and hear those cases.

Mr. Montgomery - Are we all agreed that we don't want them elected? (Members present agreed). So we're talking about some version of Alternate 2.

Mr. Roberto - Mr. Chairman, there seems to be sentiment, and I agree, that if you simply strike the reference to a term in Alternate 2, Alternate 2 is pretty much what werecommended previously with regard to magistrates. They are people who are appointed by the judge, as an assistant judge, except in this case they would be called associate judges.

Mr. Nemeth - There is, of course, a very fundamental difference, namely that the Supreme Court will no longer prescribe duties and powers. All of that business is going to be transferred to the General Assembly.

Mr. Mansfield -Nevertheless, you really take care of a fundamental problem. I think Mr. Roberto is right.

Mr. Roberto - Except that this is still our recommendation of providing personnel for the courts.

Mr. Montgomery - It's implied but he could appoint them for his own term. We don't have to state that, do we?

Mr. Mansfield - I think Al's suggestion was a very good one, "to serve at the judge's pleasure."

Mr. Norris - That was pretty clear in the original draft. Let's see what we have there: "Courts of common pleas may appoint magistrates who need not devote their full time to the performance of judicial duties."

Dr. Cunningham - Why not call them referees?

Mr. Montgomery - We've already got those.

Mr. Norris - That they can't make a final decision is the problem, and these fellows would be able to pronounce sentence, which I think is important. I don't think you need that whole sentence, "Terms of office of associate justices shall begin. . ." either.

Mr. Roberto - How about the past part of that,". . . laws shall be enacted to prescribe the times and mode of their appointment". You may want to keep that.

Mr. Nemeth - The reason we did that is because we wanted to put every reference that was necessary in the Constitution, as far as possible, into this one section to differentiate associate judges from full-time judges, because we are still providing in the first sentence in Section 7 that judges shall devote their full time to the performance of judicial duties. Then in the next sentence, we go on and provide for part-time people. We wanted to make sure that whatever had to be in the Constitution about associate judges would be in this one section, in order to avoid a possible conflict with any other section of the Constitution referring to judges--to full-fledged judges.

Mr. Mansfield - I'm not clear on this, Julius. Are you suggesting that "associate" isn't adequate to distinguish them from full-time judges?

Mr. Nemeth - It is if you make sure by drafting the section so that the other sections of the Constitution which refer to judges don't apply to associate judges. That's why there is all this language in here, which is in part a repetition of provisions in Section 4.

Mr. Guggenheim - Julius, when you say that these are handled by the common pleas courts that they are to serve, does that mean by a particular judge, so that each judge shall appoint his own associate, where there are a number of common pleas judges?

Mr. Nemeth - It would be an appointment made by the court as a whole, I would think.

Mr. Guggenheim - Then I think you'd have to put in something about removal.

Mrs. Eriksson - I think that's the purpose of the language that "laws shall be enacted to prescribe the times and mode of their appointment." It would seem to me that it would be up to the General Assembly to determine how they would be appointed and whether the presiding judge would make the appointment.

Mr. Guggenheim.- All right.

Mr. Norris - Mr. Chairman, could I make a suggestion on drafting? It will have to be reworked anyhow, because I think now that first sentence can be a little more artfully drawn since we are going to cut out some of these things. I'd leave the first sentence the way itis and the second sentence would read: Such associate judges shall be appointed" and then strike out "for a term of four years"; then continue "by the common pleas court they are to serve"; then strike "Terms of office of all such associate judges shall begin on the days fixed by law"; then go down to the next line and strike "and providing for the filling of a vacancy in office'; after the word "duties" insert "and"; strike "and the causes for and method of removal"; and, then strike the last sentence. They would have to be cleaned up, but that essentially says that the General Assembly could provide by law for the appointment of associate judges by common pleas courts and then the General Assembly would prescribe the time and mode of the appointment and the powers and duties of compensation. I don't think we need to leave anything in there about removal, because obviously if the guy is serving at the pleasure of the judge, then that takes care of that.

Mr. Montgomery - Don't we need a "however" at the beginning of the second sentence?

Mr. Norris - I think some of this can be combined in the first two sentences, because I think it's a little awkward to say "provide for associate judges of the courts of common pleas who need not devote their full time." Well, maybe that follows associate judges.

Mr. Montgomery - It should say,"Judges shall devote their full time to the performance of judicial duties. However, the General Assembly may, by law, provide for associate judges who need not devote their full time." You need a bridge there.

Mr. Norris - I see what you mean. What we did in the prior draft would have been to put a comma after "duties" and then put in "but".

Mr. Guggenheim - the prior draft really read pretty well.

Mr. Montgomery - That was my thought.

Mr. Mansfield - And with that additional change, I would be glad to move the adoption of Alternate 2 as amended by Mr. Norris.

Mr. Montgomery - Is there a second?

Mr. Guggenheim - I second that.

Mr. Montgomery - Any discussion? Do you think we should poll the remaining "no" votes again before we vote on this one, or are you sufficiently confident with this that we can go ahead with it?

(The committee members thought it was not necessary to poll the "no" votes on this section.)

Mr. Montgomery - All in favor signify by saying aye. (The vote was taken, all voted aye) The motion is carried. Let's return to Section 5.

Mr. Nemeth - The principal change in Section 5 is the deletion of the Supreme Court's rule-making power in regard to personnel. The other changes here are not really major departures, and the place where language came out is Section 5 (B) (1), which is the last paragraph on the first page.

Mr. Mansfield - I have a question, Julius. Earlier, you made some reference to deleting what we had before with respect to the Supreme Court's power to establish criteria by rule. Now the draft gives the Court the power to establish uniform criteria, but not by rule.

Mr. Nemeth - That's correct.

Mr. Norris - Yes, that's unchanged from the previous draft.

Mr. Mansfield - Oh, it is unchanged.

Mr. Norris - It doesn't give them the authority to do anything, they just make recommendations to the General Assembly. We can ignore them if we want.

Mr. Mansfield - Okay, that answers my question.

Mr. Montgomery - Are we reading your opposition right here?

Norris - Well, this is my question. There are two things that we deleted in this draft that the original draft gave the Supreme Court. The first was, it gave the Supreme Court the authority by rule to provide for the employment and duties of personnel. Now, I can see opposition to that. I can understand that. I have no objection to that being taken out. Also, in the rejected draft, we gave the Supreme Court the authority to promulgate rules establishing subject matter divisions, but, and this is what I hate to lose. We established a new method of their doing that. One of the things that always stuck in my craw was the provision in the Modern Courts Amendment that they submit a rule, and we "take it or leave it" in the General Assembly. This would be a new procedure, where the Court would submit, but we could adopt, reject, or alter. We could amend, and I thought that was a very, very important kind of a procedure to establish. And I guess I can see why people would object to the first one, that is, providing for rules governing employment and duties of personnel. But this procedure concerning divisions seems to me to be imaginative, while it also has the safeguards in it that the objectional procedures in the Modern Courts Amendment didn't have. And I'm just wondering whether the opposition was focused in on that as much as it was on that employment and duty thing, because I hate to lose this. And you have to remember that I'm the guy who fought and beat the Supreme Court on the Criminal Rules.

Mr. Mansfield - You're hating to lose the veto or amendatory power that the General Assembly would have over rules governing divisions?

Mr. Norris - Yes, that's right. My feeling has always been, Bruce, that the Court knows its business better than anybody, but the Court is also least suited to promulgating legislation--less suited than the General Assembly. And I felt that what we really needed was a partnership. And if you leave the Legislature alone so that it has all the authority, we would never have all these modern rules of procedure. I believe that very strongly. I also think we probably would do little or nothing in the area of creating

subject-matter divisions in a sensible way. On the other hand, I don't want to give it all to the Supreme Court either. They do everything in secret, you know. There really is no input. And I think they make mistakes. So what you ought to have is the two working together, and what I would like to see is the Supreme Court promulgating these rules and then giving them to the Legislature to work on as we would any other bill.

Mr. Mansfield - Can't/be changed to accommodate this that?

Mr. Norris - Well, it does do that. The old language did that.

Dr. Cunningham - It said "subject to a condition subsequent . . . ."

Mr. Norris - Yes. If we didn't do anything then it would take effect just as it was. Under modern courts, they promulgate the rules and then we either take them or leave them, but we cannot change them. But the idea of the Court being able to submit to us rules which we can amend just as we could any other bill, I think has a lot of merit and I hate to lose that.

Mrs. Eriksson - There is even a third possibility, if I might interrupt, and that is to do it as we've done the criteria for establishing judges--to give the Supreme Court the duty to make recommendations regarding subject matter divisions.

Mr. Norris - With this in there, it gave us all three stages. We would have been unique among the states, I'm sure. The one would be to take or leave a rule; another would be to amend a rule; and the third would be to simply provide for suggestions. I think there is some merit in those steps. I just don't really think that this is a radical proposal, but it is still innovative.

Mr. Montgomery - When someone votes "no", you don't know what section of it bothers them the most.

Mr. Norris - That's what I'm raising. In the first one, I have no problem with getting rid of the business of the Supreme Court telling you whom you have to hire and what they have to do. But I sure hate to give up that subsection (B) of (3) without at least polling the membership to make sure they really understood that.

Mr. Mansfield - I have no objection to that.

Mr. Montgomery - How do you feel about that?

Mr. Roberto - You want to poll the membership with regard to the old (B) (3), and adopting this revisory language? That's fine. I have no problem with that.

Mrs. Eriksson - Mr. Norris, are you thinking, though, of still retaining the probate division specifically?

Mr. Norris - We're polling them anyhow on that particular section, are we not?

Mrs. Eriksson - Yes.

Mr. Norris - So this would be consistent with the polling on both of these sections that are intertwined.

Mr. Guggenheim - This wouldn't be inconsistent with that, would it?

Mr. Norris - It could be. Another thing that we could do, however, and this easily would be, if we find people are adamant on the probate division, we could just make that an exception in (B) (3): the Supreme Court could suggest divisions except for probate, because obviously we'd have that in the other section. So that it wouldn't have to be inconsistent.

Mr. Norris - So I guess what I'm suggesting, Ann, is that we go along with getting rid of (B) (1), making that change in (B) (1), but polling on (B) (3).

Mr. Mansfield - Let me ask, Al, there is a reference in (B) (3) to districts of common pleas courts.

Mr. Nemeth - We are talking about two B (3)s here. We have renumbered these. Mr. Norris is talking about the old (B) (3).

Mr. Guggenheim - You are talking about subject matter divisions?

Mr. Norris - Yes, when I said (B) (3), I meant the old (B) (3).

Mr. Mansfield - My only question is that I'm under the impression that up until now, we haven't really come to grips with whether we will have districts.

Mr. Guggenheim - Yes, I agree.

Mr. Mansfield - If that's the case I query whether we should make reference to the districts in this (B) (3).

Mr. Nemeth - Well, what we've done really is not made any changes from Issue 3 in that regard. We really are not recommending the creation of districts and neither are we recommending any provision which would prevent the creation of districts. It's left in the hands of the General Assembly.

Mr. Mansfield - You are assuming that there will be districts of the common pleas courts?

Mr. Nemeth - There is that possibility.

Mr. Norris - That's already in the Constitution, Bruce.

Mr. Mansfield - If that's so, then I have no objection.

Dr. Cunningham - How are you going to frame the motion?

Mr. Norris - Oh. What I was doing was just suggesting informally that Ann poll the negative votes on Section 5 concerning their willingness to retain section (B) (3) of the original draft--the subject matter divisions--if we struck the provision of (B) (1) concerning the Supreme Court making rules on personnel and duties. I don't think any of us worry too much about that, if that comes out.

Mr. Guggenheim - Alan, I'm in favor of what you are proposing, but I'm not exactly clear. It says the Supreme Court may prescribe rules governing . . . . subject matter divisions and assignment of judges thereto , . . " What does that do to Bruce's thoughts about the juvenile court?

Mr. Norris - In its purest form it would mean that there would be no direct election either to the probate division or domestic relations.

Mr. Guggenheim - But we might except probate.

Mr. Norris - Right. We're polling on that section as it is so if we find that people are adamant, that we've got to make an exception for probate and domestic relations, then we can make the same exception in this section.

Mr. Mansfield - What Al is suggesting, as I understand it, Dick, would not preclude their being separate divisions and separate judges elected to those divisions, even though old (B) (3) is reinstated.

Mr. Montgomery - All right. I think we have an understanding there. We won't take a vote on this particular Section 5. We'll take a poll. What is our next section?

Mr. Nemeth - The next one is Section 6. There are two alternates on Section 6.The first alternate would provide for the election of all judges and there would be some mainly grammatical changes made. The only really substantive change in the section, if it goes through this way, would be in Section 6 (B), where we would provide that in addition to the compensation of all other judges being equal, the compensation of all judges of the courts of common pleas would be equal also. That's not a change from the previous draft, but it's the only substantive difference there would really be between this draft and the existing Constitution.

Mr. Norris - And that's Alternate 1, you say?

Mr. Nemeth - Yes

Mr. Norris - That just does away with merit selection altogether.

Mr. Nemeth - Yes.

Mr. Montgomery - It leaves it like it is.

Mr. Mansfield - What does Alternate 2 do?

Mr. Nemeth - Alternate 2 does away with merit selection for common pleas court judges completely, taking out the "local option," but makes it mandatory for courts of appeals and Supreme Court judges.

Mr. Montgomery - Again, we don't know where the opposition comes from.

Mr. Norris - I think we've just got to poll. If we pick up enough votes by deleting the "local option" Okay. If we don't then we'll know where we are, I guess. I just find it hard to believe that we lost the vote on the "Local option."

Mr. Mansfield - You'd pick up my vote by deleting the part on the "local option."

Mr. Norris - That's good to know, because I know we've got opposition to merit selection. If the "local option" hangs some people up, then maybe we can work that out.

Mr. Montgomery - All right. Is that satisfactory with everyone? I really don't think there's much point in spending much time on it. Well, Ann, we want to poll the "no" votes to see if they would be in favor of dropping the "local option" provision first.

Mrs. Eriksson - Does anyone know how Senator Gillmor feels, because I understood he had changed his original opposition on merit selection to agreement with the Bar Association's position.

Mr. Milligan - The answer is that I haven't talked to Paul. I'd be pleased if that were his position.

Mr. Montgomery - Then we'll see, and we will resubmit the most likely alternate. We won't take a formal position on it today. Does that conclude discussion of redrafts?

Mr. Nemeth - That concludes the redraft sections, but we should still consider what to do about judicial qualifications commissions in view of the prior discussions.

Mr. Montgomery - All right. Lunch is not here yet so let's go right ahead.

Mr. Norris - Do I understand then, Mr. Chairman, that sections 13, 15, and 23 will really fall into place just depending on what we do with Section 6 and the others?

Mr. Nemeth - We will have to do something with Section 13, particularly.

Mr. Norris - Well, that falls in with Section 6.

Mr. Nemeth and Mrs. Eriksson - Yes.

Mr. Norris - How important is Section 15, for example. I'm not so sure what that is.

Mrs. Eriksson - Section 15 is the section which requires the extraordinary majority of the General Assembly to change the number of judges. That, I think, can be kept in the Constitution without being inconsistent with the remainder of the report. Now the problem is that Mr. Skipton's committee recommended the repeal of that section in the first report of the Commission on the basis that extraordinary majorities in the General Assembly were undesirable except in a very special circumstance. But the repeal of that section never got to the ballot because it never got through the General Assembly. So that section is "in limbo" as far as the Commission is concerned at the present time, and I wouldn't think that it is essential to do something with it.

Mr. Norris - Okay, that vote is not very lopsided. We've got 19 "yes" on that one.

Mr. Montgomery - We probably could get enough there if we just explained it a little bit because the Commission did take the contrary position before.

Mrs. Eriksson - That's right. It did take a position for repeal of that section, a couple of years ago.

Mr. Montgomery - So we're in conflict with ourselves.

Mr. Nemeth - Of course, the membership was different then. It may not be the same people who voted.

Mr. Montgomery - I think it was a victim of momentum. When people decided they were going to vote "no", they just voted "no" on everything thereafter.

Mr. Norris - This section created some problems for me, personally. It took me two sessions to pass the Court of Claims as a result of this thing. We passed the House with less than a two-thirds majority and didn't even know the provision was in the Constitution. We found out when it was in the Senate, and obviously we had to nullify it. I'd like to see that out of there the more I think about it. The trouble we have creating judgeships sometimes.

Mr. Nemeth - Do you want to get into judicial qualifications before lunch?

Mr. Mansfield - Maybe in a preliminary way. I'm not sure I understand why we are going to talk about that.

Mr. Nemeth - There was some discussion at the Commission level that, particularly if the appointive-elective system did not make it, and that therefore the screening procedure of the nominating commission was not available there would be a reason to take another look at the judicial qualifications commission concept on the basis that it may provide a more expeditious and sure method of weeding out judges who are unfit for the bench then present disciplinary methods do.

Mr. Mansfield - This would have to do only with removal of judges?

Mr. Nemeth - Not necessarily. It could involve discipline of other types and it could also involve recommendations of retirement for health reasons.

Mr. Mansfield - It has nothing to do with their qualifications for becoming a candidate?

Mr. Nemeth - No.

Mr. Montgomery - You can immediately say that we don't need it because our Supreme Court is doing it anyway and it works pretty well. That's where most of the testimony has gotten.

Mr. Mansfield - I was about to add my opinion to that column.

Mr. Montgomery - But the new ingredient in this is public participation.

Mr. Nemeth - Public participation and the possibility of filing a complaint directly with the Commission. Under the present procedures in Ohio a citizen cannot file a complaint himself. He has to start with the bar association either at the local or at the state level.

Mr. Mansfield - I think that's where it ought to originate.

Mr. Norris - All we need is some new "suberbody" to harass judges.

Mr. Guggenheim - I'm against "superbodies" and harassing anybody.

Mr. Roberto - Mr. Chairman, the citizens have the opportunity to review the qualifications of judges at least every six years.

Mr. Guggenheim - This would add something here. The merit system replaced the mechanics of elections, and in that sense there wasn't so much wasted effort. But this just adds one more commission on top of everything.

Mr. Montgomery - I think the reason why we are publishing it and presenting it to you is because the Chairman of the Commission brought it to us, and this is out of courtesy to him.

Mr. Norris - Can I ask one question before we start on the presentation? Could not the General Assembly, by law, require the Supreme Court to accept complaints? It couldn't require them to act on them, but we could provide by statute a procedure where a citizen who didn't like a judge could file a complaint with the Supreme Court, couldn't we?

Mr. Nemeth - I think that could be done. We have also discussed in committee before that it would be possible for the Supreme Court to set up a commission like a judicial qualifications commission by rule and the Court could empower it to do just about anything except to make a final determination. And I don't know if there is any support anyway, either in the committee or the Commission for a judicial qualifications commission which could hand down a final verdict as to what to do in a particular case.

Mr. Norris - One advantage that we have had in this state, particularly, maybe over some states too, but particularly over the other professions, is we have the Supreme Court as the one disciplinary body. We don't have to worry about some of these commissions for discipline and trials and that kind of thing. That centralization and that disciplinary authority is the best protection the public has. I hate to see that splintered. But out of courtesy to the Chairman of the Commission I have no objection to listening to the research.

Mr. Montgomery - If we don't want to get into it, there is no point. Everyone knows what it is, and unless someone would like to get into it in some detail . . . Ann, what did Dick tell you?

Mrs. Eriksson - There are some people on the Commission who are very much interested in it, who were Dick and Paul Unger. Paul, because of his acquaintance with constitutional revision procedures in Pennsylvania. The person who was director of the constitutional revision body there became very much interested in it, and I think the whole thing is based upon the California experience. The other states that have adopted these have pretty much followed the California pattern. I think that both Dick and Paul Unger are impressed with the possibility of a body which can receive complaints directly from citizens. And it's constituted, in California, at least, to have some lay persons on it. Of course, this body does not remove judges. It simply makes recommendations to the California Supreme Court, which has the ultimate authority. I think that the other thing that perhaps you should know is something about the experience of California which has not had an overwhelming number of complaints filed. It has not worked out that they have been innundated with complaints about judges. I don't know about these things in other states. I don't believe that we've had reports. We do have a report on the California commission. You might give them some of those figures if you have them, Sally.

Mrs. Hunter - The memorandum that you received in July on judicial qualifications commissions contains some figures on the numbers of complaints filed.

Mr. Skipton - Actually, although Dick and Mr. Unger may see a bit of merit in this, I always felt that that was originally broached as a sort of sop to "no" votes on the appointive system. If you get the votes without that, I don't see much reason to have it in.

Mrs. Hunter - Here are some statistics on the California Commission, if anyone is interested. In its 1974 report, the California Commission states that in 1973, 197 complaints were filed with it. Of these, the commission determined that 157 did not state a basis for further checking and that some inquiry or investigation was conducted in 40 instances. In 32 of these 40 matters there was a written communication to the judge, and in some of these instances the judges response "satisfactorily explained the question which had arisen". The commission further states that in several other instances "a corrective influence was served by the investigatory procedure." In 1973, 11 preliminary investigations were conducted and two judges chose to resign in the course of commission proceedings. That's the 1973 experience. In the same report, the commission states than in 1974 it received 247 complaints, 211 of which were groundless or outside the commission's jurisdiction. Thirty-six matters were the subject of inquiry. There were 33 communications with judges about complaints and many of these resulted in improvements or changes in judicial conduct. In 1974, the commission recommended the removal of one judge from office. In another case, the court censured a judge whom the commission had recommended be removed. In 1973 and 1974, approximately 1100 judges were subject to the commission's jurisdiction.

Mr. Roberto - That's what I wanted to know, then. And the upshot of it is that probably the only action the Court has taken is to censure one judge, and say "naughty, naughty". But none were removed, and probably none were disciplined, and probably two of them quit in frustration because they were being hassled by the commission. So I'm wondering what all of that activity amounted to. That's what I suspected and that seems to bear it out that the commission really didn't add anything to the process. We have a disciplinary process which is workable in Ohio, and adding another commission with laymen would not significantly improve that, I don't suspect.

Mr. Montgomery - Are there any further questions on that? I think we'll just consider the matter closed at this point. What else do we have to take up?

Mr. Nemeth - I think we have gone through the Agenda.

Mr. Norris - What about Section 23? What are we going to do with that, if anything? We're two votes short on that, with four passes.

Mr. Montgomery - I would like to suggest, Ann, when you talk to some of these Commission members, if we could also try to ask their position on some of the obvious ones. I think I am going to have to call Jim Shocknessy myself and see if he won't reconsider and cast a vote on some of these things.

Mr. Norris - "Service of a judge on more than one court"--what's that all about?

Mrs. Eriksson - If the Commission's recommendation on the three-tier court system is adopted, that section becomes obsolete.

Mr. Norris - Is that the one that allows the county to opt to combine probate and common pleas?

Mrs. Eriksson - Right.

Mr. Norris - Then we would still need it.

Mrs. Eriksson - Well, probate really is not a separate court now.

Mr. Norris - Yes, but they can get rid of it and have only one judge.

Mrs. Eriksson - Yes, perhaps so. That section really speaks about probate courts, not the probate division. Now, whether it is applicable . . .

Mr. Norris - I would assume from what you are telling me that we have three or four counties every year which do that down in southeastern Ohio. Isn't this the one that puts it on the ballot county-wide to reconsolidate and they end up with only one judge and we give them an extra $5,000 salary?

Mr. Nemeth - Yes, it puts it on the ballot county-wide.

Mr. Norris - And then we give them an extra $5,000 from the state till for salaries? I'd hate to lose that. Now that assumes that in our poll we find out that we're going to lose the probate division as a constitutional court. The repeal of this is consistent, obviously.

Mr. Montgomery - Bill, do you want to bring us up to date on anything the Bar Association is up to?

Mr. Milligan - Yes, Don. The Modern Courts Committee did meet on Saturday, along, of course, with the other committees of the state bar. We have some members of our committee who are concerned with the problem of districting. That is to say, they are concerned in the sense that they don't like it very well. I had promised them that we would discuss that and we did. They did debate this and there are certain members of the committee who are concerned about it. That's one thing we discussed. I think that probably, what it boils down to is that the committee would not be really opposed to districting if that's the route that the legislature elects to go, providing that there were some provision that there would be at least one resident judge in each county. In many cases, that's the current feeling of the Modern Courts Committee of the Ohio State Bar. Now, whether this will be reflected in the Council of Delegates when they meet is another question. On the subject of merit selection, they were, of course, disappointed that the full Revision Commission did not approve, at least by the necessary two-thirds vote, of the inclusion of merit selection in Ohio. I didn't poll everybody, but I think that their feeling relative to merit selection at the local level in any form, whether it be by the option of the Legislature or the option of the voters in the county, is that they will be willing to accept let's call it the"two-phase"approach, that is to say, appellate courts maybe in the near future and then, if that works, another separate constitutional amendment later to deal with whether it could be extended in whole or in part to local courts. We do have some members of our committee whom you might call men of principle. Bruce Petrie is a good example of that. He feels that merit selection is so obvious that anybody with any sense at all ought to adopt the whole thing immediately, and what are we waiting on? My view is somewhat similar to the one I just described of the committee. I don't think really that local option would work. I think that putting in local option is almost the same as not having it at all. I say this from having gone through the experience of a local option election on combining courts. Any of you, if you haven't been through that experience, ought to sometime. It's illustrative.

Mr. Norris - You lost it, obviously.

Mr. Milligan - Yes, we lost it. Shelby county is a good example. It needs two full-time, well paid judges and getting from here to there from where we are--which is from three judges--seems to be difficult. But just to give you one illustration, that's what happened in Shelby county. I don't know about all 88 counties. True, there are counties that need one judge. Sure, there are those that need 20. But in any case, the Modern Courts Committee is very concerned about the position of the Revision Commission. They feel that this position will be the critical factor at

least in the immediate future as far as merit selection is concerned. So, it would be very pleasing to the Modern Courts Committee if the full Commission at least would adopt merit selection, or recommend merit selection, at the appellate level at this time. And there was Judge Perkins. He was there. He's even more ubiquitous than I am. But even he, from his very specialized point of view,says often that he has no objection to merit selection at the appellate level state-wide. So I think this illustrates something of a movement in that direction. I hope it does. I might say that the Committee was very appreciative of the positive position taken by this Committee in regard to merit selection. We're sorry that up to now two-thirds of the full Commission has not elected to go along, but we would be very happy if they decided to do so.

Mr. Montgomery - Thank you.

Mrs. Eriksson - I understand that the Modern Courts Committee of the Bar did have some thoughts on an initiative, and I was wondering what the status of that proposal was.

Mr. Milligan -The status of that proposal is that they have had a tentative plan, not actually finalized to make an effort to put the matter on the ballot for a vote in November of 1976. I asked the Committee whether they wanted to make the decision to make that a firm target date and their conclusion was that they wanted to wait and see if the position of the Constitutional Revision Commission is indeed final--that is, that there will not be endorsement or that there will be. And if there is one or there isn't one, at our next meeting, based on that, we would make a final decision as to what our target date would be for an initiative. We of course have been before the Legislature a number of times without success. There has to be some new development before we can go back to the Legislature and say, "Gentlemen, we encourage you to put this on the ballot". The kind of new development I'm talking about would be, of course, a positive vote by the Constitutional Revision Commission. There are I presume other possibilities, but that certainly would be one of them. In any case that is our position.

Mr. Norris - You'll never get it on the ballot, anyhow. I don't think the initiative would ever make it.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
October 1, 1975

Summary

The Judiciary Committee met on October 1 in the Commission offices in the Neil House. Committee members in attendance were Mr. Montgomery, Chairman, Dr. Cunningham, and Messrs. Guggenheim, Norris and Roberto. Robert Manning of the Ohio State Bar Association and Douglas Somerlot of the Supreme Court were present as observers. Director Eriksson and Julius Nemeth were present from the staff.

Mr. Montgomery - I call to order the meeting of the judicial committee of the Ohio Constitutional Revision Commission. You have all received the minutes of the last meeting. Were there any objections and corrections? Do you want them read? If not, with your concurrence, we will waive the reading. Julius, would you like to start through the agenda with the polling of the voters on our proposition?

Mr. Nemeth - Before we go to that, perhaps we can take a minute to start on a very positive note. We have since the last meeting received an additional vote on the recommended repeal of Section 17, which concerns the removal of judges by concurrent resolution of the General Assembly.

I hope you all have received the memorandum dated October 1 headed "The Possible Changes in the Committee Report." At the last meeting, the staff was asked to conduct a poll of negative votes to determine what the reason for the negative votes was and to determine whether any of the defeated sections could be redrafted so as to become acceptable to a sufficiently large number of Commission members to become Commission recommendations. The committee's concern was with three general areas: first, the method of judicial selection; second, the creation of subject matter divisions and the election of judges to divisions that are created; and third, the creation of a class of judicial officers other than full-fledged judges at the common pleas court level. Specifically, we were asked to fine out, first, whether it would be possible to draft a section incorporating an appointive-elective system for judicial selection relative to appellate judges only; second, whether it would be possible to draft an acceptable section which would permit the Supreme Court to promulgate rules pursuant to which subject matter divisions are created, if the present provision concerning the probate court were left as it is, and thirdly, whether a section would be acceptable if it provided for associate judges in the common pleas court whose powers and duties are prescribed by the General Assembly. The original committee recommendation on this provided that the Supreme Court would promulgate rules setting forth the powers and duties. We've come up with the following conclusions. On judicial selection, which is covered in Section 6 of the original report, which received 15 votes, there were two members of the Commission who voted against the original section 6 who said that they would or might be persuaded to vote for it if the appointive-elective system were confined to Courts of Appeals and Supreme Court judges only. And there were two other members who indicated that they would or might vote for an appointive-elective system if it were limited to Supreme Court judges only. Since the original recommendation received 15 votes, if all of those votes stick and we can count on these two or four more, that means a provision setting forth an appointive-elective system covering Supreme Court and Courts of Appeals only probably would receive about 17 votes. If the provision were limited so as to cover only the Supreme Court, it might receive about 19 votes.

Mr. Norris - How many do we need, Julius?

Mr. Nemeth - Twenty-two.

Mr. Norris - Did you poll all of the"passes"?

Mr. Nemeth - Yes, we polled all of the people who voted "no" or passed, with the exception of Mr. Shocknessy, and we've been in contact with Mr. Russo but don't know how he would go on it.

Mr. Norris - You didn't pick up any of the passes?

Mr. Nemeth - No. There are, to the best of my ability to count, 11 members of the Commission who are opposed to the appointive-elective system for any judges. Based on this, we set forth three alternatives for the committee to follow. The first of which is the one that Mr. Norris mentioned, namely to abandon the appointive-elective concept altogether, and submit a redraft of section 6 which makes no changes in the method of judicial selection but contains the other amendments which we have proposed in section 6 and which don't appear to have any substantial opposition. And this includes an amendment which provides for equal pay for common pleas judges.

Mr. Norris - Remind me, Julius, is that predicated on districting?

Mr. Nemeth - It's not predicated on districting in that these are not inextricably tied together, it is tied to the proposition that for equal work there should be equal pay, however that is accomplished. The second alternative is to submit a redraft of section 6 limiting the appointive-elective method to Supreme Court justices only. If we did this, we would have to rewrite section 13, which refers to the filling of vacancies, to make section 6 and 13 consistent, but that's not a major problem. I think at this point, you may want to discuss these alternatives.

Mr. Montgomery - I told Julius that I didn't feel that submission of the Supreme Court only would be successful, and even if we did it, really, that's not enough reform to fool with. If we couldn't do the whole appellate level, we probably ought to say that this isn't the time or the vehicle to bring this to the legislature's attention. Maybe a minority report, or some alternate report, could be brought to the legislature's attention to let them know that there was substantial sentiment for it but not enough to get an endorsement by the Commission.

Mr. Norris - I can see abandoning the local option for the common pleas if that would get the votes, but if on the Court of Appeals, too, we still fall short, I would rather throw in the towel and stick to the provision as we submitted it, and get some legislator to introduce it.

Mr. Montgomery - Certainly we don't want the work of this subcommittee to be lost. That's the main thing. A lot of work has been done and we think it should be saved for whatever use it may have for the legislature. So the technique of doing that is going to be a separate thing. Do any of you have any other feelings on the appointive-elective?

Dr. Cunningham - I think it's down the drain already.

Mr. Guggenheim - I haven't got any comment. I think it's futile and in some ways irrelevant. I think the higher the court the more we need it because the less knowledge and the less contact the voters have with them. I don't see any point in fooling around with it.

Dr. Cunningham - That's the point of division. The appellate court or nothing, and then the appellate court and leave it optional for the lower courts, which we can't get, either.

Mr. Roberto - My feeling would be to recommend no change as the majority position for the committee. But I'd like to see a minority report. I never really expected to see the appointive-elective system to make it through the legislative process, anyhow, quite frankly. I did expect it to make it through the committee process here. I think there ought to be a responsible group in the committee make a recommendation as a minority report so that it is presented at least even though the majority report may be no recommendation for change.I'd like to get the report, even though it is futile, to encourage public debate. On that kind of a problem there has to be a vehicle which stimulates debate, and I think without anything, we're not chipping away at the problem.

Mr. Norris - It's a query whether or not the Bar Association has the kind of leverage to scare up the votes for us in the Commission. They may have a different count.

Mr. Manning - No, we do not have a different count than you do.The last I heard, I don't think it was very significantly different from what you were just told. I might say with respect to submitting help that the Bar Association is interested in the appointive-elective system and we have a resolution prepared that tracks reasonably closely with what the committee efforts have been with respect to the Constitution. I think it does contain a local option provision but that could easily be cut out so that it would only apply to the appellate and Supreme Court. I would be more than willing, if Mr. Roberto and Mr. Norris would like to sponsor such a thing in the House. Maybe that's a way to help get this before the public. And then coupled with a "Minority " report from the Judiciary Committee, it might give a forum for some public debate on the issues.

Mr. Roberto - I don't mind doing that at all, Bob. I have a feeling it will wind up in the same place as my flexible debt limitation, though.

Mr. Manning - It helps get it out in front of the public, to some extent.

Mr. Roberto - I agree.

Mr. Manning - After all the hours you people have put in, I think it would be a shame to just forget it.

Mr. Norris - It needs to be introduced, and I've had in the back of my mind some ideas to present to the legislative committees anyhow. We've discussed some of them briefly toward the end of our deliberations and they may have some appeal to come legislators: for example, that we have the selection committee comment on the qualifications of the judges when they come up for resubmission to the public. That takes a lot of wind out of the sail of the opposition. When you go into that legislature, you are bargaining for votes and counting tallies, and there are some things like that that we have not tried before and I think it would be worth a try to see if we could add up the votes by trying something different. It's too late to float that before the full Commission. But you'd be surprised. Some of that stuff might have some appeal to some of the General Assembly members over there, and maybe they won't see anything wrong with it. You could write that in and if that convinces the legislature that we're not creating a new generation of federal judges for our state bench, you may be able to do it. I'd like to see if we can.

Mr. Manning - Another thing that might have been suggested is the concept that maybe on the retention election you would have to get more than 50%. Fifty-five or fifty-seven, or something like that. Some of the members that I've talked to in the

legislature have indicated that this would ease a lot of their pain with the concept, if it required just a little bit more than a bare majority. But these are all things that could be brought out once we get the forum.

Mrs. Eriksson - I might also mention here just for the record, concerning a minority report proposing an appointive-elective method, there are members of the Commission other than the members of this committee who would probably very much want to be a part of that report. I think probably 16 or so, altogether.

Mr. Montgomery - I think that's very significant. You know we made our own rules as to what is going to be a commission report and I think we have made it awful tough on ourselves to be successful. Of course, the legislature wouldn't be as tough on themselves as we are to get something passed. And we have 16 out of 22 and that's a majority and it's something that the legislature ought to hear.

Mr. Roberto - Mr. Chairman, I would want to limit the minority report to appointive-elective for appellate and Supreme Court justices. I wouldn't even introduce common pleas. I think it scares people to death just to suggest that common pleas judges might be appointed that way. I think that's buying a lot of trouble. I would limit it to appellate and supreme court judges.

Mr. Montgomery - How do the rest of you feel about that proposition? Dick?

Mr. Guggenheim - There are some practical politicians here who know what they have to deal with. It's a question of whether we want to put the theory out or . . .

Mr. Norris - My feeling is that it ought to be introduced with it in. If Mark has an aversion to that, it would be my understanding that that would be one of the things we would give away. It's a sound idea, the local option. I agree it creates emotional problems, but that could be something that you give away.

Dr. Cunningham - I think that if we can accomplish the appellate division, that's all we can hope for at this point. However, I believe in this thing 100%.

Mr. Montgomery - You have no objection to introducing it at the trial court level, just as we originally reported it?

Dr. Cunningham - As a suggestion, but not to try to push it. From what I get up and down the state, people are scared stiff with the idea of appointing judges in the lower level. It's all involved with the municipal bench and the common pleas bench and the specialized courts like juvenile courts, and I don't think we are ever going to overcome that prejudice.

Mr. Guggenheim - I think the question is whether we want to give the picture of the whole philosophy to the legislature and let them bat it around, because our subcommittee's philosophy is consistent all the way in all these courts, or whether we feel that that was so frightening that we only put in part of it. I think that's what it boils down to.

Mr. Montgomery - I would be inclined to submit a report pretty much as we've submitted it to the Commission, because that was our best thinking at the time after we had heard all of the testimony, and before we thought about making any additional compromises to get the majority votes that we have to have. So unless someone is adament about it, I think we will resubmit it in a minority report on the basis that we originally submitted it to the Commission and see if we can get a significant number of Commission members to sign it.

Mr. Roberto - Fine. No problem. I don't think that's giving away too much.

Mr. Guggenheim - I think there is a difference between a minority report of the Commission and what is presented to the legislature.

Mr. Norris - You can't bind the legislature.

Mr. Nemeth - Ann, is there anything that you would like to add to that?

Mrs. Eriksson - No.

Mr. Montgomery - All right. Julius, I think that takes care of merit selection at this point.

Mr. Nemeth - The next item concerns the creation of special subject matter divisions and specific election to divisions. In the original committee report we deleted section 4 (C) of Article IV. Section 4 (C) is the one that recognizes the probate division of the common pleas court and provides for the specific election of the probate court judge, etc. And it also provides that if other subject matter divisions are created by the General Assembly by law, then judges shall be specifically elected to such divisions. We deleted Section 4(C) in the original report and transferred the matter of the creation of subject matter divisions and the question of the manner of appointment to divisions to section 5, that is, we would have brought it under the rule-making umbrella of the Supreme Court. This recommendation was voted down. I think that sections 4 and 5 received 17 and 16 votes, respectively. As a result of the survey we are able to report that 3 members who voted against the originally proposed sections 4 and 5 indicated that if all common pleas judges were elected, which is where we are going now, they might vote for a provision under which subject matter divisions were created pursuant to Supreme Court rule subject to amendment by the General Assembly. That's what you suggested, Mr. Norris.

Mr. Norris - How did rule-making on divisions come out in our proposal? We could amend those, right?

Mr. Nemeth - Yes.

Mr. Montgomery - We incorporated your suggestion in our recommendation.

Mr. Nemeth - One of these three members who said that under these circumstances he might be willing to vote for it, however, said that he would only do so if the proposal were drafted in such a manner that it would also provide that the General Assembly could provide for specific elections to the divisions. A fourth member indicated that if we just put the probate court back in and provided for the continued constitutional status of that division, then the original proposal would be acceptable.

We outline three possibilities here. The first of which would be to submit a redraft of section 4 with all these other amendments contained which we have agreed to, and, again, to which there doesn't seem to be much opposition, but leave Division (C) as it is now. At the same time, the committee could submit a redraft of section 5, deleting any reference to the creation of divisions by the Supreme Court and retaining any other amendments that are included in section 5 which don't appear to have substantial opposition with the exception of the one, and this must be emphasized, there doesn't seem to be much if any support among the peopoe who voted against section 5 with respect to Supreme Court rule-making power in regard to personnel.

Mr. Montgomery - When is the Supreme Court's role advisory only?

Mr. Nemeth - That's alternate (3). There doesn't seem to be any opposition to that approach.

Mr. Montgomery - I think we could pass that. You make it advisory and allow the legislature to create the divisions and leave probate alone.

Mr. Norris - That would be the present provision plus Supreme Court advisory to the legislature.

Mr. Nemeth - There is a possibility that the second alternate listed here might pass. That is, an alternate which would permit the General Assembly to decide whether or not the specific election should be required to divisions other than probate.

Mr. Norris - What you are saying is that the second alternate is essentially what we originally had plus restoring the probate division to its present situation, plus allowing the General Assembly to decide the question of specific election to other divisions.

Mr. Nemeth - Yes, and you could adopt alternate (3), no matter what you decide on one or two. That is, you could combine (1) or (2) with (3).

Mr. Norris - But under (1) and (2), as far as the Supreme Court's function, it would be what we have suggested originally that they submit rules which the General Assembly could amend concerning creation of divisions?

Mr. Nemeth - No.

Mrs. Eriksson - Under (2), the General Assembly would decide the question of specific divisions itself, not according to Supreme Court rules.

Mr. Norris - I'd sure like to put together the votes for retaining the original concept. I just wonder how many of our people understand how we change rule-making here, how significant this amending authority in the General Assembly is. I see a real threat, not only to our present court system, which is already fragmented, but that this would be multiplied manifold if we go to a unified court system and then let the General Assembly start creating housing courts and whatever might catch their fancy at the moment--all kinds of divisions created by statute. It's bad enough now. But we've already got a fragmented system, so you can always argue that it doesn't hurt to fragment it more.

Mr. Montgomery - We really tried to sell this very hard to the Commission. I think if we can get through a lot of the things that we have now agreed upon, and focus on a few of the real significant items that we have left, we shall marshal support for some of these propositions. But it's going to take some effort. A fellow like you, Alan, who's been involved in the judiciary process for so long--they're going to listen to a man with your experience.

Mr. Norris - I don't know if they will, but I have my head in the cannon, I think, with rule-making, and if I can buy that, anybody can buy that.

Mrs. Eriksson - I talked with several legislators and used your name in support of this proposition, and got fairly negative answers because some of the legislators would even, if they could do so now, retreat on rules. There is a certain amount of that kind of sentiment. Now, I wouldn't say that you couldn't sell it, if we restored the probate.

Mr. Norris - Oh ,yes. I think we'd have to restore the probate, and we'd have to allow the General Assembly to decide whether or not there would be specific elections. That's pretty clear, if we want to pick up four votes. But I'd hate to lose that court initiation on the rules. I just think that would be a mistake.

Mrs. Eriksson - You might be able to sell that, but I think you would really have to sell it. You'd have to talk to these people and persuade them.

Mr. Norris - Because with "amendment" in there, it does overcome objections to the legislature not being able to change a proposed rule.

Mr. Montgomery - You protect the legislature, and you still keep the integrity of the whole system.

Mr. Norris - The initiative by the Court, I think, is very important at this point.

Mr. Nemeth - One of the legislators made a practical point, and I think perhaps it is appropriate to bring it up here. He said he was afraid of this approach because the General Assembly does not have adequate machinery at the present time to deal with the rules that the Court proposes now. He thinks there are no committees, for example, to which these rules are specifically funneled.

Mr. Montgomery - So it would be better equipped to make a study?

Mrs. Eriksson - Of course, he raised that point at the Commission meeting too.

Mr. Norris - That's the only way we got the civil rules through. Let's face it, all of these reforms have come as a result of Court initiative.

Mr. Nemeth - It would seem that it wouldn't be an overly difficult thing for each house of the General Assembly to decide which committee is going to deal with rules submitted by the Court.

Mr. Norris - It's tough, all right, but the alternative is nothing. If we don't have the ability to review, we sure don't have the ability to initiate.

Mr. Montgomery - Does anyone feel differently? Al and I, I think, have the same position.

Mr. Roberto - Do you want to resubmit the original proposal?

Mr. Montgomery - To restore the probate division provision as it now stands, and allow the Supreme Court to initiate changing the other subject matter divisions, subject to legislative review and amendment.

Mr. Norris - As I understand then, the proposal is what we originally submitted with essentially two changes. First, you'd have a specific probate division with election to that division; second, you would give the General Assembly the authority to decide if there would be election to the other specific divisions created pursuant to Supreme Court rule, with the legislature having the ability to amend those rules. Is that right?

Mr. Nemeth - That's my understanding.

Mr. Montgomery - Would you like to move that?

Mr. Norris - I'll move it.

Mr. Montgomery - Is there a second?

Mr. Roberto - I'll second.

Mr. Montgomery - Is there any discussion? All in favor signify by saying "aye". (All members present voted in the affirmative)

Mr. Montgomery - What's the next major area?

Mr. Nemeth - The next major area is the question of a judicial officer other than a full-fledged judge in the common pleas court. The original section 7 which was submitted by the committee received 20 votes.

Mr. Montgomery - On the magistrates? I'm surprised it did that well.

Mr. Nemeth - Opposition here arose from two things: first of all, the use of the word "magistrates" is a little foreign to Ohio law, and we didn't do a very satisfactory job of explaining it; second, the concept embodied in section 7 that the Supreme Court prescribe the powers and duties, etc. for these magistrates. If these powers and duties were to be assigned by the General Assembly, I think we would pick up enough votes to pass this one, with the additional change , perhaps, of changing "magistrates" to "associate judges." One of the individuals who indicated that he might vote for a section that was redrafted along these lines raised a point which I think merits discussion. And that is that using the words "associate judge" might raise some opposition from the full-fledged judges as possibly detracting from the title of "judge."

Mr. Montgomery - I don't think that's as strong an argument as those that think "magistrate" is a rather unjudicial phrase.

Mr. Guggenheim - If it's just a matter of semantics, can't we invent some title they like?

Mr. Montgomery - "Associate judge" is the closest we came to something that would be acceptable. It's like an associate degree. I think that people pretty well understand the use of the word "associate." It isn't quite the same thing, but close to.

Mr. Guggenheim - Perhaps we could think of some different word.

Mr. Montgomery - Well, we're open to suggestions.

Mr. Norris - I like"magistrates".

Mr. Guggenheim - Yes

Mr. Montgomery - Well, we are only two votes away with the use of the term.

Mr. Nemeth - There was an alternate word suggested, and that is "judicator", which is in Webster's Third Unabridged and it means "One who acts as a judge".

Mr. Montgomery - Some of the testimony that we had by the county and the municipal judges sort of left me with the impression that they all felt there was a need for a part-time judge and I think we all agree that there has to be some work done by part-time judges, but they want the dignity of the court behind them. They didn't want to feel that they are second-class. I felt that the image here was important to them.

Mr. Guggenheim - What do you call someone that the court appoints to go out and assemble the facts?

Mr. Nemeth - He's a master or referee.

Mr. Norris - "Associate judge" is alright with me, but I see what the problem is. The problem is with part-time judges now.

Mr. Montgomery - Right. They're judges, and they don't want to be called "magistrates". They feel they're being demoted.

Mr. Norris - I couldn't see any protest from the public standpoint on the word "Magistrate."

Mr. Montgomery - And the other thing is that the use of the word "magistrate" is close to the police. In many states police courts they call them magistrates, so it has that connotation.

Mr. Norris - Remind me how these associate judges get the job.

Mr. Nemeth - They would be appointed by the common pleas court.

Mr. Norris - What we're saying is that what we have to do to pick up votes, is to have their duties prescribed by statute.

Mr. Montgomery - We are only two votes short.

Mr. Nemeth - One of the people who said that he isn't opposed to court unification said he might vote for an associate judge provision. He also said that he couldn't vote for any such section if it provided for appointed associate judges because he simply believes in election of judges, period.

Mr. Norris - That's one thing you overcome by using the word "magistrate."

Mr. Montgomery - There's nothing wrong with trying it.

Mr. Norris- Well, if we retain the word "magistrate" but let the General Assembly prescribe the duties, do you think we would pick up the votes?

Mr. Montgomery - Possibly we might.

Mr. Guggenheim - Give the Commission a choice then.

Mr. Norris - The word "magistrate" doesn't bother me.

Mr. Guggenheim - I kind of like it. It's really more accurate. "Associate judge" is a clumsy term.

Mr. Norris - It is clumsy, and "magistrate" is a subordinate term, which is really what we are talking about.

Mr. Montgomery - But the judge of that county court, whom they call "judge" down at the coffee shop every morning, is not going to like it. I think we have the sentiment on that. We'll try "magistrate" first, with the powers and duties prescribed by the legislature. Any disagreement on that? (No disagreement was voiced).

Mr. Nemeth - This is essentially in the form of Mr. Norris' suggestion at the last meeting, when we struck out some language in the original draft.

Mr. Norris - Oh, yes. Just make it simply that they serve at the pleasure of the judge.

Mr. Montgomery - Alright. What's next?

Mr. Nemeth - Now we come to where we consider the methods of bringing a revised committee report or revised committee proposals before the Commission. So far, we are in the position that the original proposals, or parts of them have been voted down. But the report has not beenrereferredto us, either in whole or in part. We have no notions on this point but simply want to bring it up for discussion.

Mr. Montgomery - Ann, where do we stand procedurally? We passed some, we're revising some to put them in the condition that we think can be passed, and there are some which have been defeated.

Mrs. Eriksson - Where you stand procedurally is this: The vote was held open until the next meeting. That's the way we have always done it. Now, the vote on those sections in the first part of your report has been closed, because it was taken up and closed at the last meeting. We're talking there about two sections that failed, Sections 4 and 5. Then, on the second part of the report, technically the vote is still held open until the date of the next meeting. So the first order of business will be to appear and to ask whether anyone who has not cast a vote on those sections wishes to, and then to announce the result, which will show some of those portions not receiving sufficient votes. Now, at that point several possibilities occur. One would be for someone to move that the defeated sections be rereffered to the committee for further consideration, and then the committee will report back, which is essentially what you're doing now.

Mr. Montgomery - We are anticipating.

Mrs. Eriksson - Another possibility would be for someone to move to reconsider the defeated sections and then for the committee chairman to offer a substitute for those sections. The reason I think you should discuss it is because I think the procedures ought to be agreed to ahead of time so that it will be clear, at least to everyone on the committee, what your preference is for a method of proceeding.

Mr. Montgomery - How busy are we going to be at the next Commission meeting?

Mrs. Eriksson - This is the topic of the meeting.

Mr. Montgomery - Why not tell everybody ahead of time what we are going to do?

Mrs. Eriksson - That means, if you follow the rules of the legislature, having someone who voted "no" moving to reconsider.

Mr. Montgomery - We can tell them we have anticipated this and we have reconsidered, and we are bringing in a new proposition.

Mrs. Eriksson - You could have someone do that with the understanding that you are going to be presenting different versions of the sections.

Mr. Norris - I would assume that you could get someone who said they would be willing to vote for it if these changes are made.

Mrs. Eriksson -Otherwise, if it is rereferred to the committee, we have to break up and have the committee report back.

Mr. Montgomery - Assuming that we don't get all of this through, then what?

Mrs. Eriksson - Well, once again, we won't have two-thirds of the Commission at the meeting. We never do. Therefore, it's always going to have to be held over.

Mr. Montgomery -But assuming some will fail, where are we with the defeated suggestions?

Mr. Norris - We regroup, don't we?

Mrs. Eriksson - I think you regroup again.

Mr. Montgomery - Do it one more time the same way? Try to satisfy and amend, and if we can't, then decide on whether we should file a minority report?

Mrs. Eriksson - I would think that you might want to talk about that also, today-- the minority report.

Mr. Montgomery - Well, we think there are some that we can't get through on any date.

Mrs. Eriksson - Right. Another possibility, I suppose, is to present some alternates to the Commission. Now, that you may or may not want to do. If, for example, this matter with the associate judge or magistrate would seem to be troublesome, you might have alternates to see which one would get 22 votes.

Mr. Norris - Mr. Chairman, may I suggest that we consider the next Commission meeting as the one in which we do most of this in. That seems to mean that we are going to have to have the staff working, at this point, on a draft on merit selection, because we know we aren't going to bring that up again. By that time, we will have to find someone to propose to reconsider, and then go through the reconsideration process on these two that we decide to resubmit, anticipating that we will win these.

Mr. Montgomery - But has the Commission on other committee recommendations taken any policy position where it did not accept the subcommittee report? I don't think the Commission as a whole has ever adopted any policy on it.

Mrs. Eriksson - Yes, we have a policy on minority reports. It is a part of our rules that any member may submit a minority report and we have had minority reports in two instances.

Mr. Montgomery - Is that the technique we should use for merit selection, for example?

Mrs. Eriksson - Well, I would think that that might very well be the technique for merit selection. Now, as to the other matters which we are now essentially dropping from the committee report, for example, the removal of the probate division, whether anybody feels strongly enough about those to want to submit a minority report, I don't know.

Mr. Montgomery - It's a technique to be used.

Mrs. Eriksson - If you are substantially agreed on merit selection, I would suggest a minority report on that one.

Mr. Norris - Not a committee report, but a minority report of the Commission--of as many members as we can get to sign.

Mrs. Eriksson - One member of the Commission can submit a minority report, but I would think that you would want to have as many members as you can get to sign a minority report on merit selection.

Mr. Montgomery - Is there anything else?

Mr. Nemeth - Well, maybe we are into it already. The other point here on the agenda is to consider the possibility of filing more than one report with the General Assembly.

Mr. Montgomery - I think we have said that. The minority report is the other report.

Mr. Norris - There could be a majority and a minority report.

Mr. Nemeth - There could also be such a thing as a majority report even though it doesn't have a sufficient number of signers to constitute a Commission report, as such.

Mr. Montgomery - Well, no, I think in our case we're talking about a report which has passed the number for viable recommendation. I don't think we can do it by majority. When we say minority in our context, we mean less than two-thirds.

Mrs. Eriksson - I think what Julius means is that if the committee redrafts and resubmits a section, and if there are still not enough Commission votes, and if the committee then decides it doesn't want to go any farther than that--that it doesn't want to "reduce the bid" any more, which might happen on the question of the divisions--then you might want to either have a minority report on that question, or you may not have any recommendation, in which case you might still want to have a report discussing all of the alternates that were considered and what the committee's position is, even though you might not have a recommendation on it. It wouldn't really be a minority report.

Mr. Montgomery - We'd better let that go for now. We just don't know about that. Okay, is everyone satisfied as to where we are going?

Mr. Norris - What language do we use concerning amendment by the General Assembly of the rules? Do we just use the word "amend" or do we also use "delete"?

Mr. Nemeth - I think we only use the word "amend."

Mrs. Eriksson - "Amendments to such proposed rules may be filed with the clerk not later than . . ."

Mr. Norris - While we're redrafting here, had we best not check the definition of the word "amendment"? Does that mean only an addition? You and I and the General Assembly think that "amendment" means additions and deletions, but I'd hate to have the Supreme Court say "Wait a minute!"

Mr. Montgomery - I'm sure it means any changes.

Mr. Norris - Well, could staff look at that?

Mr. Guggenheim - Maybe you could say alter or amend.

Mr. Nemeth-But if we find that "amendment" means any kind of change should we leave it the way it is?

Mr. Norris - Oh, yes. Just so we're real sure. The thought jumped through my mind, what happens if the Court recommends two kinds of divisions and the only change the General Assembly makes is to delete one of those proposed divisions. Could the Supreme Court say, "Amendment means that you could add a third one, but you can't take away one"?

Mr. Montgomery - Okay, we'll check it. What's next?

Mr. Nemeth - The next thing is the letter from Mr. Woodle dated September 24. He raises the matter of the appellate jurisdiction of the Supreme Court again. You'll remember that he has written us once before on this. His basic position is that in establishing the standard that a case has to raise a "substantial" constitutional question, the Court is in effect amending the Constitution, and he wants us to do something about that.

Mr. Montgomery - We considered that at the time of the original letter, didn't we?

Mr. Nemeth - He wrote us a letter and it was distributed to the Commission with the cover memorandum. It certainly has been brought to the attention of the Commission, although the Commission minutes don't reflect any extensive debate on it. You did make a statement on the point at a Commission meeting.

Mr. Montgomery - As I recall, he was there, he stood up, and he made the point himself and we had discussion on it.

Mr. Norris -- He wants us to say in effect that the Supreme Court must take jurisdiction of any case presenting any constitutional question.

Mr. Montgomery - Almost. And that there is no review of what the Supreme Court determines is substantial.

Mr. Cunningham - Or have an appellate court to which you can appeal as to whether it should have jurisdiction.

Mr. Norris - That's not even a good result.

Mr. Montgomery - I remember I asked him about the environmentalists, who were supposedly bringing up all kinds of frivolous constitutional questions to the Supreme Court, and his suggestion was that they have to take jurisdiction.

Mr. Norris - Yes. What he is doing is granting an appeal by right in all constitutional questions. You get one of those already in the court of appeals. There's no reason to give you two appeals.

Mr. Cunningham - That's what the supreme court does in assuming jurisdiction.

Mr. Montgomery - Alright. With your concurrence then, we will write him and tell him we reconsidered it and didn't feel change is merited and took no action. Is there anything else?

Mr. Manning - Mr. Chairman, if I may make a comment on something which is recorded in the minutes of the last meeting. There, there is a statement to the effect that the Ohio State Bar Association pushed Issue 3. My only comment is that I personally take a great deal of grief from the local bar groups, especially the more rural bar groups. The Ohio State Bar Association did push Issue #3. That's a fact. But the creation of districts was a creature of the Legislative that was added to the resolution and brought in through the House, specifically. The purpose of Issue #3 as far as the Ohio State Bar Association was concerned was the clarification of the municipal court situation. After the Legislature was finished with it, we were faced with, do we go out and campaign against our own issue or do we not? We elected to campaign for the issue even though it did contain districts. But that portion was not a concept of the Ohio State Bar Association. I just want to make that clear.

Mr. Montgomery - Thank you Mr. Manning.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Judiciary Committee
June 14, 1973

Research Study No. 22

Introduction to Court Structure and Organization

This introduction to the structure and organization of Ohio courts includes a general description of courts established by the Constitution and courts that from time to time have been created by law.

The Outline of Study presented to this committee begins with Structure and Organization, a topic that will include examination of the following:

Section 1 - vesting of judicial power in constitutional courts and a look at courts that have been established by law

Section 3 - courts of appeals and appellate districts - a description of the intermediate level of Ohio courts, to be followed by a history of appellate courts in Ohio

Section 4 - court of common pleas - the 1968 substitution of one constitutional court by a probate division of such court

Section 15- changes in the number of courts, judges, districts

Section 19- courts of conciliation

Section 23- authority for judge to serve in more than one court.

The two parts of that outline dealt with in greatest detail in this introduction are sections 1 and 4 of Article IV. The discussion furnishes an overview of the Ohio trial courts and may be said to update the Ohio Legislative Service Commission reports on the Ohio court system as it existed prior to the adoption of the Modern Courts Amendment in 1968.

This introduction is intended to point out some questions that have arisen as a result of this 1968 revision of the judicial article and others that have persisted in spite of it.

Soon to be forthcoming is an introduction to the appellate system in Ohio. Section 3, however, is included in this memorandum in order to adhere to the outline.

Section 1. Vesting of judicial power

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law.

Constitutional and statutory courts

Descriptions of court organization in Ohio have often used the terms "constitutional courts" and "statutory courts." Although no such designations appear in the constitutional or statutory law pertaining to the judicial department of government, they have been used to differentiate between courts created by law that may be abolished by act of the General Assembly and courts created by constitutional edict, capable of being abolished only by constitutional amendment.

The 1968 revision of the judicial article, referred to hereafter as the Modern

Courts Amendment, deleted the reference to "courts of probate" that existed prior to its adoption and provided instead, in Section 4 of the revised article, for a probate division of the court of common pleas, unless otherwise provided by law. The amendment thus lessened the number of constitutional courts by one although it recognized the continuation of a probate function by the division provision. The Schedule to the Modern Courts Amendment provided that all probate judges were to become judges of the courts of common pleas. The constitutional courts in which Section 1 now vests judicial power are: The Supreme Court, courts of appeals, and courts of common pleas.

Section 1 also authorizes the General Assembly to create courts inferior to the supreme court, in contrast to its power before 1968 to create only courts that were "inferior to the courts of appeals." The revision in authority to create courts is explained by two officers of the Modern Courts Committee of the Ohio State Bar Association, in a law review article published shortly after passage of the Modern Courts Amendment:

> "The change in Section 1 to permit the creation of new courts by the General Assembly at the appellate level was made in response to suggestions that there might exist in the Ohio judicial system a need for specialized courts similar to those existing in the federal system, such as a tax court, a court of claims or an administrative appeals court, which would function on the same level as the courts of appeals."

They concluded that such language gave the General Assembly an authority it had not had before and refused to speculate upon legislative reaction to proposals for specialized courts.

Minimal statutory changes have been made since 1968 in the jurisdiction and distribution of courts inferior to the constitutional courts. These statutory courts include municipal courts, county courts, one police court, and mayors courts, which function by virtue of statutes giving limited criminal jurisdiction to mayors of municipalities in which neither a municipal court nor a police court is located.

There are many sections in the Revised Code that refer to the juvenile court, but the term is defined as "division of the court of common pleas or a juvenile court separately and independently created." Prior to 1972 there was one separately and independently created juvenile court, in Cuyahoga county, but that has been made a division of the court of common pleas of that county.

There is only one police court, in the village of Ottawa Hills in Lucas county, with jurisdiction over violations of any ordinance of such village and over misdemeanors committed within the village, except in cases where the accused is entitled to a jury trial unless the jury is waived. At any criminal trial where the penalty could exceed a fine of $50 the accused has a right to trial by jury. There are general laws governing police courts in "each municipal corporation where a police court is provided by law." Other police courts have existed, but the last, other than Ottawa Hills, was abolished many years ago.

Municipal and County Courts

Municipal and county courts together comprise the major segment of what has been termed the minor court system in this state.

A. Municipal Courts

The Ohio General Assembly has created by statute 108 municipal courts to date. Unless otherwise specified, the territorial jurisdiction of a municipal court is limited to its corporate boundaries. Each session of the General Assembly has produced numerous bills to create new municipal courts and to expand the territory of existing courts. Consequently, at the present time only 11 municipal courts have territorial jurisdiction that is restricted to their territorial limits. Five of them are located in Cuyahoga County. Thirty-six courts have county-wide jurisdiction. For other municipal courts the extension of territorial jurisdiction beyond corporate boundaries is specifically set forth by a statutory enumeration of municipalities and townships within which each court has jurisdiction.

The name of each court carries the name of the municipality in which established except for five county-wide courts which use the county name in conjunction with the appellation "municipal court." Thus, the Cincinnati municipal first became the Hamilton county municipal court, and others following suit included: Columbus (Franklin); Ravenna (Portage); Athens (Athens); and Newark (Licking).

Cuyahoga county has 13 independently operating municipal courts. Twenty-five counties have no municipal courts.

A municipal court has original jurisdiction in civil cases where the amount claimed by any party or the appraised value of property sought to be recovered does not exceed $5,000, except in the 13 municipal courts located in Cuyahoga county, where it does not exceed $10,000, and in the municipal courts of Franklin and Hamilton counties, where it does not exceed $7500. The term "civil cases" means law suits that relate to and affect only individual rights, as opposed to criminal prosecutions, involving public wrongs.

Municipal courts have criminal jurisdiction to try persons accused of misdemeanors, municipal ordinance violations. or traffic violations, and limited power to hear cases arising out of felonies committed within their territories. A municipal court judge sets bond in felony cases, and upon a finding of probable cause, binds over an accused to the grand jury for the indictment process. Under Ohio law misdemeanors and felonies are distinguished not necessarily on the basis of the severity of the crime but on the basis of the sentence which could be assessed under state law for the particular offense. Felony is defined by statute as a crime that may be punished by death or imprisonment in the penitentiary. A misdemeanor is a crime punishable only by fine or imprisonment in the county jail for no more than one year. The maximum possible sentence under state law determines whether the offense is a felony or a misdemeanor.

Specific powers of municipal courts are set forth by statute under a heading that purports to describe jurisdiction of subject matter. One must determine subject matter limitations by a circuitous route because of a reference to jurisdiction in any civil action "wherein judges of county courts have jurisdiction."

The Cleveland municipal court has certain powers not conferred upon all courts. One is to hear actions for injunctions to prevent or terminate violations of ordinances and regulations of the city made under the exercise of the city's police power. Calling this a remedy, not a right, one commentator has observed:

> "While given only to the court which requested it in order to be able to deal with new actions arising under the urban renewal and slum clearance

programs of the city, there is no reason why this authority to hear such injunction cases could not be given profitably to other municipal courts for use in cases involving health and building regulations generally."

B. County Courts

When county courts were established in 1957, replacing justice of the peace tribunals, the General Assembly provided that the territorial jurisdiction of any county court is restricted to the area of a county not within the jurisdiction of a municipal court. Thirty-six municipal courts have territorial jurisdiction throughout the county. In these counties, and in ten others where two or more municipal courts exercise jurisdiction over all parts of the county, no county court exists.

In general the jurisdiction of county courts is similar to that of the justice courts, but the organization of the two courts is quite different. The justice of the peace was a township officer; county court judges are elected by the electors of the county court district. The county court has been specifically designated as a court of record, a term discussed in the commentary following Section 4. Records were not required to be made in proceedings before a justice of the peace.

A report of the Ohio Legislative Service Commission, Minor Courts in Ohio, published in February, 1959, stated that at that time there were 54 county courts, whose jurisdiction extended to approximately 25 per cent of the population of Ohio. Since that time, the steady increase in the number and size of municipal courts has caused a decline in the relative importance of the county courts. At the present time, there are 43 county courts with 72 judges, compared to 108 municipal courts, presided over by 170 judges. The largest county court, the Montgomery county court, has five judges and jurisdiction over territory with a total population of more than 130,000 while the smallest, in Erie county, has jurisdiction over a population of about 2400.

Generally, judges of county courts have exclusive original jurisdiction in civil actions where the amount claimed or the value of property sought does not exceed $500. In addition to jurisdiction in specific kinds of actions referred to by references to many chapters of the Revised Code, county courts have jurisdiction in motor vehicle violations and in all other misdemeanors. The civil and criminal jurisdiction of county courts is set forth in a large number of statutes that are scattered throughout the Revised Code.

A Comparison

Municipal judges are elected for six-year terms. The number of municipal court judges is fixed by statute, and as in territory served by the court, a great variance is evident. The Huron municipal court serves a population of 8641, and the Hamilton County Municipal Court has jurisdiction over a territory that includes 924,018 in population. Of the 170 municipal court judges, 37 are categorized by statute as "part-time" judges. As such they are disqualified from the practice of law only as to matters pending or originating in the courts in which they serve. Although courts with part-time judges tend to have jurisdiction over smaller territories, the relationship is not constant. The average population served by municipal courts with part-time judges is 31,000, and the average population of the 37 smallest municipal courts with single full-time judges is only 41,000.

A statutory population formula for municipal court judgeships has been

established, but it has been attended by uncertainties and discrepancies in its operation. The municipal court of Cleveland has more judges than it should have under the formula, and the Hamilton County Municipal Court has less.

County court judges are elected for four-year terms. Like a part-time municipal judge a county court judge is disqualified from the practice of law only as to matters before courts in which the judge serves.

The statutes governing county courts also establish a formula for the creation of judgeships. It contains at least one exception by authorizing the court of common pleas, with consent of county commissioners, to provide for additional judges in districts hearing cases that involve motor vehicle violations on the Ohio Turnpike. Moreover, some county court districts are entitled to elect more judges than they so far have done under the statutory formula.

C. Mayors' Courts

In every municipal corporation not having a police court (there is only one) and not being the site of a municipal court (and subject to another special exception applicable only to Portage county) a mayor "has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation and has jurisdiction in all criminal causes involving moving traffic violations occurring on state highways located within the boundaries of the municipal corporation." Not being a court of record a mayor's court may not hold a jury trial, and a defendant entitled to jury trial who does not waive such right in writing must be transferred to a municipal court having territorial jurisdiction. At any trial involving the violation of a municipal ordinance or state statute where the penalty could exceed a fine of $50, the accused has a right to trial by jury.

The number of mayors' courts in operation is not subject to an accurate count. A recent study of courts in Cuyahoga County reported 33 active mayors courts in that county. Dated December, 1971, it reported further that five of these had been abolished in 1971. A mayor's court is automatically abolished when a municipal court is established in the municipality.

The appeal of a mayor's court to municipalities may well be the significant portion of revenues derived from fines and forfeitures under municipal ordinances. Moreover, Section 5503.04 of the Revised Code provides for the disposition of fines and forfeitures by persons apprehended by state highway patrolmen, according to where the case is prosecuted. The distribution by court is as follows:

Court	State Treasury	County Treasury	Municipal Treasury
Mayor	45%		55%
Municipal	45%	10%	45%
County	45%	55%	

At one time by statute mayors would have lost jurisdiction over moving traffic violations on state highways, but the provision, tied to a specific future date, was removed out of concern for loss of revenue and problems that would be posed for small municipalities served by county courts or neighboring municipal courts. The problem was one of keeping village streets protected while the one or two policemen were away entering charges or testifying against offenders. Indeed, recognized as a "thorny" problem in the judicial studies of 1964 through 1968 was the practical

problem of what would happen to fines municipalities collect if municipal courts were brought within the common pleas umbrella as favored by proponents of unified court at the county level.

Nevertheless, much criticism has been directed toward the retention of mayors' courts. Mayors need not have legal training, and court room facilities are frequently inadequate. The League of Women Voters has pointed out the danger to individual rights in the whole concept of a mayor's court where executive and judicial powers are centered in one man.

The Monroeville case mentioned above went to the United States Supreme Court after the Ohio Supreme Court upheld the Court of Appeals as to the authority of the General Assembly to provide for review of mayors' court decisions by courts of common pleas notwithstanding Section 4 (B). The Ohio Supreme Court held also that the facts that revenues produced from a mayor's court provide a substantial portion of a municipality's funds, and that a mayor who serves as judicial officer of a mayor's court is also the chief executive officer of the municipality, do not necessarily prevent such mayor from being impartial when acting in a judicial capacity.

On the latter point the Ohio Supreme Court was reversed. The defendant had been convicted of two traffic offenses, and the mayor of Monroeville had convicted him and fined him $50 on each. The Court found a major part of village income to be derived from fines, forfeitures, costs and fees in mayor's court and also that the mayor had wide executive powers and was president of the village council, with duties to account annually respecting village fines. The Supreme Court said the test of whether the mayor can be regarded as an impartial judge is "Whether the mayor situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. . . . Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finance may make him partisan to maintain the high level of contribution from the mayor's court. This too is a 'situation in which an office perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, and necessarily involves a lack of due process of law in the trial . . ." Ward v. Monroeville, 93 Supreme Court 80 (1972) In a footnote to the opinion the following statement is made:

> "The question presented on this record is the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or nolo contendere, a forfeiture of collateral, or the like,"

All the ramifications of this case are not clear at this point.

D. Small Claims

Some of the problems that might confront a party with a cause of action in Cuyahoga county can be illustrated by a description of the small claims division which each municipal and county court is required by law to establish. A small claims division has jurisdiction in civil actions for the recovery of money only (excluding specific grounds - libel, slander, alienation of affections, etc.) for amounts not in

excess of $150, excluding interest and costs. Claims in such a division are required to be written in concise, nontechnical form. Because the amount collectible is low, and because the appearance of any attorney while permitted is not required, and the proceedings are not attended by the usual formalities of a trial, a party might wish to take advantage of small claims court without hiring counsel. Such party must make several determinations before commencing the action.

The small claims statute says that the territorial jurisdiction and venue are concurrent with that of the court and its procedures in ordering civil actions. Venue means the geographical division in which a particular action must be brought. It is established by rules of civil procedure of the Ohio Supreme Court and bears a general relationship to the convenience of the parties. These rules require suit in one of three places: (1) where the person being sued lives; (2) the principal place of business of the person being sued; or (3) where the wrong occurred.

In Cuyahoga county there are 13 municipal courts, five (Cleveland Heights, East Cleveland, Euclid, Lakewood, and South Euclid) limited to their corporate boundaries and eight with jurisdiction beyond. One would have to check the specific townships and municipalities over which the jurisdiction of each of these eight extends if location were in question. The eight courts are the municipal courts of Bedford, Berea, Cleveland, Garfield Heights, Lyndhurst, Parma, Rocky River, and Shaker Heights.

The choice of courts must meet both venue requirement and territorial jurisdiction requirements. If the wrong occurred in and the person being sued lives in a city within Cuyahoga county that does not have a municipal court, the person filing the action must determine which municipal court has territorial jurisdiction.

Section 4. Courts of common pleas; probate division

(A) There shall be a court of common pleas in each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. Each county shall have at least one resident judge and such additional resident judges as may be provided by law. In counties having more than one judge, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

History of Paragraph (A)

Section 4 (A) provides for a court of common pleas in each county, manned by at least one judge for each county. Its predecessor provision, Section 3 of Article IV prior to the Modern Courts Amendment, also required the election of at least one common pleas judge in each county. The authority for any judge of the court to hold court temporarily in any county is also a carry-over provision.

What was new in 1968 was the requirement that in multiple judge counties a presiding judge be selected and that such judge have such duties and exercise such powers as are prescribed by rule of the supreme court.

These provisions grew out of a concern for better court administration in Ohio. In its 1961 staff report entitled The Ohio Court System: Its Organization and Capacity

the Ohio Legislative Service Commission pointed out the weaknesses of a judicial system in which administrative authority was ambiguous and both courts and judges remained independent of one another. The Report discussed statutes that had attempted to promote local administration in multi-judge courts and noted that they had been generally unpopular and ineffective. It made the specific point that: "In matters of administrative supervision, management and control, there is evidence that judges of constitutional courts have more independence from legislative enactments than statutory courts."

A later Legislative Service Commission staff report on Judicial Administration in 1965 repeated:

> "Efforts to improve methods and to pursue judicial business with dispatch depend upon the cooperation and good will of judges, because under the present system nobody is in charge. Under the present Constitution and current court decisions, it may be impossible to put anybody in charge."

Internal management of individual courts was judged to be poor because it was governed in part by statutes, in part by rules of individual courts, and in part by practices preferred by individual judges. Creation of the office of presiding judge in the Modern Courts Amendment grew out of recommendations of the need for greater management in the courts.

Number of Judges

The number of common pleas judges within each county is fixed by statute and has been subject to fairly constant increase. Four counties presently each have a single judge; 51 counties each have two judges; 20 counties each have three judges. Lake and Richland counties each have four judges; Butler, Lorain, and Trumbull counties each have five judges; Stark and Mahoning counties each have seven judges; Lucas county has nine judges; Summit and Montgomery counties each have ten judges; Franklin county has 14 judges; Hamilton County has 15 judges and Cuyahoga county has 34 judges. The total number of common pleas judges in Ohio is 294.

Section 4 (B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

Commentary upon Paragraph (B)

Paragraph (B) of Section 4 confers upon courts of common pleas original jurisdiction and "powers of review." The former constitutional provision conferred no jurisdiction but rather recognized what Ohio courts have called a "capacity to receive jurisdiction." The former section 4 was one sentence long: "The jurisdiction of the Courts of Common Pleas and of the Judges thereof, shall be fixed by law."

Jurisdiction of the court of common pleas to decide both civil and criminal cases has long been the subject of statute, as has also been the court's authority to hear appeals from other tribunals. Revised Code section 2305.01 gives the court original jurisdiction in all civil cases (as opposed to criminal proceedings) where the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts. County courts have exclusive original jurisdiction in civil actions for the recovery of sums not exceeding $500. In counties where a municipal court is located

that court shares jurisdiction with the court of common pleas over civil cases involving up to $5000 (or more in several other counties). That level of monetary jurisdiction eases the burden on the court of common pleas and helps to explain the popularity of municipal courts.

The Revised Code gives the court of common pleas original jurisdiction of "all crimes and offenses, except in cases of minor offenses, the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas." Because there is no crime or offense the exclusive jurisdiction of which is vested in courts inferior to the courts of common pleas, the court of common pleas has original jurisdiction of all crimes and offenses.

A question that confronted Ohio courts after adoption of the 1968 amendment was whether the General Assembly's authority to confer jurisdiction to review orders and judgments of inferior courts had been limited by the new language in Section 4 (B), conferring "such powers of review of proceedings of administrative officers and agencies as may be provided by law." The first court to confront the question, the court of common pleas of Franklin county, in Stone v. Goolsby, 47 Ohio Ops. 2d. 206 (C.P. 1969) reasoned that the effect of amending Section 4 was to place a limitation upon legislative power to provide for appeals other than as stated in the revised section. The court held that the statutory provision authorizing appeals from municipal courts to courts of common pleas was therefore void.

However, the court of appeals of Huron county, in a case that involved an appeal from a mayor's court, agreed with the contention of both plaintiff and defendant that the Goolsby case was not good law. Another court of common pleas had held invalid a statutory provision for appeals in criminal proceedings from a mayor's court to the court of common pleas, based upon the Goolsby rationale. Commercial Point v. Branson, 48 Ohio Ops. 2d 349 (C. P. 1969). Next, the Court of Appeals of Hamilton County was called upon to decide the validity of a provision for appeal to an Ohio court of appeals from a mayor's court. Section 3 (B) (2) of Article IV confers appellate jurisdiction from "courts of record," and in Ohio a mayor's court had already been determined not to be a court of record. City of Greenhills v. Miller, 20 Ohio App. 2d. 313 (1969) thus became authority for the rule that a mayor's court decision could not be reviewed by a court of appeals.

The term "court of record" deserves explanation at this point. In a 1965 opinion the Ohio Attorney General pointed out that a distinction between courts of record and not of record has long been acknowledged, even in the absence of statutory definition of those terms. Some courts have defined a court of record as one whose proceedings are made a matter of record. In 1917 the Ohio Supreme Court in Heininger v. Davis, 96 Ohio St. 205 concluded that a mayor's court was a court of record, but the Court was overruled ten years later in State v. Allen, 117 Ohio St. 470 (1927) that rule a justice of the peace was not. This ruling was based largely on facts that a justice had no clerk or seal, no regular terms or sessions, kept no journal or record other than a docket, and was not designated by statute as a court of record. In his Opinion No. 65-21 the Attorney General affirmed that a mayor's court is not a court of record because although the statutes provide for a seal and the power to punish for contempt (sometimes indicia of a court of record) the mayor's court had no clerk, and there is no requirement that there be complete records of proceedings. More important, he said, was the fact that the legislature has declared both municipal and county courts to be courts of record but has not done so in provisions governing the mayor's court.

The combined effect of the Commercial Point and City of Greenhills rulings was, as stated by the court in the latter case, that there was no constitutional "avenue for review of a judgment or order of a mayor's court, a consequence which is repugnant to the basic guarantee of 'one trial--one review'." Mindful of all these decisions the court of appeals held and was upheld by the Supreme Court that Goolsby was not good law, agreeing with the contentions of both parties in the case that plenary legislative power is vested in the General Assembly by Section 1 of Article II and any limitation upon such power must be found in a clear prohibition. The power to create other courts, said the Court, carries with it the power to determine jurisdiction. Monroeville v. Ward, 27 Ohio St. 2d 179 (1971). Effective June, 1970 the General Assembly had already eliminated statutory appeals to common pleas and provided, instead, for appeals to municipal and county courts.

It should be pointed out at this juncture that the Modern Courts Amendment was the culmination of a variety of judicial studies that looked to reform in court organization, by the Legislative Service Commission, the Ohio Judicial Conference, and committees of the Ohio State Bar Association. As originally proposed the house joint resolution that became known as Modern Courts provided for a unified court structure at the county level. Its proponents favored consolidation of all courts under the common pleas umbrella. Section 4 (B) is written as it is because it was not redrafted after the hope for a unified court system was for the time being abandoned.

Section 4 (C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas court.

Commentary upon Paragraph (C)

Section 4 (C) provides that, unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division. The probate divisions of the court of common pleas were, prior to the Modern Courts Amendment, separate constitutional courts, known as probate courts. In four counties, however, the courts of common pleas and probate had combined, under prior constitutional authority to do so. See comments following Section 23.

Prior to 1968 the jurisdiction of the probate court was set forth in the Constitution, along with a constitutional grant to the General Assembly to bestow such other jurisdiction as may be provided by law. Revised Code section 2101.24 was the basic statute relating to the jurisdiction of the probate court, and it now applies to the probate division by virtue of a statutory amendment that provides for substituting "probate division" for "probate court" wherever used in the Revised Code. Jurisdiction includes such matters as proceedings involving wills and like documents, administration of estates, appointment of guardians, and the issuance of marriage licenses.

Furthermore, by statutory prescription, the probate division of the common pleas court in 74 counties has juvenile court jurisdiction. The elements of such jurisdiction are also set forth by statute. Revised Code section 2151.23 confers exclusive original jurisdiction on juvenile courts in a number of specific kinds of proceedings, including cases concerning juvenile traffic offenders and delinquent, unruly, neglected, or dependent children; custody matters; probate division powers if a child otherwise within the jurisdiction of the court is mentally ill or retarded; and

charges against adults involving violations of the juvenile code. It confers original jurisdiction in other specified proceedings, including adult misdemeanors involving children, paternity suits, and interstate support matters. Section 2151.23 provides further that juvenile courts which are part of the probate division have jurisdiction to hear, determine and make a record of any action for divorce or alimony involving the custody and care of children filed in the court of common pleas and certified to such division for trial, if the consent of the juvenile judge is first obtained.

In not all counties is juvenile court jurisdiction exercised by the probate division. A different arrangement prevails in the 14 counties of Butler, Cuyahoga, Erie, Franklin, Hamilton, Lake, Lorain, Lucas, Mahoning, Montgomery, Richland, Stark, Summit, and Trumbull. Section 2301.03 creates the division of domestic relations in the court of common pleas of each of these counties. In each of these courts judges of the domestic relations divisions have jurisdiction over divorce, alimony and annulment cases. In 12 of the 14 courts the division of domestic relations has jurisdiction of cases arising under the juvenile code. The Hamilton county and Cuyahoga county courts of common pleas each have a juvenile division, in addition to a domestic relations division.

Section 2151.07 defines a juvenile court as a court of record and within the division of domestic relations or probate of the court of common pleas "except that the juvenile courts of Cuyahoga county and Hamilton county shall be separate divisions of the court of common pleas." An older but as yet unrepealed Section 2151.08 states that the conferral of powers and jurisdiction of a juvenile court "shall be deemed a creation of a separately and independently created and established juvenile court in Hamilton county." That section conflicts with other sections ans has little meaning now. The 1972 legislation that changed the separately and independently created juvenile court of Cuyahoga county to a division of the common pleas of that county also amended Section 2151.07 to accord with the change.

It is apparent that improvements have been made in these two counties by removing ambiguities as to which court has jurisdiction in cases that involve the custody of children. Jurisdictional differences in divisions of the same court should create fewer problems.

Cuyahoga county still has 13 independently created municipal courts and an indeterminate number of mayors exercising limited criminal jurisdiction. The limits upon jurisdiction and the very independence of one from another might cause even an experienced attorney some uncertainty as to the proper forum.

Section 3 Courts of Appeals

"(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;

(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals."

Section 3 developed from an essentially re-written from of its predecessor, Section 6, with no major substantive changes. A history of the appellate courts will soon be furnished to this committee, relating past developments to the currently popular notion of "one trial and one review."

Section 15. Changes in number of judges, courts, districts, etc.

"Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided."

The Committee to Study the Legislature and the Commission in its initial set of recommendations favored repeal of Section 15 as an outmoded restriction, inconsistent with the power of the General Assembly to adopt enactments affecting courts named in the Constitution or as may be established by law. The Administrative Director of the Ohio Supreme Court transmitted to the Commission his endorsement of the repeal of Section 15 of Article IV as an obsolete provision. The history of this recommendation in the legislature will be reviewed in order that this committee can re-evaluate the original recommendation with respect to Section 15.

Section 19 - Courts of Conciliation

"The General Assembly may establish courts of Conciliation, and prescribe their powers and duties; but such courts shall not render final judgment, in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment."

Section 19, authorizing establishment of courts of conciliation, had its origin

in the Constitutional Convention of 1850-51. The history and background of its inclusion will be prepared for committee consideration.

Section 23 - Judge may serve in more than one court

"Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten per cent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in each county the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or of two or more of such courts. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities, but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected.

Elections may be had in the same manner to discontinue or change the practice of having one person serve in the capacity of judge of more than one court when once adopted."

Section 23 was adopted by the Ohio electorate on November 2, 1965. This section permits the passage of local option laws, authorizing the electors of any county with a population of less than 40,000 to adopt a system whereby the same person could serve on two or more courts within the county. It authorizes submission of such a question by unanimous vote of the county commissioners or ten per cent of the number of electors voting for governor at the next preceding election. Courts covered include common pleas, probate, juvenile, municipal, and county courts. Section 23 is the only section that contains a reference to statutory courts, although Section 2 of Article XVII similarly refers to "justices of the peace" - an obsolete reference because justices of the peace courts were abolished and replaced with county courts by legislative action in 1957. Constitutional references of this kind are unwise because they are apt to become obsolete by legislative action.

Section 23 requires a majority vote for the adoption of a proposition to allow service upon multiple courts, protects the right of any judge then in office to finish his term, and allows elections to discontinue or change the practice of having one person serve in the capacity of judge of more than one court when once adopted.

Prior to the Modern Courts Amendment the Constitution authorized submission of the question of whether the courts of common pleas and probate should be combined in counties having a population of less than 60,000. Such question could only be submitted by petition of ten per cent of the electorate. Although the 1960 census figures showed that 53 counties had a population of less than 60,000 only the four counties of Adams, Henry, Morrow and Wyandot had used that provision and implementing legislation to combine the courts of common pleas and probate. Common pleas courts in these four counties have probate divisions, but judges are not specifically elected to such divisions. In the other 84 counties, common pleas judges are specifically elected to the probate division by the voters of the county. One judge is so elected in each of 83 counties and two judges are so elected in Cuyahoga county.

Ohio Constitutional Revision Commission
Judiciary Committee
July 2, 1973

Ohio Trial Courts
Number of Judges in Each Court, by County

County	Population 1970	Total Judicial Power	Common pleas - divisions				Minor Courts	
			Gen.	Probate	Dom. Rel.	Juv.	Muni.	County
Adams	18,957	2	1	a	-	-	-	1
Allen	111,144	5	2	1	-	-	2	-
Ashland	43,303	3	1	1	-	-	1	-
Ashtabula	98,237	7	2	1	-	-	2	2
Athens	54,889	3	1	1	-	-	1	-
Auglaize	38,602	4	1	1	-	-	-	2
Belmont	80,917	6	2	1	-	-	-	3
Brown	26,635	3	1	1	-	-	-	1
Butler	226,207	10	3	1	1	-	3	2
Carroll	21,579	3	1	1	-	-	-	1
Champaign	30,491	3	1	1	-	-	1	-
Clark	157,115	5	2	1	-	-	2	-
Clermont	95,725	6	2	1	-	-	-	3
Clinton	31,464	3	1	-	-	-	1	-
Columbiana	108,310	7	2	1	-	-	1	3
Coshocton	33,486	3	1	1	-	-	2	-
Crawford	50,364	4	1	1	-	-	-	2
Cuyahoga	1,721,300	60	26	2	2	4	28	-
Darke	49,141	4	1	1	-	-	-	2
Defiance	36,949	3	1	1	-	-	1	-
Delaware	42,908	3	1	1	-	-	1	-
Erie	75,909	7	1	1	1	-	3	1
Fairfield	73,301	4	2	1	-	-	1	-
Fayette	25,461	3	1	1	-	-	1	-
Franklin	833,249	24	10	1	3	-	12	-
Fulton	33,071	4	1	1	-	-	-	2
Gallia	25,239	3	1	1	-	-	1	-
Geauga	62,977	3	1	1	-	-	1	-
Greene	125,057	7	2	1	-	-	2	2
Guernsey	37,665	3	1	1	-	-	1	-
Hamilton	924,018	24	11	1	1	2	10	-
Hancock	61,217	3	1	1	-	-	1b	-
Hardin	30,813	4	1	1	-	-	1	1
Harrison	17,013	3	1	1	-	-	-	1
Henry	27,058	2	1	a	-	-	1	-
Highland	28,996	4	1	1	-	-	1	1
Hocking	20,322	3	1	1	-	-	-	1
Holmes	23,024	3	1	1	-	-	-	1
Huron	49,587	5	1	1	-	-	1c	2
Jackson	27,174	3	1	1	-	-	-	1

County	Population 1970	Total Judicial Power	Common pleas - divisions				Minor Courts	
			Gen.	Probate	Dom. Rel.	Juv.	Muni.	County
Jefferson	96,193	7	2	1	-	-	1	3
Knox	41,795	3	1	1	-	-	1	-
Lake	197,200	7	2	1	1	-	3	-
Lawrence	56,868	4	1	1	-	-	1	1
Licking	107,799	4	2	1	-	-	2	-
Logan	35,072	3	1	1	-	-	1	-
Lorain	256,843	9	3	1	1	-	4	-
Lucas	484,370	19	6	1	2	-	10d	-
Madison	28,318	3	1	1	-	-	-	1
Mahoning	303,424	16	4	1	2	-	5	4
Marion	64,724	3	1	1	-	-	1	-
Medina	82,717	5	2	1	-	-	1	1
Meigs	19,799	3	1	1	-	-	-	1
Mercer	35,265	3	1	1	-	-	1	-
Miami	84,342	6	2	1	-	-	2	1
Monroe	15,739	3	1	1	-	-	-	1
Montgomery	606,148	23	7	1	2	-	9	4
Morgan	12,375	3	1	1	-	-	-	1
Morrow	21,348	2	1	a	-	-	-	1
Muskingum	77,826	6	2	1	-	-	1	2
Noble	10,428	3	1	1	-	-	-	1
Ottawa	37,099	3	1	1	-	-	1	-
Paulding	19,329	3	1	1	-	-	-	1
Perry	27,434	3	1	1	-	-	-	1
Pickaway	40,071	3	1	1	-	-	1	-
Pike	19,114	3	1	1	-	-	-	1
Portage	125,868	5	2	1	-	-	2	-
Preble	34,719	3	1	1	-	-	1	-
Putnam	31,134	3	1	1	-	-	-	1
Richland	129,997	7	2	1	1	-	3	1
Ross	61,211	3	1	1	-	-	1	-
Sandusky	60,983	5	1	1	-	-	1c	2
Scioto	76,951	4	2	1	-	-	1	-
Seneca	60,696	4	1	1	-	-	2b	-
Shelby	37,748	3	1	1	-	-	1	-
Stark	372,210	12	4	1	2	-	6	-
Summit	553,371	19	7	1	2	-	9	-
Trumbull	232,579	10	3	1	1	-	5	1
Tuscarawas	77,211	6	2	1	-	-	-	3
Union	23,786	3	1	1	-	-	1	-
Van Wert	29,194	3	1	1	-	-	1	-
Vinton	9,420	3	1	1	-	-	-	1
Warren	84,925	8	2	1	-	-	3	2
Washington	57,160	3	1	1	-	-	1	-
Wayne	87,123	4	2	1	-	-	1	-
Williams	33,669	3	1	1	-	-	1	-
Wood	89,722	5	2	1	-	-	2b	-
Wyandot	21,826	2	1	a	-	-	1	-
TOTALS	10,652,017	527	182	85	22	6	171	70

(161 muni.
1 police)

Total common pleas -	295	
Total municipal -	161	
Total county	70	
Total police	1	
	527	trial judges (plus mayors' courts)
	38	court of appeals judges
	7	supreme court justices, including Chief Justice
TOTAL MANPOWER	572	

All Courts of Record

Footnotes

a. Probate court has been combined with common pleas court, not separately elected.

b. Fostoria municipal court has jurisdiction in Hancock, Seneca and Wood counties. For purposes of this table, judge allocated to Seneca county.

c. Bellevue municipal court has jurisdiction in Huron and Sandusky counties. For purposes of this table, judge allocated to Huron county.

d. Includes police judge of Ottawa Hills.

Ohio Constitutional Revision Commission
Judiciary Committee
July 23, 1973

Rules of Superintendence

A demonstrated need for administrative responsibility and centralized control over court operations culminated in constitutional recognition of ultimate authority in the Supreme Court and led to the recent adoption of the first set of rules of superintendence.

A recurring theme of the Ohio court and judicial administration studies that preceded the Modern Courts Amendment of 1968 was that courts were autonomous, judges operated independently, and no person or entity was in charge of the system. A 1961 Ohio Legislative Service Commission Report suggested: "Because a judge was assured freedom in his judicial determinations the assumption arose that each judge and each court must act independently in matters of administration."[1]

Apart from the importance of vesting power to make more effective use of existing judicial manpower by assignment of judges through constitutional recognition of such power, and in addition to calling for court authority to control the conduct of litigation through statutory regulation of practice and procedure, most judicial administration experts of that period cited the need to standardize basic court forms and operating procedures to promote overall efficiency. Repeatedly cited was the advice of United States Supreme Court Justice William J. Brennan that a modern court system required "an administrator at the head of the entire organization, as there is in the executive branch of government."

In 1955 the General Assembly created the office of administrative assistant to the Supreme Court with authority to examine the status of court dockets, determine the need for assistance by any particular court, and report needs to the chief justice of the Supreme Court. However, the 1961 Legislative Service Commission report observed that there were various limitations to statistics then being collected. They covered only courts of common pleas, appeals and supreme court. Said the Report:

> "The statistics are further limited because they do not tell enough about the nature or character of the cases . . . pending,filed, and disposed of."[2]

Categorizing of filings and disposals was termed "incomplete." Insufficient designation of the character of pending cases was noted. "In addition," said the Report, "nothing is reported on the number of motions filed on each case and the number of rehearings scheduled before the court. Sheer numbers alone do not give the proper information necessary to determine the scope of the business before the court."[3]

A further deficiency, according to the Report, related to the autonomy of courts and judges:

> "Courts do not follow the same procedures in reporting the information to the administrative assistant to the Supreme Court. For instance, some courts consider a case awaiting decision in a higher court as still pending on the docket; other courts consider such a case closed. Even the accuracy of some reports is questionable."[3]

Further points made in the 1961 Report were the lack of an attempt to measure the capacity of the courts and to maintain central data on the cost of the judiciary.

It maintained that analysis of available statistics could not give complete information about the operations of the various courts unless practices and procedures in effect in the various courts were known and understood.

Four years later in its research report entitled "Problems of Judicial Administration," the Legislative Service Commission staff reiterated the indicia of poor court management: "Study of Ohio court operations reveals several indicators of poor management of the state's judicial business: Absence of administrative responsibility and control over court operations; poor use of available judicial manpower; variations in administrative procedures employed; and inadequate reporting of judicial statistics."[4]

Again the hodge podge of procedures in effect in trial courts was deplored:

> "Practices established by court rules and customs often are as important to the status of the trial docket and productivity of the court as the number of cases filed. The latter figures are available but are insufficient to evaluate the capacity of efficiency of a particular court. Because of differences in both practice and terminology, court operations can be understood and interpreted only by examining each court individually."[5]

Commenting upon a feature of major importance in the Modern Courts Amendment, two members of the Modern Courts Committee of the Ohio State Bar Association cited the basic provision for supervision of the courts of the state by the supreme court, designed to remedy the deficiencies noted by the Legislative Service Commission and other studies. That is now found in paragraph (A) (1) of Section 5 of Article V which provides:

> "In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court."

They stated:

> "Under this provision ultimate administration authority is given to the Supreme Court as a whole. It is apparent, however, that the Court as a whole is not to be called on for routine administrative decisions. It will operate through the promulgation of administrative rules. It should be noted that the administrative rules are distinct from and in addition to the rules of practice and procedure which the court has the authority to issue under its 'rule-making' power.
>
> Once the administrative rules are promulgated, the responsibility for carrying out the superintending power devolves upon the Chief Justice. It may be that a given Chief Justice would prefer to delegate most of the detail involved in administration to the administrative director. Be this as it may, it is clear that the Chief Justice is responsible for the exercise of the superintending power, in conformance with the rules promulgated by the full court."[6]

The authors cited a further significant provision in Section 5, designed to meet the obvious need for accurate and uniform records. Division (B) of Section 5, Article IV provides in part: "The supreme court may make rules to require uniform record keeping for all courts of the state . . ." They concluded, "It is to be hoped that under the new constitutional amendment the neglect of uniform statistics will become a thing of the past."[7]

> The rules of superintendence, promulgated primarily to combat delay and backlog in the courts of common pleas establish a vocabulary and standards that will facilitate measurement of judicial capacity and make judicial statistics more valuable.

Rules of superintendence for the courts of common pleas were adopted by the Ohio supreme court on September 30, 1971 and became effective January 1, 1972. The immediate effect of the rules on court backlog is demonstrated by figures extracted from the publication Ohio Courts supplied to the Committee.

Work on superintendence rules for the municipal courts is in process.

The purposes of the current rules of superintendence are stated in rule 1: "(1) to expedite the disposition of both criminal and civil cases in the trial courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; (2) to serve that public interest which mandates the prompt disposition of all cases before the courts."

These rules establish standards for determining that judicial dockets are current, provide administrative machinery for seeing to it that these standards are met, require regular reports to the administrative director of the courts, and furnish definitions that serve to give uniformity to judicial statistics.

Rules 2 through 4

Superintendence rules 2, 3, and 4, dealing respectively with presiding judges, administrative judges, and the individual assignment system, could be characterized as the administrative machinery for implementation of the rules that follow.

Superintendence rule 2 is in part a restatement of the requirement introduced by the Modern Courts Amendment that each multi-judge common pleas court select a presiding judge, whose powers and duties are to be prescribed by the supreme court. The purpose of including such a provision in Section 4 of Article IV was to overcome "constitutional objections (that) have neutralized statutory attempts to grant administrative supervisory authority to one judge in the multi-judge courts."[8]

Rule 2 provides further that judges of all multi-judge courts meet on a regular basis at the call of the presiding judge "for the purpose of discussing and resolving administrative problems common to all divisions of the court." It also requires the presiding judge to "assign judges from one division of the court to serve another division as the business of the court may require." The divisions referred to are: probate, domestic relations, juvenile, and general. Section 4 of Article IV recognizes the existence of a probate division, to which judges are specifically elected. Statutes have created juvenile and domestic relations divisions. To distinguish between these specialized branches and the other categories of judicial business before the courts the superintendence rules and the

statistical reports of the administrative director make reference to a general division.

Considerable variation exists among the 88 counties in division organization. Seventy counties use a two division plan, with one division exercising general and domestic relations jurisdiction and one division exercising probate and juvenile jurisdiction. Twelve counties use a three division plan: one general; one probate; and one domestic relations and juvenile combined. Four counties have one division, where a single judge has jurisdiction over all four functional areas. The two counties of Cuyahoga and Hamilton have four separate divisions, each exercising jurisdiction in one of the functional areas.

Superintendence rule 3 requires that in addition to a presiding judge over a multi-judge court, judges of each multi-judge division must select one of their number to act as administrative judge, with full responsibility for and control over the administration, docket and calendar of the division which he serves. It requires further that the administrative judge "cause cases to be assigned to judges within the division and . . . require . . . reports from each judge . . . to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay."

Rule 4 is one that has been credited with making major inroads upon the backlog in congested metropolitan courts in the first year of operation of the rules of superintendence. It requires each multi-judge general division to adopt the "individual assignment system," a term defined by the rule. Under such a system each case as a whole is assigned to one particular judge for individual disposition. Prior to its institution all motions filed preliminary to trial could go to different judges, and a judge who had made no prior ruling could eventually preside over trial of the case. Such a general assignment practice made the pinpointing of responsibility for delay particularly difficult. It allowed less conscientious judges to pass the buck and was considered to contribute to the excessive delay between the filing and trial of a case in the large counties where used.

Superintendence rule 4 requires assignment by lot to a judge "who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination." Preliminary matters specifically include requests for continuances. Continuances, sought by attorneys in pending cases for a variety of reasons, are frequently blamed for delay in congested courts, and both this rule and rule 14 recognize the problem and attempt to deal with it.

Rule 5

Rule 5 is a detailed one, having to do with the filing of reports and information to the chief justice of the supreme court. It makes reference to forms that are to be used for reporting judicial statistics, and the forms are included as an appendix to the rules. In multi-judge courts reports must be submitted through the administrative judge and bear the signatures of both the reporting and administrative judges. Rule 5 empowers the administrative judge to "formulate such accounting and audit systems within his division and the office of the clerk of courts, as will insure the accuracy of all reports required by these rules."

The forms that are the subject of rule 5 and are attached to the rules call for reporting the numbers of cases pending, filed or assigned, and terminated for the applicable period of time, by category of proceeding, and, for the general and

domestic relations divisions, information concerning the "median case." Form A, for example, applicable to general division only, calls for age of median case terminated, --at pretrial, by court trial, and by jury trial, under the following categories: personal injury; workmen's compensation; appropriations; criminal cases; domestic relations (limited application because another form applies); and all other cases.

Age of median case is to be determined, according to definition in the rule, "by listing all cases tried in order according to the lapse of time in months from date of filing (civil) or . . . arraignment (criminal) . . . to the date of trial. The middle case in the list will be the median case for that category of cases."

An interpretation of median case age and an explanation of its importance can be found in the implementation manual included with the rules furnished to the members of this committee. The manual was prepared by the Ohio Legal Center Institute and is not an official part of the rules.

For each category (kind of case) in each classification (how terminated) the age of cases in months is to be listed in sequential order. The example given in the manual supposes age of personal injury actions (kind of case) terminated by jury trial (classification) to be arranged in sequential order as follows: 6, 6, 8, 9, 9, 10, 12, 16, 42.

The manual states:

"In a series of numbers, the median number is the midpoint of the series, that is there are as many numbers in the series of lesser value as there are numbers of higher value. In the series above 9 is the median. There are as many numbers less than 9, that is 6,6, 8 and 9,9, as there are numbers greater than 9, that is, 10, 12, 16, and 42. The report asks for the age of the median case when the cases are arranged by age. It does not ask for the median age of cases, although that language appears in the rule. That would transfer the series to 6, 8, 9, 10, 12, 16, 42. The last sentence of Sup. R. 5, par. 7, item 5, is clear that the age of the middle case is the critical figure.

. . .

> For reporting age of cases terminated, the median is the most reliable figure. The reason is, that even in very busy courts, the number of terminated cases in each category by classification will be small. When the series of numbers is small, variations are much more likely to disturb the mode (the number that appears most frequently in the series) and the mean (the average of the series) than they are the median. For example, in the series above, the one case pending 42 months disturbs the average. Without it, the average would be 9. In the lives of pending cases, the aberrational case will always be abnormally long and never abnormally short. The sample is too small to make the mean average reliable. The mode is also unreliable in a small sample. If four related cases were terminated within one month after filing, 1 would be the mode in our assumed series and it would signify nothing of value for purposes of case disposition comparison.
>
> ...The median age of cases terminated, defining age as time elapsed between filing and termination, or arraignment and termination is the statistic used in other jurisdictions, and permits the comparison

of jurisdictions as to the effectiveness of docket and calendar controls as well as the comparison of the work of the Courts within a single system."

By supplying definitions of such terminology affecting court cases as "terminated," "terminated by court trial," "terminated by jury trial," and length of time a case is "pending," rule 5 serves to overcome problems caused by differences in practice and terminology used to describe court operations. Reports must be filed monthly (except the report pertaining to the probate division, which must be submitted quarterly) and annually.

Rule 5 also directs the administrative director to publish reports reflecting information called for and authorizes the chief justice of the supreme court to require such additional information concerning the disposition of cases and management of business of the courts as he may find useful to assist in the assignment of judges among counties, in the presentation of rules, and in discharging his duty to superintend the courts of the state. It recognizes the further power of the chief justice to require specific information where report forms show excessive delay exists.

Rules 6 through 9

Rules 6, 7, 8, and 9 have to do with the prompt dispatch of judicial business. Rule 6, for example, provides for the closing out of cases. Under the civil rules of procedure (specifically Rule 58) the court must cause a journal entry of judgment to be prepared upon verdict or determination of a case. Superintendence rule 6 implements the civil rules by providing that the journal entry shall be journalized within 30 days of the verdict or determination and that if it is not prepared by counsel in the case, it shall be prepared by the court.

Rule 7 requires a quarterly review of all cases and the dismissal of cases which have been on the docket for six months without any proceedings taken, except cases waiting trial assignment without any proceedings taken, except cases waiting trial assignment. The implementation manual points out that "docket" in this context means "appearance docket" and not "trial docket." It also notes that the dismissal sanction does not apply to criminal cases because they are the subject of a specific provision in Rule 8.

Rule 8, part B, provides: "All criminal trials shall be tried within six months of the date of arraignment. . ." Part C of the same rule requires prompt sentencing.

Rule 9 states an intent not to prohibit the application of local rules which facilitate the earlier disposition of cases.

Rules 10 through 15

Rules 10 through 15 are referred to as miscellaneous rules in the implementation manual. Along with provisions concerning trial transcripts (rule 10) improper publicizing of court proceedings (rule 11) and extraordinary procedures for the administration of justice during civil disorders (rule 12), they also contain provisions intended to avoid or combat delay in the courts.

Rule 13, for example, authorizes the assignment of retired municipal court

judges not engaged in the practice of law to active duty on any municipal, county, or police court in the state. This is the only rule in the present supreme court rules that is specifically applicable to minor courts only. It specifically provides that it does not limit provisions in the Ohio Revised Code that (1) provide for the filling of municipal court vacancies and authorize the appointment of acting municipal judges during temporary absence or incapacity (R. C. 1901.10) and (2) provide for the designation of another minor court judge in situations where bias, prejudice, or disqualification is established in criminal cases.

Rule 14 is the second rule in which continuances are specifically regulated. A continuance, although not defined by rule, is generally understood to mean the postponement of a pending action, at the behest of one of the attorneys in the case, for such reasons as are given in the rule in the form of examples as sickness, vacation, or counsel engaged elsewhere. As was noted in the comments relative to the individual assignment system, requests for continuances must be disposed of by the judge to whom the case is assigned for trial.

Rule 14 begins: "The continuance of a scheduled trial or hearing is a matter within the sound discretion of the trial court." It then establishes certain rules governing continuances, including requiring: consideration of the feasibility of recorded testimony where the reason for the request is the unavailability of a witness; (2) receipt of a written statement of reason for the request; (3) reports as to the number of requests for continuances, names of attorneys, reasons given and number granted. One reason enumerated is engaged counsel, defined as meaning counsel engaged in any other hearing at the time the case is called for trial.

Rule 14 deals in a direct fashion with the problem of engaged counsel by providing that if any attorney designated as trial counsel has such a number of cases assigned as to bring about undue delay, the administrative judge may require such attorney to provide substitute trial counsel or be removed.

Related to this provision is one in Rule 3, having to do with the administrative judge, which requires such judge to maintain records indicating the number of pending cases each attorney is to try and calling for the early designation of the particular attorney who will represent each party at trial in both civil and criminal cases.

Rule 15 provides the guidelines for use of videotape as a medium for transcribing depositions, video tape trials, and for the use of video tape as a means of transcribing verbatim transcripts of proceedings. Its purpose, according to Chief Justice O'Neill, is "to reduce the time delay between the completion of a case at the trial level and the completion of the appellate process by allowing videotape to be used as the medium for preserving the content of proceedings in the trial court. In this way, the transcript of proceedings, in the form of a videotape, will be available for review immediately at the conclusion of the trial proceedings."[9]

Footnotes

1. The Ohio Court System: Its Organization and Capacity (January, 1961) at 24.

2. Id. at 32 .

3. Id. at 33 .

4. Problems of Judicial Administration (February, 1965) at 7.

5. Id. at 10.

6. William W. Milligan and James E. Pohlman, "The 1968 Modern Courts Amendment to the Ohio Constitution," 29 Ohio St. L.J. 811, 822 (Fall, 1968).

7. Id. at 824.

8. Id. at 827.

9. 1973 Biennial Report of Judicial Conference.

Ohio Constitutional Revision Commission
Judiciary Committee
August 16, 1973

All Divisions in Ohio Common Pleas Courts
Showing Population, Number of Judges, and Population, Filings, and Terminations in Relation to Number of Judges, by County-1971

Pop'n in 1000	County	No. of Judges[a]	Pop'n per Judge	Filings per Judge	Terminations per Judge
1721	Cuyahoga	28	61,475.00	884.50	907.03
924	Hamilton	14	66,001.28	832.28	878.28
833	Franklin	13	64,096.07	1007.38	1016.69
606	Montgomery	9	67,349.77	1104.44	1078.33
553	Summit	9	61,485.66	912.44	1195.11
484	Lucas	8	60,546.25	870.87	902.37
372	Stark	6	62,035.00	701.33	740.33
303	Mahoning	6	50,570.66	727.33	726.50
257	Lorain	4	64,210.75	753.00	814.00
233	Trumbull	4	58,144.75	862.50	752.75
226	Butler	4	57,551.75	833.25	1046.25
197	Lake	3	65,733.33	809.66	831.66
157	Clark	2	78,557.50	1093.50	1121.00
130	Richland	3	43,332.33	708.33	712.66
126	Portage	2	62,934.00	885.50	963.50
125	Greene	2	62,528.50	770.50	1129.50
111	Allen	2	55,572,00	655.00	581.50
108	Licking	2	53,899.50	828.50	866.00
108	Columbiana	2	54,155.00	645.00	689.00
98	Ashtabula	2	49,118.50	645.50	629.50
96	Jefferson	2	48,096.50	650.50	672.50
96	Clermont	2	47,862.50	657.50	595.00
90	Wood	2	44,861.00	384.00	439.50
87	Wayne	2	43,561.50	400.00	421.00
85	Warren	2	42,462.50	683.50	733.50
84	Miami	2	42,171.00	510.50	559,50
83	Medina	2	41,358.50	493.00	529.00
81	Belmont	2	40,458.50	467.50	481.00
78	Muskingum	2	38,913.00	482.50	508.00
77	Tuscarawas	2	38,605.50	501.00	492.00
77	Scioto	2	38,475.50	569.50	534.00
76	Erie	2	37,954.50	499.00	528.00
73	Fairfield	2	36,650.50	493.00	520.00
65	Marion	1	64,724.00	981.00	920.00
63	Geauga	1	62,977.00	688.00	728.00
61	Ross	1	61,211.00	738.00	708.00
61	Hancock	1	61,217.00	664.00	612.00
61	Sandusky	1	60,983.00	733.00	743.00
61	Seneca	1	60,696.00	556.00	594.00
57	Washington	1	57,160.00	474.00	635.00
57	Lawrence	1	56,868.00	1098.00	1208.00
55	Athens	1	54,889.00	524.00	515.00
50	Crawford	1	50,364.00	646.00	645.00

50	Huron	1	49,587.00	1019.00	1064.00
49	Darke	1	49,141.00	536.00	579.00
43	Ashland	1	43,303.00	569.00	632.00
43	Delaware	1	42,908.00	553.00	489.00
42	Knox	1	41,795.00	496.00	518.00
40	Pickaway	1	40,071.00	559.00	565.00
39	Auglaize	1	38,602.00	420.00	429.00
38	Shelby	1	37,748.00	400.00	507.00
38	Guernsey	1	37,665.00	585.00	545.00
37	Ottawa	1	37,099.00	349.00	374.00
37	Defiance	1	36,949.00	413.00	365.00
35	Mercer	1	35,265.00	197.00	196.00
35	Logan	1	35,072.00	460.00	392.00
35	Preble	1	34,719.00	340.00	365.00
34	Williams	1	33,669.00	397.00	434.00
33	Coshocton	1	33,486.00	337.00	318.00
33	Fulton	1	33,071.00	312.00	310.00
31	Clinton	1	31,464.00	416.00	367.00
31	Putnam	1	31,134.00	194.00	170.00
31	Hardin	1	30,813.00	320.00	263.00
30	Champaign	1	30,491.00	370.00	357.00
29	Van Wert	1	29,194.00	233.00	228.00
29	Highland	1	28,996.00	407.00	395.00
28	Madison	1	28,318.00	435.00	442.00
27	Perry	1	27,434.00	256.00	220.00
27	Jackson	1	27,174.00	455.00	410.00
27	Henry	1	27,058.00	202.00	241.00
27	Brown	1	26,635.00	374.00	370.00
25	Fayette	1	25,461.00	337.00	328.00
25	Gallia	1	25,239.00	335.00	327.00
24	Union	1	23,786.00	320.00	341.00
23	Holmes	1	23,024.00	147.00	154.00
22	Wyandot	1	21,826.00	149.00	209.00
22	Carroll	1	21,579.00	338.00	417.00
21	Morrow	1	21,348.00	246.00	231.00
20	Hocking	1	20,322.00	257.00	293.00
20	Meigs	1	19,799.00	232.00	273.00
19	Paulding	1	19,329.00	235.00	270.00
19	Pike	1	19,114.00	235.00	284.00
19	Adams	1	18,957.00	302.00	310.00
17	Harrison	1	17,013.00	278.00	182.00
16	Monroe	1	15,739.00	144.00	172.00
12	Morgan	1	12,375.00	138.00	137.00
10	Noble	1	10,428.00	112.00	169.00
9	Vinton	1	9,420.00	126.00	97.00

Source: Ohio Courts, 1971 Summary, Table 6

a Number of judges is taken from the Ohio Courts Summary table. It does not include judges of the probate division. It does include judges of the domestic relations division in the 14 counties that have such divisions.

Ohio Constitutional Revision Commission
Judiciary Committee
September 18, 1973

Minor Courts in Ohio

The general principle of a unified court system, as embodied in the ABA Commission's tentative draft of standards relating to court organization, has several facets. Ideally it calls for one court at the trial level but, short of that goal, the Commission's report makes the point that whatever the number of levels of courts--trial and appellate--all the courts at each level should have the same jurisdiction. So it is urged:

> "If there is a single set of courts at the trial level, they should all have original jurisdiction of all proceedings. If there are two sets of courts at the trial level, the jurisdictional definition for each level should be the same throughout the state. Similarly, if there is one appellate court, its appellate jurisdiction should be the same in relation to all courts of first instance; if there are two appellate levels, the relationships between levels should be uniform." (p. 5)

Not counting mayors' courts which continue to exercise restricted criminal jurisdiction, Ohio has two sets of courts of limited jurisdiction at the trial level, both inferior to the court of common pleas, which is a trial court of general jurisdiction. The two sets of courts are the municipal courts and the county courts. Both deal with small claims, civil actions involving limited amounts of money, and with misdemeanors and the violation of municipal ordinances. The powers of these courts are similar in many instances and dissimilar in others. Unfortunately, as will be pointed out in this memorandum, conflicting and confusing provisions remain in the law despite many attempts in recent years to achieve greater uniformity and consistency through statutory amendment and adoption of the Modern Courts Amendment in 1968.

Courts inferior to the court of common pleas have been termed "minor" courts although this designation has no constitutional or statutory basis. For simplicity the term will be used throughout this memorandum when referring to all trial courts other than the court of common pleas.

The type and number of minor courts differ from county to county. Some counties have one municipal court and no county court, some have two or more municipal courts and no county court, some have a county court and no municipal court, and some have a county court and one or more municipal courts. Each municipal court has territorial jurisdiction within the limits of its respective municipal corporation, and many have additional territorial jurisdiction, described by statute in terms of specific municipalities and townships. It has been noted that such courts have been created strictly in accordance with the desires of the people of the respective areas involved with the result that there is considerable variation in the populations and areas served by municipal courts.

County courts, on the other hand, have territorial jurisdiction within what the statute calls the county court district, an area which it defines as comprising the area of a county not within the territorial jurisdiction of any municipal court.

Research Study No. 22 pointed out that municipal courts have increased greatly in number, territorial scope and monetary jurisdiction since the 1951 adoption of the Uniform Municipal Court Act. Still, 24 counties have no municipal court and 19

counties have a combination of municipal and county courts. In 35 counties one municipal court has county-wide jurisdiction, and in 10 others two or more municipal courts exercise jurisdiction over all parts of the county so no county court district exists.

An Ohio Legislative Service Commission publication of February, 1959 reported the then existence of 54 county courts, whose jurisdiction extended to approximately 25 per cent of the population of the state. Since that time municipal courts have steadily increased in number and expanded in jurisdiction, to the point that at the present time the number of county courts has been reduced to 43, manned by 72 judges, with jurisdiction that extends to approximately 15 per cent of the state's population. The largest county court in Montgomery county has five judges and jurisdiction over a population of more than 130,000, while the smallest, in Erie, has jurisdiction over a district of about 2400 population. Montgomery county is marked by the further distinction that it has in addition four separate municipal courts--in Dayton, Kettering, Oakwood, and Vandalia.

The same Legislative Service Commission report noted 86 separate municipal courts in 58 counties. The number presently stands at 108 courts in 63 counties.

By virtue of Revised Code section 1905.01 in all municipal corporations not having a police court and not being the site of a municipal court (and subject to exceptions noted in Portage county, noted in the discussion of municipal courts) the mayor has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation and has jurisdiction in all criminal causes involving moving traffic violations occurring on state highways located within the municipal boundaries. This authority is subject to further limitations in the criminal code, specifically in sections 2937.08 and 2938.04 of the Revised Code. Under the former, if a defendant pleads not guilty and a right to jury trial exists (as it does at any trial in any court for the violation of any statute or ordinance except where the penalty involved does not exceed $50) the matter may not be tried before the mayor "unless the accused, by writing subscribed by him, waives a jury and consents to be tried" by the mayor, acting in this case as magistrate under general procedures applicable to criminal proceedings in minor courts. If jury trial is not waived, the mayor must require the accused to enter into recognizance (i.e. an obligation supported by security) to appear before a court of record in the county. Both municipal and county courts are "courts of record"--a term discussed in Research Report No. 22. Section 2938.04 of the Revised Code provides in part: "In courts not of record (e.g. mayors' courts) jury trial may not be had, but failure to waive jury in writing where right to jury trial may be asserted shall require the magistrate (mayor) to certify such case to a court of record . . ." Under one of the supreme court's uniform rules of practice and procedure in criminal cases for minor courts, discussed below, "the failure of a defendant entitled to trial by jury . . . to file with the court a signed waiver of jury trial shall require the transfer of the case to a court of record within the county wherein the offense is claimed to be committed." (Rule .20) The rule makes further reference to transmittal "to the transferee court selected by the magistrate (mayor)" and suggests that the mayor thereby has some choice of which court to certify in counties having both municipal and county courts. In 1968 the Review Commission, created under the uniform rules, recommended amendment of the rule on transfers to require that the mayor transfer to a court of record "having jurisdiction." (When the statutory language was adopted county courts were not courts of record and since one of the motives for the certification law was to avoid overtaxing the common pleas court the power of selection was given the transferring magistrate so that the case could

be heard by a juvenile judge or some municipal judge if one existed in the county.) The rule appears unchanged in the latest supplement to the appropriate volume in Page's Ohio Revised Code that contains the uniform rules. Do mayors still have an option as to which court to transfer a case? The answer is uncertain but may be of interest because of commentary in a 1968 Ohio State Bar Association report which noted that "some mayors apparently like the element of choice, for they can exercise the preference in favor of a 'tough' court as a threat to extort waivers."

In any prosecution for the violation of a municipal ordinance in which the penalty involved is imprisonment, the accused has a right to be tried by jury. The Ohio attorney general ruled in 1969 that the mayor of a village presiding over a mayor's court may sentence a person to imprisonment for violation of a village ordinance if such person in writing waives a jury and consents to be tried by the mayor as magistrate. 1969 Ohio Atty. Gen. No. 117.

The jurisdiction of a mayor is thus limited to ordinance and traffic violations in each municipality without police court and "not being the site of a municipal court" where no right to jury trial exists unless it is waived. The mayors of municipalities within the territory of a municipal court but not named as being the site of the municipal court retain the described criminal jurisdiction, to be exercised concurrently with the municipal court in the territory. Mayor court jurisdiction may be further limited by the ramifications of the case of Ward v. Monroeville, 93 Sup. St. 80 (1972) an Ohio case, wherein the supreme court reversed mayor's conviction on two traffic offenses because the mayor's executive responsibilities for village finance represented a conflict with his judicial authority to adjudicate a contested matter. The case footnote deserves repeating, however, inasmuch as where there is no waiver or right to a jury trial and the case is not contested the mayor's authority to preside in traffic court is still recognized. The U. S. Supreme Court said in that somewhat ambiguous footnote:

> "The question presented on this record is the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. We intimate no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or nolo contendere, a forfeiture of collaterial or the like."

How many persons charged with traffic offenses can be expected to be or become knowledgeable about their rights when taken before a mayor or given a notice to so appear?

Because municipal courts are established by statute the number of such courts can easily be computed. With a little more computation, based upon the territorial description of the existing municipal courts and a copy of the U. S. Census or Ohio map showing township and municipal boundaries, one can compute the number of county courts. The annual roster of the Ohio Secretary of State in which are contained state, federal, and local officers, facilitates the process of enumerating minor courts, other than mayors' courts. Even the holder of the position of judge of the Ottawa Hills police court in Lucas county (the only police court judge now authorized by statute) is listed under tables showing county court and municipal court judges.

To know how many Ohio mayors exercise the authority which they possess under Chapter 1905. of the Revised Code is not so easy, however. A recent study done in

Cuyahoga county pointed out that statutes permit the establishment of a mayor's court in municipalities which are neither the seat of a municipal or police court, noted that 13 municipalities in the county are sites of municipal courts, stated that therefore, all but 13 municipalities in Cuyahoga county may have a mayor's court, but reported that of the 33 active mayors' courts in the county, five were abolished in 1971. This information must have been discovered by individual tally, because no known source of centralized data has been discovered. A statewide figure has been reported, however, in Ohio's 1973 Comprehensive Criminal Justice Plan, published by the Department of Economic Development and entitled Toward a Safer, More Just Society. According to this very recent publication, in 1972 there were only 363 active mayor's courts in the state of Ohio.

The establishment and operation of police courts generally are governed by Chapter 1903. of the Revised Code. Most of these provisions are largely inoperative because there is only one statutory police court in the state at the present time. Municipal courts by local rule may operate as divisions, involving perhaps use of the term "police judge" but the only police court authorized by statute is that created by Section 1903.88 of the Revised Code in Ottawa Hills, Lucas county. According to that section the police court of Ottawa Hills is a court of record "and has jurisdiction of any offense under any ordinance of such village and of any misdemeanor committed within the limits of such village and shall hear and finally determine the same and impose the prescribed penalties; but cases, in which the accused is entitled to a trial by jury, shall not be so tried, unless a jury is waived in writing in advance by the accused."

According to the 1961 Legislative Service Commission study at one time or another since 1852 police courts have existed in almost all large cities of the state but have gradually been replaced by municipal courts. The police court of Ottawa Hills resembles a municipal court in its criminal jurisdiction. The extent of its civil jurisdiction is in doubt because of Section 1903.96 which provides in part: "The police judge of the village of Ottawa Hills may perform marriage ceremonies, take acknowledgements of deeds and other instruments, administer oaths, and perform any other duty of judges of the county court . . ." It is akin to a mayor's court in that jury trial may not be had although unlike the mayor's court the police court is a court of record.

In 1961 it was reported that although the general sections governing all police courts and the specific section governing the police court of Ottawa Hills confer only limited criminal jurisdiction, civil jurisdiction is exercised by the police court of Ottawa Hills because of a court of appeals holding that the court has such jurisdiction. The case was that of Sparks v. Weber, 48 Ohio App. 60 (1933) in which the court said that the original act abolishing the jurisdiction of and office of justice of the peace in Ottawa Hills township and establishing in the village, the territorial limits of which were the same as those of the township, the police court, and requiring the judge of the police court to perform any other duty given to justices of the peace (as the section read before amended to refer to county court judges), such legislation conferred upon the judge of the police court the civil jurisdiction exercised by the former justice of the peace. A dissenting opinion argued that authority to perform a "duty" is not synonomous with "jurisdiction." However, the holding has never been reversed.

Territorial jurisdiction of municipal courts

Each of the 108 municipal courts existing in Ohio at the present time came into being by specific enactment of the legislature. A new court is created by adding its

name to Revised Code section 1901.01, a section that has been repeatedly amended for this purpose since its predecessor General Code section was adopted in 1951, the year a uniform municipal court act was adopted.

The population served by a municipal court depends upon the territorial area that it serves, and this, too, is specifically prescribed by Revised Code section 1901.02 which sets forth the municipalities and townships within which each court has territorial jurisdiction. The 35 courts that have county-wide jurisdiction are shown in the attached table showing population and number of judges. In these counties, and in the 10 other counties where two or more municipal courts exercise jurisdiction over all parts of the county, no county court exists.

All municipal courts have jurisdiction within the corporate boundaries of their respective boundaries. For 11 courts no additional territorial jurisdiction is enumerated. That number must be increased by at least one because, although the municipal court of Conneaut is given jurisdiction in the municipal corporation of Lakeville (in Ashtabula county), the latter has been consolidated into the city of Conneaut. For the other 60 municipal courts territory is described in terms of specific municipalities and townships. The computation of population served by each court is more complex than might be at first apparent because sometimes the enumerated municipalities and townships overlap. The city of Bowling Green, in Wood county, for example, is given territorial jurisdiction in 18 named municipalities and in 15 named townships, but census figures reveal that all of the named municipalities are included within the population figures for named townships. Cuyahoga Falls has jurisdiction in 10 additional municipalities and in 6 townships in Summit county, but one of the municipalities is included within one of the named townships. The court of Canton has jurisdiction within certain townships in Stark county, one of which is co-extensive with the city of Canton and need not therefore have been named.

Several of the municipal courts that have county-wide jurisdiction bear the name of the county in which established. These include Athens county (formerly the Athens municipal court), Franklin county (formerly the Columbus court), Licking county (formerly the Newark court), and Portage county (formerly Ravenna court). In the counties of Hamilton and Portage the clerk of courts, an officer who serves the courts of common pleas and appeals, serves also as clerk of the municipal court. Revised Code section 1901.024 authorizes agreement between the county commissioners of Hamilton county and the city of Cincinnati for sharing the costs of the operation of the Hamilton county municipal court. Other like provisions evidence a slight trend toward unification of courts at the county level.

Section 1901.021 allows the judge or judge of any municipal court having jurisdiction outside the corporate limits of municipal boundaries to sit outside corporate limits within the area of territorial jurisdiction of the court. Accompanying table B reveals that 96 of the 108 municipal courts have jurisdiction beyond municipal boundaries. Under Section 1901.021 in any municipal court having more than one judge the decision for one or more such judges to sit outside municipal limits shall be made by rule of court. Seventeen of the 96 courts have more than one judge; seven have more than two judges. The section contains in addition special provisions relative to the Hamilton county and Portage county municipal courts. It requires two or more judges of the Hamilton court to be assigned by the presiding judge to sit outside Cincinnati. As to Portage county it provides that one of the judges shall sit in Ravenna and may sit in other incorporated areas of Portage county and that one of the judges shall sit in Kent and may sit in other incorporated areas of such county.

Although 96 of the 108 municipal courts have extra-territorial jurisdiction, that jurisdiction often does not encompass a large extra-territorial population. In the case of the Cleveland municipal court, for example, the additional territory over which the court has jurisdiction is Bratenahl, adding an insignificant population figure of barely over 1600 inhabitants to the population served by the court.

By definition in Revised Code section 1901.03 "a municipal corporation in which a municipal court is located" does not include one in which a judge sits under section 1901.021 of the Revised Code. However, the jurisdiction of mayors in Portage county is affected by that section because the provisions giving mayors jurisdiction excepts "a place where Portage county municipal court sits as required pursuant to section 1901.021 of the Revised Code (Ravenna and Kent) or by designation of the judges" pursuant to that section.

Number of municipal court judges - relationship to territory

Section 1901.08 of the Revised Code sets forth the number of judges that serve each municipal court and the times for their election. It cannot be relied upon, however, for an accurate count of municipal judges because of the existence of section 1901.05, which establishes a population formula for the number of municipal judges and declares by its terms that such offices of judge "are hereby created." Section 1901.05 recognizes increases in population by acquisition of territory or decennial census. It further provides that whenever "the population of a territory warrants a reduction in the number of judges, the first vacancy in the office of a judge, excluding the office of the chief justice, due to the death, resignation, forfeiture, removal from office, or otherwise than by the expiration of the term of office, shall not be filled, and that office is hereby abolished as of the day such vacancy occurs."

In paragraphs governing the number of judges in Barberton, Cleveland, Kettering, and Youngstown, respectively, in Section 1901.08, there is a disclaimer of the operation of the population formula by provisions calling for the election of a specific number of judges "notwithstanding Section 1901.05." In Cleveland and Youngstown the number of judges would have decreased with diminutions in population of those two cities.

The Hamilton county municipal court is another exception to the population formula. When this court was created in 1965, the population of its territory would have warranted 12 judges instead of the nine then created. As a result of the 1970 federal census, the population of the Hamilton county municipal court entitled it to 14 judges under the formula. However, the Ohio supreme court held that the increase in territorial population entitled the court to only one additional judge because continuing effect must be given to the legislature's intent that the court have three judges less than it is entitled to under the statutory formula. State ex rel. Leis v. Hamilton County Board of Elections, 28 Ohio St. 2d 7 (1971). Therefore, although the Hamilton county municipal court has the largest jurisdictional population of any municipal court, it ranks third in number of judges--only 10 as compared to 13 in the Cleveland municipal court and 12 in the Franklin county court.

One of the criticisms that has been made of the present minor court structure is that number of judges depends upon an arbitrary population factor instead of need, as demonstrated by caseload.

Section 1901.08 designates some municipal court judges as "part-time," an appellation which means that they may practice law in courts other than the ones they serve. In territories having a population of more than 50,000 the compensation of a municipal judge is based upon population served, regardless of designation. Attached Table A shows that there are 170 municipal court judges at the present time, 38 of whom are part-time judges. Eighty-eight municipal courts are one-judge courts.

One might expect that part-time judges would have jurisdiction over areas of less population than full-time judges, and in general, this is true. However, the variations in both categories are great. The table shows population per judge to the nearest thousand and reveals a range in population served by part-time judges from 8 in the Huron court to 92 in the Berea court. On the other hand, a full-time judge in the Conneaut court, serving a population of 14,522, contrasts sharply with the part-time Berea judge and the full-time judges in Garfield Heights and Willoughby, who each serve a population of nearly 100 thousand.

Monetary Jurisdiction of Municipal Courts

Municipal courts have original jurisdiction in civil cases where the amount claimed by any party or the appraised value of property sought does not exceed $5,000, except in the 13 municipal courts located in Cuyahoga county, where it does not exceed $10,000 and in the Franklin and Hamilton county municipal courts, where it does not exceed $7,500. The trend in recent years has been to increase the monetary jurisdiction of municipal courts giving them greater concurrent jurisdiction with the courts of common pleas and hopefully easing the burden of congested dockets with which these courts have found themselves faced.

A further effort in this direction was the enactment in 1961 of a provision authorizing the court of common pleas to transfer for trial any action to any municipal court in the county having concurrent jurisdiction of the subject matter of and the parties to the action if the amount sought does not exceed $1000 and if the judge, presiding judge, or chief justice of the municipal court concurs in the proposed transfer. The degree to which this effort has been successful is one that the committee may wish to explore. However partial this avenue of relief may be, however, it is not available in counties that lack a municipal court with concurrent territorial jurisdiction.

Subject Matter Jurisdiction of Municipal Courts

Subject to the applicable monetary limits the subject matter jurisdiction of municipal courts is fixed by Revised Code section 1901.18 and covers the following:

(A) Any civil action wherein judges of county courts have jurisdiction;

(B) Any action for the recovery of money or personal property of which the court of common pleas has jurisdiction;

(C) Any action based on contract to determine certain rights and remedies;

(D) Any action or proceeding for the sale of personal property under mortgage, lien or other charge;

(E) Any action or proceeding to enforce collection of its own judgments;

(F) Interpleader proceedings--i.e. whereby two or more persons claim the same thing and a third, laying no claim to it but ignorant of which of the claimants has a right to it, may commence a proceeding that requires the other two or more to litigate their claims as between themselves;

(G) Replevin--i.e. to recover the possession of specific goods;

(H) Forcible entry and detainer--e.g. eviction from real estate and its repossession.

The same section recognizes other specific jurisdiction of the Cleveland municipal court in actions involving real estate--liens upon, mortgage foreclosure, and recovery--as well as jurisdiction to enjoin the violations of city ordinances and regulations.

Municipal judges are given specific powers by Revised Code section 1901.14 to perform marriages, take acknowledgements, administer oaths, and "perform any other duties which are conferred upon judges of county courts." They may also adopt rules of practice and procedure and rules for selection of jurors and relating to court administration.

Additional powers related to the actions and proceedings over which municipal courts have subject matter jurisdiction are also specifically conferred by statute, in section 1901.13 of the Revised Code.

A municipal court has jurisdiction over various kinds of civil law suits not enumerated in Revised Code section 1901.18. The references to its jurisdiction in any civil action wherein judges of county courts have jurisdiction and actions for the recovery of money of which the court of common pleas had jurisdiction have been construed as amplifications of not limitations on the power to hear and determine various kinds of actions. Such a provision as is found in section 1901.18 (A) has been interpreted as not denying jurisdiction to municipal court in cases in which county court judges are specifically denied jurisdiction by statute, discussed below. Thus county courts may not hear actions based on assault and battery or in which the title to real estate is drawn in question regardless of the amount in controversy whereas the jurisdiction of municipal courts in these two areas has been judicially recognized.

In addition to the diversity that exists as to minor court arrangements in the various counties (resulting in greater or lesser burdens upon the court of common pleas) statutory provisions relating to each particular set of courts contain inconsistencies. For example, although Revised Code section 1901.18 gives a municipal court jurisdiction within its territory in any civil action where judges of county courts have jurisdiction (although for the recovery of greater amounts), Revised Code section 1901.19 recognizes certain county-wide "jurisdictional powers," having to do with compelling witnesses to attend proceedings and with taking actions relative to the court's enforcement of its own judgments. Paragraph (D) of that section recognizes county-wide jurisdiction of municipal courts in "any civil action or proceeding at law in which the subject matter of the action or proceeding is located within the territory or when the defendant or some one of the defendants resides or is served within the territory." As might be expected the courts have had to interpret this somewhat ambiguous provision.

In 1962 the Ohio supreme court held in Gastaldo v. Parker Appliance Co., 173 Ohio

St. 181 that an action to recover for claimed negligence in a particular territory where such negligence is claimed to have proximately caused injury in that territory is an action in which "the subject matter of the action. . . is located within the territory" as those words are used in Section 1901.19 (D) of the Revised Code.

A court of appeals two years later faced the issue of whether the Bedford municipal court had jurisdiction over a case for personal injuries resulting from the negligent operation of the defendant's automobile in Warrensville Heights (in which the Bedford court has territorial jurisdiction) where the defendant resided in another county. The court held that it did because under Section 1901.19 (D) the Bedford court had jurisdiction of the subject matter, the collision having occurred within its territory. Jacubenta v. Dunbar, 120 Ohio App. 249 (1964).

In 1966 a municipal court held that where an automobile accident occurred within the territorial jurisdiction of the Akron municipal court and the defendants resided within the county but outside the territorial jurisdiction of that court, the Akron court has jurisdiction of the subject matter, and the defendants could be served anywhere within the county. Carbin v. Major, 8 Ohio Misc. 176, 37 Ohio Ops. 2d 255 (Mun. 1966).

In a 1967 case adjudicated by the municipal court of Shaker Heights for damages arising out of a collision that occurred within the county but outside the municipal boundaries of any of the municipalities over which the Shaker Heights court has jurisdiction, one defendant resided in Shaker Heights and the other defendant was a resident of the county but not of any of the municipalities over which the Shaker Heights court has jurisdiction. When a jury verdict ruled in favor of the Shaker Heights resident defendant and against the other, the latter moved for judgment notwithstanding the verdict, objecting to the jurisdiction of the court. The court held that although the subject matter of the action was not located within the territory of the court, as in Gastaldo and Carbin, the jurisdictional test of Section 1901.19 (D) was met because one of the defendants "resides or is served with summons in the territory." The objections of the nonterritorial resident defendant were overruled. Yoe v. Warner, 14 Ohio Misc. 34, 43 Ohio Ops. 2d 70 (Mun. 1967)

County Court Structure

As in municipal court territories, the number of county court judges serving within each county court district is subject to a statutory formula. Revised Code section 1907.041 provides for one judge per each 30,000 population or part thereof up to 150,000 population. Thereafter in districts exceeding 150,000 but not exceeding 400,000 (there are no such districts) the district shall have eight judges and in districts exceeding 450,000 the district shall have 12 judges. Pursuant to Revised Code section 1907.042 additional judges--one judge for each 20,000 population--are authorized in districts hearing cases involving motor vehicle violations on the Ohio turnpike.

Revised Code section 1907.071 provides that in counties having more than one county court judge, the common pleas court may divide the county district into areas of separate jurisdiction and may designate the area in which each judge has jurisdiction to the exclusion of any other judge of the district, and the location where each judge holds court. In assigning areas, the court is required to make each area as equal in population to the others in the district as is possible. The court of common pleas may redetermine areas of separate jurisdiction whenever the territory of the county court is reduced by territorial expansion of a municipal court jurisdiction, and if a county court judgeship becomes vacant, the court of common pleas may

redetermine the areas of jurisdiction by changing the number of judges for such district, if necessary, to accord with the statutory population formula. In counties having one county court judge, the area of jurisdiction consists of the entire county court district, and the court of common pleas is required to designate the location where the judge holds court.

Territorial Jurisdiction of a County Court Judge

The jurisdiction of each county court judge is, pursuant to the Code section last mentioned, limited to that judge's area of jurisdiction. However, in specific situations county court judges have county-wide authority. These include: (A) the exercise of miscellaneous powers, such as to administer oaths, take acknowledgements, solemnize marriages, issue subpoenas, proceed against security for costs and bail, issue execution on judgments, and proceed against certain county officers in certain situations, under Revised Code section 1909.02; (B) the hearing of civil actions founded upon a bond or undertaking, referred to Revised Code section 1909.06; (C) the hearing of criminal actions based on violations of particular Revised Code provisions, some obviously obsolete or no longer used, including laws on film censorship (Revised Code section 3305.06) Chatauqua assemblies (Revised Code section 3771.06), intoxication (Revised Code section 3773.22), and building standards (Revised Code section 3781.04).

This discrepancy in jurisdiction is another illustration of the many exceptions and inconsistencies in the statutes that govern courts of limited jurisdiction in Ohio.

Monetary and Subject Matter Jurisdiction of County Courts

Specific civil and criminal jurisdiction of county courts is set forth in various parts of the Revised Code. By virtue of Revised Code section 1909.04 judges of a county courts have "exclusive original jurisdiction in civil actions for the recovery of sums not exceeding five hundred dollars."

Revised Code section 2305.01 provides that the court of common pleas has original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts--i.e. $500 at the present time. This figure has been and can be changed by statutory amendment. Thus the minimum monetary limits of civil jurisdiction for courts of common pleas are set by a section that establishes the exclusive jurisdiction of county courts although only half the counties of the state have a county court district.

Actions "founded upon a bond or undertaking, in any civil proceeding" are recognized by Section 1909.06, which confers jurisdiction coextensive with the county in such matters.

By virtue of Revised Code section 1909.08 and Chapter 1909., county courts, like municipal courts, have jurisdiction in replevin--for the recovery of specific personal property. Subject to monetary limits county court judges have limited jurisdiction in actions in which the title to real estate may be drawn in question--specifically actions for trespass and to recover proportionate survey expenses. Revised Code section 1909.09. Chapter 1923. of the Revised Code gives county courts, like municipal courts, jurisdiction in forcible entry and detainer (eviction and related remedies in limited situations.)

Revised Code section 1909.10 enumerates cases in which county court judges do

not have jurisdiction:

(A) To recover damages for assault or assault and battery;

(B) For malicious prosecution--defined in legal dictionaries as an action begun without probable cause to believe the charges can be sustained, instituted with the intention of injuring the defendant;

(C) Against county court judges or other officers for misconduct in office, except for specific authority in section 1909.02 to proceed against ministerial officers of the court for failure to turn over moneys and to try actions against other county court judges for refusing or neglecting to pay over moneys collected in their official capacity when the amount claimed does not exceed one hundred dollars;

(D) For slander or libel;

(E) On contracts for real estate;

(F) For recovery of title to real estate or in actions in which title may be drawn in question, except as enumerated above and actions for forcible entry and detainer (eviction) that are specifically prescribed by Chapter 1923. of the Revised Code.

This section, depriving county court judges of certain enumerated jurisdiction, had its origin in a comparable provision governing justices of the peace, whom they replaced, and the only interpretations of the various parts deal with jp's and can be found in older cases. The justice of the peace was, however, quite a different brand of public official. He was a township, not county, officer, needed no legal training, and was compensated on the basis of fees rather than by salary, as are county court judges. Ever since January 1, 1963 county courts have had statutory recognition as courts of record, and judges thereof must have been admitted to the practice of law in Ohio and have been engaged in the practice of law for at least one year. The precedents, therefore, would seem to have little value, but like much of the county court law these provisions were merely altered to replace references to justices of the peace with references to county courts.

In summary, county courts lack jurisdiction in cases involving intentional torts and in suits involving contracts for the sale of real estate.

Both municipal and county courts may hear actions in forcible entry and detainer (involving eviction when between landlord and tenant) by specific provisions applicable to the two sets of courts, but the differences in subject matter jurisdiction are well illustrated by a 1964 court of appeals case involving such an action. Here the litigants were not landlord and tenant but vendor and vendee under a land contract. The principal question was whether in an action in municipal court for forcible entry and detainer under terms of the land contract the defendant buyer could assert certain defenses and remedies, and the court held that he could, noting the distinction between county and municipal courts in its opinion. Where an action in forcible entry and detainer is brought upon a contract for real estate the county court, like the justice of the peace court which preceded it, does not have jurisdiction to entertain it. "In contrast to the extremely limited jurisdiction of the justices of the peace, the municipal courts, although courts of limited jurisdiction, are courts having broad

powers to hear and determine all rights, both legal and equitable for complete determination of the rights of the parties," declared the court. Kuhn v. Griffin, 3 Ohio App. 2d 195 (1964).

Criminal Jurisdiction

Revised Code section 1907.012 provides that a county court has "jurisdiction in motor vehicle violations and all other misdemeanors." Jurisdiction on the part of county court to hear municipal ordinance violation cases can be assumed by Revised Code section 1905.32 providing that "(f)ines, penalties, and forfeitures, may, in all cases, and in addition to any other mode provided, be recovered by action before any judge of a county court, or other court of competent jurisdiction, in the name of the proper municipal corporation, and for its use."

Other references to the jurisdiction of county courts are scattered throughout the Code, and are exemplified by the following:

Subject matter	Code Chapter	Court with which county court shares jurisdiction
Bastardy proceedings	3111	juvenile court
Film censorship	3305	mayor, police judge
Health laws	3707	police court, municipal court
Chatauqua assemblies	3771	mayor, police court
Intoxication	3773	none
Building standards	3781	police court, municipal court
Employment agencies	4143	police court, municipal court
Traffic laws regulation equipment and loads	4513	mayor, court of record
Protection of wildlife	1531	police court, municipal court

Revised Code section 1901.21 provides that the municipal court has jurisdiction of ordinance violations of any municipal corporation within its territory and of any misdemeanor committed within the limits of its territory. The same section gives the court jurisdiction in felony cases to discharge, recognize or commit the accused. Recognize is understood to mean take bail or other security for the appearance of the accused at a subsequent date. The court's authority and procedure in felony matters is elaborated below.

Somewhat redundant to this section is one in the criminal code, Revised Code section 2931.041, giving municipal courts jurisdiction in criminal cases to finally try and determine prosecutions for the violation of municipal ordinances and misdemeanor cases, as provided in Chapter 1901. of the Revised Code. The authority of municipal courts in felony cases is there stated to be "the same power as a county court as a committing magistrate . . ."

What is this power as committing magistrate? The term "magistrate" as defined by Revised Code section 2931.01 includes county court judges, police judges or justices (of which it has been noted only one presently exists), mayors, and "judges of other courts inferior to the court of common pleas." Preliminary examination after arrest or pursuant to summons by court or magistrate is the subject of Chapter 2937. of the Revised Code and therefore has application to criminal proceedings in all minor courts.

One accused of a crime--felony or misdemeanor--must be brought before a court or magistrate either pursuant to arrest, or upon summons and notice. Section 2937.02 provides the court or magistrate in all cases to make an opening informative announcement to the accused, including: the nature of the charge and the identity of the complainant, permitting the accused or his counsel to read the affidavit, complaint, or copy; that the accused has the right to have counsel and of the right of continuance to obtain counsel; a statement about the effect of various pleas to the charge; apprising accused of his right to jury trial. If the offense charged is a felony, the accused must be informed of the nature and extent of possible punishment and of his right to have a preliminary hearing.

At the preliminary hearing--the last state felony procedure of the preliminary examination--the prosecutor may state the case for the state and the accused may offer evidence on his own behalf. Under Division (B) of Revised Code section 2937.12, upon conclusion of all the evidence and the statement of the accused, if any, the court or magistrate shall either:

(1) Find that the crime alleged has been committed and that there is probable and reasonable cause to hold or recognize defendant to appear before the court of common pleas of the county or any other county in which venue appears, for trial pursuant to indictment by grand jury;

(2) Find that there is probable cause to hold or recognize defendant to appear before the court of common pleas for trial pursuant to indictment or information on such other charge, felony or misdemeanor, as the evidence indicates was committed by accused;

(3) Find that a misdemeanor was committed and there is probable cause to recognize accused to appear before himself or some other court inferior to the court of common pleas for trial upon such charge;

(4) Order the accused discharged from custody.

The primary issue in felony cases is whether or not probable cause is established. The basis for a finding of probable cause is fixed by statute (Revised Code section 2937.13) and explanations of "probable cause" abound in case law.

Preliminary examination is not a prerequisite for indictment by a grand jury, and discharge of an accused at the preliminary hearing does not prohibit subsequent indictment. However, before indictment an accused may compel a preliminary examination because the procedure is a statutory right.

As to misdemeanor jurisdiction, which extends to trial upon the merits of the charge, a county court judge is declared to be a conservator of the peace and under Revised Code section 2931.02 has jurisdiction in criminal cases throughout his area of jurisdiction. Specifically under that section of the code he may hear breach of the peace complaints, issue search warrants and certain arrest warrants, and within the area of jurisdiction may hear cases involving violations of law relating to: adulteration of food and drugs; prevention of cruelty to animals and children; abandonment, nonsupport or ill treatment of children under 18; employment of children under 14 in certain vocations; the regulation of employment of females and minors; torture, ill treatment or deprivation; liquor control and permits;

illuminating oil in mines; commercial feeds; dust-creating machinery; pharmaceutical regulations, public health, steam boilers; weights and measures; medicine; registered containers; and conservation.

Under Revised Code section 2151.23 the juvenile court has exclusive original jurisdiction over any person under the age of 18 who is alleged to be a juvenile traffic offender--i.e. who violates any traffic law, traffic ordinance, or traffic regulation of the state, the United States, or a political subdivision of the state. Therefore, all cases involving juvenile traffic offenders must be referred to the juvenile court having jurisdiction. Vehicular crimes calling for imprisonment of one year or more (traffic felonies) are within the jurisdiction of the court of common pleas and must be bound over to that court. All other state traffic offenses come within the jurisdiction of minor courts with overlapping jurisdiction in the case of mayors' courts and municipal and county courts.

In state cases involving moving traffic violations within a municipality, the state highway patrol may take the case to the mayor or to the municipal or county court which has territorial jurisdiction. Under Revised Code section 5503.04 all fines collected or money from bonds forfeited by persons arrested by the highway patrol are distributed 45 per cent to the state and 55 per cent to the municipal corporation if the case is prosecuted in a mayor's court. If such prosecution is in a trial court outside a municipal corporation or outside the territorial jurisdiction of a municipal court, such moneys are paid 55 per cent into the county treasury. If prosecution is in a municipal court, 45 per cent of such moneys are paid into the state treasury to be credited to the state highway maintenance and repair fund, 10 per cent to the county treasury, and 45 per cent to the municipal treasury, to be credited to the general fund of such county or municipal corporation.

Changes in the handling of traffic prosecutions could create some problems. If local officers are required to take ordinance cases to branch offices of the court of common pleas or to "judicial officers" as proposed in some recommendations for a unified court at the trial level, they may have a distance as well as availability problem. In state cases municipalities would stand to lose considerable revenues.

However, an observation made in Staff Research Report No. 75 of the Ohio Legislative Service Commission in 1965 (Problems of Judicial Administration) is pertinent. Pointing out that prior to November 6, 1959 mayors within the territory of a municipal court could hear only cases involving ordinance violations and had no jurisdiction in state cases, the report noted that in municipal court territories under this situation arresting officers were required to travel to the nearest municipal court. Twenty-six counties in 1959 had one municipal court with county wide jurisdiction. The state highway patrol reported at that time that in some cases it was necessary to take a violator 20 to 30 miles to get to a municipal court. Nevertheless, "municipal courts were not considered as presenting a major problem to the state highway patrol even where some municipal courts were available for hearings for only a very limited time during the week," and "this situation did not appear to cause serious problems in municipal court territories although municipal courts were the only courts available to highway patrolmen in such areas."

Moreover, with the exception for out-of-state or nonresident drivers, physical arrests are not the normal practice in enforcing traffic laws. More often notices to appear or citation tags are issued. Police officers make physical arrests in felony cases, operating vehicle while under the influence of alcohol or drugs, driving while under suspension or revocation of a driver's license or privilege, leaving the

scene of an accident where injury or fatality is involved, a combination of traffic offense with other offenses, such as disorderly conduct, and reckless driving or multiple offenses, including the effort to evade the officer. In other traffic cases the officer, in his discretion, may use physical arrest.

Furthermore, concluded the staff report:

> "Possible alternative solutions could be provided by legislation. The chief or presiding judge of the unified court in each county or his administrative office could be authorized to designate a local person to take bond in such a situation. The law could permit the posting of bond with designated deputy clerks, bailiffs, or sheriffs. Arresting officers might be empowered to take bonds, using authorized forms"

Since that time the first step towards procedural unification at the minor court level has been taken when in 1967 the Ohio supreme court adopted rules of practice and procedure in traffic cases for all courts inferior to common pleas.

Statutory authority for such rules had existed for some seven years before their adoption. Revised Code section 2935.17 provides in part that the supreme court may by rule provide for the uniform type and language to be used in any affidavit or complaint to be filed in any court inferior to the court of common pleas for violations of the motor vehicle and traffic acts and related ordinances and in any notice to violators to appear in such courts. Moreover, Section 2937.46 provides:

> "The supreme court of Ohio may, in the interest of uniformity of procedure in the various courts, and for the purpose of promoting prompt and efficient disposition of cases arising under the traffic laws of this state and related ordinances, make uniform rules for practice and procedure in courts inferior to the court of common pleas not inconsistent with the provisions of Chapter 2937. of the Revised Code, including, but not limited to:
>
> (A) Separation of arraignment and trial of traffic and other types of cases;
>
> (B) Consolidation of cases for trial;
>
> (C) Transfer of cases within the same county for the purpose of trial;
>
> (D) Designation of special referees for hearings or for receiving pleas or bail at times when courts are not in session;
>
> (E) Fixing of reasonable bonds, and disposition of cases in which bonds have been forfeited.
>
> All of said rules, when promulgated by the supreme court, shall be fully binding on all courts inferior to the court of common pleas and shall effect a cancellation of any local court rules inconsistent therewith."

This section became effective January 10, 1961, prior to the later acquired

constitutional power of the supreme court to make rules governing practice and procedure.

The rules have been credited with updating criminal procedures in courts presided over by magistrates in supplementing the statutory revamping that these procedures received in 1960. As one commentator has noted,[1] only the title of the rules and those provisions relating to the uniform traffic ticket itself are specifically limited to traffic matters. The purposes of the rules, as stated in Rule .02 are "to supplement statutory procedures in providing for a just determination of criminal and traffic cases." (Emphasis added.) The same writer, a member of the committee which worked on the drafting of the rules, called attention to the importance of two rules that regulate official conduct. One is Rule .05, which makes the canons of judicial ethics applicable to any judge, whether or not he is admitted to the bar. Combined with this is Rule .04, which specifically imposes all the obligations of a judge on any mayor or other presiding officer sitting as a court. He also commented: "Whether the presence of the canons will give rise to a suspicion in many mayors' mind that there may be a conflict of interest in serving, simultaneously, as head of the law enforcement arm of his community and as arbiter between that arm and the private citizens against which it files complaints is (a) . . . question. Many mayors are . . . completely oblivious to any ethical problems" raised by such situation. "

Copies of the rules as amended January 4, 1971 are enclosed for committee perusal. Notice is called to Rule .18, authorizing the creation of a traffic violations bureau and the designation of violations referees.

The Review Commission created by these rules is required to consult regularly with the administrative director of the court and the committee should find his views as to progress under the rules a valuable means of evaluating the present situation with respect to the prosecution of moving traffic violations.

The Costs of Operating Minor Courts

Because no single source exists for the collection of statistics concerning municipal or county courts few supported statements can be made about the general operations of either set of courts. Municipal courts have long been acknowledged as revenue producers for the cities in which located. Reports including the receipts and expenditures of civil and criminal branches, respectively, are required to be made annually to the board of county commissioners of each county within its territory by every municipal court, on or before the last day of January. Revised Code section 1901.14 is the source of this requirement. However, even by September the county commissioners had not received the reports of all of the 13 municipal courts in Cuyahoga county. Moreover, until uniform rules are adopted, differences in terminology make comparisons difficult.

1 James G. Frances, "The Ohio Supreme Court's Traffic Rules: A Beginning of Procedural Rule Making" Akron L. Rev. 1 (1967)

It is possible, however, to report on some aspects of court finance, such as judicial salaries, and the extent of supporting personnel that may be provided under statutory authority for each of the 108 separate courts in the state.

Revised Code section 1901.11 provides that part-time judges shall receive not less than $6,000 annually and that full-time judges and all judges where the population is more than 50,000, regardless of designation, shall receive $10,000 plus 12 cents per capita for the first 40,000 and 10 cents per capita for more than 40,000. The compensation of any municipal judge shall not be more than an amount which is $2000 per year less than the statutory compensation of the judge of the court of common pleas in the county in which the municipal court is situated, or $23,000, whichever is smaller.

Pursuant to Revised Code section 1901.09 in municipal courts having 12 or more judges, one shall be designated chief justice and elected as such. In a municipal court having two judges, the judge whose term next expires is presiding judge. In a municipal court having between 3 and 11 judges, the judges select the presiding judge. Section 1901.11 provides for an additional per annum for the presiding judge of $500 and for the chief justice of $1000. Three-fifths of the compensation of a municipal court judge is payable from the city treasury, and two-fifths is payable from the treasury of the county. Where the territory is located in two or more counties, the county portion is pro-rated among counties.

Officials of the municipal court include clerk, deputy clerks, bailiffs, deputy bailiffs, psychiatrists, probation officers, assignment commissioners, deputy assignment commissioners, typists, stenographers, statistical clerks, and official reporters. Revised Code section 1901.311 allows municipal courts to establish branch offices, headed by special deputy clerks. Section 1901.36 requires the legislative authority of the municipal corporation to provide suitable accommodations for the court and its officers, as well as accommodations for a law library, complete sets of reports of supreme and inferior courts and such other law books and publications as are deemed necessary by the presiding judge, and a copy of the Revised Code for each court room. Other employees as are necessary must be provided, as well as necessary form books, dockets, books of record, and all supplies, including telephone, furniture, heat, light and janitor service and such other ordinary or extraordinary expenses as deemed advisable or necessary for proper operation or administration of the court. The duplication of such facilities in some counties could obviously be considerable.

Under Revised Code section 1907.081 county court judges (who are all part-time judges by virtue of the fact that they are permitted to engage in some law practice) are entitled to $3000 plus six cents per capita, and, in addition, under section 1907.082 the board of county commissioners may provide for the payment of a fixed annual amount not to exceed $2000 to each county court judge.

Revised Code section 1907.101 provides that the clerk of courts shall be the clerk of the county court except that the board of county commissioners, with the concurrence of the county court judge or judges, may appoint a clerk for each county court judge. Such appointed clerk serves at the pleasure of the board and receives such compensation as is set by the board. Section 1907.201 authorizes special constables although section 1907.511 designates the county sheriff as the ministerial officer of the county court in all civil and criminal cases in which the court has jurisdiction.

Faults in the Existing Law

1. Overlapping of jurisdiction does exist because, although the legislative purpose appears to have been to make the territorial jurisdiction of county and municipal court mutually exclusive, in some instances both county and municipal courts have countywide jurisdiction. In counties in which both exist (19) or where more than one municipal court exists (20) the possibilities for forum shopping exist. Where the mayor has the option of choosing the court of record to which will be certified jury trial cases now waived in his court, forum choice may have additional adverse effect because it gives the mayor extra leverage in favor of waiver where one court is "tough," another lenient.

2. The jurisdictional exceptions and inconsistencies in the law are bound to cause uncertainty and confusion and add to litigation. Note cases construing the special provisions that relate to municipal court jurisdiction under section 1901.19 (D) of the Revised Code that by somewhat confusing jurisdiction to hear a case and the jurisdictional power of a court to obtain good service of process and thus jurisdiction of the person have resulted in several actions requiring judicial interpretation of the exception there provided. To the general exceptions and inconsistencies must be added the special ones, such as provisions in the Revised Code, that give certain courts added monetary jurisdiction to some courts and give the Cleveland municipal court jurisdiction over actions and proceedings that may not be heard in other municipal courts.

3. Table B reveals that 20 counties have more than one municipal court. The extreme example is Cuyahoga county, with 13 courts. Obviously, duplication of costs results. See portion of this memorandum having to do with personnel and court accommodations. The expenses of running minor courts is borne locally--usually in the case of municipal courts by city and county. Lack of adequate social services (e.g. adequate probate services) in a municipal court has been deplored in a recent law review article, based upon a statistical survey illustrating the role that poverty plays in the outcome of cases involving misdemeanors in municipal courts, and demonstrating the signification of race and the presence or absence of an attorney in hearings in such courts.[2]

4, A plethora of studies concerning Ohio courts and judicial administration as well as the many works dealing solely with the administration of criminal justice in Ohio have criticized the fact that the number of judgeships in this state is based upon an arbitrary statutory formula and not upon demonstrated need. Unification would obviously facilitate the allocation of judicial manpower on the basis of periodic necessity.

5. Particularly frustrating to the would be reporter of the status quo in Ohio courts is the lack of centralized data concerning the minor courts and the absence of uniformity in reporting what insufficient statistical material is required.

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2 Lewis R. Katz, "Municipal Courts - Another Urban Ill," 20 Case W.R.L. Rev. 87 (1968)

6. Because some counties have municipal courts and others have courts that derived from the justice of the peace court and hence have less prestige, state court services are neither equal nor uniformly adequate. Some courts are overstaffed, some understaffed. Some judges have adequate assistance, others, little or none. Disparate salary levels and hiring practices do affect the quality of judicial service, and this must vary, according to the locality's ability to pay. Unitary budgeting is a subject that deserves independent research, but the ABA Commission on Standards of Judicial Administration makes sense in its supporting study on court finance and unitary budgeting when it observes that court finance is simply the fiscal counterpart of court administration and that when a court system is administratively and functionally integrated, the budget expresses the means by which the various activities of the system are to be carried out. When a system is not administratively integrated, its budget is a formal but not a functional document. It simply aggregates expenditures for activities that are only nominally related to each other.

7. The operation of mayors' courts still raises important questions of the propriety of allowing persons untrained in the law to make decisions that may result in imprisonment and the conflict of interest questions that were raised by the Ward case discussed herein.

8. Related to the point that courts of limited jurisdiction generally have either no or inadequate probationary and auxiliary services is the point made by the President's Commission on Law Enforcement and Administration in its Task Force Report on the Courts: "In many respects," its authors argued, "the distinction between felonies and misdemeanors is an artificial one. Misdemeanants are sometimes liable to lengthy imprisonment, and a large percentage of these offenders are initially charged with felonies which were reduced to misdemeanors as a result of plea bargaining; they may represent the same danger to society and the same need for rehabilitative measures as those processed through the felony courts."

Ohio Constitutional Revision Commission
Judiciary Committee
August 16, 1973

TABLE A

Ohio Municipal Courts
Population and Judicial Personnel
(County underlined means one county-wide municipal court)

Muni. Ct.	County	Pop'n Served	No. of Judges	Full/ Part-time	Pop'n per Judge (nearest 1000)
Akron	Summit	322,520	5[a]	F	65
Alliance	Stark	47,418	1	F	47
Ashland	Ashland	43,303	1	F	43
Ashtabula	Ashtabula	40,506	1	F	41
Athens	Athens	54,889	1	F	55
Avon Lake	Lorain	60,108	1	P	60
Barberton	Summit	115,754	2	F	58
Bedford	Cuyahoga	79,442	1	P	79
Bellefontaine	Logan	35.072	1	P	35
Bellevue	Huron[b]	12,155	1	P	12
Berea	Cuyahoga	92,064	1	P	92
Bowling Green	Wood	51,417	1	P	51
Bryan	Williams	33,669	1	F	34
Cambridge	Guernsey	37,665	1	F	38
Campbell	Mahoning	14,869	1	P	15
Canton	Stark	218,186	3	F	73
Celina	Mercer	35,265	1	F	35
Chardon	Geauga	62,977	1	P	63
Chillicothe	Ross	61,211	1	F	61
Circleville	Pickaway	40,071	1	F	40
Cleveland	Cuyahoga	752,516	13	F	58
Cleveland Heights	Cuyahoga	60,767	1	F	61
Conneaut	Ashtabula	14,522	1	F	15
Coshocton	Coshocton	33,486	2	F	17
Cuyahoga Falls	Summit	136,701	2	F	68
Dayton	Montgomery	243,601	5	F	49
Defiance	Defiance	36,949	1	F	37
Delaware	Delaware	42,908	1	F	43
East Cleveland	Cuyahoga	39,600	1	F	40
East Liverpool	Columbiana	23,698	1	F	24
Eaton	Preble	34,719	1	P	35
Elyria	Lorain	96,303	1	F	96
Euclid	Cuyahoga	71,552	1	F	72
Fairborn	Green	38,474	1	P	38
Fairfield	Butler	14,680	1	P	15

Findlay	Hancock	59,400	1	F	59
Fostoria	Seneca[c]	22,902	1	P	23
Franklin	Warren	25,963	1	P	26
Franklin County	Franklin	833,249	12[a]	F	69
Fremont	Sandusky	29,007	1	P	29
Gallipolis	Gallia	25,239	1	P	25
Garfield Heights	Cuyahoga	99,873	1	F	100
Girard	Trumbull	47,163	1	F	47
Hamilton	Butler	79,627	1	F	80
Hamilton County	Hamilton	924,018	10[a]	F	92
Hillsboro	Highland	22,238	1	P	22
Huron	Erie	8,298	1	P	8
Ironton	Lawrence	27,232	1	F	27
Kenton	Hardin	21,699	1	P	22
Kettering	Montgomery	98,994	1	F	99
Lakewood	Cuyahoga	70,173	1	F	70
Lancaster	Fairfield	73,301	1	F	73
Lebanon	Warren	14,635	1	P	15
Licking County	Licking	107,799	2[a]	F	54
Lima	Allen	111,144	2[a]	F	56
Lorain	Lorain	95,698	1	F	96
Lyndhurst	Cuyahoga	62,960	1	P	63
Mansfield	Richland	110,677	2[a]	F	55
Marietta	Washington	57,160	1	F	57
Marion	Marion	64,724	1	F	65
Marysville	Union	23,786	1	P	24
Mason	Warren	12,317	1	P	12
Massillon	Stark	106,606	2[a]	F	53
Maumee	Lucas	32,546	1	F	33
Medina	Medina	65,204	1	F	65
Mentor	Lake	43,429	1	F	43
Miamisburg	Montgomery	50,983	1	P	51
Middletown	Butler	70,250	1	F	70
Mount Vernon	Knox	41,795	1	F	42
Napoleon	Henry	27,058	1	P	27
Newton Falls	Trumbull	24,568	1	F	25
Niles	Trumbull	31,769	1	F	32
Oakwood	Montgomery	10,095	1	P	10
Oberlin	Lorain	40,481	1	P	40
Oregon	Lucas	20,206	1	F	20
Painesville	Lake	59,926	1	F	60
Parma	Cuyahoga	179,192	3[a]	F	60
Perrysburg	Wood	35,818	1	P	36
Piqua	Miami	26,146	1	P	26
Portage	Portage	125,878	2	F	63

Port Clinton	Ottawa	37,099	1	F	37
Portsmouth	Scioto	76,951	1	F	77
Rocky River	Cuyahoga	113,984	2[a]	F	57
Sandusky	Erie	44,968	1	F	45
Shaker Heights	Cuyahoga	69,598	1	F	70
Shelby	Richland	19,320	1	P	19
Sidney	Shelby	37,748	1	P	38
South Euclid	Cuyahoga	29,579	1	P	30
Springfield	Clark	137,115	2	F	79
Steubenville	Jefferson	30,771	1	F	31
Struthers	Mahoning	37,260	1	P	37
Sylvania	Lucas	42,308	1	F	42
Tiffin	Seneca	45,195	1	F	45
Toledo	Lucas	390,234	6[a]	F	65
Troy	Miami	28,731	1	F	29
Upper Sandusky	Wyandot	21,826	1	P	22
Urbana	Champaign	30,491	1	P	30
Vandalia	Montgomery	75,037	1	F	75
Van Wert	Van Wert	29,194	1	F	29
Vermilion	Erie	15,244	1	P	15
Warren	Trumbull	100,319	2[a]	F	50
Washington C.H.	Fayette	25,461	1	P	25
Willoughby	Lake	99,574	1	F	100
Wilmington	Clinton	31,464	1	P	31
Wooster	Wayne	87,123	1	F	87
Xenia	Greene	33,285	1	P	33
Youngstown	Mahoning	140,909	3	F	47
Zanesville	Muskingum	33,045	1	F	33
TOTAL			170		

a Number of judges presiding exceeds the specific number prescribed by Revised Code 1901.08 for each court, as a result of the operation of Revised Code 1901.05, which fixes a statutory formula of one judge for any portion of the first 100,000 inhabitants and one additional judge for each additional 70,000 inhabitants or part thereof and declares such offices thereby created.

b Bellevue municipal court has jurisdiction in Huron and Sandusky counties. For purposes of this table, judge allocated to Huron county.

c Fostoria municipal court has jurisdiction in Hancock, Seneca and Wood counties. For purposes of this table, judge allocated to Seneca county.

TABLE B

MUNICIPAL COURTS WITH JURISDICTION BEYOND CORPORATE LIMITS

Court	County	Judges	County Court	Other Municipal Courts
Akron	Summit	5	No	Yes (2)
Alliance	Stark	1	No	Yes (2)
Ashland	Ashland	1	No	No
Ashtabula	Ashtabule	1	Yes	Yes (1)[a]
Athens County	Athens	1	No	No
Avon Lake	Lorain	1	No	Yes (4)
Barberton	Summit	2	No	Yes (2)
Bedford	Cuyahoga	1	No	Yes (12)[b]
Bellefontaine	Logan	1	No	No
Bellevue	Huron	1	Yes	No
"	Sandusky		Yes	Yes (1)
Berea	Cuyahoga	1	No	Yes (12)[b]
Bowling Green	Wood	1	No	Yes (2)
Bryan	Williams	1	No	No
Cambridge	Guernsey	1	No	No
Campbell	Mahoning	1	Yes	Yes (2)[c]
Canton	Stark	3	No	Yes (2)
Celina	Mercer	1	No	No
Chardon	Geauga	1	No	No
Chillicothe	Ross	1	No	No
Circleville	Pickaway	1	No	No
Cleveland	Cuyahoga	13	No	Yes (12)[b]
Coshocton	Coshocton	2	No	No
Cuyahoga Falls	Summit	2	No	Yes (2)
Defiance	Defiance	1	No	No
Delaware	Delaware	1	No	No

East Liverpool	Columbiana	1	Yes	No
Eaton	Preble	1	No	No
Elyria	Lorain	1	No	Yes (4)
Fairborn	Greene	1	Yes	Yes (1)
Findlay	Hancock	1	No	Yes (1)
Fostoria	Hancock	1	No	Yes (1)
"	Seneca		No	Yes (1)
"	Wood		No	Yes (2)
Franklin	Warren	1	Yes	Yes (2)
Franklin County	Franklin	12	No	No
Fremont	Sandusky	1	Yes	Yes (1)
Gallipolis	Gallia	1	No	No
Garfield Heights	Cuyahoga	1	No	Yes (12)[b]
Girard	Trumbull	1	Yes	Yes (3)
Hamilton	Butler	1	Yes	Yes (2)[d]
Hamilton County	Hamilton	10	No	No
Hillsboro	Highland	1	Yes	No
Huron	Erie	1	Yes	Yes (2)
Ironton	Lawrence	1	Yes	No
Kenton	Hardin	1	Yes	No
Kettering	Montgomery	1	Yes	Yes (4)[e]
Lancaster	Fairfield	1	No	No
Lebanon	Warren	1	Yes	Yes (2)
Licking County	Licking	2	No	No
Lima	Allen	2	No	No
Lorain	Lorain	1	No	Yes (4)
Lyndhurst	Cuyahoga	1	No	Yes (12)[b]
Mansfield	Richland	2	Yes	Yes (1)
Marietta	Washington	1	No	No

Marion	Marion	1	No	No
Marysville	Union	1	No	No
Mason	Warren	1	Yes	Yes (2)
Massillon	Stark	2	No	Yes (2)
Maumee	Lucas	1	No	Yes (3)
Medina	Medina	1	Yes	No
Mentor	Lake	1	No	Yes (2)
Miamisburg	Montgomery	1	Yes	Yes (4)[e]
Middletown	Butler	1	Yes	Yes (2)[d]
Mount Vernon	Knox	1	No	No
Napoleon	Henry	1	No	No
Newton Falls	Trumbull	1	Yes	Yes (3)
Niles	Trumbull	1	Yes	Yes (3)
Oberlin	Lorain	1	No	Yes (4)
Oregon	Lucas	1	No	Yes (3)
Painesville	Lake	1	No	Yes (2)
Parma	Cuyahoga	3	No	Yes (12)[b]
Perrysburg	Wood	1	No	Yes (2)
Piqua	Miami	1	No	Yes (1)
Portage County	Portage	2	No	No
Port Clinton	Ottawa	1	No	No
Portsmouth	Scioto	1	No	No
Rocky River	Cuyahoga	2	No	Yes (12)[b]
Sandusky	Erie	1	Yes	Yes (2)
Shaker Heights	Cuyahoga	1	No	Yes (12)[b]
Shelby	Richland	1	Yes	Yes (1)
Sidney	Shelby	1	No	No
Springfield	Clark	2	No	No

Struthers	Mahoning	1	Yes	Yes (2)[c]
Sylvania	Lucas	1	No	Yes (3)
Tiffin	Seneca	1	No	Yes (1)
Toledo	Lucas	6	No	Yes (3)
Troy	Miami	1	Yes	Yes (1)
Upper Sandusky	Wyandot	1	No	No
Urbana	Champaign	1	No	No
Vandalia	Montgomery	1	Yes	Yes (4)[e]
Van Wert	Van Wert	1	No	No
Vermilion	Erie	1	Yes	Yes (2)
"	Lorain		No	Yes (4)
Warren	Trumbull	1	Yes	Yes (3)
Washington C.H.	Fayette	1	No	No
Willoughby	Lake	1	No	Yes (2)
Wilmington	Clinton	1	No	No
Wooster	Wayne	1	No	No
Xenia	Greene	1	Yes	Yes (1)

a - Conneaut is the other municipal court in Ashtabula county, with jurisdiction within its corporate boundaries only.

b - Municipal courts in Cuyahoga county having no jurisdiction beyond their corporate boundaries are Cleveland Heights, East Cleveland, Euclid, Lakewood, South Euclid.

c - Youngstown municipal court in Mahoning county has jurisdiction within its corporate boundaries only.

d - Fairfield municipal court in Butler county has jurisdiction within its corporate boundaries only.

e - Dayton and Oakwood municipal courts in Montgomery county have jurisdiction within corporate boundaries only.

Other municipal courts not shown on this table are Steubenville (Jefferson county) and Zanesville (Muskingum) with jurisdiction within their corporate boundaries only.

Ohio Constitutional Revision Commission
Judiciary Committee
September 26, 1973

State Trial Court Districts : A Survey

In recent years, judicial reform advocates have been increasingly concerned with restructuring trial courts of general jurisdiction--such as the Common Pleas Courts in Ohio--in order to improve the efficiency of the administration of justice, particularly with respect to the distribution of the judicial workload, that is, the number of cases or matters assigned to each trial judge. This memorandum will focus on three constitutional aspects of trial court structure: (1) the theoretical advantage of the existence of a single trial court with statewide jurisdiction over the existence of separate trial courts covering designated areas within a state, (2) the bases for trial court districting (as distinguished from the one-court-per-county concept now prescribed by the Ohio Constitution) and (3) the locus of the power to create, alter or abolish trial court districts. The memorandum is based on a survey of 22 state constitutions other than that of Ohio, each of whose judicial article has been either adopted or extensively amended since 1945. The states surveyed were Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, and Wyoming.

Trial courts of statewide jurisdiction are relatively rare. Of the states surveyed, only Alaska, Michigan, New Jersey and South Carolina appear to have such courts. These courts are, of course, divided into trial court districts. The other states do not have trial courts of statewide jurisdiction but instead have separate trial courts covering designated areas of the state. The claimed advantages of a single trial court of statewide jurisdiction are those of administrative simplicity, particularly the ease with which cases may be transferred from one court to another and the ease with which judges may be assigned where needed.[1] However, if the supreme court or the judicial council of a state which has separate trial courts has sufficient latitude in the assignment of judges and transfer of cases, and in its power to make administrative rules, the theoretical advantage of a single, statewide trial court over separate trial courts is minimized or eliminated. All of the states surveyed have centralized the administration of their judicial systems by constitutional mandate and, as the Advisory Commission on Intergovernmental Relations concludes, the centralization of administration "suggests that this is the key to unification in the minds of many authorities."[2] Therefore, if centralization of administrative authority exists, the question of whether or not there is a single trial court of statewide jurisdiction would not seem to be of overriding significance.

Of the 22 constitutions surveyed, 17 either permit or mandate that their respective states be divided into trial court districts,[3] and 5 constitutions are silent on the point.[4] However, in the latter group, three states have created trial court districts by law,[5] so that, in total, 20 of the 22 states whose constitutions were surveyed have trial court districts.

Traditionally, trial court districts are created along county lines. Some constitutions merely require that the state be divided into such districts, and permit the legislature to specify the counties included in each district.[6] Other constitutions specifically enumerate the counties encompassed in each district.[7]

Very few states depart from the county-line concept for establishing district boundaries. Alaska, the most notable exception, has established trial court districts based on state election districts as these were described in the state constitution on March 19, 1959.[8] And the Illinois Constitution of 1970 provides that ". . . the

legislature is authorized to provide for the division of a circuit for the purpose of selection of Circuit Judges and for the selection of Circuit Judges from the circuits at large."[9] It has been said that "this authority embraces more than the single county and multicounty circuit into county units. It clearly permits single county and multicounty circuits to be divided without regard to county lines."[10]

In California, trial court districts may, in effect, be created by local agreement. While the Constitution provides that there shall be a general trial court (a Superior Court) in each county, a judge of such a court can serve more than one county if the "governing authority" of each county concurs.[11]

The most common constitutional standard for determining the size of trial court districts is that they be formed of "compact and contiguous territory." Another standard which has received increasing attention is that such districts be established with regard to the amount of business thrust upon a particular court. Thus, the Michigan Constitution of 1963 states that "circuits shall be created, altered and discontinued on recommendation of the supreme court to reflect changes in judicial activity."[12] This same concept was contained in the draft proposal for a new South Carolina Constitution submitted to the South Carolina General Assembly by the Committee to Make a Study of the South Carolina Constitution. That Committee proposed a provision that the General Assembly divide the state into 16 judicial circuits "of reasonably equal volume of judicial business."The Committee also proposed that the General Assembly be given the power to provide for the election of not more than five trial court judges on an at-large basis for assignment by the Chief Justice.[13] The legislature rejected the "judicial business" criterion as being "too idealistic," although it did concur in the concept of electing some trial judges at large, and that concept is part of the new judicial article adopted in South Carolina in 1972. However, according to the South Carolina Legislative Service, it is possible that the authority granted by this provision will not be implemented, because the General Assembly has the alternative of creating as many judgeships in each circuit as it deems advisable--an alternative it is more likely to follow.

On the question of who has the authority to create, alter and abolish trial court districts, the surveyed constitutions display a marked variety. For example, a South Dakota provision adopted in 1972 states that "/t/he circuit courts consist of such number of circuits and judges as the Supreme Court determines by rule."[14] However, this apparently blanket authority is considerably circumscribed by South Dakota law, which provides that although the court may change the boundaries of circuits it cannot increase them, and if it decreases the number of circuits, such a change cannot work the removal of a judge during his term. Additionally, the statute prescribes the number of circuits, their territorial limits, and the number of judges.[15] In contrast to the South Dakota provision, which purports to give the power to the Supreme Court, the Pennsylvania Constitution merely provides that "/t/he number and boundaries of judicial districts shall be changed by the General Assembly only with the advice and consent of the Supreme Court."[16]

No constitutional provision involves the judiciary more continually and profoundly in the evaluation and alteration of the entire court system than Article 5, Section 9 of the Florida Constitution, adopted in 1972. It reads as follows:

> "The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits. If the supreme court finds that

> a need exists for increasing or decreasing the number of judges or increasing, decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need. Upon receipt of such certificate, the legislature, at the next regular session, shall consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part; provided the legislature may create more judicial offices than are recommended by the supreme court or may decrease the number of judicial offices by a greater number than recommended by the court only upon a finding of two-thirds of the membership of both houses of the legislature, that such a need exists. A decrease in the number of judges shall be effective only after the expiration of a term. If the supreme court fails to make findings as provided above when need exists, the legislature may by concurrent resolution request the court to certify its findings and recommendations and upon the failure of the court to certify its findings for nine consecutive months, the legislature may, upon a finding of two-thirds of the membership of both houses of the legislature that a need exists, increase or decrease the number of judges or increase, decrease or redefine appellate districts and judicial circuits.

Traditionally, decisions as to the number of trial court districts, and other questions of court organization, have been considered legislative matters. In the matter of trial court districts, for example, the legislative prerogative to change such districts has been recognized in state constitutions even in instances when the constitutions set forth the areas (invariably counties) which were to comprise the districts originally.[17] However, as the above provision of the Florida Constitution illustrates in particular, there is a growing awareness among writers of constitutional provisions that matters of court structure and administration are more appropriately solved by cooperation between the legislature and judiciary branches, with formal recognition of the duty of the judicial branch to participate in its own reform.

FOOTNOTES

1 See Roscoe Pound, "Principles and Outlines of a Modern Unified Court Organization", Journal of the American Judicature Society, 23 (1940) pp. 225-233.

2 Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, Report A-38 (Washington: U. S. Government Printing Office, 1971) p. 187.

3. Permit: California, Michigan, Missouri; mandate: Alaska, Colorado, Florida, Idaho, Illinois, Kansas, Minnesota, Montana, Nebraska, Oklahoma, Pennsylvania, South Carolina, South Dakota, Wyoming.

4 Connecticut, Hawaii, New Hampshire, New Jersey, Virginia.

5 Hawaii, New Jersey, Virginia.

6 e.g. Colorado, Art. VI, Sec. 10; Michigan, Art. VI, Sec. 11.

7 e.g. Montana, Art. VIII, Sec. 13.

8 A. S. Sec. 22.10.010.

9 Illinois Art. VI, Sec. 7 (a).

10 Rubin G. Cohen, "The Illinois Judicial Department--Change Effected by the Constitution of 1970," 2 Illinois Law Forum 835, 836 (1971)

11 California Art. VI, Sec. 4.

12 Michigan Art. VI, Sec. 11.

13 Proposed Article V, Section I, Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895,p. 64 (1969).

14 South Dakota Article V, Section 3.

15 S.D.C.L. 1967 16-5-11 et seq.

16 Pennsylvania Art. 5, Sec. 11, 1968 Amendment.

17 Montana Art. VIII, Secs. 13 and 14.

Ohio Constitutional Revision Commission
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Clerk of Courts and Clerk of Municipal Courts

County Clerk

As the Constitution requires the establishment of a court of common pleas in every county, statutes provide for the office of clerk of the court of common pleas in every county of the state. Chapter 2303 of the Revised Code requires that such clerk be elected every four years and sets forth in a general way the duties that attach to the office of clerk. The clerk must provide bond to the state, guaranteeing to "enter and record all the orders, decrees, judgments and proceedings of the courts of which he is the clerk, pay over all moneys received by him in his official capacity, and faithfully and impartially discharge the duties of his office." The expense of such bond is to be paid by the county commissioners. Powers and duties of the clerk include administering oaths and certifying written documents; indorsing, filing and preserving court papers; keeping an appearance docket, trial docket, journal, and execution docket, as well as indexes thereto; and making complete court records. Section 2303.26 provides:

> "The clerk of the court of common pleas shall exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law; and in the performance of his duties he shall be under the direction of his court."

Additional duties related to judicial proceedings are to be found in other parts of the Revised Code that govern such special proceedings.

By virtue of Section 2303.03 the clerk of the court of common pleas in each county also serves as clerk of the court of appeals of such county.

The salary of each clerk is fixed by Section 325.08 of the Revised Code and is dependent upon the population range of the county in which such clerk is elected. Under that section the minimum annual compensation is $6600 in counties with a population not exceeding 15,000, and the maximum is $19,260 in counties with a population of 1,500,000 and over. Only the clerk of the court of Cuyahoga county falls into the latter category, as shown by the table showing salaries of prosecuting attorney and clerk of courts in each county.

Under Section 325.17 of the Revised Code the clerk may appoint and employ deputies, assistants, clerks, bookkeepers, or other employees, and fix their compensation, not to exceed in the aggregate the amount fixed by the board of county commissioners.

The clerk of the court of common pleas has a number of statutory duties and responsibilities that are not related to the operation of the court or the execution of its orders and judgments. A major responsibility of the clerk in this category is that of the issuance of certificates of title to motor vehicles. Applications for such certificates must be made to the clerk, and the clerk must also maintain a file of such certificates. See R. C. Sections 4505.06, 4505.08, and 4505.09.

Other responsibilities not strictly related to judicial proceedings in the court of common pleas or court of appeals are, along with judicial duties, scattered

throughout the code. As examples of responsibilities that are not court related, the clerk is required to:

(1) record commissions of notaries public - R. C. 147.05

(2) serve as member of the county records commission, the functions of which are to provide for retention and disposal of public records - R. C. 149.38

(3) approve plans and specifications for courthouse or jail construction or improvement - R. C. 153.36

(4) record surveys of county lines - R. C. 307.33

(5) record certificates of election of certain municipal officers - R. C. 733.16

(6) approve the official bond of a mayor of a municipality in certain cases - R. C. 733.70

(7) issue hunting and trapping licenses - R. C. 1533.13

(8) record accounts of educational corporations - R. C. 1713.29

(9) file certificates of formation of limited partnerships - R. C. 1781.02

(10) file certificates of partnerships and maintain registers of names of partnerships and members thereof - R. C. 177.02 and 177.05

(11) file and preserve for two years pollbooks, poll lists, and tally sheets after general and special elections - R. C. 3505.31

(12) file and maintain certified lists of officers, enlisted men, and contributing members of the Ohio National Guard - R. C. 5919.19 and 5919.20.

Clerk of the Municipal Court

The subject of Section 1901.31 is the clerk of the municipal court. In territories in which the population exceeds 100,000 a clerk of the municipal court is elected for a six-year term. In the counties of Hamilton and Portage the clerk of courts (i.e. of the court of common pleas and appeals) also serves as clerk of the countywide municipal court in each of these counties. Provisions are made for an assistant clerk in Hamilton county and chief deputy clerks in Portage county.

In territories in which the population is less than 100,000 the clerk is appointed by the court, to hold office unless a successor is appointed. The statute provides an exception for the courts of Lorain, Alliance and Massillon where the court is to be elected. The Massillon court, presently serving a population of more than 100,000 would not need to be included within this exception. The population of the Alliance court is 47,418 and of the Lorain court is 95,698.

A vacancy in the office of an elective clerk is temporarily filled by appointment of the court, with provision for a successor to be elected to fill the office for the unexpired term at the first municipal election held more than 120 days after the vacancy occurs.

In territories having a population of less than 100,000 the clerk receives such compensation as the legislative authority prescribes. In territories having a population of 100,000 or more the clerk's compensation is set at 85 per cent of the salary of the municipal judge. The clerk's compensation may not exceed that of the clerk of courts of the county in which the municipal court is located.

Like the clerk of courts, the municipal court clerk is required to furnish bond, conditioned upon the faithful performance of his duties.

The powers and duties of a municipal court clerk are all court-related and include powers to administer oaths, take affidavits, issue executions upon any judgment, sign all papers issuing out of the court, attach the court seal, approve sureties fixed by the court or by law and to keep court journals, records, books and papers. The preparation and maintenance of a general index, a docket, and such other records as the court requires are specifically enumerated as duties of the clerk. He is responsible for receiving and disbursing costs, fees, fines, penalties, bail, and other moneys payable to the office of clerk of office of court and to keep specified records of receipts and disbursements.

By virtue of division (H) of Section 1901.31, the clerk may appoint deputy clerks, compensated out of the city treasury.

Salaries

County	Population	Prosecuting Attorney	Clerk of Courts
Adams	18,957	$ 5,460	$ 6,840
Allen	111,144	12,840	13,800
Ashland	43,303	8,520	9,120
Ashtabula	98,237	11,760	12,720
Athens	55,747	9,420	10,200
Auglaize	38,602	7,380	8,100
Belmont	80,917	10,860	12,000
Brown	26,635	6,600	7,680
Butler	226,207	14,760	14,760
Carroll	21,579	6,240	7,440
Champaign	30,491	7,020	7,920
Clark	157,115	13,800	14,280
Clermont	95,887	11,760	12,720
Clinton	31,464	7,020	7,920
Columbiana	108,310	12,600	13,560
Coshocton	33,486	7,020	7,920
Crawford	50,364	9,180	9,840
Cuyahoga	1,721,300	21,600	19,260
Darke	49,141	8,940	9,360
Defiance	36,949	7,380	8,100
Delaware	42,908	8,520	9,120
Erie	75,909	10,260	11,520
Fairfield	73,301	10,260	11,520
Fayette	25,461	6,600	7,680
Franklin	833,249	19,800	18,060
Fulton	33,071	7,020	7,920
Gallia	25,239	6,600	7,680
Geauga	62,977	9,720	10,560
Greene	125,057	13,560	14,220
Guernsey	37,665	7,380	8,100
Hamilton	923,205	19,800	18,060
Hancock	61,217	9,720	10,560
Hardin	30,813	6,600	7,680
Harrison	17,013	5,460	6,840
Henry	27,058	6,600	7,680
Highland	28,996	6,600	7,680
Hocking	20,322	6,240	7,440
Holmes	23,024	6,240	7,440
Huron	49,587	8,940	9,360
Jackson	27,174	6,600	7,680

Jefferson	96,193	11,760	12,720
Knox	41,795	8,520	9,120
Lake	197,200	14,400	14,700
Lawrence	56,868	9,420	10,200
Licking	107,799	12,600	13,560
Logan	35,072	7,380	8,100
Lorain	256,843	15,480	14,760
Lucas	484,370	18,000	16,200
Madison	28,318	6,600	7,680
Mahoning	304,545	16,680	14,940
Marion	64,724	9,720	10,560
Medina	82,717	10,860	12,000
Meigs	19,799	6,420	7,440
Mercer	35,558	7,380	8,100
Miami	84,342	10,860	12,000
Monroe	15,739	5,460	6,840
Montgomery	608,413	19,200	17,460
Morgan	12,375	5,040	6,600
Morrow	21,348	6,240	7,440
Muskingum	77,826	10,560	11,760
Noble	10,428	5,040	6.600
Ottawa	37,099	7,380	8,100
Paulding	19,329	5,460	6,840
Perry	27,434	6,600	7,680
Pickaway	40,071	7,380	8,100
Pike	19,114	5,460	6,840
Portage	125,868	13,320	14,160
Preble	34,719	7,020	7,920
Putnam	31,134	7,020	7,920
Richland	129,997	13,560	14,220
Ross	61,211	9,720	10,560
Sandusky	60,983	9,720	10,560
Scioto	76,951	10,560	11,760
Seneca	60,696	9,420	10,200
Shelby	37,748	7,380	8,100
Stark	372,210	16,680	14,940
Summit	553,371	18,600	16,860
Trumbull	232,579	14,760	14,760
Tuscarawas	77,211	10,560	11,760
Union	23,786	6,240	7,440

Van Wert	29,194	6,600	7,680
Vinton	9,420	5,040	6,600
Warren	85,505	10,860	12,000
Washington	57,160	9,420	10,200
Wayne	87,123	11,160	12,240
Williams	33,669	7,020	7,920
Wood	89,722	11,160	12,240
Wyandot	21,826	6,240	7,440

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The Prosecuting Attorney and the Municipal Prosecutor

Prosecuting Attorney

Like the clerk of the Court of Common Pleas, the prosecuting attorney is elected quadrennially in every county. Salary of the office, like that of the clerk, depends upon classification and a population schedule. It ranges from $5040 in counties with a population not exceeding 15,000 to $21,600 in Cuyahoga County, and is provided for in Section 325.11 of the Revised Code. The table attached to the memo on the clerk of courts shows the prosecutor's salary in each county.

Chapter 309 of the Revised Code establishes the office of prosecuting attorney and prescribes the general powers and duties that attach to it. As is the case with the clerk of courts, all duties and responsibilities of the office are not contained within one chapter of the code, however.

Sections 309.08 and 309.09 make general provision for powers and duties to be exercised by the county prosecuting attorney. Under the former, he "may inquire into the commission of crimes within the county and shall prosecute , on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court." This section provides further:

> "In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all moneys belonging to the state or county which come into his possession."

Section 309.09 designates the prosecuting attorney as legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and permits them to "require written opinions or instructions from him in matters connected with their official duties." The prosecuting attorney is required to "prosecute and defend all suits and actions which any such officer or board directs or to which it is a party" and county officers are prohibited from employing other counsel at the expense of the county except when ordered by the court of common pleas in special cases. The prosecuting attorney is also the legal adviser for all township officers.

Section 309.10 provides that these two sections do not prevent a school board from employing counsel to represent it, nor a board of county hospital trustees from employing counsel to bring action for delinquent accounts. Nor do they prevent a board of library trustees from employing counsel when the

prosecuting attorney is unable to serve or is adversely interested or when legal action is between two or more boards of library trustees in the same county. Finally, they do not prevent the general appointment and employment of assistants nor the appointment by either the court of common pleas or appeals of an attorney to assist in the trial of a particular case and his payment by the county.

Under Section 309.11, the prosecuting attorney is required to prepare the official bonds for all county officers. He also has specific duties regarding the protection of public funds and injuries to timber, under Sections 309.12 and 309.14, respectively. If required by the attorney general, the prosecuting attorney must make an annual report of all crimes prosecuted by indictment or information in the county, specifying:

(A) Under the head of felonies:
  (1) The number convicted;
  (2) The number acquitted;
  (3) The amount of costs incurred;
  (4) The amount of costs collected.

(B) Under the head of misdemeanors:
  (1) The number convicted;
  (2) The number acquitted;
  (3) The amount of fines imposed;
  (4) The amount of fines collected;
  (5) The amount of costs incurred;
  (6) The amount of costs collected.

(C) Such other information as the attorney general requires.

The prosecuting attorney is also unconditionally required to make an annual certified statement to the county commissioners of the number of criminal prosecutions pursued to final conviction and sentence under his official care. Such a statement must name the parties to each prosecution, the amount of fine assessed, number of recognizances forfeited, and amount of money collected in each case. Failure to make this report to the commissioners in the manner required could result in forfeiture of $50 to $100 in a civil action brought by the board,as authorized by Section 309.16 of the Revised Code.

In addition to the statement of general powers and duties contained in Chapter 309. of the Revised Code, many other provisions which give the prosecuting attorney authority to prosecute violation of various state statutes are found elsewhere in the Code. In some, the prosecutorial authority is shared (e.g., with the city solicitor in the cases of violations of the law regulating dentistry under Section 4715.05) and in others it is not (e.g., violation of the laws governing architects).

Municipal Prosecutors

The principal section governing powers and duties of the municipal prosecutor is Section 1901.34 of the Revised Code, which provides that the "city solicitor, city attorney, or director of law for each municipal corporation within the territory (of a municipal court) shall prosecute all criminal cases brought before the municipal court for violations of the ordinances of the municipal corporation for which he is solicitor, attorney, or director of law or for violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is a solicitor, attorney, or

director of law." With the exception of the Portage County Municipal Court, where the county prosecuting attorney is required to prosecute all violations of state law,and the Hamilton County Municipal Court, where the Cincinnati city solicitor is required to prosecute all criminal cases, the municipal legal officer (city solicitor, city attorney, or director of law) of the city in which the court is located is required by this section to prosecute all criminal cases brought before said court arising in the unincorporated areas of the court's territory. Section 1901.34 provides further:

> "The city solicitor, city attorney, or director of law shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county. He or his assistants whom he may appoint shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes."

In 1952, the Ohio Attorney General ruled that the "additional compensation" authorized by Section 1901.34 is for services rendered by officers designated in the prosecution of criminal offenses under state statutes, and that the county commissioners are authorized to prescribe such compensation with respect to the prosecuting officers of any of the municipalities within the court's territory. (1952 OAG 785, No. 2183) There the Attorney General reasoned:

> "In support of this view it may be observed that although there is an obvious lack of uniformity in these enactments (prior to the uniform municipal court act), there is yet a general 'system' or 'scheme' discernable as to virtually all of them. This 'system' or 'scheme' is found in the evident legislative intent that the city should bear the expense of prosecuting the so-called 'city cases' and that the county be given authority to aid in meeting the expense of prosecuting the so-called 'state cases.' It seems to me that any legislative intent to abandon this 'system' or 'scheme' ought to be found, if at all, in express language in the uniform act." (p. 792)

Section 1901.34 requires the municipal legal officer to prosecute "all criminal cases for violation of state statutes or other criminal offenses." Section 2935.01 provides that the "prosecutor" who is to conduct preliminary matters in felony cases is the city solicitor, for courts inferior to the court of common pleas. Thus the attorney general interpreted the language "all criminal cases" in section 1901.34 to impose a duty upon the city solicitor to represent the state on felony violations occurring in the appropriate area through the preliminary hearing stage. In the same ruling the attorney general held that it is the duty of the city solicitor to presecute misdemeanor violations occurring in the territorial area ofthe municipality for which he is solicotor through to a final verdict, except in the instances of those violations which are specifically assigned to a prosecuting attorney by statute. (The opinion referred to the license laws as an example of specific statutory assignment to the prosecuting attorney for enforcement.) (1966 OAG 159)

A 1968 ruling affirmed that it is the duty of the municipal legal officer to prosecute violators of ordinances or of state laws occurring within the municipality regardless of whether municipal police or county or state officials file charges. (1968 OAG 117)

The Ohio Supreme Court held in 1971 that under the authority of Section 1901.34 a director of law of a municipality who prosecutes a case in a municipal court for violation of a state statute, which case is then appealed to the court of appeals, may institute an appeal from the judgment of the court of appeals to the supreme court. The authority to effect such an appeal was said to lie in the provision that the municipal legal officer "shall perform the same duties.... as are required of the prosecuting attorney of the county." State v. Myers, 26 Ohio St. 2d 190 (1971).

Ohio Constitutional Revision Commission
Judiciary Committee
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Minor Court Unification: A Survey

Minor court unification--that is, the unification of courts below the general trial court level--has attracted considerable attention since the end of World War II. At least 34 of the 50 states, including Ohio, have undertaken some measure of reform in this direction since 1945.

Ohio's present minor court system, the details of which have been presented to the committee in prior memoranda, was defined by 1951 legislation creating a uniform system of municipal courts and 1957 legislation creating county courts to function in areas of counties not within the jurisdiction of a municipal court. With some exceptions, the monetary limit of municipal court jurisdiction in civil cases is $5,000 and the monetary limit of all county courts in civil cases is $500. The criminal jurisdiction of municipal courts is limited to municipal ordinances, misdemeanors, and preliminary hearings in felony matters. County court criminal jurisdiction is similar, and the bulk of cases in county courts, which supplanted justice of the peace courts, is in the area of misdemeanors and motor vehicle violations.

In addition to 108 municipal courts in 63 counties, and 43 county courts, the state's minor court system contains one police court and over 500 mayors' courts. The jurisdiction of the police court, in Ottawa Hills, is criminal only and is limited to misdemeanors, violation of village ordinances, and preliminary hearings in felony cases. The jurisdiction of mayors' courts is likewise criminal only, and extends to ordinances and moving violations on state highways within their territorial boundaries. Since there is no provision for jury trials in mayors' courts, and the law provides that an accused is entitled to a jury trial in any matter in which the potential penalty exceeds $50 ($100 as of January 1, 1974), this provision effectively limits the jurisdiction of

such courts in many cases, jury cases being transferred to county or municipal courts. A further complication in the operation of the mayors' courts was introduced by the case of Ward v. City of Monroeville, 409 U.S. 57 (1972), which arose in Ohio and which holds that a mayor is disabled from hearing a contested case when his position as mayor places him in a position of having a substantial interest in the financial position of the municipality.

In other states, minor court reform since 1945 has included, as a minimum, either elimination of fee-supported justice of the peace courts and their replacement by courts of limited jurisdiction, or the transfer of their powers to county or municipal courts staffed by full-time, salaried attorney-judges. In most states where there has been progress toward unification, such progress has not resulted in the creation of a single trial court, and the distinction between courts of limited jurisdiction and courts of general jurisdiction has been preserved, as well as the procedures for appeal from the former to the latter. Idaho and Illinois, which have instead provided for a tier of magistrates within their general trial court structure, are the notable exceptions in this regard. In at least 10 of the states, all of the expenses of the minor court system are borne by the state. These are Alaska, Colorado, Connecticut, Hawaii, Maine, Maryland, New Mexico, Oklahoma, Rhode Island and Vermont, except that in Connecticut and Rhode Island probate courts receive support from the fees they collect. (Separate memoranda will deal with minor court financing).

According to the California Lower Court Study, published by the Judicial Council of California in mid-1971, 18 of the 30 states surveyed for that study had established, or were about to establish, minor courts on a district basis. The trend seems to be in the direction of establishing one minor court per county below the general trial court level whose territorial jurisdiction is at least coextensive with county boundaries. Territorial units of smaller size are in the minority.

With this general overview of Ohio's minor court organization and the organizational trends in other states, the following survey of the highlights of this reform is intended to illustrate a variety of possible solutions, not all of which necessarily involved constitutional change:

1. Missouri was the first state to undertake court reform following World War II. In 1945, that state replaced justices of the peace with magistrate's courts staffed by salaried attorney-judges with countywide civil jurisdiction (to specified limits), criminal jurisdiction in misdemeanors (including traffic) and jurisdiction to hold preliminary hearings, and set bail, in felony cases.

2. Alaska established a unified court system under the judicial article adopted in 1956 which includes district court as a court of limited jurisdiction in a judicial system which some, including Geoffrey Hazzard of Yale, have called the "most perfect" judicial system in the nation. There are at present four district court districts in Alaska, each of whose territory is coextensive with that of a superior court district, the court of general jurisdiction. These four districts are served by a total of 9 judges and 52 legally-trained magistrates who are appointed by the district court and judges whom they serve carry out functions prescribed by law. The district court judges are, in turn, appointed by the presiding judges of the respective superior courts. Civil jurisdiction of the district court is set by law at $10,000 (except $15,000 in accident cases), and limited to ordinances, misdemeanors and preliminary hearings in criminal matters, in which the jurisdiction of the court is statewide.

3. New Hampshire, which has 10 counties, by legislation enacted in 1963 converted 37 municipal courts to district courts, and abolished the remaining municipal courts. The district courts were given limited civil jurisdiction with the general trial court and criminal jurisdiction in cases involving a maximum of one year imprisonment or a $1,000 fine, or both.

4. Wisconsin in 1959 enacted legislation creating a statewide court system consisting of the Supreme Court, trial courts of general jurisdiction called circuit courts, and county courts. County courts had existed previously but their jurisdiction had been limited to probate, paternity and juvenile cases. This jurisdiction was expanded to include civil jurisdiction to $25,000 (the highest found in the present survey), and concurrent criminal jurisdiction with the circuit courts. Except in Milwaukee County--where they became divisions of the county court--municipal, civil, and district courts were abolished.

5. Maine in 1961 established a unified minor court system (a statewide district court further subdivided into "divisions"), which has centralized management under a chief judge who is appointed by the Chief Justice of the Supreme Court. In addition to matters formerly handled by justice courts and municipal courts, which were abolished, the district court has concurrent jurisdiction with the general trial court in civil matters to $10,000. As noted earlier, Maine is one of those states whose lower court system is financed entirely by the state--from fines, forfeitures and fees.

6. New York voters approved a constitutional amendment in 1961 which established the framework for a unified state judicial system. to the constitutional amendment and implementing legislation, a system of district courts was authorized to be established outside New York City, on a local option basis, to replace existing city, village, and town courts. At the same time, the constitution established a family court in each county to handle family and juvenile matters. In New York City, a single city-wide civil court, and a single city-wide criminal court were established to replace the existing minor courts.

However, the most innovative feature of the revised court structure of New York City became operational on July 1, 1970, when a system of administrative adjudication of traffic offenses was instituted. Under this system, all parking violations are handled by a parking violations bureau in the City Transportation Administration. All moving violations classified as "infractions" are handled by an Administrative Adjudication Bureau within the State Department of Motor Vehicles. There are provisions for hearings before either bureau upon request, and for appeal within the respective agencies as well as ultimate judicial review. Traffic cases which do not fall within the foregoing categories, on the other hand, are handled from their inception in criminal court.

7. Colorado completely reorganized its minor court system as the result of constitutional amendments passed in 1962 and 1966. In 1965, all justice of the peace courts were eliminated and a system of county courts established, except in the City and County of Denver. The county courts, in general, have criminal jurisdiction in misdemeanor cases, and civil jurisdiction to $2,000 concurrent with the district court, which is the general trial court.

As a result of a 1969 Colorado Supreme Court ruling that necessary and reasonable judicial expenses had to be paid by the counties regardless of their budgetary limitations in the absence of a clear showing of arbitrary and capricious action by the judiciary, Colorado enacted legislation providing for state funding of all district court and county court expenses effective January 1, 1970, and all court employees became employees of the state Judicial Department. Denver and other cities were given the option to create their own municipal and police courts.

8. Illinois began its court reform under the 1964 Judicial Article, which established a single, state-wide system of circuit courts, with unlimited original jurisdiction over all justiciable matters, replacing an assortment of courts which then included circuit, superior, criminal, family, county, justice of the peace, police magistrate, municipal, city, village and incorporated town courts. Twenty-one circuits were established, Cook and DuPage Counties each constituting a single district, the others being multi-county. The 1964 Judicial Article provided for three classes of judicial officers: (1) circuit judge elected on a circuit-wide basis, (2) associate judges elected on a county-wide basis and (3) magistrates, appointed by the circuit judges. Under the 1970 Judicial Article, all former associate judges (including non-attorneys) were elevated to circuit judgeships, and all magistrates (including non-attorneys) were elevated to associate judgeships. The title "magistrate", as such, was abolished. The "new" associate judges, who are still appointed, have a constitutionally guaranteed four-year term, and perform such functions as are assigned by Supreme Court rule. All judges who begin their tenure at any time in the future must be licensed to practice law in the state.

9. North Carolina voters in 1962 approved a constitutional amendment providing the framework for a unified court system called a General Court of Justice, with three divisions: an appellate division, consisting of the Supreme Court; a superior court division and a district court division. The Supreme Court was given general administrative authority over the court system with the aid of an Administrative Office of the Courts. In 1963 the Legislature created a Courts Commission to prepare and draft the legislation necessary for implementation of the new Judicial Article. This legislation was enacted in 1965. It provided for establishment of the new court system in progressive stages, commencing in 1966 and to be completed in 1970.

Under this legislation district courts were established in each of 30 new judicial districts, replacing justice of the peace and various other courts of limited jurisdiction. A chief district judge is designated for each district by the Chief Justice of the Supreme Court, and vested with extensive administrative authority. Magistrates, assigned to duty and supervised by the chief district judges, are authorized for each county. The magistrates' functions include issuance of warrants, hearing of small claims actions, acceptance of guilty pleas in minor traffic and non-traffic misdemeanor cases, conduct of preliminary examinations in misdemeanor cases, setting of bail, and performance of certain ministerial duties.

The district court division of the North Carolina General Court of Justice has exclusive jurisdiction of misdemeanors, and is the proper division for the trial of civil cases where the amount in controversy does not exceed $5,000. It is also the forum for domestic relations and juvenile cases. No jury is provided in the district court for criminal trials but each defendant has the right of appeal to the superior court and to a jury trial de novo in that court. In civil matters either party may demand a jury trial in the district court, and in civil cases the appeal is directly to the Court of Appeals.

All operating expenses of the General Court of Justice, with the exception of those related to furnishing and equipment of courtrooms and related judicial facilities, are borne by the State; and to aid the local agencies in meeting this expense a facilities fee is assessed as part of the costs in every case processed by either the district or superior courts. This fee is divided between the State and the local government units providing the facilities.

10. Idaho abolished all probate, justice of the peace and police courts by legislation effective January, 1971. All judges of these courts on January 1, 1969 were made eligible for the appointive office of magistrate, and a Magistrate's Division was created in the District Court of Idaho. Magistrate Commissions were created in each of the seven judicial districts to determine the number and location of magistrates (at least one per county) and to appoint them to two-year renewable terms, on a nonpartisan merit basis and subject to the approval of a majority of the district judges. The types of matters which may be heard by magistrates are set out in detail by statute, attorney-magistrates and non-attorney magistrates having different authority.

11. Michigan changed its minor court system by legislation enacted in 1968 implementing a constitutional amendment. A system of district courts was established, replacing justices of the peace, circuit court commissioners, municipal courts, police courts and recorder's courts. The state was divided into 99 judicial districts, each being an administrative unit supported

locally but subject to the supervisory control of the Supreme Court. The new district courts have jurisdiction of civil cases up to $3,000, criminal jurisdiction of misdemeanors for which the possible punishment does not exceed one year, and handle all felony preliminary hearings. Each district has a small claims division, and is authorized to set up a traffic bureau which is administered by a clerk of the court. In certain classes of districts quasi-judicial officers called magistrates may perform limited functions when specifically authorized by their appointing judge. The district courts have no jurisdiction in injunctions, domestic relations, or matters pertaining to probate, juvenile or circuit courts.

The new district courts came into existence January 1, 1969. As of that date the judicial staffing consisted of 150 judges, who held sessions at 137 locations. On that date the only courts of limited jurisdiction which remained in existence were the Common Pleas Court of Detroit (with 9 judges) and 35 municipal courts which had been created by city charters. On January 1, 1971 six of the cities which had retained their municipal courts elected to come into the district court system. At present there are 166 district judges functioning in 101 districts, located in 83 counties.

12. Vermont, by legislation enacted in 1965, replaced 16 municipal courts with a district court system of 12 courts. In 1967 legislation was enacted replacing the 1965 court organization with a single statewide district court with 10 full-time judges. The 1967 legislation also created the office of Court Administrator and gave the Supreme Court power to organize the new court into territorial units and each unit into two or more circuits. The Supreme Court has delegated to the Court Administrator the authority to assign judges to the respective units and circuits.

The jurisdiction of the Vermont district court is concurrent with that of county courts (the general trial courts) in criminal matters, except that the district court does not have jurisdiction of crimes punishable by death or life imprisonment. The civil jurisdiction of the district court is limited to matters involving not over $5,000, but it has exclusive jurisdiction over juvenile matters and small claims actions. The salaries of all district court judges and support personnel are paid by the State. All revenues from traffic fines and bail forfeiture are paid into the State Treasury and go into the general fund.

13. Maryland, in November 1970 approved a constitutional amendment completely reorganizing the lower court system. Under the reorganization, which became effective July 5, 1971, the former system (consisting of full and part-time people's and municipal court and trial magistrates) was replaced by a full-time district court system staffed by 80 judges who are required to be members of the bar with a minimum period of five years of law practice. The district court is totally funded by the State of Maryland and will be administered by a Chief Judge, assisted by an administrative judge for each of the twelve districts that comprise the court. The administrative judges are appointed by the Chief Judge of the district court, subject to the approval of the Chief Judge of the Court of Appeals. Jurisdiction of the court includes traffic offenses, criminal misdemeanors, (and some limited felonies) and civil cases to $5,000. Civil jurisdiction of the district court is exclusive in cases involving not more than $2,500 and concurrent with the circuit court (trial court of general jurisdiction) in cases involving more than $2,500 and not more than $5,000.

A unique feature of the new district court system is that juries are not used. In criminal and traffic cases the defendant may demand a jury, but if he exercises this right the matter is removed for trial to the circuit court in which the offense occurred or to the criminal court of Baltimore if the offense occurred therein. In civil cases where the amount in controversy exceeds $500 either party may demand a jury, but in that event the case is transferred to the circuit court in the county in which the cause of action arose or was filed, or to the Superior Court of Baltimore if the cause of action arose or was filed in that city.

The first Chief Judge of the District Court was appointed by the Governor with successors to be appointed by the Chief Judge of the Court of Appeals. The Chief Judge and all associate judges will be appointed by the Governor (subject to Senatorial confirmation) for ten-year terms. Committing commissioners (full-time), appointed by the court, will be used to set bail, issue warrants and accept collateral. The clerical staff of the court serves under a chief clerk who is appointed by the Chief Judge.

14. Florida, as the result of the adoption of a new judicial article, instituted a thorough revision of its judicial system in 1972. In this system, the county court will be the lowest, into which all minor courts, except some municipal courts, have been absorbed. All municipal courts will be abolished by 1977. The need for reform is readily apparent when one realizes the bewildering multiplicity of courts which the county court now replaces, as is evident from Section 20 (a) (4) of the schedule of the new article, which reads in part:

"County courts shall have original jurisdiction in all criminal misdemeanor cases not cognizable by the circuit courts, of all violation of municipal and county ordinances, and of all actions at law in which the matter in controversy does not exceed the sum of two thousand five hundred dollars. The county courts shall have jurisdiction now exercised by the county judge's courts....the county courts, the claims court, the small claims courts, the small claims magistrate's courts, justice of the peace courts, municipal courts and courts of chartered counties..."

15. Minnesota on July 1, 1972, established a county court system, consisting of multi-county districts, which illustrates the concept of a county court as a "local service" court within a court structure in which the general trial court is established on a district basis.

The monetary limit of county court civil jurisdiction is $5,000, and it has criminal jurisdiction over misdemeanors, violations of ordinances, and preliminary hearings in felony cases. In addition, it has concurrent jurisdiction with the general trial court in matters relating to estates, divorce, enforcement of support, change of name, and title to realty.

Statute requires the establishment of (1) probate, (2) family and (3) civil and criminal divisions. It also authorizes the establishment of a small claims court and traffic and ordinance violations bureaus within the civil and criminal division.

The multi-county districts established by law (which include all areas except the cities of Duluth and Saint Paul and Hennepin County, which have municipal courts)are further combined by concurrence of the county boards of the affected counties. In the same manner, the number of county court judges may be increased or decreased.

SOURCE: The principal source of information contained in this memorandum relating to states other than Ohio and to reforms undertaken to mid-1971, is a research paper prepared by Warren P. Marsden, Prject Director, California Lower Court Study, in the summer of 1971.

Ohio Constitutional Revision Commission
Judiciary Committee
November 8, 1973

Supplemental Memorandum
on Minor Courts in Ohio

This memorandum supplements the discussion of the cost of operating minor courts begun at page 16 of the memorandum dated September 18, 1973. There, it was noted that no single source exists for the collection of statistics concerning county and municipal courts, and that no uniform method for reporting exists, making comparison difficult. However, some observations concerning court financing can be made from a reading of the statutes. The September 18 memorandum focuses on statutory provisions dealing with county and municipal courts. This memorandum deals with the relatively meager body of law relating to the financing of police and mayors' courts, and also examines the annual report of one municipal court with a view to implications inherent in the report relative to court financing.

Police Court

As of this date, there is only one police court in the state, in the village of Ottawa Hills in Lucas County. The judge of a police court receives his compensation from the city in which the court is located and the county. Revised Code Section 1903.02 provides that the judge receive not more than $2,000 annually from the city and such additional compensation, payable quarterly from the county treasury, as the board of county commissioners may provide. The clerk of the court, in accordance with Section 1903.24 of the Revised Code, receives not more than $2,000 from the city for municipal cases, and not more than $2,000 from the county for state cases. Service of process is carried out by the municipal police department and other support personnel, such as probation officers, are compensated from the city treasury in amounts determined by the legislative authority. Courtroom facilities and equipment are provided by the municipality.

Mayors' Courts

The mayor's court is undoubtedly the court with the lowest overhead. The mayor receives no additional compensation for his services. Section 1905.04 of the Revised Code provides that neither the clerk of the court nor his deputy shall be interested as attorneys or agents in any case before the court, but statute does not appear to provide either whether they should be paid, who should pay them, or how much they should be paid.

In two communities checked in Franklin County, one has a full-time mayor's court clerk and the other has a mayor's court clerk who is the secretary of the mayor and receives no additional compensation for her work as clerk. In both instances, the salaries are set by the respective city councils. Bailiffing functions are performed by the police chief or a deputy or a village marshal, whose services, in accordance with Section 1905.08 of the Revised Code, are taxed as costs. Court facilities and supplies are provided by the legislative authority of the municipality, in accordance with Section 1905.21 of the Revised Code.

Municipal Court

The difficulty of obtaining statistics concerning the operation of municipal courts in standardized form makes any discussion of the methods by which they are financed somewhat hazardous, other than to say that in most instances, the salaries of all judges and all support personnel, as well as all expenses relating to facilities, are borne by the municipal corporation in which the court is located, even

in the case of a municipal court with county-wide jurisdiction, such as the Franklin County Municipal Court. In the case of Hamilton County, however, Section 1901.024 of the Revised Code specifically authorizes the Hamilton County Commissioners to make an agreement with the City of Cincinnati to share the costs of operating a county-wide municipal court.

The Legislative Service Commission has a project in progress which is expected to be completed by the end of the year and which will, for the first time, provide meaningful comparative statistics on the financial operation of municipal courts in Ohio. In the meanwhile, the examination of the 1972 annual report of one court--the Franklin County Municipal Court-- may provide some insight into the financial practicalities of the operation of such a court.

The 1972 budget of the Franklin County Municipal Court consists of two parts, one prepared by the judges and covering salaries relating to court administration--including judges, bailiffs, court reporters, and secretaries as well as other office expenses, and the other prepared by the clerk, covering the salaries of the clerk and his deputies and expenses incidental to the clerk's office. These two budgets are identified by individual department numbers (120 and 130, respectively) on the books of the city. The actual expenses in calendar 1972 for Department #120 were $1,015,458.51, and $1,062,684.82 for Department #130, so that the portion of the budget controlled by the clerk exceeded the portion controlled by the judges by about $50,000.

Against total expenses of $2,078,143.33, the court paid a total of $3,212,825.73, into the city general fund of which $277,022.50 resulted from the operation of the Civil Division, the remainder in approximately equal amounts from the operations of the Criminal Division and the Traffic Bureau--the latter of which exists for the "cafeteria-style" payment of traffic tickets. Of course, the court does not support itself, in the sense that all monies collected for the city are ultimately deposited in the general fund and the city council votes on the court budget(s). But if a fee-support system had existed in 1972, more than 2/3 of the total cost of operating the court would have come from what are, esentially, uncontested traffic cases.

The percentage of funds retained by the municipality in which a court is located varies, according to law, depending on the origin of the ordinance under which an offense is prosecuted, and upon the particular state statute in question. In the instance of a case based on an ordinance of a village or municipality other than the one in which the court is situated, 100% of the fine is returned to that municipality, and the city in which the court is located keeps the costs. The city where the court is located also keeps costs in instances of Highway Patrol cases, whether they are paid through the Traffic Bureau or as the result of a court appearance, and 45% of the fine. But in some instances, such as liquor control violations based on state law, the city seldom gets anything. In such liquor control cases, the state gets ½ of the fine, the county gets the other ½, and costs are seldom imposed. The city where the court is located retains 25% of a traffic ticket based on a county ordinance, 25% of a ticket based on a county ordinance, and 25% of a ticket based on the Uniform Traffic Code. Seventy-five per cent of the latter goes to the county.

The 25%-75% division of Uniform Traffic Code ticket proceeds resulted in an anomalous situation in Columbus in 1972, as appears from the report of the Franklin County Municipal Court. While many provisions of the Columbus City Ordinances relating to the operation of motor vehicles are similar or identical to provisions of

the Uniform Motor Vehicle Code, in 1972 Columbus police issued traffic tickets under the state statute which yielded the city only $7,287.25, while during the same period traffic tickets issued under city ordinances yielded $988,129.00. This seems to suggest that, if the court were entirely state-financed, and all of the funds collected by the court were returned to the state, there might be less reliance on municipal ordinances as the basis for prosecutions and more reliance on state laws. The same might happen if the amount or percentage retained by municipalities were identical, whether a prosecution were brought under a statute or an ordinance. However, it is clear that the Constitution or the General Assembly would have to give municipalities, and other units of local government, new or additional sources of revenue to compensate for losses which would result from a change in the manner in which funds generated by a municipal court are distributed. Attached as an appendix are the disbursement categories shown on the Franklin County Municipal Court report for funds generated by the Criminal Division, which categories illustrate the present distribution.

APPENDIX

Franklin County Municipal Court

Criminal Division

Disbursements

City Treasurer

City Ordinances

Costs

Fines

Bond Forfeitures

Traffic Tickets

25% County

25% Townships

25% Uniform Traffic

100% City

45% Patrol

100% Patrol Cost

100% City Cost

State Statutes

45% Patrol Fines

Costs

State Treasurer

45% Patrol Fines

45% Patrol Tickets

½ Liquor Fines

Natural Resources

Boards and Commissions

B. U. C. Spec. Adm. Fund

County Treasurer

Regular Court Fines

Uniform Traffic Court Fines

Uniform Traffic ½ Twn. Ct. Fines

10% Patrol Fines

½ Liquor Control Fines

Dog & Kennel Fund

Misc. Fines

75% County Tickets

37½% Township Tickets

75% Uniform Traffic Tickets

10% Patrol Tickets

Traffic Ticket Refunds

Townships

37½% Township Tickets

50% Township Court Fines

Cities

County Clerk of Courts

Columbus Law Library Assn.

City Funds

State Funds

Other Refunds

City

State

November 8, 1973

TO: Judiciary Committee
Ohio Constitutional Revision Commission

FROM: John E. Gotherman, Chief Counsel, Ohio Municipal League,
Assistant Secretary-Treasurer, Ohio Municipal Attorneys Association

SUBJECT: Organization of Trial Courts--Prosecution Responsibility

The purpose of this memorandum is to state the position taken by the officers of the Ohio Municipal Attorneys Association in regard to the organization of Ohio's trial courts and the responsibility for the prosecution of criminal cases, as those matters relate to constitutional revision. The existing provisions of the Ohio Constitution, especially with the passage of issue No. 3 last Tuesday, places full power in the General Assembly to provide for the organization of Ohio's trial courts and the procecutors role. This is highly desirable during a period of change in governmental structures and the rethinking of traditional concepts of state and local relations, as well as the introduction of regionalism as a serious alternative method of providing services and governmental functions to the citizenry. While the process is now underway, the workable approaches are far from clear at this time. A situation that mandates a great deal of flexibility. Therefore the Ohio Municipal Attorneys Association would strongly oppose constitutional changes that decrease the flexibility available to the General Assembly in dealing with the structuring and function of the trial courts, or the prosecution of criminal cases, whether felonies or misdemeanors.

To turn our state constitution into a forum for deciding whether the county prosecutor or the municipal attorneys should prosecute all or certain

criminal cases would be irresponsible. That decision, together with the issues of trial court organization, rightfully belongs to the state legislature. The circumstances that exist in the urban and rural areas are complex and vary from locality to locality. The political considerations attendant to the existing arrangements hardly lend themselves to a simple solution by constitutional fiat. The necessarily close relationship of the prosecutor to municipal law enforcement agencies and the management responsibilities of municipal officials to the people must be preserved.

It is clearly desirable to retain, without substantial change, the ability of our state law makers to evaluate specific problems and to provide solutions as the times and circumstances require.

Ohio Constitutional Revision Commission
Judiciary Committee
November 18, 1973

Alternatives on Minor Court Organization

Of Ohio's present courts, only the Supreme Court, the Courts of Appeals, and the Courts of Common Pleas are mentioned by name in the Constitution, which also authorizes the establishment of Courts of Conciliation, in Section 19 of Article IV. The minor courts are created by law. Therefore, they could be abolished, combined or otherwise reorganized without the necessity of constitutional change. The following skeleton outline suggests alternatives for minor court reorganization--alternatives which come mainly from court reform in other states and from presentations made before this committee. Some of them appear in state constitutions. But the outline is intended as a guide in the consideration of the elements of court organization and as an aid in the formulation of recommendations concerning the minor courts of the state, whether or not these recommendations include constitutional change.

Constitutional Status

A. Maintain nonconstitutional status

B. Mention by name in Constitution

C. Mention by name, prohibit all others

D. Prohibit all courts below common pleas.

Unification

A. Combine county and municipal courts, abolish others; distinguish between charter and noncharter municipalities

B. Establish minor courts as division of common pleas

or

C. Establish minor courts as separate tier below common pleas level

D. Establish single, statewide minor court

E. Maintain separate courts

F. Abolish particular courts such as mayor's courts

Jurisdiction

A. Uniformity; territorial extent--statewide criminal

1. Civil limit	Exclusive	Concurrent	Concurrent within limit
(a) $5,000			
(b) $10,000			
(c) $25,000			
(d) Other			

2. Criminal Exclusive Concurrent

(a) Misdemeanor

(b) Ordinances

(c) Preliminary hearings

(d) Other (e.g. domestic relations, juvenile, probate, some felonies)

3. Administrative disposition of cases

(a) Motor vehicle

(b) Alcohol

(c) Other

Financing

A. Unified judicial budget; responsibility for development

B. Funding Local State Share

1. Judicial salaries

2. Other salaries

3. Facilities

4. Supplies

5. Other (e.g. juries)

C. Source of financial support

1. Fines, fees, forfeitures

2. General fund

3. Other (e.g. facilities fee)

D. Disposition of revenues generated; effect on political subdivisions.

Personnel

A. Judges

1. Full-time or part-time; uniformity of judicial qualifications

2. Uniformity of judicial salaries

3. Number of judges determined by:

(a) General Assembly

(b) Supreme Court

(c) County commissioners

(d) Other

4. Electoral

(a) at large

(b) from sub-districts

Or

5. Appointment

(a) By higher court

(b) By Governor, with advice of nominating committee

(c) Other

6. Chief administrative judge--duties; selection by:

(a) Supreme Court

(b) Common pleas court

(c) Other.

7. Eligibility to office of incumbent judges at time of changeover to new court structure

B. Magistrates

1. Manner of selection: Idaho, Illinois models

2. Qualifications

(a) Attorney

(b) Nonattorney

3. Number determined by:

(a) General Assembly

(b) Magistrates' commission

(c) Local court, in accordance with law or Supreme Court rule.

4. Powers prescribed by :

(a) Law

(b) Supreme Court rule

(c) Other

C. Clerk

1. Combination of offices

2. Election or appointment; appointing authority if appointed

3. Appointment of deputies

(a) At pleasure of clerk

(b) By state judicial department or Supreme Court rule

(c) Other

4. Court administrator--selection and appointment

5. Bailiffs, probation officers, reporters, secretaries-- selection and appointment

6. Use of referees, master commissioners

Districts

A. Territorial limits

1. County; multi-county

2. Election districts

3. Common pleas districts

4. Other

B. Creation, alteration, abolition by:

1. General Assembly

2. Supreme Court rule

3. Common pleas court

4. County commissioners, as prescribed by law

5. Other

C. Subject-matter divisions prescribed by:

1. Constitution

2. General Assembly

3. Supreme Court rule

4. Presiding or administrative judge

D. Territorial divisions prescribed by:

1. Common pleas court

2. Other

E. Ultimate administrative responsibility

1. Centralized

2. Other

Ohio Constitutional Revision Commission
Judiciary Committee
November 29, 1973

References to Trial Court Structure in the Ohio Constitution

The Constitution vests the judicial power of the state in "a supreme court, courts of appeals, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law".[1]

The basic trial court is the court of common pleas, which exists in each county. New provisions relating to common pleas courts have not yet been implemented due to their recent passage, but the Constitution now provides that there shall be a common pleas court "serving" each county and that each county shall have one or more resident common pleas judges, or two or more counties may be combined into districts having one or more judges resident in the districts "and serving the common pleas courts in the district." (The plural reference in this provision may lead to confusion in that it implies that each county would have a separate court identified with it). In a multi-judge court, the Constitution gives the judges of the court the power to elect one of their number as presiding judge, whose powers and duties are to be prescribed by rule of the Supreme Court. In case of an equal division of the vote, the judge "having the longest total service on the court" is to serve as presiding judge until one is elected.[2]

The Constitution mandates that until otherwise provided by law there shall be a probate division in each common pleas court, and such other divisions as provided by law. Judges are to be elected specifically to each division, and judges of the probate division are to control the clerks and employees of the division.[3] (The requirement of election to divisions introduces an element of specialization not in accord with principles now being advocated by the American Bar Association Commission on Standards of Judicial Administration.)

The Constitution further requires that the judges of the common pleas courts be elected "by the electors of the counties, districts, or, as may be provided by law, other subdivisions in which their respective courts are located,"[4] and each judge is required to reside during his term of office "in the county, district, or subdivision in which his court is located."[5] This raises the possibility that divisions of the common pleas court might have less than county-wide (or district-wide) jurisdiction, again contrary to the tentative ABA standards and contrary to present Ohio practice. It also raises the possibility of providing county-wide (or district-wide) jurisdiction for some judges elected by an electorate smaller than the territory they serve.

If the term "subdivision" is interpreted to mean political subdivisions as they now exist, and if municipal courts were to become divisions of courts of common pleas, as some have suggested, then the new constitutional provision would impose a more restrictive residence requirement on municipal court judges than there is at present, because at present a municipal judge may reside anywhere in the territory his court serves, whereas the constitutional provision now in effect requires him to reside in the subdivision in which his court is located.

In accordance with a 1965 amendment, in counties of less than 40,000 population the county commissioners, on petition of 10% of the electors, may place on the ballot the question of whether "the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or two or more of such courts."[6] This provision,

it is understood, was intended mainly to permit the combination of common pleas and probate courts in the smaller counties. It is no longer necessary for that purpose since the passage of the Modern Courts Amendment of 1968 and implementing legislation. The provision also introduces reference to county and municipal courts into the Constitution, which may be undesirable in view of the fact that these are not constitutional courts as such, and references to them in the document may, at some future time, raise questions as to their constitutional status. The same question may arise in regard to statutorily-created divisions of the common pleas court enumerated in this section.

The Constitution also provides that laws to increase or diminish the number of judges of the Supreme Court and the common pleas courts, and laws to establish new courts, require a 2/3 vote of both houses, and that no such law may vacate the office of any judge.

Footnotes

(All references to Art. IV, Ohio Constitution)

1. Sec. 1
2. Sec. 4 (A)
3. Sec. 4 (C)
4. Sec. 6 (A) (3)
5. Ibid.
6. Sec. 23
7. Sec. 15

Ohio Constitutional Revision Commission
Judiciary Committee
November 29, 1973

State and Local Financing of the Courts

Although the dearth of significant statistical data concerning operations of minor courts in Ohio has been the subject of comment in prior memoranda and testimony presented to the Committee, the proposition has been advanced and to some degree supported that appreciable amounts of revenue are produced by courts of limited jurisdiction in the form of fees, fines, and forfeitures. At the last meeting the Committee was promised information regarding financing of the courts in other states.

In some states unification of courts has been accompanied by state financing of both courts of general and limited jurisdiction, and some authorities have maintained that a trend in this direction is discernible.

Although this memorandum will summarize developments in jurisdictions where the state has taken over financing of the judicial branch, it will reinforce the earlier observation about the difficulty in reporting information about state court systems other than by first hand examination, on a state by state basis. It will also review the pro's and con's involved in state financing and suggest alternative methods employed by other states which have adopted complete or nearly complete centralized funding of the judiciary.

The U.S. Advisory Commission on Intergovernmental Affairs in a comprehensive examination of state-local relations in the criminal justice system devoted several sections of its 1972 report on this subject to a discussion of the responsibility for financing state and local courts. Noting great variations in the degree to which state and local governments share the costs of operating the judicial branch of government,this report acknowledges rising interest in transferring judicial costs to state government.

As to the relationship of state financing of the courts to court unification the writers assert:

> "Full State assumption of court expenses is a logical concomitant of a unified and simplified State-local judicial system. Such a system is designed to achieve greater uniformity in the administration of justice through simplified structure and State prescription and policing of standards of performance. Included in the latter are the vesting in the highest court of responsibility for promulgation of rules and practice and procedure, exercise of administrative oversight through an administrative office, and assignment and reassignment of judges to meet fluctuations in workloads. It is argued that these objectives of unification and simplification are more likely to be achieved if the State supplies the necessary funds instead of relying on county or city governments to provide any substantial portion."[1]

It has been further observed:

> "A state constitutional provision for a unified court system administered by the chief justice of the supreme court permits the judges to control

> the system of justice. But when the courts must go hat in hand to various local departments of government for the wherewithal to support their needs, the judgment of the financier may be substituted for that of the judge. Conflicts between courts and branches of local government respecting personnel often arise."[2]

The judiciary article of the National Municipal League's Model State Constitution calls for both a unified court system and state financing. However, this proposal also permits the legislature to provide by law for political subdivisions to reimburse the state for "appropriate portions of such costs."[3] The NML's rationale is:

> "For improved management made possible by a unified judicial system, the state is to pay for the costs, thus doing away with the widespread practice of having separate local courts maintained and paid for locally. Since burdens may be greater in some parts of the state than in others, and in view of the fact that local sharing of costs may be part of a state's financial structure, the Model allows the legislature to provide for reimbursement to the state by political subdivisions of portions of the cost."[4]

The Institute of Judicial Administration conducted a study of state and local financing of the courts and in 1969 published a tentative report based in large part upon responses to questionnaires submitted to state supreme courts and court administrators. The writers make the point at the outset that the study was undertaken to obtain information about state and local financing that is virtually impossible to obtain through ordinary research methods. In fact, complete and accurate information about the financing of courts other than federal courts is unobtainable. The introduction to the IJA report states:

> "Even an intelligent guess as to the total amount of state funds expended on the judiciary within a state is almost impossible, except in the relative few states where the entire, or almost the entire, judiciary is supported exclusively by state funds."[5] Information concerning the "typical" state is even more elusive. "The entire cost of one or more courts will be borne by the state government. Other courts will obtain funds from both state government and local government units. Still other courts are completely financied by local government units, sometimes by both county and municipal governments. This means that in order to determine total appropriations for the judiciary within a single state, it is necessary to consult numerous county and municipal budgets and supplemental appropriations measures. Inconsistent inclusions on and exclusions from the local judicial budgets make an intelligent estimate of the actual total expenditures for the support of the judiciary within the state exceedingly difficult."[6]

It was because of the difficulty of obtaining information on the subject through ordinary research methods that the sources of data upon which the Institute relied were responses to questionnaires. In addition to state supreme courts twenty-five selected local court administrators were polled. Inconsistences in responses were noted in the tentative report and dramatize the Herculean nature of the effort that would be required to compile complete and accurate information regarding the manner of funding and cost of operating courts in most states.

One problem noted is the variance in state and local practices as to what items are includable on the judicial budget. Caution the writers: "This is a natural result of the varying classifications employed in the organization of the typical line item budget. In addition, particularly on the local level, funds appropriated for the executive branch may in fact be used to support the judiciary."7 An example given is the disparate treatment of salaries of deputy sheriffs in attendance in court rooms.

Unitary budgeting in relatively few states appears to be a comprehensive system in which most judicial costs (upwards of 90 per cent) are state funded through a single budget administered by the judicial branch. The relevant constitutional and statutory provisions in effect in these states are summarized below.

In other states varying patterns of sharing the cost of operating the courts exist among the state and various local units of government. In general, the state's share of court financing tends to recede as one moves down the judicial hierarchy, and counties shoulder the largest fiscal load because they are generally assigned the major trial courts and at least a portion of the lower courts. Ohio falls into this category.

attached hereto
Table A/shows state and local sharing of courts expenses by state in 1969, and its source is the IJA tentative report, State and Local Financing of the Courts, (New York, April, 1969, "State Court Survey," at pages 26 through 36.)

Tables B and C are reproduced from the report of the U.S. Advisory Commission on Intergovernmental Relations, entitled State-Local Relations in the Criminal Justice System (1971) and are based upon sources indicated in the tables.

According to a report of the American Judicature Society as of the summer of 1971 the state had virtually taken over the financing of the judiciary in the ten states of Alaska, Colorado, Connecticut, Hawaii, Maine, Maryland, New Mexico, Oklahoma, Rhode Island, and Vermont. In not every case has it been possible to verify this report, but a summary of some relevant constitutional and statutory provisions in these states has been set forth below.

Florida, with a new judicial article effective January, 1973, and North Carolina, where most judicial expenses are reportedly assumed by the state, are also included in the summary below.

The supporting study of the American Bar Association's Commission on Standards of Judicial Administration discusses two methods by which courts have achieved an adequate judicial budget - (1) through exercise of judicial inherent power to require that adequate funds be appropriated and (2) through the administrative concept of unitary budgeting, as provided by constitution and statute. The statutory developments in Colorado have been in part traced to the success of the inherent power doctrine. However, as noted in the Commission study:

> "Substantial reliance upon the doctrine, however, may be shortsighted and unwise. As applied to date, it has been more bountiful in legal rhetoric than in practical consequences. Most of the reported decisions have involved marginal appropriations for ancillary personnel and facilities rather than basic fiscal underwriting. Moreover, the disputes have pitted the judicial system not against the executive and legislative branches of state government, but rather against subdivisions such as counties or municipalities.... The courts thus avoid a direct confrontation with their co-equal partner in state government by requiring only local governments to

fulfill their financial responsibilities."[8]

The 1969 study by the Institute of Judicial Administration reported that except in Alaska, Connecticut, Deleware, Hawaii, Rhode Island and Illinois, the really substantial fiscal control over the court system is exercised by local government. The per capita local judicial expense in most instances was substantially greater than the average per capita state figure. This fact raised important questions:

> "To what extent is the type and quality of justice actually affected by the amount of money spent on the judiciary?"
>
> "To what extent is local control over the judiciary with its variations throughout a state consistent with due process of law or just plain fair play?"

Court financing comprehends several items of expense other than judicial salaries. They include: (1) space - courtrooms, chambers, clerks offices, jury rooms, etc.; (2) personnel - county clerks and staff, court attendants, jury commissioners; and (3) supplies, furnishings and equipment. Very little has been found concerning the financing of these specific items of judicial expense. It has been argued that present financing arrangements in most states defeat sound expenditures. In a study conducted by the Institute of Judicial Administration in 1971 points made with respect to these expense items were as follows:

> Space - present space utilization policies are wasteful, inefficient and through maintenance of an excessive number of court locations, tend to pull all courts down to a common low level of accomodations. Proper regard for economy and efficiency dictates that court locations be distributed strategically about in relation to needs of people for court services, not on random county basis.
>
> Personnel - should be upgraded; salary scales should be set by judiciary.
>
> Supplies - should also be part of a statewide master plan to be efficient. If centralized court locations are to house judges, except for short period when they service outlying locations, it would be improper to charge all expenses to one county and not worth the effort to develop cost accounting principles to try to divide the expenses among the user counties.

Arguments in favor of state financing were:

(1) Control over the expenditure of money is essential, because division of responsibility too often means that there is no responsibility;

(2) The judiciary should have the capacity to determine its financial situation on a weekly or even monthly basis.

(3) A financial plan or budget is needed, related to basic goals of the judiciary as detailed in specific program proposals.

(4) The judiciary would become directly accountable for performance as its programs and budget plans are exposed to public hearings and not hidden in the present welter of separate county funding.

On the other side, it has been asserted that:

(1) Local financing brings government closer to the people served.

(2) Local control breeds greater responsibility in the agency being supported.

(3) People who pay the bills see at close range how well or ill their money is being spent so that they can take action.

TABLE A

STATE (S) AND LOCAL (L) SHARING OF COURT EXPENSES, 1969

	Highest Court	Intermediate Appellate Courts[1]	Trial Courts of General Jurisdiction: Judicial Salaries	Non-Judicial Salaries	Travel Expenses	Other Expenses	Lower Courts	Judicial Retirement	Judicial Council	Judicial Conference	State Court Administrators	Local Trial Court Administrators	Construction of Court Buildings	Maintenance of Court Buildings
Alabama	S	S	S	S	S	S								
Alaska	S		S	S	S	S	S	S	S	S	S	S	S	
Arizona	S	S									S			
Arkansas	S		S	S	S	S	L	S			S		L	L
California	S	S	SL	L	L	L	SL	S	S		S	L	SL	S
Colorado[4]	S							SL		S	S	L	SL	S
Connecticut	S	S	S	S	S	S	L	S	S		S		S	S
Delaware	S		SL	SL	SL	SL	S	S	S	S		L	SL	S
Florida	S	S	S	S	S	S	S	S	S				S	S
Georgia	S	S	L	L	L	L	L	S	S					S
Hawaii	S		S	S	S	S	S	S			S	S	S	S
Idaho	S		S	S	S	L	L		S	S	S		SL	S
Illinois	S	S								S	S			
Indiana	S	S					L	S		S	S		L	S
Iowa	S						L	SL	S		S		L	L
Kansas	S		SL	SL	S	L	L	S	S	S	S		L	L
Kentucky	S	SL						S	S	S	S		L	S
Louisiana	S	S	SL	SL	SL	SL	SL	SL	S	S	S			L
Maine	S		SL	SL	SL	SL	SL		S	S			L	L
Maryland	S	S	SL	L	L	L	L	SL		S	S	L	L	L
Massachusetts	S		SL	SL	SL	SL	L	SL	S	S	S	S	L	L
Michigan	S	S	SL	SL	SL	SL	L	S		S	S	L	SL	S
Minnesota	S		SL	SL	SL	SL	L		S		S	L	L	L
Mississippi	S		SL	SL	SL	SL	SL			S				
Missouri	S	S	S	S	S	S			S				S	
Montana	S		S	S	S	S	L	S		S				S
Nebraska	S		SL	SL	SL	L	L	S	[2]	[2]			L	L
Nevada	S							S					S	
New Hampshire	S		S	S	S	S	L	S	S		S		SL	S
New Jersey	S	S					SL	SL		S	S		L	S
New Mexico	S	S	SL	SL	SL	SL	SL				S			S
New York	S	SL	SL	SL	SL	SL	SL	SL		S	S		L[3]	L[3]
North Carolina	S	S	S	S	S	S		S	S		S		L	L
North Dakota	S		S	S	S	S		L					L	L
Ohio	S	SL	SL	SL	SL	SL	L	SL			S	L	SL	S
Oklahoma	S		S	S	S	S	S	S		S	S		L	L
Oregon	S		S	L	L	L	SL	S	S	S	S	L	SL	S
Pennsylvania	S										S			
Rhode Island	S		S	S	S	S	SL		S	S				S
South Carolina	S						L						S	
South Dakota	S		S	S	S	S	L	S		S			L	S
Tennessee	S	S	S	S	S	S	L	S	S	S	S		SL	S
Texas	S	S												
Utah	S		S	S	S	S	L							
Vermont	S		S	S	S	S	S	S	S		S		SL	S
Virginia	SL		S	S	S	S	SL		S	S	S		L	L
Washington	S		SL	L	L	L	L	S		S	S	L	L	L
West Virginia	S		SL	SL	SL	SL	L	SL					L	L
Wisconsin	S		SL	SL	SL	SL	L	S		S	S			
Wyoming	S		S	S	S	S		S		S			SL	S

[1]Twenty States have intermediate appellate courts.
[2]Bar Association.
[3]Except court of appeals.
[4]Colorado assumed full state financing of its court system in 1970.

Source: The Institute of Judicial Administration, *State and Local Financing of the Courts,* (Tentative Report) (New York, April 1969), "State Court Survey," pp. 26-36.

TABLE B

STATE-LOCAL SHARING OF COURT EXPENDITURES
1968-1969

STATE SHARE OF TOTAL STATE-LOCAL COURT EXPENDITURES[a]				
0-20%	21-40%	41-60%	61-80%	81-100%
Arizona (12)	Alabama (23)	Arkansas (47)	Delaware (68)	Alaska (93)
California (13)	Illinois (33)	Idaho (57)	Kentucky (72)	Connecticut (99)
Colorado (17)[b]	Iowa (24)	Maine (56)		Hawaii (99)
Florida (18)	Kansas (29)	New Hampshire (51)		North Carolina (91)
Georgia (17)	Louisiana (35)	New Mexico (47)		Rhode Island (99)
Indiana (19)	Maryland (40)	Oklahoma (44)		Vermont (100)
Michigan (17)	Massachusetts (22)	Utah (57)		
Nevada (17)	Minnesota (21)	Virginia (47)		
New York (20)	Mississippi (27)	West Virginia (42)		
Ohio (13)	Missouri (34)			
Pennsylvania (16)	Montana (29)			
South Carolina (18)	Nebraska (40)			
Texas (19)	New Jersey (34)			
Washington (17)	North Dakota (25)			
	Oregon (27)			
	South Dakota (25)			
	Tennessee (26)			
	Wisconsin (31)			
	Wyoming (36)			
14 States	19 States	9 States	2 States	6 States

[a]Numbers in parentheses indicate state percent of State-local court expenditures.

[b]Colorado assumed full State financing of its court system in 1970.

Source: U.S. Law Enforcement Assistance Administration & U.S. Bureau of the Census. *Expenditure and Employment Data for the Criminal Justice System 1968-1969.* Washington, 1971, Table No. 5.

TABLE C

NON-CAPITAL EXPENDITURE PER CAPITA FOR JUDICIAL ACTIVITIES BY STATE GOVERNMENTS, COUNTIES OVER 500,000 POPULATION, AND CITIES OVER 300,000 POPULATION, BY STATE: FISCAL YEAR 1968-1969

State	State govt.	County govts. over 500,000 population[e]	City govts. over 300,000 population[e]
Alabama	$0.72	$3.09	$0.54
Arizona	0.64	3.79	0.87
California	0.75	4.58	0.00[a]
Georgia	0.66	5.76	1.53
Illinois	1.53	4.49	0.02
Kentucky	1.86	1.11	0.57
Michigan	0.84	3.78	2.09
Minnesota	0.72	3.67	1.18
Missouri	1.30	2.47	0.88[b]
New Jersey	1.21	3.51	1.37
New York	1.46	3.66	1.76[c]
Ohio	0.61	2.75	2.32
Oregon	1.15	3.49	1.42
Pennsylvania	0.68	3.00	0.61[d]
Tennessee	0.67	2.56	0.43
Texas	0.64	2.50	0.64
Washington	0.50	2.27	1.71
Wisconsin	1.27	4.40	0.12
Median	0.72	3.29	0.88

[a]Does not include San Francisco.

[b]Does not include Saint Louis.

[c]Does not include New York City.

[d]Does not include Philadelphia.

[e]All population figures are 1970 Census preliminary estimates.

Source: U.S. Law Enforcement Assistance Administration & U.S. Bureau of the Census. *Expenditure and Employment Data for the Criminal Justice System 1968-1969.* Washington, 1971, Tables No. 11, 21, 27.

Alaska

According to the 1969 IJA survey of courts all court expenses are handled by the state in Alaska. See Table A. Alaska is shown as assuming 93 per cent of total state-local expenditures in 1968-1969, according to Table B.

The unitary budget in that state apparently derives from constitutional provision. Section 1 of Article IV of the Alaska constitution provides:

> "The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law."

Statutes have created one superior court, for the state, consisting of four districts. Statutes also establish a district court for each of the four judicial districts of the superior court and provide for judges and magistrates for each district. (Sec. 22.10.010 et seq. Alas. Stat.)

No salary warrant may be issued to a justice of the supreme court, judge of the superior court, or district judge or magistrate "until he has filed with the state officer designated to issue salary warrants an affidavit that no matter referred...opinion or decision has been uncompleted or undecided by him for a period of more than six months..."

Furthermore, statutory provision has been made for the division of fines, penalties and forfietures between state and local government. Alaska statutes provides:

> "When by law any fees, fines, forfeitures, or penalties are levied and collected by the district judge or magistrate, the proceeds and all other money collected shall be accounted for and transmitted to the administrative director of the judicial system for transfer to the general fund of the state except as provided in Section 270 of this Chapter."
>
> The latter provides:
>
> "All fines, penalties and forfeitures resulting from violations of ordinances of political subdivisions shall be returned to the political subdivision whose ordinance is involved in the manner provided by rule of the supreme court. The political subdivision shall pay to the state administrative director of the court for transfer to the general fund of the state such sums as will pay for the judicial services rendered to the political subdivision by the district judge or magistrate rendering the services. Fines, penalties and forfeitures imposed after appeals accrue to the state, unless the appeal is prosecuted by the political subdivision."

Colorado

Effective January 1, 1970, the state of Colorado, by statute, assumed the responsibility for funding "the operations, salaries, and other expenses of all courts of record within the state, except for county courts in the city and county of Denver and municipal courts." (Sec. 37-11-6 Colo. Rev. Stat.) Table B reveals that prior to the adoption

of this plan the state's share in court expenditures was a reported low 17 per cent.

State assumption of judicial financing in Colorado has been traced to two events - a 1963 Colorado Supreme Court opinion requiring the county to pay necessary and reasonable judicial salaries and expenses fixed by the court unless they were so unreasonable as to indicate arbitrary and capricious action on the court's part (Smith v. Miller, 153 Colo. 35, 384 P. 2d. 738 1963) and a 1965 reorganization of the court system by constitutional revision, eliminating justice of the peace courts and establishing in their place a system of county courts. County officials in some counties reportedly complained that other necessary county functions had to be curtailed because they no longer controlled court budgets after the court decision upholding the court's inherent powers to order the payment of salaries under the conditions stipulated in the 1963 opinion.

The 1969 legislation that evolved out of these developments required that on January 1, 1970 supplies and equipment belonging to courts of record (other than in Denver as noted) be transferred to the state judicial department. It coveres a personnel classification plan for court employees, as well as qualifications, duties, and procedures governing appointment, promotion, transfer, removal, various conditions of employment, and retirement association transfer. It also recognizes the constitutional authority of the chief justice to consolidate clerks of district and county courts in certain counties when there is insufficient judicial business to warrant separate offices.

Budgetary and fiscal procedures in the plan are spelled out with some detail in the statutes. The court administrator, who under the constitution is appointed by the supreme court, is required to prepare an annual judicial department operating budget. The court administrator must prepare an annual budget request and submit budget request documents to the executive director of the department of administration and the joint budget committee of the legislature. The governor is required to include his recommendations for court appropriations as part of his regular budget message. Further responsibilities of the court administrator include the development of court procedures governing budget requests, funds disbursement, purchases, and fiscal administration. (Sec. 37-11-8)

The Colorado plan recognize the dual responsibility of state and local government for court building facilities. Although county commissioners "continue to have the responsibility of providing and maintaining adequate courtrooms and other court facilities, including janitorial service, "the centralized court funding program also provides for the payment of state funds for the construction of capital improvement facilities to be used for judicial purposes authorized and approved by the general assembly. The court administrator is required to prepare an annual capital construction budget for submission to the general assembly and state controller and a long-range judicial construction plan outlining capital construction needs on a five-year basis. The administrator may enter into agreements when joint construction is authorized or when the approved facilities are to be used in part for non-judicial purposes, to provide for the payment of state funds for that portion of costs related to court operations. (Sec. 37-11-10).

Connecticut

Another state in which state financing of courts is said to be virtually complete is Connecticut. Connecticut stands with Hawaii, Rhode Island, and Vermont in the Table B report of state local sharing of expenditures in that 99 per cent of such expenditures

are paid by the state. The IJA survey reflected in Table A indicates that all costs other than lower court costs are state financed. The courts referred to are courts of probate.

It is by virtue of statute that court operations are centrally financed. The post of executive secretary to the chief court administrator has been established by law, and the fiscal responsibilities that attach to the office are as follows:

> "(a) Audit all bills to be paid from state appropriations for the expenses of the judicial department and each of its constituent courts prior to taxation or final approval thereof by any judge;
>
> (b) maintain adequate accounting and budgetary records for all appropriations by the state for the maintenance of the judicial department and all other appropriations assigned by the legislature or state budgetary control offices for administration by the judicial department;
>
> (c) prepare and submit to the appropriate budget agency of the state government estimates of appropriations necessary for the maintenance and operation of the judicial department and make recommendations in respect thereto;
>
> (d) act as secretary of any conferences or assemblies of judges or chief judges of the judicial department and of each of its constituent courts;
>
> (e) supervise allpurchases of commodities and services for the judicial department to be charged to state appropriations, and issue all orders therefor:
>
> (f) examine the administrative methods and systems employed in the judicial department and each of its constituent courts and the several agencies thereof, and make recommendations for the improvement thereof and for securing uniform administration and procedures;
>
> (g) examine the state of the dockets of each of the constituent courts of the judicial department to ascertain the need for assistance by any court; collect and compile statistical and other data concerning the business transacted by the judicial department and each of its constituent courts and the expenditure of public moneys for the maintenance and operation of the judicial system;
>
> (h) assist in the preparation of the assignments of the judges of the superior court, the court of common pleas and the circuit court and attend to the printing and distribution thereof;
>
> (i) serve as payroll officer for the judicial department and each of its constituent courts supported by state appropriations;
>
> (j) supervise the assignment of court reporters of the superior court, the court of common pleas and the circuit court;
>
> (k) report periodically to the chief court administrator concerning all matters which have been entrusted to him;
>
> (l) attend to such other matters as may be assigned to him by the chief court administrator." (Conn. Get. Stat. Ann. Sec. 51-9)

Judges of the supreme court have the statutory obligation "from time to time (to)

prescribe the compensation plan for all positions in the state-maintained courts, including such classes, grades and salary groups for full-time positions as they deem necessary." (Sec. 51-12)

Florida

In Florida a new judicial article, proposed at the 1971 Third Special Session of the Legislature and adopted by the voters at a special election on March 14, 1972 became effective January, 1973.

Section 1 of the new article, Article V, provides in part:

> "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality..."

Section 14 provides:

> "All justices and judges shall be compensated only by state salaries fixed by general law. The judiciary shall have no power to fix appropriations."

Finally, a portion of the new judicial article confirming administrative unification of the courts is section 9 of Article V:

> "The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits. If the supreme court finds that a need exists for increasing or decreasing the number of judges or increasing, decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need. Upon receipt of such certificate, the legislature, at the next regular session, shall consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part, provided the legislature may create more judicial offices than are recommended by the supreme court or may decrease the number of judicial officers by a greater number than recommended by the court only upon a finding of two-thirds of the membership of both houses of the legislature that such a need exists. A decrease in the number of judges shall be effective only after the expiration of a term. If the supreme court fails to make findings as provided above when need exists, the legislature may by concurrent resolution request the court to certify its findings and recommendations; and upon the failure of the court to certify its findings for nine consecutive months, the legislature may, upon a finding of two-thirds of the membership of both houses of the legislature that a need exists, increase or decrease the number of judges or increase, decrease or redefine appellate district and judicial circuits."

Hawaii

Hawaii is a state that has been cited in several studies as one of a handful that assume virtually all of the expenses of the state court system. Table A, published in 1969, and Table B, published in 1971, both substantiate the claim that in Hawaii

the state share of judicial expenses is as great as in any other state.

In Hawaii the financing provision is statutory. Section 5 of Article V of the constitution of the state designates the chief justice of the supreme court "administrative head of the courts." In this capacity the chief justice is required by statute to make regular reports to the legislature of the business of the department and of the administration of justice throughout the state.

More specifically, the chief justice is required to present to the legislature a unified budget for all of the courts in the department and "to procure from all of the courts in the department estimates for their appropriations; with the cooperation of the representatives of the court concerned to review and revise them as he deems necessary for equitable provisions for the various courts according to their needs and to present the estimates, as reviewed and revised by him, to the governor and the legislature as collectively constituting a unified budget for all of the courts in the department." (Hawaii Rev. Stat. Tit.32, Sec. 601-3, 601-3)

Maine

Maine has three statewide courts - the Supreme Judicial Court, the Superior Court, and the District Court. The district court replaced justice courts and municipal courts, which were abolished when a unified minor court system was established in 1961.

According to the IJA material the state of Maine shared with local government the costs of running the trial courts of general jurisdiction as well as lower courts when its survey was made. See Table A. Table B shows Maine as a state that in 1968-1969 contributed 56 per cent of court expenditures. Moreover, an American Judicature Report lists Maineas one of ten states in which all expenses of the minor court system are borne by the state.

A special study of the Maine court system by the Institute of Judicial Administration, published in 1971, pointed out that of the three statewide courts of Maine, only the Superior Court is presently financed partly by the state and partly by the counties. The major question in court financing in Maine is whether the state should assume all financial obligations of the Superior Court as it has done with other statewide courts. The IJA summarizes the pro's and cons of doing so and recommends a statewide master plan, with complete state financing. The latest supplements available to the Maine Revised Statute Annotated do not reveal whether the IJA recommendations were adopted.

Maryland

The 1969 tentative report of the Institute of Judicial Administration on state and local financing of the courts indicated that in Maryland the salaries of judges of the trial courts of general jurisdiction were shared by state and local government and that the costs of operating lower courts were largely borne by local government. See Table A based upon that report as a source.

The subsequent report of the U.S. Advisory Commission on Intergovernmental Relations shows Maryland's state share of total state-local court expenditures at 40 per cent. See Table B.

An American Judicature Society Report on the Administration of Justice, on the other

hand, lists Maryland as a jurisdiction in which as of the summer of 1971 the state had taken over the bulk of financing of the courts. This is so because of the constitutional amendment approved in November, 1970, completely reorganizing the lower court system. An earlier memorandum to this committee, dated October 25, 1973, pointed out: "Under the reorganization, which became effective July 5, 1971, the former system (consisting of full and part-time people and municipal courts and trial magistrates) was replaced by a full-time district court system staffed by 80 judges who are required to be members of the bar with a minimum period of five years of law practice." By statute enacted pursuant to that constitutional amendment, effective from and after July 1, 1972, "the salaries of the judges of the Court of Appeals, the Court of Special Appeals, the circuit courts of the several counties, the Supreme Bench of Baltimore City, and the District Court shall be as provided in the State budget." Sec. 47, Art. 26 Md. Code Ann.) Additional payments from political subdivisions to such judges are specifically prohibited.

New Mexico

The court of general trial jurisdiction in New Mexico is the district court.

Statutes adopted in 1968 make the following provisions for financing of such courts:

> "A. All money for the operation and maintenance of the district court, including the children's and family court divisions, shall be paid by the state treasurer upon warrants of the director of the department of finance and administration, supported by vouchers of the district judges and in accordance with budgets approved by the administrative officer of the courts and the state budget division of the department of finance and administration. In judicial districts having more than one district judge, vouchers shall be approved by the presiding judge of the district or his authorized representative.
>
> B. The district judge may authorize the establsihment of a checking account, designated as the"district court special operations account," in a federally insured bank. In accordance with budget requirements, warrants of the director of the department of finance and administration may be deposited to the district court special operations account, and checks on the account may be written by the district judge or his authorized representative for payment of:
>
> (1) jury fees and expenses
> (2) witness fees and expenses; and
> (3) petty cash expenses
>
> Specific provision is made by statute for court facilities.

"In each county the district court shall be held at the county seat. Each board of county commissioners shall provide adequate quarters for the operation of the district court and provide necessary utilities and maintenance service for the operation and upkeep of district court facilities. From the funds of each judicial district,furniture equipment, books and supplies shall be provided for the operation of each district court within the judicial district." (Section 16-3-23, Art. 3, New Mex. Stats.)

North Carolina

According to Table A, in North Carolina most judicial expenses are assumed by the state; only the construction and maintenance of court buildings are shown as local expenses.

Table B verifies that North Carolina deserves to be listed as one of the seven states in which virtually all judicial costs are funded by the state through a single budget administered by the judicial branch.

The provision for state financing of the courts is statutory in North Carolina. Section 7A-300 of the North Carolina General Statutes provides:

> (a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly. The Administrative Office of theCourts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:
>
> (1) Salaries, departmental expense, printing and other costs of the appellate division;
>
> (2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders and fees and expenses of counsel assigned to represent indigents...
>
> (3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;
>
> (4) Salaries and travel expenses of district judges, magistrates, and family court counselors;
>
> (5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;
>
> (6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;
>
> (7) Compensation and allowances of court reporters;
>
> (8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;
>
> (9) Transcripts of preliminary hearings in indigency cases;
>
> (10) Transcript of the evidence and trial court charge furnished the solicitor when a criminal action is appealed to the appellate division; and
>
> (11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State."

North Carolina statutes provide an interesting method of reimbursing local units of government for expenses involved in the furnishing of court rooms. Section 7A-302 requires that judicial facilities for district courts be furnished by county or municipality but provided in part:

> "To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the 'facilities fee,' collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities."

Oklahoma

In its study of state and local financing of the courts the Institute of Judicial Administration found that in Oklahoma the state assumes a large portion of court expenses, including the expense of lower courts. Only the construction and maintenance of court buildings are shown as local expenses. On the other hand, Table B indicates that the state share of total state-local court expenditures for Oklahoma in that time period was 44 per cent. The IJA study would suggest that a higher proportion of judicial expenses are borne by the state in Oklahoma, and the American Judicature Society reports that as of the summer of 1971 Oklahoma is one of 10 states in which the state has taken over the bulk of court financing.

The discrepancy is probably explained by the provisions of a new judicial article of the Oklahoma Constitution, adopted in 1968 but carrying a delayed effective date for some portions. Section 7 of the new Article VII establishes the district court, manned by district judges, associate district judges and special judges, as a replacement for other courts existing prior to the amendment. Section 11 provides in part: "All basic salaries and expenses, or any portion thereof, of judges of District Courts shall be paid by the State unless otherwise provided by Statute, with such additional salaries as may be provided by statute to be paid by the respective districts or counties." This provision became effective on January 13, 1969.

The Oklahoma provision for state assumption of expenses is constitutional rather than statutory but allows another arrangement to be established by statute.

Rhode Island

Rhode Island reported state assumption of all court expenses except lower courts in the IJA survey reflected in Table A. The state is credited with picking up 99 per cent, or virtually the total costs of courts in Table B. In Rhode Island, as in Connecticut, probate courts receive support from the fees which they collect.

The provision for unitary budgeting is statutory in Rhode Island. The chief justice of the supreme court, as executive head of the judicial system, appoints a court administrator and assistants. The court administrator is required to "prepare an annual budget for the judicial system and submit the same to the department of administration and perform all other necessary functions relating to the administration of the courts thereof." (R. I. Gen. Laws, Sec. 8-15-4)

Vermont

The state of Vermont is shown in Table B as having assumed 100 per cent of court expenditures in 1968-1969. However the IJA survey as reported in Table A shows that the state handles all court expenses except that it share with local government the cost of the construction of court buildings. The two tables are impossible to reconcile and either is impossible to validate except possibly by survey.

The state effected a unified court organization by legislation enacted in 1965 and 1967. What has been created is one district court having statewide jurisdiction. "For administrative purposes, the supreme court from time to time may organize the district court in territorial units, designating the towns within the units and may organize the territorial units into two or more circuits. It shall designate the location of the principal office in each unit. The district court may hold its sessions in any town designated by the supreme court where adequate facilities exist for disposing of court business. It shall hold sessions in each county as often as the court administrator finds the caseload of the county requires." (Vt. Stat. Ann. Title 4, Sec. 436)

FOOTNOTES

1. U.S. Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System (1971) 207.

2. Ibid.

3. Ibid.

4. Ibid.

5. Institute of Judicial Administration, State and Local Financinf of the Courts (Tentative Report - April, 1969) 4.

6. Ibid.

7. Id. at 5.

8. Geoffrey Hazard, Martin B. McNamara, and Irvin F. Sentilles, III, Court Finance and Unitary Budgeting (A.B.A. 1973) 2.

Ohio Constitutional Revision Commission
Judiciary Committee
December 27, 1973

Research Study No. 29

The Ohio Courts of Appeals

History

The Ohio Courts of Appeals, as such, are a relatively recent development, having been created by the revision of what was Article IV, section 6 in 1912. However, intermediate courts known by other names have existed in Ohio since the adoption of the Constitution in 1851. Before that time the only appellate jurisdiction in the state resided in the Supreme Court and was exercised on circuit in each of the counties. As established by the Constitution of 1802, the Supreme Court consisted of three judges and the General Assembly had the authority to add a fourth judge after five years. In 1808, the General Assembly did enlarge the Court to four judges and, pursuant to constitutional direction, the state was divided into two Supreme Court districts, each presided over by two of the judges who there decided questions on appeal. However, two years later the 1808 act was repealed, thereby ending the state's division into districts and again giving the Supreme Court a three-judge bench. A new statutory provision for a fourth judge was enacted in 1816 and, again in accordance with the constitutional mandate, the state had two Supreme Court districts. The number of Supreme Court judges was not further changed until set at five by the Constitution of 1851.

The first intermediate reviewing courts were the District Courts. The Constitution of 1851 not only established the District Courts but also divided the state into nine judicial districts, each having a District Court composed of one judge of the Supreme Court and all the Common Pleas judges in the district. Any three of the appropriate judges constituted a quorum for the District Court to act.

An amendment of Section 6 in 1883 abolished the District Courts and established the Circuit Courts in their place. The Circuit Courts were the first constitutionally authorized Ohio courts having intermediate appellate jurisdiction and elected judges who did not serve primarily on other courts. The amendment of 1883 and complementary legislation created seven judicial districts, each having a Circuit Court composed of three judges, and required that two sessions of the court be held annually in each of the counties. The Circuit Courts had original jurisdiction like that of the Supreme Court in cases involving extraordinary writs and such appellate jurisdiction as was prescribed by law.

The electorate in 1912 not only replaced the Circuit Courts with the Courts of Appeals but also removed most of the legislative control over the jurisdiction of these intermediate appellate courts and made the judgments of the Courts of Appeals final in certain cases. Where both the 1851 and the 1883 provisions had indicated that these courts would have:

> ...like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law,

the 1912 amendment specified both the original and appellate jurisdiction, removing mention of any jurisdiction which might, otherwise, have been granted by the General Assembly through the enactment of laws. The pertinent section of the 1912 provision read:

> (t)he courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeus corpus, prohibition and procedendo and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law.

A 1944 amendment to Section 6 provided for review by the Courts of Appeals of the judgments and orders of some state boards, commissions, and officers. At the same time, some legislative control over the jurisdiction of the Courts of Appeals was restored by a re-adoption of the language referring to "jurisdiction as may be provided by law."

In 1959 yet another amendment was adopted, allowing the General Assembly to increase the number of judges on the Courts of Appeals in any district where the volume of business required more than the usual three judges.

The constitutional provisions relating to the Courts of Appeals underwent major modification with the adoption in 1968 of the Modern Courts Amendment. The Courts of Appeals are now treated in Article IV, Section 3, which concerns the establishment of districts, the number of judges, the delineation of original jurisdiction, the statutory explication of appellate jurisdiction, the consensus of judges necessary for decisions in different matters, the certification of inter-district conflicts in interpretation to the Supreme Court for their resolution, and the reporting of cases. Other sections of the present Constitution also relate to the Courts of Appeals and their judges, but Section 3 is by far the most important.

Perhaps the most significant recent step in the development of the Courts of Appeals was the adoption, pursuant to Article IV, section 5, of the Ohio Rules of Appellate Procedure in 1971. The Appellate Rules govern appeals from the courts of record to the Courts of Appeals and some aspects of appeals from the Board of Tax Appeals to the Courts of Appeals. Appellate Rule 2 abolishes appeals on questions of law and fact. In doing so, one of the most important changes brought about by the new Rules is achieved. [1]

Jurisdiction

The jurisdiction of the Courts of Appeals is set forth generally in Article IV, section 3 and is divided into two categories -- original jurisdiction and appellate jurisdiction.

The original jurisdiction of the Courts of Appeals is the same as the original jurisdiction of the Supreme Court with the exception that the higher court has exclusive original jurisdiction in matters relating to admission to the bar and the practice of law. Five of the six areas in which the Courts of Appeals may exercise original jurisdiction involve cases which rely upon extraordinary writs, namely quo warranto, mandamus, habeus corpus, prohibition, and procedendo. The sixth area in which the Courts of Appeals have original jurisdiction is found in Section 3 (B) (1) (f) of Article IV and reads, "In any cause on review as may be necessary to its complete determination." This grant of jurisdiction to the Courts of Appeals is new in that no such jurisdiction

1 Alba L. Whiteside, Ohio Appellate Practice (Cleveland: Banks Baldwin Law Publishing Company, 1972) Preface.

existed before the adoption in 1968 of the Modern Courts Amendment. While the extraordinary writs have long been used and the extent of the jurisdiction bestowed in relationship to them is well understood, such is not the case with the original jurisdiction conferred by Division (B) (1) (f). The intent of having such original jurisdiction in a reviewing court is to allow the higher court to prevent, when possible, any further litigation by making an order beyond the usual affirmance or denial which will place the parties in the positions the court thinks they would otherwise reach only after the subsequent rehearing or new hearing in the trial court. The courts have not, as of yet, explicated the extent of this jurisdictional grant. However, the Courts of Appeals have in several reported instances exercised this jurisdiction. For example, and as the result of such an instance, the Supreme Court has upheld the use of this provision by a Court of Appeals which awarded custody of a minor to the child's father, thereby curing the trial court's error as a matter of law in giving the mother "legal custody and control" while giving the maternal grandmother "physical custody." [2]

The appellate jurisdiction of the Courts of Appeals is specified by statute pursuant to Section 3 (B) (2). The constitutional provision indicates that the Courts of Appeals may only review and rule on judgments and final orders of those courts which are inferior to the Courts of Appeals and which are courts of record. The Constitution also extends, as the General Assembly may see fit, appellate jurisdiction to the review and disposition of administrative orders and actions. It is important to again note that the anomalous appeal on questions of law and fact, which took the form of a trial de novo was abolished by the enactment of Appellate Rule 2 even though the provisions for such an appeal still appear on the face of the statute. The jurisdiction to "review, and affirm, modify, or reverse judgments or final orders," is essentially the authority to study the events of a case in a lower court and to provide relief for a party who suffered a prejudicial error of law in the court below. Such a review can be made only if the lower court was a court of record, such as a common pleas court and, consequently, no case may be taken to the Courts of Appeals from a mayor's court since the latter is not a court of record. The jurisdiction of the Courts of Appeals with respect to the review of administrative orders and actions is basically to make a second review after the matter has been appealed to a common pleas court. Proceedings to reverse, vacate, or modify a decision of the Board of Tax Appeals may be taken directly to the Courts of Appeals, but there are no statutory provisions for direct appeal of other administrative action to the Courts of Appeals even though the language of Section 3 (B) (2) indicates that laws might be passed to this effect.

Organization and Operation

The state is divided by Revised Code Section 2501.01 into eleven courts of appeals districts. Each of the districts is bounded by county lines although the Modern Courts Amendment removed the constitutional requirement that such be the case. The 1912, 1944, and 1959 constitutional provisions each include the phrase:

> (t)he state shall be divided into appellate districts of compact territory bounded by county lines...

2 Baxter v. Baxter, 37 Ohio St. 2d 168, 271 N.E. 2d 873 (1971).

The present Article IV, section 3 contains the simpler statement that:

> (t)he state shall be divided by law into compact appellate districts...

The Eighth and Tenth District each is comprised of a single county, Cuyahoga and Franklin, respectively, while the remaining nine districts have from four to sixteen counties each.

Article IV, section 3 (A) and Revised Code section 2501.18 require that the county commissioners in every county provide and furnish an appropriate courtroom for use by the Courts of Appeals. Additional statutory provisions make the clerks of the courts responsible for supplying needed stationary and lawbooks, and allow the courts to appoint official shorthand reporters and constables.

Prior to the adoption of the Modern Courts Amendment, the Constitution of 1851 had mandated that each intermediate appellate court hold at least one session annually in every county within its district. The present Article IV, section 6 states:

> (t)he court shall hold sessions in each county as the necessity arises.

While the effect of removing the clear mandate of holding court in each county annually has not been determined by the courts, it may be interpreted to mean that the Courts of Appeals need no longer meet in every county of their districts each year. The recent enactment of Revised Code section 2501.181, and the fact that Article IV, section 3 (A) does not say the court facilities to be furnished by the county commissioners need be in the separate counties, may be seen to support this analysis. Revised Code section 2501.181 allows a court of appeals to select one county in its district as its principal seat. When this occurs, the court's expenses are shared by all the counties in the district and the counties other than that of the principal seat are excused from maintaining separate facilities for the court.

As already indicated, the procedural practice in the Courts of Appeals as well as the procedural operation of the courts is largely regulated by the Rules of Appellate Procedure. As a general rule, cases in the courts are disposed of in the same order as they are entered.

Statistics of the Supreme Court's Administrative Director indicate that, as of October 31, 1973, there are 2,422 cases pending in the Courts of Appeals. The largest number of pending cases was in the Eighth District with 482, while the smallest number of cases was in the Third District, where 103 cases were pending.[3] The most recent biennial report of the Ohio Judicial Conference suggests that while the number of pending vases has remained fairly stable in recent years, the number of filings and terminations in the Courts of Appeals has increated approximately forty per cent to about 3,700 annually.

Judges

There are presently thirty-eight judges of the Courts of Appeals. Section 3 of Article IV mandates that there be a minimum of three judges in each district

3 See Appendix

and allows the General Assembly to create more positions as needed. Only the Eighth and Tenth Districts currently have more than three judges, the former having six and the latter having five. In districts having more than three judges, three of the judges sit in each case. The majority of judges necessary to make a ruling is set out in the Constitution. A simple majority is sufficient to render judgment except when a jury verdict has been had in a case and it is to be reversed on the weight of the evidence, in which instances all three judges must concur.

The judges are elected within their districts to terms of six years, and, except in those districts having more than three judges, only one judge is chosen every two years in each district. Section 5 of Article IV provides for the Chief Justice of the Supreme Court to appoint, when necessary, any common plaase judge to sit temporarily on any Court of Appeals or to appoint a Court of Appeals judge to serve outside his district or on a court of common pleas. Superintendence Rule 12 (C) makes provision for the appointment of any judge to service on the Supreme Court temporarily, Each judge of the Courts of Appeals must be an attorney and have practiced law or have been a judge for the six years preceding his election or appointment to the Court of Appeals.

The statutes direct that the judges of the Courts of Appeals meet annually and then select one of their number as chief justice of the Courts of Appeals and another as secretary. This requirement, designed to aid in organizing the Courts of Appeals, is complemented by another statutory provision which makes the elected judge in each district who has the shortest period of time left to run on his term in office the presiding judge. While referring to seniority among the judges, it is interesting to note that twenty-five of the thrity-eight persons presently on the bench in the Courts of Appeals are serving their first terms and that the longest current tenure on the Courts of Appeals is sixteen years.

The compensation of judges of the Courts of Appeals is required by the Constitution and set by the General Assembly. The Constitution also mandates that, unlike the case among common pleas judges, the judges of the Courts of Appeals all receive the same compensation. The salary for a judge of the Courts of Appeals has recently been raised from $28,000 per year to $37,000 per year.

Financing

The expenses of operating the Courts of Appeals are shared by the state and the counties. The major recurring expense of the courts, namely the judges' salaries, is paid entirely by the state out of the general revenue funds.

In addition to the salaries of the thirty-eight judges, the maintenance expenses of the judges such as travel expenses, the per diem salaries of retired judges assigned to active duty on the Courts of Appeals, and the salaries and maintenance of the court reporters are also borne entirely by the state.

Revised Code sections 2501.16 and 2501.17 provide for as many official shorthand reporters as the Courts of Appeals find necessary and indicate such persons are to be paid from the state treasury. The statutes also provide that such reporters have the same powers as their counterparts in the courts of common pleas and are to perform such other duties as the court might direct them to carry out. There are currently only thirty-seven persons who receive any state compensation for services as shorthand reporters in the Courts of Appeals.

The amounts these persons receive suggest that they are not fully paid by the state and that parts of their total salaries are paid by the various counties for services not considered by the Courts of Appeals as those of official shorthand reporters.

Revised Code sections 2701.07 and 2701.08 allow the Courts of Appeals to appoint constables who serve the courts and are paid from the county treasuries. Such constables are charged by the statutes with responsibility for maintaining order in the court, assigning cases, and performing other duties as directed by the court.

In that the Courts of Appeals have no statutory authority to appoint staff persons other than reporters, paid by the state, and constables, paid by the counties, all non-elected Courts of Appeals personnel serve officially in one or both of these capacities, regardless of the actual scope of their work.

The amounts of money expended by the counties for the Courts of Appeals are not readily ascertainable in that no central accounting of such costs is kept. The costs incurred by the counties in meeting their statutory duties to provide and maintain necessary physical facilities such as court and conference rooms can, likewise, only be determined by reference to the accounts of each individual county.

APPENDIX

Courts of Appeals
Cases Showing Status by District and County
October 1973

	PENDING AT BEGINNING OF PERIOD	NUMBER OF CASES FILED	TERM.	PENDING AT END OF PERIOD
FIRST DISTRICT				
BUTLER	58	11	13	56
CLERMONT	15	3	5	13
CLINTON	2	1	0	3
HAMILTON	337	52	56	333
WARREN	28	3	6	25
DISTRICT TOTALS	440	70	80	430
SECOND DISTRICT				
CHAMPAIGN	2	1	0	3
CLARK	42	10	10	42
DARKE	13	2	2	13
FAYETTE	15	3	7	11
GREENE	20	2	4	18
MADISON	21	2	5	18
MIAMI	16	5	5	16
MONTGOMERY	114	23	11	126
PREBLE	2	0	2	0
SHELBY	1	0	0	1
DISTRICT TOTALS	246	48	46	248
THIRD DISTRICT				
ALLEN	29	9	10	28
AUGLAIZE	7	4	0	11
CRAWFORD	1	0	0	1
DEFIANCE	0	3	0	3
HANCOCK	15	1	0	16
HARDIN	3	0	0	3
HENRY	1	1	0	2
LOGAN	9	0	0	9
MARION	5	3	0	8
MERCER	2	0	0	2
PAULDING	3	0	0	3
PUTNAM	4	0	0	4
SENECA	3	0	0	3
UNION	4	2	1	5
VAN WERT	2	0	0	2
WYANDOT	4	1	2	3
DISTRICT TOTALS	92	24	13	103

	PENDING AT BEGINNING OF PERIOD	NUMBER OF CASES FILED	TERM	PENDING AT END OF PERIOD
FOURTH DISTRICT				
ADAMS	4	0	1	3
ATHENS	15	5	1	19
BROWN	0	0	0	0
GALLIA	9	1	2	8
HIGHLAND	16	2	5	13
HOCKING	2	0	0	2
JACKSON	6	0	0	6
LAWRENCE	11	1	2	10
LEIGS	1	0	0	1
PICKAWAY	15	0	0	15
PIKE	3	0	0	3
ROSS	7	1	1	7
SCIOTO	25	6	2	29
VINTON	3	0	2	1
WASHINGTON	8	2	0	10
DISTRICT TOTALS	125	18	16	127
FIFTH DISTRICT				
ASHLAND	7	0	0	7
COSHOCTON	8	1	1	8
DELAWARE	7	0	6	1
FAIRFIELD	11	2	2	11
GUERNSEY	3	1	0	4
HOLMES	2	0	0	2
KNOX	9	2	2	9
LICKING	10	4	1	13
MORGAN	4	0	0	4
MORROW	7	0	0	7
MUSKINGUM	22	1	0	23
PERRY	1	3	0	4
RICHLAND	32	3	14	21
STARK	69	16	15	70
TUSCARAWAS	6	2	0	8
DISTRICT TOTALS	198	35	41	192
SIXTH DISTRICT				
ERIE	14	6	5	15
FULTON	2	1	1	2
HURON	6	0	1	5
LUCAS	77	21	13	85
OTTAWA	6	2	1	7
SANDUSKY	9	3	3	9
WILLIAMS	6	0	1	5
WOOD	15	7	0	22
DISTRICT TOTALS	135	40	25	150

	PENDING AT BEGINNING OF PERIOD	NUMBER OF CASES FILED	TERM	PENDING AT END OF PERIOD
SEVENTH DISTRICT				
BELMONT	7	2	0	9
CARROLL	8	1	0	9
COLUMBIANA	21	3	2	22
HARRISON	6	0	0	6
JEFFERSON	1	0	0	1
MAHONING	43	11	8	46
MONROE	8	4	0	12
NOBLE	0	0	0	0
DISTRICT TOTALS	94	21	10	105
EIGHTH DISTRICT				
CUYAHOGA	516	76	110	482
DISTRICT TOTALS	516	76	110	482
NINTH DISTRICT				
LORAIN	50	12	6	56
MEDINA	24	5	2	27
SUMMIT	105	22	26	101
WAYNE	19	1	4	16
DISTRICT TOTALS	198	40	38	200
TENTH DISTRICT				
FRANKLIN	203	45	25	223
DISTRICT TOTALS	203	45	25	223
ELEVENTH DISTRICT				
ASHTABULA	19	2	1	20
GEAUGA	20	3	3	20
LAKE	47	2	4	45
PORTAGE	31	5	2	34
TRUMBULL	45	6	8	43
DISTRICT TOTALS	162	18	18	162
STATE RECAP	2,409	435	422	2,422

SOURCE: Ohio Courts, October 1973

Ohio Constitutional Revision Commission
Judiciary Committee
January 11, 1974

Provisions Regarding the Supreme Court in Article IV of the Ohio Constitution

Organization and Jurisdiction

The Constitution provides that the Supreme Court shall consist of seven judges, to be known as the Chief Justice and justices. In case of the absence or disability of the Chief Justice, the member with the longest period of total service on the Court is the Chief Justice.

A majority of the Court constitutes a quorum and may render a judgment. If for reason of illness, disability or disqualification, any member of the Court cannot hear and decide a case, the Chief Justice or the acting Chief Justice may direct any judge of any court of appeals to sit with the judges of the Supreme Court in the place of the absent judge.

The original jurisdiction of the Supreme Court, with one addition, is the same as the original jurisdiction of the courts of appeals. It has original jurisdiction in the following cases: (a) Quo warranto; (b) Mandamus; (c) Habeas Corpus; (d) Prohibition; (e) Procedendo and (f) "/i/n any cause on review as may be necessary to its complete determination."

In addition, the Court has jurisdiction over admission to the practice of law, the discipline of persons admitted, and all other matters relating to the practice of law.

There is an appeal to the Supreme Court, as a matter of right, in three situations: (1) in cases originating in the courts of appeals; (2) in cases in which the death penalty has been affirmed; and (3) in cases arising under the Constitution of the United States or the Constitution of Ohio.

By leave of Court, felony cases may be appealed from courts of appeals. Also, the Court may order a court of appeals to certify to it any case of "public or great general interest", and it may review and affirm, modify or reverse the judgment of the court of appeals. The Supreme Court must also review and affirm, modify or reverse any judgment certified to it by any court of appeals as being in conflict with the judgment of another court of appeals in the state on the same question.

The Constitution also gives the Supreme Court such "revisory jurisdiction" over the proceedings of administrative agencies or officers as provided by law.

Supervision and Rule-making

As the result of the passage of the Modern Courts Amendment in 1968, the Supreme Court has the power of "general superintendence over all courts of the state", to be exercised by the Chief Justice in accordance with rules promulgated by the Court. The Court is required to appoint an Administrative Director, to serve at its pleasure, and to determine his duties and compensation.

The areas in which the Court is given constitutional power to make rules are (1) practice and procedure (mandatory); (2) uniform record keeping in all courts (permissive); (3) temporary assignment of judges to courts created by law (permissive);

(4) hearing matters of disqualification of judges of courts created by law (permissive); and (5) admission to practice and discipline of those admitted (mandatory).

Rules of practice and procedure which the Court wishes to promulgate must be filed with the clerk of each house of the General Assembly by January 15, during a regular session. Such rules take effect on July 1 of that year, unless prior to that date, the General Assembly adopts a concurrent resolution of disapproval.

Local courts are given the power to adopt additional rules of practice not inconsistent with Supreme Court rules.

While the Court may promulgate rules governing the assignment of judges in courts created by law, the Constitution itself authorizes the Chief Justice or acting Chief Justice to temporarily assign any common pleas judge to sit or hold court on any other common pleas court or any court of appeals, and to assign any court of appeals judge to sit or hold court on any other court of appeals or any common pleas court, as necessity arises.

Powers at Chambers, or Otherwise Prescribed by Law

The Constitution also provides that judges of all courts, including the Supreme Court, shall have such powers and jurisdiction, at chambers, or otherwise, "as may be directed by law."

Constitutional Revision Commission
Judiciary Committee
January 24, 1974

Questions on Trial Court Organization

Some tenets of judicial organization, as expressed by Dean Roscoe Pound are: unification; flexibility; conservation of judicial power; and responsibility. Models provided at the January 9, 1974 meeting generate some questions regarding the attainment of these goals to which the committee might give its specific attention. They are categorized below.

1. GENERAL ORGANIZATION

   a. Should all trial courts be unified into a single trial court?

   b. Should there be a four-tiered system, with a court of general jurisdiction (common pleas by county or common pleas by district) plus one court of limited jurisdiction in each county?

   c. Is reorganization of the present trial court structure necessary to achieve a simplified, flexible court system, characterized further by conservation of judicial power and responsibility?

   d. Should the structure of the state's judicial system be left to legislative implementation, frozen into constitutional provisions, or left to the judiciary itself to implement through rule making powers?

   e. Should the proliferation of additional courts be prevented by prohibiting the legislature from establishing courts other than courts established in the constitution?

2. DISTRICT COURTS

   a. Should the trial court of general jurisdiction be created on a district rather than county basis?

   b. What branch of government should determine the geographical description of the district court--the supreme court, as in the ABA Model Judicial Article, or the legislature, as in the Ohio Constitution and the provisions of the National Municipal League Model Constitution?

   c. Should the General Assembly be empowered to create additional courts?

3. SUBJECT MATTER DIVISIONS OF THE COURT; JURISDICTION

   a. Should further splintering of the court of general jurisdiction (common pleas) be prohibited by removing the constitutional requirement that judges be elected to specific divisions?

   b. Can subject matter departmentalization be achieved without constitutional amendment?

   c. What branch of government should determine the number and nature of subject matter divisions of each district court--the supreme court, as in the ABA model, or the legislature, as in the NML Model?

d. If minor courts are retained or converted into divisions, should the court or division have exclusive jurisdiction in any area, e.g. misdemeanors?

e. Should there be administrative rather than judicial disposition of most traffic offenses (excluding serious offenses, such as DWI, reckless driving, homicide by motor vehicle)?

f. If the committee favors retention of a court of limited jurisdiction, does it recommend that such court have uniform jurisdiction throughout the state?

4. JUDGES

a. Should all judicial functions be performed by full-time judges?

b. Should the supreme court have a role in the determination of the number of judges and the creation, alteration or abolition of common pleas districts? Should this role be advisory or final?

c. Should mayors' courts and police courts be abolished or absorbed?

d. Should there be provision for the appointment of judicial officers (e.g. associate judges) to serve under the direction of the district court judges? If so, should matters to be assigned to associate judges be prescribed by Supreme Court rule or by law?

e. Should the General Assembly have the option of providing whether judges are selected from territorial sub-districts (e.g. counties) within a district or from the district at large?

5. JUDICIAL FINANCING

a. Should the state assume the burden of financing the judicial system? If so, what court employees should be included? What provisions should be made for capital costs?

6. PRACTICAL CONSIDERATIONS

Political feasibility problems involve possible reluctance of communities to lose local courts; objections regarding the unique ability of local courts to handle problems unofficially and informally; necessity of redistribution of the revenues generated by local courts; reluctance in some areas of clerks and other court personnel to consolidate.

Possible Solutions

a. Step by step approach, implementing unification proposal in populous metropolitan counties, providing showcase of what can be accomplished and making option to adopt more attractive by providing for state assumption of costs where courts are unified;

b. Recommending overall, consistent reorganization, beginning with General Assembly collection of statistics pertaining to minor courts. Information needed includes the following:

How much uniformity exists in types of cases handled in municipal and county courts and in the various mayors' courts? What proportion of cases in minor courts are traffic cases and what proportion are other misdemeanors. What is the balance between the revenues and expenditures of the minor courts? How much financial disparity exists? What is the relationship between caseload and judicial salary in the minor courts?

c. Recommending amendment of Section 1 of Article IV in order that the Constitution express explicitly that judicial power of the state is vested in a unified judicial system composed of enumerated courts.

Ohio Constitutional Revision Commission
Judiciary Committee
February 5, 1974

Research Study No. 32

Judicial Removal in Ohio

The focus of this study is on the ways by which an Ohio judge may be removed from office when, through his acts or omissions, he has failed to measure up to the high personal and professional standards expected of all judges. The provisions of law and the attendant problems surrounding mandatory retirement of a judge at a certain age, disqualification to hear particular cases, and suspension for reasons of physical or mental disability, are beyond the scope of this study.

Summary

Each of the approaches to judicial removal available in Ohio has a clearly identifiable basis in the Constitution. Generally, removal methods fall into three categories: (1) those which are traditionally set forth in state constitutions with some detail; (2) those which are set forth in statutory law; and (3) those which are the product of judicial rules. Although such a classification does not create mutually exclusive categories, it does facilitate the general overview of the subject.

Within the Ohio Constitution itself, two fundamental methods of judicial removal are set forth, not only in principle but with the major procedural elements necessary for their effective use: first, as do the federal and most state constitutions, the Ohio Constitution provides for the impeachment and legislative trial of judges. Conviction upon impeachment results in a judge being removed from office; second, the Constitution establishes a method of removal in the nature of legislative address to which judges are subject.

The General Assembly, pursuant to a mandate in the Constitution, has also enacted statutes providing two additional methods by which judicial officers may be removed: first, the General Provisions of the Revised Code allow judges and other officials to be removed for neglect or misconduct after a judicial proceeding which is initiated at the petition of a part of the electorate. Second, the statutes include the outline of a method by which judges may be removed by another type of judicial proceeding and set out the circumstances in which cause for such removal exists.

Judges may also be removed in accordance with rules of the Supreme Court, which have been adopted in fulfillment of statutory directions and constitutional grants of judicial power. The Supreme Court Rules for the Government of the Bar of Ohio give supplemental procedural and substantive details to the statutory methods of judicial removal. The Rules also establish disciplinary procedures whereby judges may be removed from office for violating the Code of Professional Responsibility, the Canons of Judicial Ethics, or the Code of Judicial Conduct which the Rules make binding upon judges.

Constitutionally Prescribed Methods of Removal

Impeachment

Impeachment is the method for removing unfit judges which is most common to state constitutions. The constitutions of approximately 40 states provide for impeachment brought by the lower legislative house and tried by the upper house. While it involves the bringing of formal charges and the holding of a trial, impeachment is

generally considered to be a legislative device and is found in Article II, the legislative article,of the Ohio Constitution. Article II, Section 23 establishes impeachment in Ohio. It reads:

> The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the Senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted, without the concurrence of two-thirds of the Senators.

This section is an original part of the Constitution of 1851 and is only changed in minor respects from Article I, Section 23 of the Constitution of 1802.

The language of Section 23 is clear in what power it vests and in the procedure to be followed by the General Assembly in exercising that power. Only the House of Representatives may impeach a judge or other official, and it may do so only on the concurrence of more than half the elected membership. Under the common law, as in Ohio, an impeachment proceeding is based on "articles of impeachment" which allege the complained-of misconduct of the subject official. Articles of impeachment serve a purpose similar to an indictment for criminal activity, and it is these articles which the House of Representatives must pass upon. Once the articles of impeachment are passed, the judge or other official who is their subject has been impeached, and what remains is the presentation of the articles to the Senate and the trial on the charges.

The Ohio Constitution places no affirmative duty of impeachment on the House of Representatives, regardless of how base or improper an official's acts may be. However, Section 23 does mandate action by the Senate after the House of Representatives passes articles of impeachment. The section states that the Senate "shall" try the impeachment.

The impeachment is presented to and prosecuted before the Senate by the House of Representatives. The House acts through Managers it appoints, and the Senate sits as a high court with each member under oath or affirmation. When the case has been heard by the Senate, the question is called as to whether the person who has been impeached is guilty as the House has charged. If two-thirds or more of all the Senators vote for conviction, the party impeached is found guilty of the charges contained in the articles of impeachment and is, thereby, removed from his office.

Two of the earliest impeachments of judges in Ohio occurred when the state was not yet a decade old. In the culmination of a power struggle between the judicial and legislative branches of the state government, Judges Tod and Pease, both members of the Supreme Court, were impeached as the result of their decisions, in separate cases, that aspects of a statute defining the powers and jurisdiction of justices of the peace were unconstitutional. Early in 1809, Tod and Pease were tried separately before the Senate. When the votes for conviction were taken, the two-thirds majority necessary for conviction was missed by a single vote in each case, and the judges were acquitted. *

The Tod and Pease impeachments were considerations, at least in part, when the Convention of 1850 reviewed the then-existing impeachment provisions and modified them to their present forms. The original provisions in the Constitution of 1802

House Journal V. 7 (1809) Pp. 47, 52, 58, 61, 62, 68, 71-75, 79-81 contain House record of procedure.

* See Senate Journal V. 7 (1809) p. 272 for record of the Impeachment Proceedings

omitted any specific mention of judges as among those persons liable to impeachment.[1] Delegates to the 1850 Convention took notice of the Tod and Pease cases as they debated whether judges and justices of the peace should be given specific mention in a revision of the phrase "the Governor and all civil officers" which then described who might be impeached.[2] Finally, after recurrent debate and numerous suggested amendments (including ones which would have added provisions similar in intent to the present Article II, Section 38, which was not adopted until 1912), the present impeachment sections were presented to the Convention and adopted by it.

What is potentially the most difficult legal question with respect to impeachment and subsequent conviction under the Ohio Constitution is that of just what conduct on the part of a judge or other official constitutes grounds for impeachment. The issue is raised by Article II, Section 24, which outlines who is liable to impeachment, the allowable sanctions upon conviction, and the applicability of normal criminal proceedings to those who are impeached. The section reads:

> The Governor, Judges, and all State officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office, under the authority of this State. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

The grounds are set forth in the first sentence of Section 24: impeachment may be for "any misdemeanor in office." The difficulty lies in the definition of the meaning of "misdemeanor."

The logic of the impeachment procedure described in Section 23 indicates that the House alleges the commission of a misdemeanor, and that the Senate is left to decide whether the allegation is well founded. Thus, the Senate must know what a "misdemeanor" is before it can "do justice according to law,"[4] in voting on conviction. However, "misdemeanor" is not historically given the same meaning within the context of impeachment as it is in the criminal law, and it has not been defined for constitutional purposes by the Ohio courts or statutes.

The Ohio criminal law regards a misdemeanor as an offense defined as such by statute and carrying a punishment of incarceration for up to and including one year.[5] For the purposes of impeachment, "misdemeanor" is extremely difficult to define succinctly, but it has as its base the concept of an offense against the people and the state--a subversion of the constitution.[6] Throughout Anglo-American legal history, when the issue has been confronted, the definition has been given in vague and elusive terms.

Terms such as "misconduct", "malfeasance","maladministration", "misfeasance", "ill behavior", and "abuse of office" are common to most definitions which have been proffered, and any of these words or phrases may be used to at least capsulize the meaning of "misdemeanor". As a term of art with reference to impeachment, "misdemeanor" certainly limits the grounds for impeachment but is not so narrow as to require indictable criminal action. Indeed, the concept of the impeachment of judges was developed in England well before the term "misdemeanor" was used in the criminal law to describe a category of lesser offenses and at a time when members of the bench were not subject to criminal indictment. However, as understood today, a judge or other official may be impeached and convicted for conduct which is also indictable.

Article II, Section 24 not only uses the term "misdemeanor", but it also says that the impeachable conduct must occur "in office." However, the scope of what impeachable misdemeanors are committed "in office" has not been defined in Ohio. Traditionally, such language has not always meant only those misdemeanors committed through the power of the office, but has often included action relating to the office which, while arising outside the sphere of official functions, is such as to shake the public confidence in the office because it was committed by the office holder. While cases to the contrary do exist, the English precedents, the federal impeachments, and many cases in other states suggest that to limit the scope of impeachment to official conduct would be to allow a serious defect in the theory of impeachment. For example, if a judge were only impeachable for his actions on the bench and in the cases before him, he could freely engage in a full array of unsavory behavior while off the bench--including such things as bribery, tax evasion, and debauchery--and regardless of how destructive to the integrity of the courts his actions were, he would be immune to legislative removal through impeachment.

A brief comparison of the Ohio impeachment provisions to the sections of the United States Constitution dealing with the removal of federal judges is helptul in emphasizing the manifold problems of impeachment and in presenting alternatives. The parts of the federal Constitution which deal directly with the removal of judges are as follows:

> The House of Representatives . . . shall have the sole power of Impeachment. (Article I, Section 2)
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose they shall be on oath or affirmation . . . and no person shall be convicted without the concurrence of two thirds of all members present. (Article I, Section 3)
>
> Judgments in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law. (Article I, Section 3)
>
> The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. (Article II, Section 4)
>
> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, . . . (Article III, Section 1)
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; . . . (Article III, Section 2)

The text of the federal Constitution and the records of the Convention of 1787 raise a legitimate question as to whether it was the intention of the Framers to

include judges within the category of "all civil officers" and to make them subject to impeachment.[7] This issue may, however, be considered moot in that eight federal judges[8] have, in fact, been impeached, the first impeachment of a judge having taken place in 1803.

The removal of federal judges is complicated by the statement in Article II of the federal Constitution that they "shall hold their offices during good behavior," and the absence of any constitutional provision indicating the consequences of, or the removal procedure which might follow, a breach of "good behavior." While the question of whether a federal judge is subject to impeachment may be regarded as settled for the present, at least two practical questions persist as to judicial removal: first, is impeachment the only way to formally force a federal judge from his office, and second, does "good behavior" affect the range of grounds for the impeachment of a judge? These issues have been vigorously debated, but the more cogent arguments suggest that a judge's office held during "good behavior" is a public grant on a condition subsequent, that the grounds for impeaching a judge are no different than those for impeaching other "civil officers of the United States", and that the Congress has the power to provide by legislation for a method other than impeachment for removing judges whose "good behavior" has lapsed.[9]

The grounds for impeachment under the United States Constitution are somewhat clearer than those under the Ohio Constitution. Article II, Section 4 of the federal document lists "treason, bribery, or other high crimes and misdemeanors" as cause for impeachment. Treason against the United States is exclusively defined in Article III, Section 3, and bribery is well defined in the criminal law. Despite recurring assertions by legislators and others that "high crimes and misdemeanors" require a violation of criminal statutes or, alternatively, are whatever the Congress considers them to be, [10] there is substantial evidence that the Framers intended the words as a limitation on congressional power, that they chose the phrase with great care, and that they were fully aware of its historical meaning within the context of impeachment.

Another area of the law of impeachment which has not been clarified under the Ohio Constitution, or for that matter under the United States Constitution, is whether or not there is a right to judicial review of a conviction upon impeachment. The question is difficult to resolve, and the constitutions neither specifically allow nor exclude such an appeal. Nevertheless, the concepts of due process, the vesting of judicial power in the courts, the separation of powers doctrine, and the constitutional grants of jurisdiction to the Supreme Courts provide strong support for the assertion of the right to such an appeal.

In allowing for the impeachment of judges, the Ohio Constitution provides a powerful and historic tool for maintaining the public confidence in the judiciary and for removing from office judges unfit to preside over the courts of justice. But, by its very nature, impeachment is a "cumbrous, unmanageable, impracticable process."[11] The fact that no bill of impeachment against a judge has been submitted, let alone passed, in the Ohio House of Representatives during this century is evidence that impeachment is not a method of judicial removal preferred by Ohioans.

The Concurrent Resolution

Article IV, Section 17 is the second provision of the Ohio Constitution which sets out a method of judicial removal. It first appeared as an original part of the Constitution of 1851 and is not paralleled by any section of the Constitution of 1802. Section 17 reads:

> Judges may be removed from office, by concurrent resolution of both Houses of the General Assembly, if two-thirds of the members, elected to each House, concur therein; but, no such removal shall be made, except upon complaint, the substance of which, shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.

Judicial removal under Section 17 may be classified for comparison with other state constitutions as a form of address. Technically and traditionally, an address is a nonobligatory request made by the legislative branch to the executive branch that an officer of the government be removed from his position. It usually applies to the removal of judges only, as with Section 17, but some constitutions make nonjudicial officers subject to address as well. Address procedures or proceedings in the nature of address are available in approximately one-half of the states.

The Ohio provision differs from the classical concept of address in that the executive takes no part in the removal process. Section 17 requires only the concurrent decision by both houses of the General Assembly that a judge be removed from office. However, the section does provide that no judge may be so removed without the posting of the legislative complaint, notice to the judge, and the opportunity for the judge to be heard.

A noteworthy facet of the concept of address as a method of judicial removal is that it is available for taking an unworthy judge from the bench when his actions are not sufficiently culpable to warrant an impeachment proceeding. This is evidenced by the fact that there is no requirement that a trial be held, but only that the responding judge be allowed to present his position. However, in one significant sense Section 17 establishes a procedure which is more difficult to apply successfully than impeachment: whether the judicial removal be by impeachment or under Section 17, a two-thirds vote of the entire Senate is required; but while articles of impeachment may be founded upon a simple majority in the House, a Section 17 removal demands the approval of a two-thirds majority of both the House and the Senate.

Section 17 is like the provisions in most state constitutions which allow proceedings in the nature of address in that a two-thirds vote is set as the standard, and in that no specification of cause for the removal, such as the commission of "misdemeanors" in the case of impeachment, is made.[12] While no delineation of sufficient cause for removing a judge exists in Section 17, the requirement that the substance of the complaint against the judge be included in the legislative journal implies that some despicable act must have been committed or an otherwise unacceptable situation must have been created by the judge in question. Still, no judicial appeal normally exists for one removed from office by address or proceedings in the nature of address, and one can infer from this that the legislature may have the power to remove a judge arbitrarily, so long as the procedure of enrolling the complaint, providing notice, and allowing the judge a hearing is followed.[13]

The inclusion of Section 17 in the Constitution of 1851 received only passing debate on the floor of the Convention. The first report of the Convention's Standing Committee on the Judicial Department included a suggestion that removal of judges be allowed upon a mere concurrent vote of two-thirds of both houses of the General Assembly.[14] Subsequently, the proposal was amended to provide for journalizing the

complaint and giving notice and an opportunity to be heard.[15] There was recognition that a constitutional method of removal other than impeachment did not exist as to nonjudicial officers and the argument was made that judges should not be exposed to a greater liability of removal.[16] The delegates who presented this argument reasoned that the judiciary was chartered as a separate branch of government and should not be subject to a threat of legislative control.[17]

The history of Ohio shows that whether the address-type proceeding provided for in Section 17 is or is not more expeditious than impeachment as a method of judicial removal, and whether or not it presents a threat of potential legislative control over the judicial branch, it, like impeachment, has not been favored as an approach to dealing with unfit judges. As with impeachment, the address-like method of removal has not been used during the twentieth century.

Statutory Approaches to Judicial Removal

The people of Ohio adopted Article II, Section 38 as a part of the 1912 revision of the Constitution. Section 38 is in the nature of a mandatory direction to the General Assembly that it provide statutory methods for the removal of officers. The provision reads:

> Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

The thrust of Section 38 is that judges and other officers should be subject to removal from office for moral turpitude and other statutorily stated causes, and that such removal need not be accomplished by impeachment or, in the case of judges, by the address-like proceeding of Article II, Section 17.

Much of the debate on the several proposals which resulted in Section 38 was directed to judicial removal, but, as can be seen from the provision as adopted, the Convention also sought to establish more expeditious procedures for the removal of all holders of public office. The Convention's final proposal came only after extended and vigorous debate as to the need for more effective methods of judicial removal and the utility of impeachment with respect to judges.[18] In debate, the impeachment of unfit judges was referred to as "an utter failure so impracticable as to be no remedy at all."[19]

Article II, Section 38, as adopted by the electorate, places upon the General Assembly the affirmative duty of establishing statutory methods for removing any officer for misconduct. The provision singles out "misconduct involving moral turpitude" as cause for statutory removal, but does not limit the General Assembly in denominating other types of misconduct as causes for removal. Section 38, while in part the result of dissatisfaction with the removal procedure under Article IV, Section 17, includes the procedural safeguard of that earlier provision by requiring that any removal made possible by statute shall be "upon complaint and hearing." The last clause of Section 38 states that removal methods created pursuant to the amendment are supplemental to impeachment and any other constitutionally created removal procedures, thus answering in the negative the assertions in actual cases that

impeachment and address are the only appropriate methods for removing a judge from office in this state.[20]

The General Assembly has responded to the direction of Section 38 by providing two statutory methods of removal to which judges are liable. Sections of the General Provisions of the Revised Code create a removal process affecting all officers, and sections of the titles on courts provide exclusively for the removal of judges.

The Complaint Filed by the Electorate

Revised Code Sections 3.07 to 3.10 specifically refer to Article II, Section 38 in establishing a procedure for removal of public officers which is initiated directly by the public and to which judges are subject. These statutes require the removal of an officer upon a judicial finding that he is guilty of "misconduct in office."

The first sentence of Revised Code Section 3.07 not only sets the framework for removal under this method and refers directly to Article II, Section 38, but also defines the "misconduct in office" which, when found, creates a vacancy in the office. The sentence reads:

> Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office.

The procedure for removal based upon a finding of "misconduct in office" is codified in Revised Code Section 3.08. The proceedings are instituted by the filing of a complaint which delineates the charge and which is signed by a designated number of electors of the state or of the political subdivision whose officer it is sought to remove. The number of voters who must sign the complaint has to be at least equal to fifteen per cent of the total vote case at the last gubernatorial election in the state or the political subdivision whose officer it is sought to remove.

With respect to the removal of judicial officers, the statute specifies that the complaint is to be filed in the court of common pleas unless the complained-of judge is a member of that court, in which case the action is filed in the court of appeals. The statute also states that complaints against state officers shall be filed in the court of appeals for the district wherein the officer resides. Therefore, a complaint accusing a member of the Supreme Court or the courts of appeals of "misconduct in office" would be appropriately filed in the courts of appeals, as would one accusing a judge of the court of common pleas. Provisions of the statutes require notice to the officer who is the subject of the complaint, a prompt hearing, and that the hearing be a matter of public record. It is further provided that the trial court may suspend the officer pending the hearing. The Supreme Court has ruled that

a judge may not be found guilty of misconduct in office and removed except upon clear and convincing evidence.[21]

The decision of a court of common pleas in a removal case under these statutes has been held, as presumably would the decision of a court of appeals should it be the court of first instance, to be a judicial rather than political decision and subject to appellate review.[22] Revised Code Section 3.09 allows a single appeal, whether the first hearing be in the common pleas court or the court of appeals. Statistics on the frequency with which judicial removal under Revised Code Sections 3.07 to 3.10 has occurred are unavailable, although reported decisions show at least three instances which have arisen under these sections and analogous provisions of the predecessor General Code.

The Commission of Judges

The second statutory method the General Assembly has authorized for the removal of unfit judges is found in Revised Code Sections 2701.11 and 2701.12. This method applies exclusively to judges, and these statutes are expressly subject to the rules of the Supreme Court and outline the procedure more fully implemented by Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio. The procedure under these statutes is discussed in detail in the section of this study dealing with judicial removal under court rules. Briefly stated, Revised Code Section 2701.11, which also concerns the retirement and suspension of judges who are physically or mentally disabled, provides for a proceeding before a commission of five judges, appointed by the Supreme Court,who may cause the removal of a complained-of judge when cause, as defined in Revised Code Section 2701.12, exists. As required by Article II, Section 38 and prescribed in Rule VI, these sections provide for a complaint and a hearing.

The specifications of cause in Revised Code Section 2701.12 are, perhaps, the most noteworthy aspects of these statutes. The section states in pertinent part:

> (A) Cause for removal or suspension of a judge from office . . . exists when he has, since first elected or appointed to judicial office:
> (1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;
> (2) Been convicted of a crime involving moral turpitude; or
> (3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before such election or appointment.

The statute clearly indicates that the cause for removal must arise after the judge assumes his office. But, in applying this rule care should be taken to note just what event constitutes the cause. For example, under subsection (A) (2) the conviction is the pivotal event which must occur while the judge is in office, although the commission of the crime involving moral turpitude might be before taking office.

Subsection (A) (3) recognizes disbarment or suspension while in office for

misconduct prior to taking office as cause for removal. In so doing, the statute creates a theoretical gap in its coverage. It is possible that a judge could be disbarred or suspended for misconduct occurring while in office which would not involve moral turpitude or a violation of the applicable canons of judicial behavior, the latter situations being cited as cause under subsection (A) (1). Should this occur, it would appear that the judge would not be subject to removal under a strict construction of Revised Code Sections 2701.11 and 2701.12, and could only be removed under an alternative procedure.

By using the phrase "involving moral turpitude" as a central concept of cause for removal of judges, the statute has assumed one of the continuing difficulties of discipline for the legal profession. That problem is the definition of "moral turpitude" and the task of deciding just what conduct does in fact involve "moral turpitude".

Courts, including those in Ohio, have attempted on numerous occasions to define "moral turpitude", but there still is no single definition which is commonly accepted. Most often the courts offer only general definitions before going on to decide by undisclosed processes whether moral turpitude is present in the particular situation with which they are confronted.[23] But even from this case-by-case approach it may be concluded that "moral turpitude" involves base or vile acts which are done knowingly and which are contrary to justice and good morals.[24]

From an examination of specific cases of judicial removal in Ohio for misconduct involving moral turpitude, it is clear that the misconduct need not be in official conduct, but may arise in the judge's private life as well.[25] It is the character of the judge himself which is at issue, and not necessarily the nature of his conduct on the bench. For example, influencing a prosecutor to coerce and intimidate a person who will not respond to a judge's personal wishes has been held to be a judicial misconduct involving moral turpitude,[26] as has presenting false information, designed to mislead, about one's legal education and experience.[27] Moral turpitude is also involved when a judge publishes a falacious opinion with the intent that it will be taken seriously and as precedent.[28]

Judicial Removal under Rules of Court

The Supreme Court of Ohio most recently exercised its power in respect to the removal of judges when in February, 1972 it adopted the Supreme Court Rules for the Government of the Bar of Ohio. Among other things, the Rules bind all attorneys and judges to certain ethical standards, provide for the discipline of attorneys who transgress the standards, and supplement the statutory methods of judicial removal.

Rule VI, entitled "Removal of Judges", is the rule most directly related to the subject under discussion. (This Rule was originally enacted as Supreme Court Rule XXI in 1969.) Not only does Rule VI deal with judges who are accused of some act or omission which makes them unfit to hold the office, but it also provides for removal of those judges who are physically or mentally disabled. It is explicit that this rule was adopted pursuant to the authority granted by the General Assembly in Revised Code Sections 2701.11 and 2701.12. The rule reiterates many of the aspects of judicial removal set forth in these statutes, but is primarily directed to supplying needed details of procedure and definitions.

While Revised Code Section 2701.11 indicates only that the complaint against a judge must set forth the cause, Rule VI prescribes the form the complaint must take,

that only certain committees of the state or a local bar association may file the complaint, and the procedure for proper filing.[29] Elsewhere in the Rules an affirmative duty is placed upon the bar associations to investigate any complaint of misconduct which comes to their attention.[30]

The full range of procedural details prescribed in Rule VI can best be seen in a direct comparison of Revised Code Section 2701.11 and 2701.12 to the Rule, but only the major steps of the procedure, which are contained in both the statutes and the rules, are outlined here. First, the grievance committee of a regularly organized bar association investigates a suspicion or charge of judicial misconduct. If it is believed that a full hearing should be held, a complaint is filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court. The seventeen member Board then investigates the complaint, and if twelve or more members find substantial credible evidence in support of the complaint, the investigation is certified to the Supreme Court. The Court then appoints a Commission of five judges to determine by a majority the question of removal. This Commission is composed of judges of courts of record located in any five appellate districts other than that in which the complained-of judge resides. If the Commission orders removal, the judge so removed may appeal directly to the Supreme Court.

Rule VI adds several noteworthy elements to the statutes. For example, the Rule affirmatively states that a judge is disqualified from performing his duties while awaiting the disposition of any indictment or information charging him with the commission of a felony.[31] The current practice under this part of the Rule is for the Supreme Court to issue an order suspending the subject judge as soon as the indictment or information becomes a matter of public record. The theory behind this aspect of the rules is to remove from the bench judges who might be unable to rule impartially, given concerns over their personal futures, or whose very presence on the bench might incite public distrust in the judiciary, regardless of the presumption of innocence. But beyond its theoretical foundation, this rule deserves attention because it is the only provision in Ohio law which ipso facto requires removal of a judge--albeit temporarily--upon the occurrence of the pivotal incident, namely the filing of the indictment or information, and without a hearing on the matter. Although it might be assumed, from the procedural guarantees in the Constitution, the statutes, and the balance of Rule VI, that the series of hearings and opportunities for the judge to be heard must be observed at every step, Rule VI does not so state, and simply indicates that the judge "is disqualified" pending the indictment or information. The question of due process, while perhaps problematical, has not been commented on by the courts.

Rule VI also expands on the delineation of causes for which a judge may be removed as set forth in Revised Code Section 2701.12 by adding "if he engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute . . ."[32]

Rule IV binds all attorneys to the Code of Professional Responsibility and all judges to the Canons of Judicial Ethics. New standards of judicial behavior became effective in December, 1973, when the Code of Judicial Conduct was adopted. Rule IV has not yet been amended to mention the new Code. This Code is designed to replace the Canons of Judicial Ethics and binds all persons not in a judicial office on the effective date of the Code when they take a judicial office and all incumbent judges upon the beginning of their next term in office. The procedure for imposing discipline under these sets of standards is set out in Rule V. In so doing, and by

prescribing suspension from the practice of law and disbarment for willful breaches of these tenets of behavior, Rule IV establishes the basis for another approach to removing an unfit judge.

The statute[33] and the rules[34] clearly state that a judge's loss of the privilege to practice law constitutes cause for his removal from office, but the fact that judges must be attorneys[35] and that attorney-judges have an obligation to follow the Codes and Canons, has been interpreted by the Supreme Court to mean that an indefinite suspension or a disbarment works a forfeiture of judicial office[36] and is in itself grounds for removal. The Court has further held that an action in quo warranto lies to enforce the vacating of the office.[37]

The situation results that the disbarment of a judge can give rise to his direct removal under the forfeiture of office concept or it can constitute cause for a proceeding under the statute or rule which exposes him to the liability of removal. It must be borne in mind here that a judge may be disbarred or suspended for a willful violation of the Code of Professional Responsibility which establishes generally more inclusive standards of behavior than are in the Canons of Judicial Ethics or the Code of Judicial Conduct and which violation might conceivably not be a violation of the ethical rules which apply only to judges.

The authority of the courts to consider the professional discipline of an attorney who is serving as a judge and to remove that judge from the bench if he is deemed unfit as an attorney has been challenged unsuccessfully on several occasions.[38] Challenges usually assert the exclusivity of constitutional and statutory methods of removal. The Supreme Court, in light of its organization as a court with the power to admit to the bar and the decision that a judge must maintain his privilege to practice law even though the public interest requires a limitation on practice during tenure in office, has ruled that it:

> . . . through its inherent power and duty to maintain the honor and dignity of the legal profession of Ohio at its traditionally high level, may prescribe a specialized standard of conduct for all members of such profession who hold judicial office and has jurisdiction over the discipline of such a member . . .[39]

While the states are split as to whether a judge may be disciplined while in office for his actions as an attorney before taking office, Ohio holds that elevation to the bench does not cut off an attorney's liability to discipline for his previous professional misconduct.[40]

The supervision of judicial fitness and the removal of judges by a combined use of Revised Code Sections 2701.11 and 2701.12 and the Supreme Court Rules has been successful. The fact that several judges have been removed from office in recent years by the use of these approaches is evidence that the statutory and rule methods are not subject to the same criticism for impracticability as are the constitutionally prescribed methods of removal.

Conclusion

Just as the existence of each of the methods of judicial removal in Ohio is justifiable, so each presents several real or potential problems deserving the attention of anyone considering a review and possible revision of these approaches. The

following are posed as a recapitulation of the most obvious questions raised or suggested by this study.

The constitutional methods are an important aspect of the separation of powers principle, regardless of their disuse. In considering possible revision, the following stand out as appropriate questions for consideration:

- whether or not having two separate methods of judicial removal available to the General Assembly serves a valid purpose,

- whether some clarification of the grounds for impeachment should be attempted,

- whether a specification should be made as to what grounds are needed for removal under Article II, Section 17,

- whether a resolution should be made in the conflict between the two constitutional methods as to the majority required in the House of Representatives.

The statutory and rule-based approaches to judicial removal have been shown to be effective means of ridding the bench of unfit judges, but several potential problems still exist, to wit:

- there is no direct public access, other than through a bar association, to the removal of a judge for misconduct prior to assuming office,

- the statutes and rules allow only a limited approach to prior misconduct,

- given the involvement of the Supreme Court in removal of judges under the statutes and rules, there is no method available, outside the legislative powers of impeachment and address, to remove a Supreme Court justice without intimately involving his brothers on the high bench in the process.

FOOTNOTES

1. Constitution of 1802, Article I Sections 23 and 24.

2. 1 State of Ohio, Debates and Proceedings, Constitutional Convention, 1850, pp. 239-141 (May 30, 1850). (hereafter cited as Debates).

3. 2 Debates 807 (March 5, 1851).

4. Constitution of 1851, Article II, Section 23.

5. Crim. R. 2

6. For an excellent discussion of this point and of impeachment in general, see: Raoul Berger, Impeachment: The Constitutional Problems, (Cambridge: Harvard University Press, 1973) Chapter II.

7. Ibid., pp. 146-148, and citations given there.

8. Pickering, 1803; Chase, 1804; Peck, 1826; Humphreys, 1862; Swayne, 1903; Archbald, 1912; Louderback, 1932; and Ritter, 1936.

9. E. g., see comment of Rep. Gerald Ford, 116 Cong. Rec. H. 3113-3114 (daily ed. 15 April 1970).

10. Berger, supra., Chapter IV.

11. 1 Debates 240 (June, 1850).

12. Institute of Judicial Administration, Selection, Tenure and Removal of Judges in the 48 states, Alaska, Hawaii and Puerto Rico (New York: August, 1956) pp. 24-25.

13. Ibid., p. 25.

14. 1 Debates 431 (June, 1850).

15. 2 Debates 397 (January 24, 1851).

16. 2 Debates 398 (January 24, 1851).

17. Ibid.

18. State of Ohio, Proceedings and Debates, Constitution Convention, 1912 p. 1310.

19. Ibid.

20. In re Copland, 66 Ohio App. 804, 33 N.E. 2d 857 (1940).

21. McMillen v. Diehl, 128 Ohio St. 212, 190 N.E. 567 (1934).

22. In re Bostwick, 125 Ohio St. 182, 180 N.E. 713 (1931).

23. In re Copland, supra.

24. In re Jacoby, 74 Ohio App. 147, 57 N.E. 2d 932; and Comm. on Legal Ethics v. Scheer, 149 W. Va. 721, 143 S. E. 2d 141 (1965).

25. In re Bostwick, 29 N.P.N.S. 21, O. L. A. 258 (C. P. 1931).

26. Ibid.

27. In re Copland, supra.

28. Ibid.

29. Gov. R. VI, Sec. 1 (a).

30. Gov. R. V, Sec. 4.

31. Gov. R. VI, Sec. 1 (b).

32. Gov. R. VI, Sec. 1 (c).

33. Revised Code Section 2701.12 (A) (3).

34. Gov. R. VI, Sec. 1 (c).

35. See, Revised Code Sections 1901.06, 1907.051, 2301.01, 2501.02, and 2503.01.

36. State ex rel. Saxbe v. Franko, 168 Ohio St. 338, 154 N.E. 2d 751 (1958).

37. Ibid.

38. E.g., In re Copland, supra.; Mahoning County Bar Association v. Franko, 168 Ohio St. 17, 151 N. E. 2d 17 (1958), cert. denied 358 U. S. 932, 79 S. Ct. 312.

39. Mahoning, supra., at 151 N. E. 2d 23.

40. In re Copland, supra.

COMPARATIVE DATA ON STATE INTERMEDIATE APPELLATE COURTS

This chart was prepared for the Committee's use in comparing the intermediate state appellate courts in all fifty states. The general observations may be drawn from the chart to capsulize the trends in these court systems.

Name of Court

While intermediate appellate courts go by several names, they are most commonly called Courts of Appeals. Twenty-three states have intermediate appellate courts and three of these states, Alabama, Oklahoma, and Texas, have one court for civil appeals and a separate court for criminal cases.

Number of Judges

The courts with general or exclusively civil appellate jurisdiction have an average of 17 judges each, the median number being 10 judges.

Terms of Judges

Ten states have 6 year terms for judges on intermediate appellate courts. The average term is 8 years, the median term is 7 years. New Jersey and New York present noteworthy exceptions to terms for a set number of years.

Divisions of Courts

The courts with general or exclusively civil jurisdiction are generally broken down into divisions or districts. Only five such courts are without divisions. The courts limited to criminal appeals are not divided.

Principal Seats

Most states having courts which are divided into districts provide a single location for the court in each district or division. Five states have intermediate appeals heard in only one city. Only Ohio has courts which travel within each district.

Method of Judicial Selection

Judges of intermediate appellate courts are initially elected to their positions in 16 states. The governors in 5 states appoint the judges who, after an initial period on the bench, may then submit to the voters the question of whether they should be retained for a term of years. In New Jersey the governor appoints the judges with the advice and consent of the state senate. In New York the judges are appointed by the governor from among those persons who have been elected judges of the trial court of general jurisdiction.

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
ALABAMA	Court of Criminal Appeals	3	6 yrs.	None	Montgomery	Election	State at large
	Court of Civil Appeals	5	6	None	Montgomery	Election	State at large
ALASKA	NONE						
ARIZONA	Court of Appeals	12	6	Division 1 - 9 Department A Department B Department C Division 2 - 3	Phoenix Tucson	Election	Division 1: 6 from Maricopa County, 3 from division at large Division 2: 2 from Pima County, 1 from division at large
ARKANSAS	NONE						
CALIF.	Court of Appeals	50	12	District 1 -12 Divisions 1-4 District 2 -20 Divisions 1-5 District 3 - 6 District 4 - 9 Divisions 1-2 District 5 - 3	San Francisco Los Angeles Sacremento San Bernardino Fresno	Election	Districts in which the judges serve
COLORADO	Court of Appeals	6	8	Division 1 - 3 Division 2 - 3	Denver	Appointed by governor for 2 year term then run unopposed to be retained	State at large

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
CONNECT.	NONE						
DELAWARE	NONE						
FLORIDA	District Court of Appeals	20	6	First Appellate District - 5 Second Appellate District - 5 Third Appellate District - 5 Fourth Appellate District - 5	Tallahassee Lakeland Dade County (Miami) Palm Beach County (Vero Beach)	Election	Districts in which the judges serve
GEORGIA	Court of Appeals	9	6	Division 1 - 3 Division 2 - 3 Division 3 - 3	Atlanta	Election	State at large
HAWAII	NONE						
IDAHO	NONE						
ILLINOIS	Appellate Court	30	10	First District -18 Second District- 3 Third District - 3 Fourth District- 3 Fifth District - 3	Chicago Elgin Ottawa Springfield Mount Vernon	Election	Districts in which the judges serve
INDIANA	Court of Appeals	9	10	First District - 3 Second District- 3 Third District - 3	Indianapolis	Appointed by governor for 2 year term then run unopposed to be retained	Judicial District

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
IOWA	NONE						
KANSAS	NONE						
KENTUCKY	NONE						
LOUISIANA	Court of Appeals	26	12	First Circuit - 6 1st District 2d District 3d District Second Circuit - 5 1st District 2d District 3d District Third Circuit - 6 1st District 2d District 3d District Fourth Circuit - 9 1st District 2d District 3d District	Baton Rouge Shreveport Lake Charles New Orleans	Election	Judicial District 2 from Circuit at large, 1 from each District 3 from Circuit at large, 1 from each District 1 from Districts 1 and 3 together 2 from District 1 5 from District 2 1 from District 3
MAINE	NONE						
MARYLAND	Court of Special Appeals	10	15	First - Sixth Appellate Judicial Circuits	Annapolis	Election	2 from Baltimore 3 from state at large 5 from special appellate judicial districts
MASS.	NONE						

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
MICHIGAN	Court of Appeals	12	6	None	Detroit Lansing Grand Rapids Marquette	Election	4 from each of 3 districts created for this purpose
MINNESOTA	NONE						
MISS.	NONE						
MISSOURI	Court of Appeals	18	12	St. Louis District - 8 Kansas City District - 6 Springfield District - 4	St. Louis Kansas City Springfield	Appointed by governor, at first November election more than 12 months after appointment judges run unopposed to be retained	Districts in which the judges serve
MONTANA	NONE						
NEBRASKA	NONE						
NEVADA	NONE						
NEW HAMP.	NONE						
NEW JERSEY	Appellate Division of Supe-	15	7 then during good behavior	Part A - 3 Part B - 3 Part C - 3 Part D - 3 Part E - 3	Trenton and Newark	Appointed by governor with advice and consent of senate	State at large

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
NEW MEXICO	Court of Appeals	5	8	None	Santa Fe	Election	State at large
NEW YORK	Appellate Divi	38	5 max.	First Department - 12 Second Department - 10 Third Department - 8 Fourth Department - 8	Manhattan Brooklyn Albany Rochester	Appointed by governor from those elected to Supreme Court	Judicial districts for 14 year terms
NORTH CAR.	Court of Appeals	9	8	None	Raleigh	Election	State at large
NORTH DAK.	NONE						
OHIO	Court of Appeals	38	6	Districts 1 - 7 - 3 each District 8 - 6 District 9 - 3 District 10 - 5 District 11 - 3	Sit at various county seats or have a principal seat within the District	Election	Districts in which the judges serve
OKLAHOMA	Court of Criminal Appeals	3	6	None	Oklahoma City	Appointed by governor for 1 year term then run unopposed to be retained	State at large

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
OKLAHOMA con't.	Court of Appeals	6	6	Division 1 - 3 Division 2 - 3	Oklahoma City Tulsa	Election	1 judge elected from each Congressional district
OREGON	Court of Appeals	5	6	None	Salem	Election	State at large
PENNA.	Superior Court	7	10	Philadelphia District Harrisburg District Pittsburg District	Philadelphia Harrisburg Pittsburgh	Election	State at large
RHODE IS.	NONE						
SOUTH CAR.	NONE						
SOUTH DAK.	NONE						
TENNESSEE	Court of Appeals	9	8	Eastern Division- 3 Middle Division - 3 Western Division- 3	Knoxville Nashville Jackson	Election.Vac. filled by appt by gov frm list of 3 sub by nom comm.	Divisions in which the judges serve
TEXAS	Court of Civil	42	6	First District - 3 Second District - 3 Third District - 3 Fourth District - 3 Fifth District - 3 Sixth District - 3	Houston Fort Worth Austin San Antonio Dallas Texarkana	Election	Districts in which the judges serve

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
TEXAS con't.				Seventh District- 3 Eighth District - 3 Ninth District - 3 Tenth District - 3 Eleventh District - 3 Twelfth District- 3 Thirteenth District - 3 Fourteenth District - 3	Amarillo El Paso Beaumont Waco Eastland Tyler Corpus Christi Houston		
	Court of Criminal Appeals	5	6	None	Austin	Election	State at large
UTAH	NONE						
VERMONT	NONE						
VIRGINIA	NONE						
WASHINGTON	Court of Appeals	9	6	Division One - 3 District 1 District 2 District 3 Division Two - 3 District 1 District 2 District 3 Division Three - 3 District 1 District 2 District 3	Seattle, may sit at Everett and Bellingham Tacoma, may sit at Vancouver Spokane, may sit at Yakima, Richland, or Walla Walla	Election	In a statewide election 1 judge is selected to represent each of the 9 districts

STATE	NAME OF COURT	NUMBER OF JUDGES	TERMS OF JUDGES	DIVISIONS OF COURT AND THE JUDGES FOR EACH	PRINCIPAL SEAT	METHOD OF JUDICIAL SELECTION	AREA FROM WHICH JUDGES SELECTED
WEST VA.	NONE						
WISCONSIN	NONE						
WYOMING	NONE						

Ohio Constitutional Revision Commission
Judiciary Committee
April 17, 1974

Selection of Judges : A Survey

Summary

Attached is a survey on the methods used by the states for the selection of judges compiled from worksheets for a table to be included in the Book of the States, 1974-1975, which has not yet been published. The classifications used refer to supreme courts, courts of appeals when applicable, and trial courts of general jurisdiction, and do not refer to courts of limited jurisdiction, unless this is specifically indicated.

Thus defined, there are 25 states which select all of their judges by means of popular election. Of these 25, 12 do so on partisan ballots. They are:

1. Alabama
2. Arkansas
3. Georgia
4. Illinois
5. Louisiana
6. Mississippi
7. New Mexico
8. New York
9. North Carolina
10. Pennsylvania
11. Texas
12. West Virginia

In the above group, judges are permitted to run unopposed for re-election on retention ballots in Illinois and Pennsylvania. Thirteen of the 25 states which select judges by popular election do so on nonpartisan ballots These states are:

1. Arizona
2. Florida
3. Idaho
4. Kentucky
5. Michigan
6. Minnesota
7. Montana
8. North Dakota
9. Ohio
10. Oregon
11. South Dakota
12. Washington
13. Wisconsin

Five states employ the method of selecting judges by election by the legislature, at least to some degree. These states are:

1. Connecticut
2. Rhode Island
3. South Carolina
4. Vermont
5. Virginia

All of the five select their supreme court judges in the stated manner, and Connecticut, South Carolina, and Virginia select all their judges in this way. In Rhode Island, trial court judges are appointed by the Governor with the consent of the Senate. In Vermont, Superior Court (general trial court) judges are also elected by the legislature, but district court (minor court) judges are appointed by the Governor with the consent of the Senate, from nominations submitted by a Judicial Selection Board.

There are 16 jurisdictions which appoint, or could appoint, all of their judges. This group constitutes the largest single classification, and consists of the following:

1. Alaska
2. Colorado
3. Delaware
4. Hawaii
5. Iowa
6. Maine
7. Maryland
8. Massachusetts
9. Missouri (Optional as to Circuit Courts)
10. Nebraska
11. New Hampshire
12. New Jersey
13. Utah
14. Wyoming
15. District of Columbia
16. Puerto Rico

Except in the District of Columbia, where the President appoints judges with the consent of the Senate, appointment is by the governor, either from nominations submitted by a nominating commission or council (seven jurisdictions), or with the consent of an executive council (three jurisdictions) or the consent of the state or commonwealth senate (five jurisdictions). In one state, Maryland, apparently the Governor may appoint judges without the consent of any body, but the appointees must run for election after service of at least one year.

Except for Massachusetts and New Hampshire (where a judicial appointment is for life), New Jersey (where an initial seven-year period may be followed by appointment for life), and Puerto Rico (where appointment to the Supreme Court is to age 70), the other jurisdictions in which judges are appointed require either a periodic reappointment or re-election on a retention ballot. In Utah, judges are originally appointed by the Governor from a list submitted by a nominating commission, and must run for retention at a specified general election. At such an election, the appointee may be opposed by any qualified member of the bar, but if that occurs, the appointee is listed first on the ballot and identified as "Judge X, incumbent." If the appointee faces no opposition, he is placed on a "Yes-No" retention ballot.

In addition to these 16 jurisdictions, 5 states provide for the appointment of supreme court and appellate court judges. These states are:

1. California
2. Indiana
3. Kansas (Supreme Court only)
4. Oklahoma
5. Tennessee

Generally, the methods of appointment in these states are the same as in those states which appoint all their judges, and in each of the 5 states, those judges who are not appointed are elected by popular vote.

The trend on the question of appointment or election seems to be in the direction of appointment. For example, while no jurisdiction has recently changed to an elective system, at least two have switched wholly or partially to an appointive one. Wyoming went from election to appointment as the result of the amendment of Article 5, section 4 of its Constitution, effective December 12, 1972, and Indiana began appointing Supreme Court and Court of Appeals judges under the Judiciary Act of 1972, which implements Section 9, Article 7 of the Indiana Constitution, added in 1970.

State-by-State Survey

Alabama	Appellate, circuit, and probate judges elected on partisan ballot. Some county judges are elected, some appointed--some by Governor, some by legislature and some by county commissions. Judges of recorder courts are appointed by the governing body of the city.
Alaska	Supreme Court Justices, superior and district court judges appointed by Governor from nominations by Judicial Council. Approved or rejected at first general election held more than 3 years after appointment, on confirmation ballot. Reconfirmed every 10, 6, and 4 years, respectively. Magistrates of the district courts appointed by and serve at pleasure of Presiding Judges of the Superior Courts.
Arizona	Supreme, appeals and superior court judges elected on nonpartisan ballot (partisan primary); justices of the peace elected on partisan ballot; city and town magistrates selected as provided by charter or ordinance, usually appointed by mayor and council.
Arkansas	All elected on partisan ballot.
California	Supreme Court and courts of appeal judges appointed by Governor with approval of Commission on Judicial Appointments. Run for reelection on record. All other judges elected on nonpartisan ballot.
Colorado	Judges of all courts, except municipal, appointed initially by Governor from lists submitted by nonpartisan nominating commissions; run on record for retention. Municipal judges appointed by city councils or town boards.
Connecticut	All appointed by Legislature from nominations submitted by Governor, except that probate judges are elected on partisan ballot.
Delaware	All appointed by Governor with consent of Senate.

Florida	Justices of the Supreme Court and judges of the district courts of appeal, circuit courts, and county courts are elected on nonpartisan ballot.
Georgia	All elected on partisan ballot except that county and some city court judges are appointed by the Governor with consent of the Senate.
Hawaii	Supreme Court Justices and circuit court judges appointed by the Governor with consent of the Senate. District magistrates appointed by Chief Justice of the State.
Idaho	Supreme Court and district court judges are elected on nonpartisan ballot. Magistrates appointed by District Magistrate's Commission with approval of majority of district judges in the district sitting en banc.
Illinois	All elected on partisan ballot and run on record for retention. Associate judges are appointed by circuit judges and serve 4-year terms.
Indiana	Judges of appellate courts appointed by Governor from a list of 3 submitted by a 7-member Judicial Nominating Commission. All other judges are elected, except municipal judges, who are appointed by Governor.
Iowa	Judges of supreme and district courts appointed initially by Governor from lists submitted by nonpartisan nominating commissions. Run on record for retention in office. District Associate Judges run on record for retention, if not retained or office becomes vacant, replaced by a full time judicial magistrate. Full-time judicial magistrates appointed by district judges in the judicial election district from nominees submitted by county judicial magistrate appointing commission. Part-time judicial magistrates appointed by county judicial magistrate appointing commissions.
Kansas	Supreme Court Judges appointed by Governor from list submitted by nominating commission. Run on record for reelection. All other judges elected on partisan ballot.
Kentucky	Judges of Court of Appeals and circuit court judges elected on nonpartisan ballot. All others elected on partisan ballot.
Louisiana	All elected on partisan ballot.
Maine	All appointed by Governor with consent of Executive Council, except that probate judges are elected on partisan ballot.
Maryland	Judges of Court of Appeals, Court of Special Appeals, Circuit Courts and Supreme Bench of Baltimore City appointed by Governor, elected on nonpartisan ballot after at least one year's service. District court judges appointed by Governor subject to confirmation by Senate.

Massachusetts	All appointed by Governor with consent of Executive Council.
Michigan	All elected on nonpartisan ballot, except municipal judges in accordance with local charters by local city councils.
Minnesota	All elected on nonpartisan ballot.
Mississippi	All elected on partisan ballot, except that city police court justices are appointed by governing authority of each municipality.
Missouri	Judges of Supreme Court, Court of Appeals, circuit and probate courts in St. Louis City and County, Jackson County, Platte County, Clay County and St. Louis Court of Criminal Correction appointed initially by Governor from nominations submitted by special commissions. Run on record for retention. All other judges run on partisan ballot.
Montana	All elected on nonpartisan ballot. Vacancies on Supreme or District Courts filled by Governor according to established appointment procedure.
Nebraska	Judges of Supreme, district, separate juvenile and municipal courts appointed initially by Governor from lists submitted by nonpartisan nominating commissions. Run on record for retention in office in general election following initial term of 3 years. County judges elected on nonpartisan ballot.
Nevada	All elected on nonpartisan ballot.
New Hampshire	All appointed by Governor with confirmation of Executive Council.
New Jersey	All appointed by Governor with consent of Senate except that magistrates of municipal courts serving one municipality only are appointed by governing bodies.
New Mexico	All elected on partisan ballot.
New York	All elected on partisan ballot except that Governor appoints Judges of Court of Claims and designates members of appellate division of Supreme Court, and Mayor of New York appoints judges of some local courts.
North Carolina	All elected on partisan ballot.
North Dakota	All elected on nonpartisan ballot.
Ohio	All elected on nonpartisan ballot.

Oklahoma	Supreme Court Justices and Court of Criminal Appeals Judges appointed by Governor from lists of three submitted by Judicial Nominating Commission. If Governor fails to make appointment within 60 days after occurrence of vacancy, appointment is made by Chief Justice from the same list. Run for election on their records at first general election following completion of 12 months' service for unexpired term. Judges of Court of Appeals, district and associate district judges elected on nonpartisan ballot in adversary popular election. Special district judges appointed by district judges. Municipal judges appointed by governing body of municipality.
Oregon	All elected on nonpartisan ballot, except that most municipal judges are appointed by city councils (elected in three cities).
Pennsylvania	All originally elected on partisan ballot; thereafter on nonpartisan retention ballot.
Rhode Island	Supreme Court Justices elected by Legislature. Superior, family and district court justices and justices of the peace appointed by Governor, with consent of Senate (except for justices of the peace). Probate and municipal court judges appointed by city or town councils.
South Carolina	Supreme Court and circuit court judges elected by Legislature. City judges, magistrates and some county judges and family court judges appointed by Governor--the latter on recommendation of the legislative delegation in the area served by the court. Probate judges and some county judges elected on partisan ballot.
South Dakota	All elected on nonpartisan ballot, except magistrates (law-trained and others), who are appointed by the presiding judge of the judicial circuit in which the county is located.
Tennessee	Judges of appellate courts appointed initially by Governor from nominations submitted by special commission. Run on record for reelection. All other judges elected on partisan ballot.
Texas	All elected on partisan ballot except municipal judges, most of whom are appointed by municipal governing body.
Utah	Supreme and district court judges appointed by Governor from lists of three nominees submitted by nominating commissions. If Governor fails to make appointment within 30 days, the Chief Justice appoints. Judges run for retention in office at next succeeding election; they may be opposed by others on nonpartisan judicial ballots. Juvenile court judges are initially appointed by the Governor from a list of not less than two nominated by the Juvenile Court Commission, and retained in office by gubernatorial appointment. Town justices are appointed by town trustees, and justices of the peace are elected.

Vermont	Supreme Court Justices originally elected by Legislature. Superior Judges (presiding judges of county courts) originally elected by Legislature from a list of three or more candidates selected by the Judicial Selection Board. District court judges appointed by Governor with consent of Senate from list of persons designated as qualified by the Judicial Selection Board. Supreme, superior and district court judges retained in office by vote of Legislature. Assistant judges of county courts, probate judges and justices of the peace elected on partisan ballot in the territorial area of their jurisdiction.
Virginia	Supreme Court and all major trial courts elected by Legislature. All judges of courts of limited jurisdiction elected by Legislature. All part-time judges appointed by circuit judges.
Washington	All elected on nonpartisan ballot except that municipal judges in second, third and fourth class cities are appointed by mayor.
West Virginia	Judges of all courts of record elected on partisan ballot.
Wisconsin	All elected on nonpartisan ballot.
Wyoming	Supreme Court Justices and district court judges appointed by Governor from a list of three submitted by nominating commission. Justice of Peace elected on nonpartisan ballot.
District of Columbia	Appointed by President of the United States upon the advice and consent of the United States Senate.
Puerto Rico	All appointed by Governor with consent of Senate.

Ohio Constitutional Revision Commission
Judiciary Committee
June 4, 1974

Suggestions for Change in Operation of Ohio Courts of Appeals

The following suggestions -- not all necessarily constitutional -- have been made regarding changes in the operation of Ohio Courts of Appeals in presentations before the Committee. Each numbered suggestion is followed by a brief staff comment. It should be noted that not all of the suggestions would necessarily involve constitutional change, but might be brought about by law or by Supreme Court rules.

Suggestion:

1. Give discretionary authority to court of appeals to transfer cases involving original jurisdiction --i.e., the high prerogative writs-- to appropriate common pleas court.

Comment: This suggestion was made because it was felt that, in many instances, such as habeas corpus, trial courts are better suited to handle these cases because they are better equipped to take evidence, and so forth. The court of appeals would continue to retain its original jurisdiction, however, this being necessary particularly in relation to lower courts and in regard to the acts of government officials. This appears to be a suggestion which could be incorporated in the Constitution in several ways, one of which would be to allow a transfer to be made only pursuant to a Supreme Court order.

2. Suggestion: Give authority to courts of appeals to compel a trial judge or administrative agency to complete the procedural steps necessary to effect an appeal.

Comment: This suggestion was made to alleviate the necessity for bringing a separate suit, e.g. mandamus, to compel a trial judge or other person to perform an act necessary to the completion of a record to be filed in connection with an appeal. In regard to common pleas courts, these duties are outlined by Supreme Court rules, and this matter would seem a more appropriate subject for rules rather than the Constitution. Further, since this suggestion was raised particularly with reference to municipal courts, for which the Supreme Court has not yet promulgated rules, and which would at any rate be abolished under the Committee's three-tier proposal, no action on this point seems advisable at this time.

3. Suggestion: Give the courts of appeals authority to transfer cases from one district to another for hearing and disposition, if the parties, and the receiving court, agree.

Comment: When this suggestion was made, it was pointed out that the above procedure could probably be followed now, even in the absence of a constitutional provision. However, it was felt that the procedure would be used more often if it were given constitutional sanctions. Such a provision might serve to expedite the disposition of some cases, and conserve judicial time, in that it would provide an alternative to the assignment of judges out of their districts. Such a provision could also be written into the Constitution

in several ways, one of which would be to allow the transfer to be made only by Supreme Court order. California apparently has such a provision, in Section 4c of Article 6 of its Constitution.

4. Suggestion: Designate the most populous conty as the principal seat of the court of appeals, and require it to maintain a headquarters office there.

Comment: There seems to be no sentiment on the part of anyone who has spoken to the Committee for a change from the district system of organizing the Court of Appeals, so that in all likelihood this arrangement will be preserved. While there appears no reason to restrict a court of appeals from traveling to, and holding court in, any county in its district, it would appear that a requirement for a principal seat and headquarters office would contribute to more effective personnel administration and record keeping. However, the Committee may wish to give each court added flexibility in deciding on the location of its headquarters office by omitting any requirement that it be in the most populous county in the district.

5. Suggestion: Give the Courts of Appeals constitutional authority to hire all employees needed to carry out their functions.

Comment: At present, the authority of the courts to hire employees is statutorily limited to constables, bailiffs, and reporters. There is no provision for the hiring of an administrator, or law clerks, for example. While this question could, of course, continue to be treated as a statutory matter, the Committee may wish to make it constitutional, particularly in view of the suggestion, which was also made, that there be established, within each district, a position to monitor the status of all appellate cases in the district, and another position, at the state level, to shift cases and judges as the total needs indicate. Such an arrangement would be feasible, but establishing it points to the need for more centralized administration and staffing in Court of Appeals offices, which suggests that constitutional authority to employ an administrator (whether or not he is called by that title), such as the Supreme Court now has, may be an appropriate solution. And if the appointment of an administrator is authorized, there would seem to be no sound reason for not mentioning "other necessary employees", also, in a provision.

6. Suggestion: Remove the provision for the assignment of retired judges. If the provision is retained, specify that retired judges shall receive their actual expenses, in addition to their salary, instead of a per diem allowance.

Comment: This suggestion was made -- not strongly -- because, as long as Ohio has an elected judiciary, the employment of judges who were not elected by the people seems inconsistent with the principle. Also, this practice, in effect, provides a method for circumventing the mandatory retirement requirement. However, if the authority to assign retired judges is continued -- as it was presumed it would be -- then the suggestion was that such judges be paid their actual expenses instead of a fixed per diem, this approach being fairer and more realistic.

7. Suggestion: Remove provision for assignment of Court of Appeals judges to Common Pleas Court.

Comment: The basis of this suggestion is the belief that the work atmosphere of a Common Pleas judge and a Court of Appeals judge are so different that an appellate judge (who may never have had trial court experience) shouldn't be forced into a situation he may not be fully equipped to handle, and vice versa. However, it must be remenbered that such assignment is made only with the consent of the judge to be assigned, and is not mandatory. Further, the trend in judicial reform is to make judges as interchangeable from court to court as possible, in order to make then less conscious of their position in a hierarchy, and more conscious that they are performing a needed function in the administration of justice no matter what judicial role they are fulfilling. No change from the present status is recommended.

Other suggestions made were for a periodic review of judicial pay by a commission, with only veto power in the General Assembly; and for the creation of commissions including representatives of affected courts, for the adoption and amendment of rules. These will be taken up at a later time as separate topics.

Other topics which the Committee may wish to consider include the following:

1. Method of selecting the presiding judge. At present, this matter is statutory in Ohio. Section 2501.06, Revised Code, states that the elected judge with the shortest time to serve shall be the presiding judge. This method obviously bears no relationship to a judge's administrative ability or desire, or to his acceptablility to his colleagues. Other methods in use are 1) appointment by the chief justice 2) election by his colleagues 3) popular election 4) seniority and 5) designation by governor.

2. Length of term of presiding judge. Variations include 1) permanent 2) permanent, with option to turn duties over to judge next in seniority 3) indefinite, at pleasure of colleagues 4) election to statutory or constitutional term and 5) at pleasure of Chief Justice.

3. Quorum. Variations include 1) no provision 2) majority of court 3) prescribed constitutional or statutory number.

4. Decisions. The writing of decisions can be made either by chance or under a prescribed formula. Opinions of the court can be arrived at either by conferences or through circulation of written opinions.

5. In reference to Article IV, Section 3(A), the Committee should devote particular attention to the last two sentences, which read: "The court shall hold sessions in each county of the district as the necessity arises. The county commissioners shall provide a proper and convenient place for the court of appeals to hold court." The first of these two sentences has apparently been interpreted by some courts as requiring them to go to a county even if only a single case has been filed there. This results in a waste of judicial man hours, and this situation could be corrected by modifying the apparently mandatory language. The second sentence should be examined in light of the new principal seat statute (Revised Code Section 2501.181) and the possibility that the Committee might recommend a principal seat provision in the Constitution.

Judicial Selection

There are five methods of judicial selection currently in use in the United States. These are:

1. Gubernatorial appointment. In this method, the governor makes the original appointment, usually with the approval of the legislature or a house thereof, or of a body especially established for this purpose.

2. Legislative election. In this method, the selection is made by a vote of the legislature.

3. Nonpartisan election. In this method, judicial candidates are formally excluded from identification with a political party on the election ballot, although they may be chosen at partisan primaries.

4. Partisan election. Here, judges may be identified on the election ballot with a political party and are nominated in partisan primaries.

5. Appointive-Elective Method. This method, which has come to be known popularly as the Merit Plan or Missouri Plan, has three essential elements: first, slates of candidates are chosen by a nonpartisan nominating commission usually composed of some designated members of the judiciary, several lawyers appointed or elected by bar associations, and several lay persons appointed by the governor; second, the governor selects a judge from the list of names submitted by the commission; finally voters review the appointment by means of a referendum in which the judge runs unopposed on his record.[1]

History of Judicial Selection in the United States

During colonial times, judges were appointed by the Crown. After the Declaration of Independence, six of the new states vested the responsibility for judicial appointments in the governor, subject, however, to the approval of a group of citizens or to the state legislature. In Pennsylvania and Delaware, the approving authority was the state legislature itself. In Massachusetts, New Hampshire, and Maryland it was the Governor's Council, consisting of various state officers, and in New York it was a special "Council of Appointment", consisting of four state senators as well as the governor. In contrast, seven of the original states entrusted the election of judges to their legislatures, as an indication of distrust for the executive. These were Connecticut, Rhode Island, New Jersey, Virginia, North Carolina, South Carolina and Georgia.[2] In 1789 no state obtained its judges by popular election. Georgia was the first to do so, in 1793.[3]

Several reasons have been advanced for the rising demand for popular control of the judiciary at this time. First, there was the impact of Marbury v. Madison, 1 Cranch 137 (1803), in which the Supreme Court unequivocally asserted the power of the judicial branch to pass on the constitutionality of legislation. This declaration generated a great deal of controversy over the possible dire consequences of unchecked judicial power, and in fact led to an attempt to impeach several members of the Court.[4] (Interestingly, two of the earliest impeachments of judges in Ohio occurred for identical reasons--in a power struggle between the judicial and the legislative branches of state government. Early in 1809, Ohio Supreme Court judges

Tod and Pease were tried individually for their decisions in separate cases that aspects of a statute defining the powers and jurisdiction of justices of peace were unconstitutional. They were not convicted, but the experience played a role in the deliberations of the Convention surrounding the impeachment provision of the Constitution of 1851.)[5] Thomas Jefferson, who before he became President, had advocated the appointment of judges to serve during good behavior, suggested after the Marbury decision that the popular election of judges might, indeed, be desirable.[6]

Second, judges of American courts were called upon to play a more active role in the creation of law than their English counterparts. Many English common-law precedents simply did not fit the circumstances and needs of a frontier society, and at least two states--Kentucky and Tennessee--statutorily forbade the application of English common-law authorities.[7] The vacuum thus caused forced the American judges to create new law for the resolution of particular legal conflicts, but many citizens regarded this as the usurpation of what they saw as a properly legislative function.[8]

Third, following the American Revolution there began a period of distrust for the legal profession as a whole, resulting from the fact that many prominent attorneys had been Loyalists during the War, and that following the War attorneys had participated extensively in debt collection work and in the foreclosure of mortgages.[9]

Finally came the impact of Jacksonian democracy, which was firmly premised on the belief that all men are created equal, and that, as a consequence, all men are equally capable of assuming any public office. In his first inaugural address, Jackson proceeded from the premise that all men are in fact equal to the conclusion that judges "were as fungible in public office as potatoes."[10]

New York's decision in 1846 to adopt the elective method ushered in the era of elected judges all over the United States. Some of the original 13 states never adopted the elective method, and some of the other states which did, eventually abandoned it either completely or in part.[11] Nevertheless, between 1848 and 1912, 40 states incorporated the principle of elective judges into their constitutions.[12]

The prevalent method of election during this period was by means of partisan primaries and elections. The excesses and evils of this approach were most startlingly exemplified by the workings of the Tweed political machine in New York City from 1866 to 1871.[13]

While the Tweed era probably represented the bleakest picture of the consequences of the partisan election of judges, the fact was that many citizens recognized the need for some reform in this area. The most notable of these reforms was the emergence of the nonpartisan judicial ballot, which was a product of the turn-of-the-century Progressive movement,[14] and which, in theory at least, was supposed to eliminate the worst feature of the election of judges--de facto domination of judicial selection by partisan political bosses and organizations.

However, no fundamentally new approach to judicial selection was put forward until 1913, when Professor Albert M. Kales of Northwestern University Law School, and also a co-founder in that year of the American Judicature Society, proposed a plan which in his view combined the advantages of the appointive and elective methods and eliminated the faults of both. The original Kales proposal was that an elected officer (he suggested an elected chief justice) do the appointing to fill judicial vacancies from a list of names submitted by an impartial, nonpartisan nominating body

(he suggested a judicial council), the appointees to go before the voters at stated intervals thereafter on the sole question of their retention in office. The rejection of a judge by the voters was to create a vacancy to[15] be filled again by appointment. This concept was from its beginning championed by the American Judicature Society and in 1937 the American Bar Association also formally declared its support for the basic concept. The text of the plan endorsed by the A.B.A. read as follows:

> "a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
>
> b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the state senate, or other legislative body, of appointments made through the dual agency suggested.
>
> c) The appointee after a period of service should be eligible for reappointment periodically or periodically go before the people on his record, with no opposing candidate, the people voting upon the question, 'Shall Judge _____ be retained in office' "[16]

For reasons apparently grounded in a widely shared desire for reform sparked by bitter partisanship and scandal in the state's judiciary over a period of several decades, Missouri in 1940 became the first state to adopt the Kales-A.B.A. principles in a constitution, previous attempts--most notably in California in 1934, being only partially successful.[17]

> The Missouri Constitution requires merit selection for all judges of the Supreme Court, courts of appeals, and specified trial courts in the city of St. Louis and Jackson County, and it authorizes the legislature to enact laws under which the question of instituting this method of selecting trial court judges may be submitted to voters in other judicial circuits. [18] Pursuant to enabling legislation, voters in the judicial circuit which includes Kansas City have adopted merit selection of trial court judges in that circuit. 19

The A.B.A.'s support for the appointive-elective plan (or Missouri Plan as it has become known after 1940) was reaffirmed when its principles were incorporated in that organization's Model Judicial Article, published in 1962.[20] Today, the states of Alaska, California, Colorado, Indiana, Idaho, Kansas, Missouri, Nebraska, Oklahoma, Utah and Vermont select at least their Supreme Court and Court of Appeals judges by this method.[21] About a half dozen states use aspects of merit selection on a more limited basis, and some states, including Ohio and Pennsylvania, have established nominating commissions for the filling of vacancies by executive order,[22] even though they still employ the election method. Significantly, no state has changed an existing method of judicial selection to anything but merit plan during the last 25 years.[23]

History of Judicial Selection in Ohio

Under the Constitution of 1803, Ohio joined the Union with a judiciary appointed by the General Assembly, following the example of Connecticut, Rhode Island, New Jersey, Virginia, North Carolina, South Carolina and Georgia. The Ohio Constitution of 1851, which was written near the height of Jacksonian democracy--which came to be known also as "Populism"--not surprisingly put Ohio into the ranks of those states which elect their judges.[24] As one commentator has remarked:

> "Most of Ohio's "founding fathers" had gone to their rewards by the time of the Ohio Constitutional Convention of 1850, and the Jacksonian version of what came to be called "populism" was sweeping the country, bringing with it the spoils system, and a belief that no special talents were needed for public office. The populists buried under an 'elitist' label anyone who cautioned that, at least in the case of those offices which required some professional or technical competence, popular election would cost more in mediocre government than it would ever gain from the largely theoretical increase in citizen involvement."[25]

By 1850, many Ohioans had concluded that the courts, staffed by the legislature, had become "undemocratic", because party service had become an indispensable qualification for a judgeship. So, the new Constitution provided for the nomination of judges by party convention and election on a partisan ballot. This, presumably, at least gave the voters a choice of candidates. By the end of the century, however, political thought had evolved to the position that judicial selection would be made "more democratic" by the elimination of partisan politics from the selection process altogether. Progressive forces were thereafter instrumental in securing the passage of the nonpartisan Judiciary Act of 1911, which required nonpartisan ballots for the election of judges, and the rotation of judges' names on the ballot. In 1912, the Progressives at the convention held that year succeeded in incorporating into the Constitution a provision for the direct primary nomination of all state officers, including judges, except for those nominated by petition, and their election on a nonpartisan ballot.[26] The new structure for judicial selection, like its predecessors, soon came under severe criticism, including that "the ability to get publicity rather than judicial fitness has become the pathway to judicial office in Ohio".[27] However, despite repeated criticism, several attempts to substitute merit selection for the present method have failed. In 1938, Ohio voters rejected a proposed constitutional amendment to adopt a plan similar to the one adopted two years later in Missouri, and none of several subsequent proposals for Merit Selection has reached the ballot in Ohio since that time.

Pros and Cons of the Types of Selection Methods

From the point of view of constitutional revision, two methods of judicial selection probably are of little more than historical interest--these being legislative appointment or simple gubernatorial appointment--for which little sentiment has been expressed in Ohio in recent years. However, it should be noted that the A.B.A.'s Standards Relating to Court Organization do suggest one variation on executive appointment as an acceptable alternative method--namely gubernatorial appointment followed by confirmation by a judicial confirmation commission, which would have a right of rejection, and which would be composed of the same elements usually represented on a judicial nominating commission.[28] However, this memorandum discusses only two selection methods--treating election (both partisan and nonpartisan) as one alternative, and merit selection (also known as the elective-appointive or Missouri Plan) as the other.

The Elective Method

Advantages

Those who favor the elective method of judicial selection usually premise

their position on the proposition that popular election is the most effective means available for citizens to voice their approval or disapproval of the performance of those whom they have entrusted to exercise judicial authority over them. Specifically, the arguments in support of this method usually fall into one of the following categories:

1. Under a democratic form of government, the people must be given a direct voice in selecting all important officials, including those of the judicial branch. Popular elections at periodic intervals prevent the judiciary from imposing political, social and economic policies contrary to the fundamental aims of the people.[29] The emphasis on the recognition of judges as law-makers--as distinguished from interpreters of the law--is, philosophically, the strongest argument in favor of retaining the elective system. As one commentator recently wrote:

"We should never lose sight of the paramount role which judges play in formulating the rules by which human conduct is regulated. In a very real sense judges are the ultimate law-givers in our society. It is an established principle of political science that public officials who formulate important social policy should be selected by election, not by appointment. If we keep this truth in mind we will be wary of divesting ourselves of the power to share directly in the selection of our judges. Whether we use this power wisely or unwisely is up to us. I do not wish to relinquish my infinitesimally small part of that power."[30]

2. Election enables selection of judges representative of various ethnic, religious and racial groups of the community.[31]

3. There is no evidence of the superiority of judges selected under other systems.[32]

4. Politics can never be entirely eliminated from the selection of any government officer. Furthermore, nominating commissions and bar associations are all subject to their own kinds of political pressures.[33]

5. In the long run, political parties produce better candidates, and any appointive system weakens party influence.[34]

6. The elective system is best designed to select judges who most effectively and sympathetically deal with everyday problems of ordinary people.[35]

7. The election of judges assures that the judiciary is an independent branch of government in that a judge need not look to the executive or legislative branches for appointment or confirmation.[36]

8. The elective method should not be disparaged until related problems that influence the quality of judicial administration, such as salaries, retirement benefits and physical facilities have been improved.[37]

Disadvantages

On the other hand, those who oppose the elective system usually base their

position on one or more of the following arguments:

1. People should have a direct voice in selecting executives and legislators who are policy-makers, but not judges. A judge should be the antithesis of a policy-maker, and be sworn not to allow influence to affect him to give preference to one policy over another.[38]

The elective system involves essentially a choice of judges by political party officials who are primarily concerned with political factors such as a candidate's support within a party organization, prior service to the party and political charisma, rather than judicial qualifications.[39]

3. There is no proof that elected judges are more responsive to the public or that the quality of the bench is improved by this method.[40]

4. Election campaigning is expensive and time-consuming. To engage in it, judges must of necessity neglect their judicial duties to some extent, and attorneys seeking judicial office must neglect their practices.[41]

5. Because of the rather secluded atmosphere in which judicial work--even trial work--is normally done, the public is not generally sufficiently knowledgeable about a judge's performance to make an informed and rational determination as to his competence or incompetence,[42] and most judges who are defeated at the polls are not rejected on the basis of poor performance, but on a basis unrelated to their ability--such as the poor showing of the party which nominated them at a particular election.[43]

6. The phenomenon of "voter drop-off" in judicial races as compared to the number of votes cast for executive or legislative offices in elections generally has been well documented and is an accepted fact in political science. The "drop-off" rate is lower among middle-income, upper income and well educated voters than among the less wealthy and less educated, putting the former, as a group, at an advantage versus the latter in terms of electing judges who share their political orientation. On that basis, if accountability to the voter is advanced as the principal argument in favor of an elective system for the selection of judges, a nonpartisan ballot produces even less favorable results than a partisan one, in the opinion of some observers. One recent study of the Ohio system, for example, contains the following comment:

"The nonpartisan elective system fails to meet the criterion of accountability in that the lack of a party label deprives the voter of any aggregate information which would enable him to predict the decisional propensities of a judicial candidate. This deficiency is most serious at the appellate level, where judicial policy-making is most likely to occur. The voter tends to be guided by familiarity or identity of the name, which may depend on incumbency or ethnic affiliation. Upper-status voters are more likely to have information enabling them to overcome the anonymity of the nonpartisan ballot,

and therefore derive an advantage from its use. Lower-status voters, less capable of coping with the nonpartisan ballot, are disadvantaged by its use. The 'invisibility' of the system disqualifies it."[44]

7. Other criticisms which have been leveled at the nonpartisan ballot are that it fails to provide any method of screening a candidate, and, if a candidate is deprived of financial support by a political party, he may have to rely on his own financial resources or accept support from "friends," which may affect his impartiality as much as, or more than, partisan affiliation.[45]

The Appointive-Elective Method

Arguments for and against the appointive-elective method, merit plan or Missouri Plan, as it is variously called, are somewhat more difficult to categorize than those for and against an elective system, in large part due to the longer existence of the latter and the consequently greater analysis and research to which it has been subjected. However, the following appear to be the chief arguments for and against an appointive-elective system. The negative is stated first:

1. It is undemocratic, because it deprives the people of a vote on the question of who should sit as judges. Those who oppose this argument say that many judges attain their seats by appointment anyway at first, by way of filling a vacancy, and most are subsequently retained by a vote of the electorate. Therefore, two of the three elements of merit selection are already operative, and the adoption of a plan would merely add the third--and crucial element--namely the nominating commission.[46]

2. Nominating commissioners tend to want to accommodate the wishes of the appointing authority by placing "preferred" candidates on the list submitted to him. Those who oppose this argument say that whether or not this situation comes about depends to a large extent on the personal integrity of those who serve on a commission. Further, such influence would tend to be less with a constitutionally-created commission than a voluntarily established one, and the bi-partisan nature of a commission would further minimize the possibility of a governor "railroading" a choice through a commission.[47]

3. Because lawyers and judges on a commission would be more likely to view potential appointees in terms of technical competence rather than community need, men appointed under a merit plan would most likely be selected from among those practicing in "prestige" law firms. The usual reply to this argument is that experience has not borne out this assumption. At least in Missouri, where merit selection has been in effect the longest period of time, judges selected under the plan appear no more conservative or elitist than those elected prior to 1940. Also, placing "community need" ahead of "technical competence" misconstrues the role of judges in society: constitutions and laws reflect needs, judges merely interpret the documents. Furthermore, the people retain the right to remove a judge from office by rejecting him at a periodic retention election.[48]

4. A merit plan diffuses responsibility for appointing judges because the governor can claim that he is precluded from making a better appointment because of the poor slate presented to him by the nominating commission. Defenders of merit selection say that under most plans, the governor has a right to reject at least one panel before the right of appointment passes to another individual or group. Besides, the poor quality of a panel may be due not to the work of the commission,but to lack of interest in poor-paying judicial positions.[49]

5. In the history of merit selection in Missouri, only one judge has been voted out of office. This proves that under the merit plan, incompetent judges cannot he removed from office. Defenders of the plan, on the other hand, maintain that this fact is just as likely to prove that the plan puts competent judges on the bench in the first place. Besides, if the people do not recognize a sitting incompetent judge to be incompetent, what guarantee is there that they would be any more capable of choosing a competent one in the first place?[50]

6. There is no guarantee that at a retention election following the initial appointment, people would be any better informed about a judge's qualifications than they were before he was appointed.[51] Defenders of the plan say that this time period does, indeed, give the electorate an opportunity to educate itself about a judge's qualifications and performance. In Missouri, the state bar periodically polls attorneys on the performance of individual judges, and the results are published. The effect of such polls was explained by a former president of the Missouri Bar Association as follows:

"Some may fear that because judges are appointed under the nonpartisan system and do not have to run for political office in the usual sense, they are not sensitive to public opinion or criticism and that they are as independent as federal judiciary personnel. This is not the case. Each year the Missouri Bar conducts a poll of its members on the question of whether the judges who are running for re-election in that year deserve to be retained in office. As to supreme court members, this poll is taken from all the lawyers in the state; as to appellate court judges, among the lawyers of the appellate districts; and in circuit court districts where the judges are under the nonpartisan system, from the lawyers of the circuit. The results of the poll are tabulated and widely disseminated in the news media. Every judge is sensitive to the standing which he occupies in the judicial poll. The fact that the judge knows that the matter in which he is regarded by the lawyers will be made public influences his conduct on the bench . He would be less than human if he did not believe the opinion of his fellow lawyers so published indicated to some degree the caliber of his work and his fitness for the office which he holds."[52]

Adherents of the merit plan further claim that it maintains the important advantage of the appointive system, namely appointment by one who is directly answerable to the people, while assuring ultimate control by the people through the retention election. Further, aside from the usual claims that the system frees judges from political pressure and assures tenure for competent judges, adherents claim an advantage in the establishment of a permanent commission which can establish

criteria and standards for judicial selection, and give members an opportunity to develop expertise in the area.[53] Finally, while conceding that it would be unrealistic to suppose that partisan politics could ever be completely eliminated from it, they point to Missouri as an example that a merit plan can indeed have an influence in reducing partisanship in the selection process. In a state which has not elected a Republican governor since 1940,[54] among the first 60 appointments under the plan, the bench was split on a 70-30 percentage basis between Democrats and Republicans.[55] And, while there were no party crossovers in judicial appointments for 16 years after the plan was instituted[56] in the1950's, by which time the plan began to be accepted not only in law but also in spirit, one governor appointed six members of the opposition party among the 14 judicial appointments he made during his term in office.[57]

Conclusion

It seems that, in essence, a preference for either an elective method or an appointive-elective method of judicial selection is determined by the kind of "politics" to be tolerated in the selection process--having conceded that "politics" of one kind or another will always enter into it. The choice is further complicated by the fact that, in spite of all the volumes of writing on the question of what qualities are needed in a "good" judge, there are no uniform criteria on the subject.[58] Indeed, in surveys among judges themselves, subjective qualities such as moral courage, decisiveness, and reputation for fairness and uprightness, rank well above the relatively objective ones, such as experience in the supervision of subordinates, well-above-average law school grades, and previous professional activities and work.[59] Thus, the selection of judges is, and in all probability will remain, a subjective process. The application of subjective standards presents problems enough but when these are coupled with traditional and demonstrable apathy on the part of the electorate toward most judicial contests and the judiciary as a whole, the notion that, in those jurisdictions where judges are elected, they are elected by a representative cross-section of the electorate to mirror the majority's expectation in their policy-making roles becomes little more than a hope.

Furthermore, once a judge is on the bench--whether he gets there by election or appointment, and due to the essentially cloistered nature of his work--many authorities believe that the degree of knowledge by the public about the quality of his performance is, in most instances, sketchy at best. In the words of one observer:

> "Once we have named a man as a judge, the quality of his performance as a judge passes almost completely outside our effective surveillance and control, unless his performance is extremely bad. . . . Any notion that the public or the bar may have any genuine control over the quality of judicial performance by judges already on the bench is simply not realistic."[60]

If the selection process is the pivotal point, then the crucial question becomes what advantage, if any, may be inherent in an elective-appointive method over an elective method. The apparent disinterest of the electorate in the judiciary is said by some to be due to the fact that most people have either no contact or only sporadic or superficial contact with the courts during the normal routine of their lives. Furthermore, the policy decisions made by courts, although they may affect the lives of citizens as profoundly as a legislative or executive act, do not appear as dramatic and exciting as the latter to the average citizen. But, as

Richard A. Watson and Rondal G. Downing point out in their in-depth study of the Missouri experience, The Politics of the Bench and the Bar, [61] there are identifiable groups in society which do have a constant interest in the courts and the judges who are selected to staff them. Briefly, these groups are (1) lawyers, (2) judges, (3) "attentive publics" and (4) the chief political officer in the state, the governor.[62] Although in practice the bar in particular has proven far from monolithic in its outlook and there have at times been heated rivalries for lawyer seats on nominating commissions in the state, each one of these elements is represented, directly or indirectly, on each nominating commission. Watson and Downing conclude that "/w / hether the plan eliminates politics in judicial selection is a false issue. Instead, the key issue is whether the particular kind of politics that evolved under the plan adequately represents the legal, judicial, public and political perspectives thought to be important in determining who shall sit on the bench."[63]

In those areas of Missouri where merit selection is in effect, both the public and the legal profession, in the main, favor it as having produced a literally more respectable judicial climate than existed in the state before the plan was adopted, and while no empirical proof is available that merit selection produces "better" judges in terms of there being fewer reversals of their decisions by higher courts, there does seem to have been a positive psychological impact on both the public and the bar as the result of its adoption in that state. Watson & Downing conclude that the plan has had a tendency to eliminate highly incompetent judges from the bench, and has placed on the bench men with qualities Missouri lawyers--and presumably also Missouri citizens-- rate most highly in a "good"judge: (1) knowledge of the law; (2) open-mindedness; (3) common sense; (4) courtesy to lawyers and witnesses; and (5) diligence.[64] Data from states which have more recently adopted appointive-elective methods have not yet been as thoroughly analyzed as those of Missouri, but judging from the trend toward the adoption of such methods which began in the 1950's and is continuing at the present time[65]--and despite the admitted shortcomings of the concept--it seems appropriate to conclude that a majority of the citizens who are concerned with the improvement of the courts and the quality of their judges--and who have had an opportunity to voice their beliefs at the ballot box--have concluded that an appointive-elective method is more likely to produce the results they desire than any other method of judicial selection now available.

Footnotes

1. Henry R. Glick and Kenneth N. Vines, State Court Systems (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973), p. 39.

2. Glenn R. Winters and Robert E. Allard, "Judicial Selection in the United States", in The Courts, The Public and the Law Explosion, ed. Harry W. Jones (Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1965), p. 149.

3. Ibid.

4. Herbert Jacob, "The Courts as Political Agencies: An Historical Analysis", VIII Tulane Studies in Political Science (New Orleans: Tulane University, 1962), p. 24.

5. State of Ohio, Debates and Proceedings, Constitutional Convention, 1850, pp. 239-241 (May 30, 1850).

6. Jacob, "The Courts as Political Agencies: An Historical Analysis", supra note 4, pp. 24-25; Dorothy W. Nelson, "Variations on a Theme -- Selection and Tenure of Judges", 36 Southern California Law Review 16 (1962).

7. Nelson, "Variations on a Theme -- Selection and Tenure of Judges, note 6; Stuart H. Perry, "Politics and Judicial Administration", 167 The Annals of the American Academy of Political and Social Sciences, p.77 (1933).

8. Montana Constitutional Convention Studies, Report No. 14, "The Judiciary" (Helena: Montana Constitutional Convention Commission, n.d.), p. 133, hereafter cited as Montana Studies.

9. Nelson, "Variations on a Theme -- Selection and Tenure of Judges", supra note 6, p. 15.

10. Roger J. Traynor, "Who Can Best Judge the Judges" in Selected Readings -- Judicial Selection and Tenure, ed. Glenn R. Winters (Chicago: American Judicature Society, 1967), p. 141.

11. Winters and Allard, The Courts, The Public, and the Law Explosion, supra note 2, p. 149; Temporary State Commission on the Constitutional Convention, Report No. 12, "The Judiciary" (New York: State of New York, 1967), pp. 19-20, hereafter cited as New York Commission.

12. Sister M. Barbara McCarthy, "The Widening Scope of American Constitutions: A Disseration" (Washington: Catholic University of America, 1928), p. 56, footnote 1.

13. Alexander B. Callow, Jr., The Tweed Ring (New York: Oxford University Press, 1966), Chapter 9, "Crime and Punishment".

14. Richard A. Watson and Rondal G. Downing, The Politics of the Bench and the Bar (New York: John Wiley and Sons, Inc., 1969), p. 3, footnote 8; Kathleen L. Barber, "Ohio Judicial Elections -- Nonpartisan Premises with Partisan Results", 32 Ohio State Law Journal 762, 768.

15. Glenn R. Winters, "Judicial Selection and Tenure", in Selected Readings -- Judicial Selection and Tenure, ed. Glenn R. Winters (Chicago: American Judicature Society, 1967), p. 32.

16. Ibid., p. 33.

17. Watson and Downing, The Politics of the Bench and the Bar, supra note 14, pp. 9-10; Winters, "Judicial Selection and Tenure", supra note 15, pp. 33-34.

18. Constitution of Missouri, Article 5, Sections 29(a) and 29(b).

19. Watson and Downing, The Politics of the Bench and the Bar, supra note 14, p. 4.

20. Model State Judicial Article (American Bar Association, 1962), Sections 5, 6 and 10.

21. Montana Studies, supra note 8, Table 14, p. 145.

22. E.g., Executive Order of Governor John J. Gilligan of Ohio, dated June 14, 1972.

23. Glick and Vines, State Court Systems, supra note 1, p. 4.

24. Bruce I. Petrie, "The 122-Year Cop-out", Cincinnati Bar Association Journal (Fall, 1973), p. 12.

25. Ibid.

26. Barber, "Ohio Judicial Elections -- Nonpartisan Premises With Partisan Results", supra note 14, p. 768.

27. Francis R. Aumann, "The Selection, Tenure, Retirement and Compensation of Judges in Ohio", 5 U. Cin. L. Rev. 408, 414 (1931).

28. American Bar Association, Standards Relating to Court Organization, Standard 1.21 (b)(i). (Tentative Draft, 1973).

29. Pennsylvania Constitutional Convention 1967-68, Preparatory Committee Reference Manual No. 5, "The Judiciary" (Harrisburg 1967), p. 103, hereafter cites as Pennsylvania Preparatory Committee; New York Commission, supra note 11, p. 23.

30. John A. Lloyd, Jr., "Our Judicial System: A Public Institution", Cincinnati Bar Association Journal (Fall 1973), p. 24.

31. Pennsylvania Preparatory Committee, supra note 29, p. 103; Charles W. Joiner, "The Judiciary", in Con Con/Issues for the Illinois Constitutional Convention (Urbana: University of Illinois Press, 1970), p. 186.

32. New York Commission, supra note 11, p. 22; Pennsylvania Preparatory Committee, supra note 29, p. 106.

33. Joiner, "The Judiciary", supra note 31, p. 186.

34. Ibid.

35. New York Commission, supra note 11, pp. 24-25.

36. Hawaii Constitutional Convention Studies, Article V, "The Judiciary" (Honolulu: Legislative Reference Bureau, 1968), p. 18, hereafter cites as Hawaii Studies.

37. Warren Burnett, "Observations on the Direct Election Method of Judicial Selection", 44 Texas Law Review, pp. 1101-1102 (1966).

38. Joiner, "The Judiciary", supra note 31, p. 187.

39. Hawaii Studies, supra note 36, p. 18; Nelson, "Variations on a Theme", supra note 6, p. 28; Joiner, "The Judiciary", supra note 31, p. 187.

40. John H. Romani, "The Courts", in Salient Issues of Constitutional Revision, John P. Wheeler, Jr. ed. (New York: National Municipal League, 1961), p. 123.

41. Nelson, "Variations on a Theme", supra note 6, p. 28; Pennsylvania Preparatory Committee, supra note 29, p. 109.

42. Winters, "Judicial Selection and Tenure", supra note 15, pp. 39-40.

43. Robert A. Leflar, "The Quality of Judges", 35 Indiana Law Journal 289, 299 (1960); Hawaii Studies, supra note 36, p. 18; Romani, "The Courts", supra note 40, p. 123.

44. Barber, "Ohio Judicial Elections -- Nonpartisan Premises with Partisan Results", supra note 14, p. 788.

45. Montana Studies, supra note 8, p. 140.

46. Ibid., p. 149.

47. New York Commission, supra note 11, p. 31; Montana Studies, supra note 8, p. 150.

48. Joiner, "The Judiciary", supra note 31, p. 189; Montana Studies, supra note 8, p. 150.

49. New York Commission, supra note 11, p. 31; Montana Studies, supra note 8, p. 150.

50. Hawaii Studies, supra note 36, p. 22; Montana Studies, supra note 8, p. 51.

51. Hawaii Studies, supra note 36, p. 22.

52. Lloyd E. Roberts, "Twenty-five Years Under the Missouri Plan", 49 Judicature 94 (1965).

53. Montana Studies, supra note 8, p. 152.

54. Warren E. Hearnes, "Twenty-five Years Under the Missouri Plan", in Selected Readings -- Judicial Selection and Tenure, supra note 15, p. 61.

55. Ibid.

56. Forrest M. Henker, "Experience Under the Missouri Non-Partisan Court Plan", in Selected Readings -- Judicial Selection and Tenure, supra note 15, p. 39.

57. Ibid.

58. Maurice Rosenberg, "The Qualities of Mercy -- Are They Strainable?", in Selected Readings -- Judicial Selection and Tenure, supra note 15, p. 3.

59. Ibid., pp. 4-10.

60. Leflar, "The Quality of Judges", supra note 43, p. 299.

61. Watson and Downing, The Politics of the Bench and the Bar, supra note 14, Chapter 10, "Concluding Comments".

62. Ibid., p. 399.

63. Ibid., pp. 331-332.

64. Ibid., p. 345.

65. Glick and Vines, State Court Systems, supra note 1, p. 41.

Judicial Compensation, Terms, and Related Matters

Compensation

Section 6(B) of Article IV of the Ohio Constitution provides in part:

> "The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law."

History

Under the Ohio Constitution of 1802 judicial power was vested in a supreme court, courts of common pleas for each county, justices of the peace,[1] and in such other courts as the legislature may from time to time establish. Courts of common pleas consisted of a president and associate judges. The judicial compensation provision of Ohio's first constitution referred only to judges of the supreme court and presidents of the courts of common pleas, who were to receive for their services

> "an adequate compensation to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit or trust under the authority of this state or of the United States."[2]

Little change was made in this compensation provision in the Constitution of 1851. Probate courts were created by Ohio's second constitution, and, as in the Constitution of 1802, justices of the peace and legislatively created courts were recognized. However, the compensation provision continued to be limited to the judges of the supreme court and the court of common pleas. To the prohibition against diminution of salary was added a prohibition against its increase during term. This addition was not discussed at length. Its author explained that the "object sought to be attained was to prevent collision between members of the Legislature and the Judiciary..."[3]

The compensation provision first proposed by the Convention of 1851 through its standing committee on the judiciary contained a minimum annual salary provision of $2000 each for justices of the supreme court and $1800 for judges of the court of common pleas, but the provision was subsequently dropped as improper for inclusion in the fundamental law. The salary provision adopted as Section 14

of Article IV of the Convention of 1861 read:

> "The Judges of the Supreme Court and of the Court of Common Pleas shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust under the authority of this State, of the United States..."

The Modern Courts Amendment of 1968 repealed the provision prohibiting increase in judicial salaries during term. Authorities explain:

> "As judicial salaries in Ohio have in recent years been adjusted upward with more frequency, and more new judgeships have been created, the former provision has in too many instances resulted in an anomalous and basically unfair situation. A judge elected to a new term of an existing or newly created judgeship may be entitled to receive the benefits of a recent salary increase while a colleague who may have served longer on the bench but is in the midst of his term, is not."[4]

The legislative study committee studying problems of judicial administration in 1965 had called for increases in judicial salaries and had called for their taking effect quickly. The study committee's report recognized the need for removing the prohibition in order to prevent having great salary discrepancies among members of a single court.

By virtue of the amendment to Section 6 adopted in November, 1973 the authority to make compensation increases during term applies to all courts of record. Without such a specific provision, the Ohio supreme court had held, Section 20 of Article II would apply to prohibit changes in compensation during term. That section directs the gereral assembly to fix compensation for all officers and provides that no change therein shall affect the salary of any officer during his existing term, but the section's application is limited to "cases not provided for in this constitution."

The provision that all members of the supreme court, except the chief justice, receive the same salary and the similar provision regarding compensation of judges of the courts of appeals were part of the Modern Courts Amendment. They had been included in the recommendations of the 1965 legislative study committee on judicial administration.

Recent Changes in the Compensation Schedule

Prior to recent changes in the salary schedule for the Ohio judiciary, John P. Henderson, professor of economics at Michigan State University, made a study of judicial compensation as it compared with compensation in effect in several neighboring states. A condensed version of his original report, in a 1973 issue of Ohio Bar, showed Ohio to be far below states of comparable industry and economy. [5]

Henderson pointed out that in May, 1968 under the compensation structure that preceded 1973 amendments, judicial salaries were higher than those in neighboring states and were competitive with the federal court system. But four and one-half years later, he asserted, the 1968 levels had become seriously eroded by inflation and the rise in earnings in both the private and government sectors.

Salaries in neighboring states and the federal system had moved far ahead in the interim. Ohio judicial salaries had also dropped significantly behind salaries of officials in the administrative branch where there had been parity as recently as 1964.

Henderson's thesis is that judicial salaries had become inferior by 1972 because of inappropriate procedures for compensation adjustment. His conclusion is: "During a period of accelerated inflation, it is imperative that judicial salaries be evaluated yearly, or at least every two years."[6]

In support of his conclusions, Professor Henderson demonstrates that for the period during which judicial salaries had not changed (from 1968 to 1973) wages and salaries on private nonagricultural payrolls had advanced at unprecedented rates. Earnings rose significantly in each year of that period in seven reported industries. Inflation during the same period is illustrated in the report by a table showing changes in the index of consumer prices. It shows that for the years 1968 to 1972, inclusive, prices rose 23 per cent for an average increase of 4.7 per cent per year. Finally, his data indicate that increases in money compensation in the private, nonfarm sector have more than matched the sharp rise in the cost of living in the last five year period.

Creation of the Ohio Elected Official and Judicial Compensation Review Commission in 1972 is recognition of the importance of an ongoing review of public salaries. This commission, a non-salaried nine member body appointed by the governor with the consent of the senate, is charged with the duty of making "a continuing study and review of the laws pertaining to compensation of elected offices of the state, counties, and townships, members of the general assembly, and judges of the various courts of the state and an evaluation of the compensation benefits such laws provide."[7] It is directed to make recommendations for changes in such laws "as it may deem advisable to provide equitable compensation and benefits commensurate with...responsibilities,"[8] and to make biennial reports to the governor and general assembly.

In 1973 the commission made a report containing general conclusions and specific recommendations concerning judicial compensation in this state. It found such compensation and retirement benefits both inadequate. Furthermore, it found that the method of compensating trial judges based on population is "outmoded and illogical." Specifically, it found: "1) A differential between compensation in small counties and larger counties cannot be justified in terms of a difference in the cost of living. 2) Present salary differentials between small and large counties have created a breakdown in judicial administration in some counties. 3) The chief justice of the supreme court, under the rules of superintendence, has the power to equalize case loads by assigning judges from county to county." The commission made specific recommendations for salary levels for all courts.

The general assembly has not adopted recommendations for equalization of salaries on the common pleas bench but it did enact significant compensation increases for the judiciary, along with increases for state executive officers and members of the General Assembly.

Annual salaries of members of the supreme court and courts of appeals are payable from the state treasury and the increases granted are uniform and are shown on Table A. Judges of the court of common pleas receive uniform compen-

sation from the state and additional compensation from the respective counties they serve. The state portion was raised from $11,000 to $20,000 and the county portion was changed as follows: from an annual compensation equal to 18¢ per capita for the first 40,000 population and 10¢ per capita for population in excess of 40,000, subject to a proviso that the additional compensation not be less than $3500 nor more than $15,000, to an annual compensation equal to 18¢ per capita, regardless of population, and subject to the same $3500 minimum and a new maximum limit of $14,000. Under the former legislation the result was that a common pleas judge received not less than $14,500 nor more than $26,000. New minimum and maximum salaries of common pleas judges are $23,500 and $34,000.

The minimum compensation to be paid to a part-time municipal judge in a territory of less than 50,000 was increased from $6000 to $8000. The increase for full-time municipal judges and part-time municipal judges having territories of 50,000 or more is based on the following formula: (a) from a basic amount of $10,000 to $21,000; (b) from 12¢ per capita for the first 40,000 population and 10¢ per capita for the excess population to 18¢ per capita, regardless of population; and (c) from a limit on the compensation of the lesser of $23,000 or $2000 under that of the common pleas judge of the county to the lesser of $30,000 or $2000 under that of the common pleas judge.

The legislation increased the base compensation for county court from $3000 to $4000, increased the percapita compensation from 6¢ to 8¢ and increased the maximum additional compensation from $3000 to $4000.

The most recent tabular comparison of judicial compensation among the various jurisdictions includes increases made in 1973 that put the state of Ohio in a competitive position. See Table B.

Compensation Commissions

Since the creation of the federal Commission on Executive, Legislative and Judicial Salaries in 1967[9] many states have created compensation commissions to help in the determination of judicial salaries and to provide the necessary on-going review of salaries and allowances. In addition to Ohio, 13 states have created such commissions.

Under the federal plan the Commission submits its report and recommendations to the President, who submits compensation recommendations that are presumably based upon the Commission report in the budget transmitted to Congress. The President's recommendations become law unless countermanded by federal legislation. The federal commission has greater power to effectuate its recommendations than do comparable bodies in many of the states that have compensation commissions.

Only three state commissions have approximately equal authority to fix judicial salaries. The new judicial article of the Alabama Constitution, prepared by the Alabama Constitutional Revision Commission, creates a state judicial compensation commission to recommend the salary and expense allowances to be paid all judges except judges of probate court. That five-member body has one member appointed by the governor, one by the president of the senate, one by the speaker of the house, and two by the Alabama state bar. Commission recommendations become law unless rejected or altered by the legislature.[10]

A constitutional provision adopted in 1970 gives Arizona a commission on salaries for elective state officers.[11] As under the federal plan, the commission makes salary reports to the governor whose recommendations become law unless the legislature rejects them.

Salaries of some Michigan judges are similarly fixed by compensation commission determination, which is effective unless rejected by the legislature, but there the statutory plan is limited to the state supreme court.[12]

Until its repeal in July, 1973 the Pennsylvania Commonwealth Compensation Commission was similarly empowered to make salary recommendations which were to take effect unless rejected by legislative action. Under that plan the commission's report was submitted to the governor, chief justice, president pro tempore of the senate, and the speaker of the house of representatives, and the statute was even more clear than is the federal model in that the commission's report became effective as law unless rejected by the legislature.

Reportedly, Illinois and Colorado have considered statutory provisions which would establish Pennsylvania-like commissions, empowered to make determinations that go into effect unless legislatively challenged.[13]

Five states -- New York,[14] Washington,[15] Connecticut,[16] Georgia,[17] and Iowa[18] -- have statutory plans whereby a compensation commission's report must be acted upon by the legislature. Unlike Ohio law, the provisions in these five states require that some action be taken on commission recommendations.

Finally, in the five states of Florida,[19] Illinois,[20] Montana,[21] South Dakota[22] and Utah,[23] as in Ohio, the statutes creating compensation commissions give them an advisory role only.

The American Judicature Society has classified commissions according to their power to effectuate recommendations in a September, 1973 report on the subject by Vincent J. Connelly.[24] The source of the following type classification is that monograph, updated by the addition of the state of Alabama.

(I) Recommendations become effective unless challenged by the legislature

(II) Recommendations must at least be considered by the legislature

(III) Recommendations are simply advisory

TYPE (I)	TYPE (II)	TYPE (III)
ALABAMA	CONNECTICUT	FLORIDA
ARIZONA	GEORGIA	ILLINOIS
MICHIGAN	IOWA	MONTANA
PENNSYLVANIA	NEW YORK	OHIO
(abolished)	WASHINGTON	SOUTH DAKOTA
FEDERAL		UTAH

The compensation commission device is constitutional in Alabama and Arizona. The 1972 Montana Constitution provides that the legislature "shall create a salary commission to recommend compensation for the judiciary and elected members of the legislative and executive branches." The Montana legislature created an advisory type commission the following year.

Similar kinds of commissions used for the determination of salaries other than judicial have been adopted by constitutional and statutory means. The use of comparable agencies to fix legislative salaries was explored by the Commission's committee to study the legislature. Although that committee made no recommendations on the subject, it was suggested in committee deliberations that if recommendations of a salary commission were to become law in the absence of legislative veto, constitutional recognition would undoubtedly be essential.

Committee Considerations

Section 6 equalizes appellate salaries but not salaries of common pleas judges. Although the Ohio Elected Official and Judicial Compensation Review Commission found no justification for salary differentials, its recommendations along this line were not followed by the legislature.

A consensus statement of the National Conference on the Judiciary in 1971 observed that judges should be compensated on a scale which conforms with the dignity of the office rather than the size of the state, and which takes into account, by means of periodic review, such factors as the current existing costs of living and the compensation received by other law-trained people, including that received by judges in the federal system. That differences in compensation between different levels of the judiciary should be held to a minimum was the view of that conference.

The committee has adopted a recommendation for the unified court at the county level, and a proposal that salaries of all judges be paid from the state general fund. See Section 8 of Trial Court Structure, Committee's Recommendation, Draft #3. It has endorsed the idea of greater caseload equalization through exercise of the rule-making authority of the supreme court. It has envisioned improvements in court administration and statistical data gathering that will further diminish county autonomy for the court of common pleas. It has favored a unified judicial budget.

In keeping with this view of the court of common pleas as a state court, the committee may decide that common pleas salaries ought to be constitutionally equalized, in accordance with the "dignity of the office" and not the population of the area from which such judge is selected.

It might further wish to consider the constitutional creation of a judicial compensation commission that would assure periodic review of salary structure and the empowering of such a commission to exercise more than advisory authority.

Table A

Judicial Compensation Increases in Ohio
1973

	Former Level	New Level
Chief Justice of Supreme Court	$32,000	$43,500
Supreme Court Justice	30,000	40,000
Court of Appeals Judge	28,000	37,000
Common Pleas Judge	14,500 - a 26,000	23,500 - b 34,000
Municipal Court - full time	10,000 - 23,000	30,000 - c
Municipal Court - part time	6,000 - d	8,000 - d
County Court*	6,000 - c	8,000 - c

a. $11,000 plus per capita with minimum and maximum

b. $20,000 plus per capita with minimum and maximum

c. Maximum

d. Minimum

* A provision authorizing payment of an additional fixed annual amount of $2000 was not changed by the 1973 legislation.

Table B

Compensation of Judges

State	Court of Last Resort	Intermediate Appellate	Major Trial Court
Alabama	$33,500	$33,000	$25,000 a
Alaska	36,000	-	33,000
Arizona	32,000	30,000	28,000
Arkansas	27,000 b	-	27,400 c
California	48,147 b	45,139	37,615
Colorado	35,000 b	32,000	28,000
Connecticut	36,000 b	-	34,500
Delaware	34,000 b	-	31,000
Florida	36,000	34,000	32,000
Georgia	32,500	32,500	20,000 a
Hawaii	32,670 b	-	30,250
Idaho	25,000	-	22,500
Illinois	42,500	40,000	30,000-37,500 a
Indiana	32,500 c	32,500 c	25,250 d
Iowa	33,000 b	-	29,000
Kansas	28,000 b	-	23,500
Kentucky	29,000	-	23,500
Louisiana	37,500	35,000	20,500-35,800 a
Maine	26,000 b	-	23,000-25,500
Maryland	40,000 b	37,500	35,500
Massachusetts	38,407 b	35,566	34,089
Michigan	42,000	41,961	35,216 d
Minnesota	36,500 b	-	32,000 a
Mississippi	26,000 b	-	22,000
Missouri	31,500	30,000	28,000
Montana	22,500 b	-	20,500
Nebraska	30,500	-	27,500-29,000 a
Nevada	35,000	-	30,000
New Hampshire	33,800 b	-	33,696
New Jersey	45,000 b	42,000	37,000
New Mexico	29,500	28,000	27,000
New York	49,665 b,e	40,182-46,682 e	37,817-43,317 e
North Carolina	38,000 b	35,500	35,500 c
North Dakota	28,000 b	-	26,000
Ohio	40,000 b	37,000	23,500-34,000
Oklahoma	26,000	22,360	14,175-21,320
Oregon	32,000	31,000	29,000
Pennsylvania	50,000 b	48,000	40,500-42,500
Rhode Island	30,000 b	-	28,000
South Carolina	34,000 b	-	34,000

Table B continued

State	Court of Last Resort	Intermediate Appellate	Major Trial Court
South Dakota	$24,000	$ -	$22,000
Tennessee	30,000 b	27,500	25,000
Texas	40,000 b	35,000	25,000 a
Utah	24,000 b	-	22,000
Vermont	29,000 b	-	25,000
Virginia	40,500 b,c	-	28,500 a
Washington	38,000	35,000	32,000
West Virginia	32,500	-	26,000
Wisconsin	34,716 b	-	25,044
Wyoming	30,000	-	27,500
Dist. Columbia	38,750	-	36,000
Federal System	60,000 b	42,500	40,000

a. Salaries

a. Salaries may be supplemented by counties.

b. These jurisdictions pay additional amounts to chief justices of courts of last resort. New Hampshire $200; Delaware, North Dakota, Texas (also presiding judge) and Utah, $500; Iowa, Kansas, Maryland, Mississippi, North Carolina, Rhode Isalnd and Virginia $1000; Hawaii $1210; Massachusetts $1363; Maine, Montana and Vermont, $1500; Arkansas, Colorado, New Jersey, Pennsylvania, and Tennessee, $2500; New York $2957; California $3008; Wisconsin $3114; Minnesota and Ohio $3500; Connecticut $4000; South Carolina $5000; Chief Justice of the United States $62,500.

c. Includes expense allowance.

d. County supplement included.

e. In addition, judges of the court of appeals receive $6000 for expenses, those of the appellate division (3rd and 4th departments) $8000 ($9000 for presiding judge) and those of the supreme court (3rd and 4th departments) $3000. Ranges are due to lower salaries paid to judges in 3rd and 4th departments. $10,500 of salaries of judges in the latter and $16,000 in 1st and 2nd departments are paid from local sources.

SOURCES OF TABLE: Book of the States 1974-75 and John P. Henderson, "The Salary Structure of the Ohio Judiciary," 46 Ohio Bar 469 (1973).

Judicial Terms[25]

Division (A) of Section 6, Article IV provides:

"(1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be elected to prescribe the times and mode of their election."

Section 2 of Article XVII provides in part:

"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 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 his 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 Courts 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."

History

Under the Constitution of 1802, judges of the supreme court and of the court of common pleas were appointed by a "joint ballot of both houses of the general assembly" for terms of seven years "if so long they behave well." Section 8, Article III.

The Constitution of 1851 fixed the term of judges of the supreme court at five years and made specific provision for staggered terms to be served by the five members of that court. Section 11, Article IV. Terms of judges of the court of common pleas were also set at five years by Section 12 of Article IV.

Constitutional amendments of 1912 increased the term of common pleas judges

to six years and provided that the judges of the supreme court be elected for such term, not less than six years, as prescribed by law.

Section 2 of Article XVII, as adopted in 1905, provided: "The term of office of judges of the supreme court and circuit courts (predecessors of the courts of appeals) shall be such even number of years not less than six (6) years as may be prescribed by the general assembly; that of the judges of the common pleas at 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 amendment adopted in 1947, the term of probate judges was increased to six years. The Modern Courts Amendment, of course, replaced the separate, independent probate court with a probate division of common pleas.

Other States

Attached Tables C and D, based in part on material from the most recent edition of the Book of the States, compare judicial terms in all the states of the court of last resort, intermediate appellate court (23 states) and major trial court. Of the courts of last resort in the 50 states, no state's court except Vermont has a term shorter than six years. Fourteen state courts of last resort have six year terms. Thirty-five state courts of last resort have longer terms, as shown below.

Of the 23 states with intermediate appellate courts, ten state courts in this category have six year terms. Twelve states have intermediate courts with longer terms. One state (New York) has an intermediate court with a five year term. The breakdown in terms of numbers is shown below.

Among the major trial courts, six years is a popular term. In almost half of the states (24) the major trial court judges serve six year terms. Nine states have major trial courts with four year terms, and in 17 states the term exceeds six years.

In the tally shown in Table C, where there is variation, the longer term was counted.

Table C

Court of Last Resort

Length of Term (in Years)	Number of States
Two	1
Six	14
Seven	1
Eight	12
Ten	10
Twelve	5
Fourteen	2
Fifteen	1
Life	4
	50

Intermediate Court

Five	1
Six	10
Eight	4
Ten	3
Twelve	3
Fifteen	1
Life	1
	23

Major Trial Court

Four	9
Six	24
Seven	1
Eight	7
Ten	2
Twelve	1
Fourteen	1
Fifteen	1
Life	4
	50

Table D

Terms of Judges
(in years)

State	Court of Last Resort	Intermediate Appellate Court	Major Trial Court
Alabama	6	6	6
Alaska	10	-	6
Arizona	6	6	4
Arkansas	8	-	6,4a
California	12	12	6
Colorado	10	8	6
Connecticut	8	-	8
Delaware	12	-	12
Florida	6	6	6
Georgia	6	6	4-8
Hawaii	10	-	10
Idaho	6	-	4
Illinois	10	10	6
Indiana	10	10	6,4b
Iowa	8	-	6
Kansas	6	-	4
Kentucky	8	-	6
Louisiana	14	12	6
Maine	7	-	7
Maryland	15	15	15
Massachusetts	To age 70	-	To age 70
Michigan	8	6	6
Minnesota	6	-	6
Mississippi	8	-	4
Missouri	12	12	6
Montana	8	-	6
Nebraska	6	-	6
Nevada	6	-	4
New Hampshire	To age 70	-	To age 70
New Jersey	7 with reappointment for life	7 with reappointment for life	7 with reappointment for life
New Mexico	8	8	6
New York	14	5	14
North Carolina	8	8	8
North Dakota	10	-	6
Ohio	6	6	6
Oklahoma	6	6	4
Oregon	6	6	6
Pennsylvania	10	10	10
Rhode Island	Life	-	Life
South Carolina	10	-	4
South Dakota	8	-	8
Tennessee	8	8	8
Texas	6	6	4
Utah	10	-	6

Table D continued

State	Court of Last Resort	Intermediate Appellate Court	Major Trial Court
Vermont	2	-	6
Virginia	12	-	8
Washington	6	-	4
West Virginia	12	-	8
Wisconsin	10	-	6
Wyoming	8	-	6

SOURCE: The Book of States 1974-75

Footnotes: a. Chancery court 6 years; Circuit court 4 years
b. Circuit court 6 years; Superios court 4 years

Non-judicial Positions; Conflicts of Interest

The last two sentences of Section 6 Division (B) prohibit judicial conflicts of employment and office. Specifically, they provide:

> "Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void."

The proscription on "fees or perquisites" and the holding of "any other office of profit or trust under the authority of this state or the United States" comes without change from Section 8 of Article III of the Constitution of 1802. The last sentence was added in 1951 and was included in Section 14 of Article IV as that section emerged from the convention. The Convention Debates record no discussion about retaining the provision banning fees or perquisites and precluding the holding of an office of profit or trust nor concerning the addition of the sentence about votes for non-judicial office. Section 14 was repealed and this portion re-enacted in Section 6 of Article IV by the Modern Courts Amendment of 1968. Section 6 was amended by Issue 3 in November, 1973 but no change was made in the conflict portion of the section.

Restrictions upon non-judicial activities in judicial articles are common. The comparable provision of the National Municipal League's Model State Constitution is found in paragraph (b) of Section 6.04 of that document:

> "No person who holds judicial office in the supreme court, appellate court or general court shall hold any other paid office, position of profit or employment under the state, its civil divisions or the United States. Any judge of the supreme court, appellate court, or general court who becomes a candidate for an elective office shall forfeit his judicial office."

The Ohio conflict clause prohibits the holding of any other "office of profit or trust." The Model clause is clearly limited to a paid office or employment and is therefore apparently less restrictive. In fact, comment to the section quoted above points out: "Note that this would not exclude judges from purely honorific or unpaid positions such as, for instance, members of school boards or other similar state or local agencies."

The Model State Judicial Article by the American Judicature Society and the American Bar Association provides:

> "No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge or magistrate shall, during his term of office, run for elective office other than the judicial office which he holds or directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign."

This provision is specific on prohibiting the practice of law, running for elective office, and contributing to or holding office in a political party or organization. The holding of an appointive public office is not specifically covered by the second model provision, whose drafters write that its purpose is that "of requiring that the

judge devote his full time to his job as judge and to remove all judges from politics to the extent possible." In commentary they add: "Several jurisdictions have hade the sorry spectacle of a judge running for the governorship, accepting contributions from lawyers, etc., while retaining his judicial office. Certainly this is conduct unbecoming a judicial officer and hardly compatible with the idea of safeguarding the judicial system from political ravages."

Other States

Comparable provisions from states with recently revised judicial articles are set forth below. The year in parenthesis is that of the date of the constitution or the last amendment of the applicable portion thereof.

CALIFORNIA (1966)

Art. VI Sec. 17 - A judge of a court of record may not practice law and during the term for which he was selected is ineligible for public employment or public office other than judicial employment or judicial office. A judge of the superior or municipal court may, however, become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidaey. Acceptance of the public office is a resignation from the office of judge. A judicial officer may not receive fees or fines for his own use.

The California constitution prohibits law practice and public employment or public office and contains an uncommon provision for the taking of leaves of absence by certain lower court judges.

COLORADO (1966)

Art. VI Sec. 18 - "...No justice or judge of a court of record shall accept designation or nomination for any public office other than judicial without first resigning from his judicial office, nor shall he hold at any other time any other public office during his term of office, nor hold office in any political party organization, nor contribute to or campaign for any political party or candidate for political office. No supreme court justice, judge of any intermediate appellate court, district court judge, probate judge or juvenile judge shall engage in the practice of law..."

The Colorado provision applies to seeking or holding public office, political activity, and the practice of law.

ILLINOIS (1970)

Art. 6 Sec. 13 - (a) The Supreme Court shall adopt rules of conduct for Judges and Associate Judges. (b) Judges and Associate Judges shall devote full time to judicial duties. They shall not practice law, hold a position of profit, hold office under the United States or this State or unit of local government or school district or in a political party. Service in the State militia or armed forces of the United States for period of time permitted by rule of the Supreme Court shall not disqualify a person from serving as a Judge or Associate Judge.

The Illinois language prohibits law practice, positions of profit, and office holding, with provision for allowed military service, pursuant to supreme court rule. It also specifically directs the supreme court to adopt rules of conduct for judges.

MICHIGAN (1964)

Art. VI Sec. 21 - Any justice or judge of a court of record shall be ineligible

to be nominated for or elected to an elective office other than a judicial office during the period of his service and for one year thereafter.

The Michigan provision bans eligibility to elective office during judicial tenure and for one year afterward.

MISSOURI (1970)

Art. V Sec. 24 - All judges and magistrates shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's or magistrate's salary shall be diminished during his term of office. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business. Judges and magistrates may receive reasonable traveling and other expenses allowed by law. The fees of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries, as provided by law.

The Missouri provision bans the receiving of "other or additional compensation" for public service and forbids both law practice and "law business." Expenses are specifically allowed.

NEBRASKA (1966)

Art. V Sec. 14 - No judge of the supreme or district courts shall act as attorney or counselor at law in any manner whatsoever. No county judge shall practice law in any court in any matter arising in or growing out of any proceedings in his own court.

The Nebraska provision is limited to the practice of law.

NEW JERSEY (1947)

Art. VI Sec.6, Paragraphs 6 and 7 - (6) The Justices of the Supreme Court and the Judges of the Superior Court shall receive for their services such salaries as may be provided by law, which shall not be diminished during the term of their appointment. They shall not, while in office, engage in the practice of law or other gainful pursuit.

(7) The Justices of the Supreme Court, the Judges of the Superior Court, and the Judges of the County Courts shall hold no other office or position of profit, under this State or the United States. Any such Justice or Judge who shall become a candidate for an elective public office shall thereby forfeit his judicial office.

The New Jersey Constitution prohibits law practice "or other gainful pursuit" and the holding of an "office or position of profit." Becoming a candidate for elective public office results in forfeiture of judicial office.

NEW MEXICO (1967)

Art. VI Sec. 19 - No judge of the Supreme or district courts shall be nominated or elected to any other than a judicial office in his state.

The New Mexico provision is limited to a restriction against nomination or election to any other than a judicial office.

NEW YORK (1961)

Art. 6 Sec. 20, paragraph (b) - A judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of a county court, judge of the surrogate's court, judge of the family court or judge of a court for the city of New York established pursuant to section fifteen of this article who is elected or appointed after the effective date of this article may not:

(1) hold any other public office or trust except member of a constitutional convention or member of the armed forces of the United States or of the state of New York in which latter event the legislature may enact such legislation as it deems appropriate to provide for a temporary judge or justice to serve during the period of the absence of such judge or justice in the armed forces;

(2) be eligible to be a candidate for any public office other than judicial office or member of a constitutional convention, unless he resigns his judicial office; in the event a judge or justice does not so resign his judicial office within ten days after his acceptance of the nomination of such other office, his judicial office shall become vacant and the vacancy shall be filled in the manner provided in this article;

(3) hold any office or assume the duties or exercise the powers of any office of any political organization or be a member of any governing or executive agency thereof;

(4) engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his judicial duties.

The New York provision is by far the longest and most detailed of any selected for this report. The proscription against public office or trust is coupled with exceptions - one an increasingly popular proviso relative to military service, and the other allowing judges to be members of a constitutional convention. As under a number of constitutions examined the provision makes a judge ineligible to be a candidate for public office. Political activity is covered as is the practice of law "or any other profession or business which interferes with" judicial duties.

OKLAHOMA (1967)

Art. VII Sec. 11 (b) No justices or Judges, except those of Municipal courts, shall engage in the practice of law nor hold any other office or position of profit under the United States or this State or any municipal corporation or political subdivision of this State, nor shall hold office in any political party. Provided that the Judges of the Court on the Judiciary, the Court of Tax Review and the Court of Bank Review and the Judges of any other such Special Courts may serve in such capacities in addition to their other judicial office. Compensation for service on the National Guard or the armed forces of the United States for such period of time as may be determined by rules of the Supreme Court shall not be deemed "profit."

The Oklahoma constitution prohibits law practice, the holding of any other public office or position of profit, and the holding of office in a political party. Exceptions are made for some judges and may be made for military office or position, pursuant to supreme court rule.

SOUTH CAROLINA (1973)

Art. 5 Sec. 12 - The Justices of the Supreme Court and the judges of the Circuit Court...shall not, while in office, engage in the practice of law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions except in the militia, nor shall they

be allowed any fees or perquisites of office. Any such Justice or judge who shall become a candidate for a popularly elected office shall thereby forfeit his judicial office.

South Carolina's revised judicial article prohibits the practice of law, holding office in a political party, and holding any other governmental office or position of profit except in the militia. Candidacy constitutes forfeiture of judicial office.

VIRGINIA (1970)

Art. VI Sec. 11 - No justice or judge of a court of record shall, during his continuance in office, engage in the practice of law within or without the Commonwealth, or seek or accept any nonjudicial elective office, or hold any other office of public trust, or engage in any other incompatible activity.

The Virginia restrictions are broadly stated. The practice of law is prohibited, as is nonjudicial elective office, other office of public trust, and "other incompatible activity."

Parallels in the Legislative Article of the Ohio Constitution

Prior to amendment initiated by this Commission, Section 4 of Article II declared that no person holding office "under the authority of the United States or any lucrative office under the authority of this State shall be eligible to... the General Assembly..." The committee to study the legislature found that determination of whether an office was established "under the authority of the United States or...this State" had been the subject of many opinions of the Ohio attorney general and court decisions. The committee's recommendation to substitute a provision prohibiting simultaneous holding of a "public office" as more concise and less ambiguous was approved by the Commission and ultimately by the electorate in May, 1973 by its adoption of modernizing amendments to Article II.

Section 4, Article II also involved determination as to whether an office was a "lucrative" one. The attorney general had been called upon frequently to find whether a particular office met the constitutional test, and applications of the restriction were found to be inconsistent. The term was dropped in the section as revised. The committee decided that public employment should not be a disability but that public officers, whether or not compensated, should not serve in the General Assembly.

Evidently the question of whether an office is one "of profit or trust" under Section 6 of Article IV (or its predecessor Section 14) is not one that can be said to have caused Ohio courts great difficulty. Few cases are reported. One frequently cited holding relies in part upon cases construing former Section 4 of Article II in concluding:

> Membership on a county charter commission...constitutes holding of public office or trust. A judge of the court of common pleas is precluded from becoming a member of a county charter commission by Section 14, Article IV, providing no such judge shall hold any other office of profit or trust under authority of the state of Ohio or of the United States. State v. Gessner, 129 Ohio St. 290 (1935).

Because the Ohio Supreme Court can supply interpretation of Section 6 through judicial canons the need for more concise terminology is not as great as it appeared in Article II. For the same reason the outmoded term "perquisites" is not apt to cause as much difficulty as it might otherwise.

Supreme Court Authority to Regulate Non-judicial Activities

In a number of jurisdictions the state supreme court has specific authority to adopt rules of conduct governing non-judicial activities and employment.

In Ohio the supreme court has exercised its power of general superintendence over all courts and its authority governing discipline of persons admitted to the practice of law in the adoption of a code of judicial conduct. By virtue of this code, as adopted by the supreme court bearing an effective date of December 20, 1973, judges are required to regulate extra-judicial activities to minimize the risk of conflict with judicial duties. Canon 3 of this Code requires disqualification by a judge in any proceeding in which the judge or the judge's spouse or minor child has a financial interest. Canon 5 requires a judge to refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with proper performance of judicial duties, exploit judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court. Specifically division (C)(2) of Canon 5 says that a judge "should not serve as an officer, director, manager, advisor, or employee of any business."

Canon 5 (D) restricts fiduciary activities, (E) prohibits acting as arbitrator or mediator, (F) states that a judge should not practice law, and (G) prohibits appointments to "a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."

Canon 6 requires a judge to file financial disclosure statements required by statutes and to make reports of compensation received for quasi-judicial and extra-judicial activities. Judges and judicial candidates are subject to the requirements of Chapter 102, of the Revised Code, calling for annual statements identifying sources of income over $500 and giving information concerning investments, real estate interests, debts, receivables, and gifts.

The subject of Canon 7 is political activity inappropriate to judicial office.

Military Office

A number of constitutions which prohibit office-holding contain a proviso to the effect that a military office is not within the prohibition. The intention has been to preclude interpretation that would apply it to commissioned status in the armed services reserves.

Similarly, in its study of other state constitutions, the committee to study the legislature of this commission found a frequent exception from the incompatibility provisions governing legislators to be an officer in the national guard or in reserve component of the armed services.

Few reported opinions deal with the Section 6, Article IV prohibition. In 1933 the Ohio attorney general ruled that a reserve officer of the United States military forces when not on active duty or when simply on duty in a training camp for 15 days does not hold an "office of profit or trust" under the authority of the United States, within the meaning of the provision. However, a reserve officer called to active duty other than duty in a training camp becomes an officer under

the authority of the United States within its meaning. 1933 Ohio Atty. Gen. Ops. No. 196. Other reported opinions and cases deal with officers on active duty, where conflict is clear because judicial duties are not being performed.

Alternatives for Committee Consideration

The Section 6 prohibition upon extra-judicial activities have apparently caused few problems. The authority of the supreme court to implement the provision can minimize the difficulties of interpretation that could otherwise arise. The supreme court has implemented the constitutional provision by a Code of Judicial Conduct.

The Committee may wish to solicit views of members of the judiciary and its special consultants on the general subject of appropriate restrictions on non-judicial and extra-judicial activities. It may wish to preclude only paid positions, as in the National Municipal League's Model State Constitution. It may wish to consider military status and exclude reserve officers from application of the prohibition by supreme court rule (as in Illinois and Oklahoma) or exclude membership in the armed forces from the provisions prohibiting office of profit or trust (as in New York and South Carolina).

Mandatory Retirement

Paragraph (C) of Section 6 originated in the Modern Courts Amendment of 1968. It reads as follows:

> "No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits for judges."

According to figures from a May, 1973 issue of the American Judicature Society's publication, Judicature, Ohio is one of 33 states that have made compulsory retirement at a fixed age applicable to at least a portion of the state judiciary. Attached Table E is based on material in Judicature. In a few states the age for retirement of a trial judge is slightly lower than the age for retirement of a member of an appellate court.

The problem to which mandatory retirement is addressed is how to assure the removal from office of judges who by reason of physical or mental disability associated with advanced years are unable to discharge effectively the duties of judicial office. Studies of the Ohio Legislative Service Commission in 1961 and 1965 mentioned earlier had explored the relationship of the incapacitated judge to delay in the courts and in reports based upon these studies commented upon the near impossibility of removing or replacing a judge for physical or mental disability. Although the chief justice of the supreme court was required to "pass upon the disqualification or disability of any judge of the court of common pleas" under former Section 3 of Article IV, the power was reportedly never used.[26] "Removal from office by impeachment proceedings," stated the first staff report in 1961, "is an action considered too drastic to be used in cases of physical and mental disability."[27]

A 1965 staff research report on problems of judicial administration discusses retirement of overage and incapacitated judges as a means for improving the quality of judicial manpower and cites recommendations from a variety of sources for mandatory retirement. Proponents of the Missouri and American Bar Association plans for selection are said to have endorsed it as an integral part of such plans. The Ohio State Bar Association's Judicial Reorganization Committee in 1961 said that " the system should be compatible with the usual case and not the exception, and compulsory retirement at some age is believed to make by and large, for better administration."[28]

The staff research report pointed out:

> "The arguments for and against mandatory judicial retirement are similar to those heard in private industry or other government service, and are not susceptible of easy answers. A 1957 report of a California survey dealing with the subject points out that unless judges differ from other men...the failure to provide compulsory retirement of judges at an appropriate age cannot be defended. The author argued that although the percentage of overage judges is small, (ten per cent were over 70 in one survey made in that state in 1956) this is no consolation to the lawyer or litigant whose case is decided by a judge afflicted with infirmities of age."[29]

The legislative study committee on judicial administration in its own report recommending mandatory retirement noted: "(T)he Committee is trying to provide a method for dealing with what has been a problem in many courts in Ohio. The Committee received...testimony regarding overage judges who have stayed on the bench beyond the point where they were still effective...Under present law there is no effective way of dealing with (this problem)."[30]

In adopting a mandatory retirement age of 70, Ohio adopted the most common age limitation. Some 25 of the 33 states with mandatory retirement have selected the age of 70 for judicial retirement. Three states fix a retirement age at 72, and five at age seventy-five. In their law review article about the Modern Courts Amendment, William Milligan and James Pohlman of the Ohio State Bar Association's Modern Courts Committee note that "even though 70 is the age mentioned in the text...73 will be the effective median age of retirement for all Ohio judges."[31] A footnote explains:

> "Since all judges are presently elected to six-year terms, some judges would be eligible to be re-elected after they have passed their 69th birthday but before they have reached their 70th birthday and thus could continue to serve a full term when they would be between 75 and 76. Other judges, having just reached their 70th birthday, would not be eligible to be re-elected. The median age of those retiring on account of the new provision should, therefore, be close to age 73,"[32]

Mandatory retirement of judges is not without its critics. Judge Leslie L. Anderson of the Fourth Judicial District Court of Minnesota in a recent law review article on the subject protests the discrimination because of age inherent in mandatory retirement from the bench, calling it "as invidious to the equal protection and due process guarantees of the Constitution of the United States as prejudicial treatment based on race, religion, sex or national origin."[33] Although he acknowledged that this view is not supported as yet by Supreme Court decision, Judge Anderson argues that mandatory retirement of judges is "a prime example of arbitrary age discrimination that has become a serious problem."[34] In maintaining

that mandatory retirement violates the equal protection clause of the United States Constitution, however, Judge Anderson must argue by analogy. The article cites no cases at federal or state level that challenge retirement on account of age.

In November, 1972, the Massachusetts Constitution was amended to provide that "upon attaining seventy years of age...judges shall be retired..." The amendment has been challenged in federal court, but to date without success. In an action to enjoin its enforcement it was held that the provision is not invalid on the theory that it constitutes an unconstitutional impairment of the obligation of contract, in violation of the federal Constitution, inasmuch as judges have no vested right to office, so an option to elect when to cease drawing full salary upon retirement was not within any contract between the judges and the commonwealth. Kingston v. McLaughlin, 359 F. Supp. 25 (1973), affirmed without opinion 93 S. Ct. 1900 (1973).

Retirement Benefits

Under the National Municipal League's Model Constitution, retirement of judges of the supreme court, appellate court, and general court at age 70 is mandatory. Under Section 6.04(c) of the M.S.C. they may be "pensioned as may be provided by law" and assigned pursuant to supreme court rule. Both this model constitutional provision and the Ohio provision presume that an adequate system of retirement benefits for judges will be maintained by the legislature.

According to Milligan and Pohlman:

> "All proponents of mandatory retirement have recognized that provision for adequate, even liberal, retirement benefits is necessary corollary. The newly adopted judicial article expressly grants to the legislature the power to provide retirement benefits and thus affirms the intention of the draftsmen and the electorate to deal positively with this matter."[35]

Various legislative alternatives were proposed by the authors to meet concerns "that the present judicial retirement system is neither adequate nor fair, particularly when applied to those judges who begin their service comparatively late in life and now may face mandatory retirement after a relatively few years of judicial service."[36]

The hope has apparently not been realized that appropriate solutions would be found to alleviate the peculiar problems posed both by the brevity of judicial careers in some instances and, now, by mandatory retirement in all cases. One of the 1973 recommendations of the Ohio Elected Official and Judicial Compensation Review Commission is addressed to the inadequacy of retirement benefits for the judiciary. Calling for a thorough study towards improving benefits, point VI of its statement of recommendations on the judiciary states: "The Commission has found that retirement benefits for judges are inadequate for most judges compared to benefits offered by private industry. The commencement of a judicial career causes an interruption of an attorney's private law practice which, in later years, becomes irreparable. Present retirement benefits have actually deterred successful attorneys from seeking judicial office."

Committee Alternatives

The idea of mandatory retirement for the judiciary is one that is growing in popularity. The fact that it was so recently adopted in Ohio, after several years of study, suggests that the provision has the approval of most segments.

Alleged inadequacy of retirement benefits is a matter of statutory not constitutional amendment and is probably, therefore, not a subject that the Committee would wish to pursue.

It should be pointed out, however, that the text of the Model State Judicial Article endorsed by the A.B.A. and the American Judicature Society includes a specific provision on retirement benefits. Section 7, Paragraph 2 provides:

> "Provision shall be made by the legislature for the payment of pensions to justices and judges and their widows. In the cases of justices and judges who have served ten years or more, and their widows, the pension shall not be less than fifty per cent of the salary received at the time of the retirement or death of the justice or judge."[37]

The Committee reasons that "the pension program could not be spelled out in the Constitution. It has endeavored nevertheless to fix a floor on such pensions so that the requirement of a pension does not become meaningless."[38]

The Committee could similarly endorse a constitutional floor on retirement benefits.

Table E

Selection and Retirement

State	Merit Plan	Mandatory Retirement Age	Service After Retirement
Alabama	No	70	Yes
Alaska	Yes	70	Yes
Arizona	No	No	Yes
Arkansas	No	No	Yes
California	V	No	Yes
Colorado	Yes	72	Yes
Connecticut	No	70	Yes
Delaware	No	No	No
Florida	Yes	70	Yes
Georgia	V	70	Yes
Hawaii	No	70	Yes
Idaho	Yes	70	Yes
Illinois	No	70	Yes
Indiana	Yes	75	No
Iowa	Yes	Sup. Ct. 75 Dist. Ct. 72	Yes
Kansas	Yes	70	Yes
Kentucky	No	No	No
Louisiana	No	75	Yes
Maine	No	No	Yes
Maryland	V	70	No
Massachusetts	V	70	No
Michigan	No	70	Yes
Minnesota	No	Dist. Ct. 70	Yes
Mississippi	No	No	No
Missouri	Yes	70	Yes
Montana	No	70	Yes
Nebraska	Yes	70	No
Nevada	No	No	No
New Hampshire	V	70	Yes
New Jersey	V	70	Yes
New Mexico	V	No	No
New York	V	70	Yes
North Carolina	No	App. Ct. 72 Trial Ct. 70	Yes
North Dakota	No	No	Yes
Ohio	V	70	Yes
Oklahoma	Yes	No	Yes
Oregon	No	75	Yes
Pennsylvania	No	70	Yes
Rhode Island	No	No	Yes
South Carolina	No	72	Yes
South Dakota	No	No	Yes
Tennessee	Yes	No	Yes
Texas	No	75	Yes

Table E continued

Utah	Yes	Dist. Ct. 70 Sup. Ct. 72	Yes
Vermont	Yes	No	No
Virginia	No	70	Yes
Washington	No	75	Yes
West Virginia	No	No	Yes
Wisconsin	No	70	Yes
Wyoming	V	No	No
District of Columbia	No	No	No
Federal Courts	No	No	Yes

V means voluntary

Source: 56 Judicature No. 10, (May, 1973)

FOOTNOTES

1. Article III, Section 1
2. Article III, Section 8
3. 2 Debates 134
4. William W. Milligan and James E. Pohlman, "The 1968 Modern Courts Amendment to the Ohio Constitution," 29 Ohio St. L.J. 811, 847 (1968).
5. John P. Henderson, "The Salary Structure of the Ohio Judiciary," 46 Ohio Bar 469 (1973).
6. Id. at 470
7. Ohio Revised Code section 103.61
8. Ibid.
9. 2 U.S.C.A. Sections 351-361, inclusive
10. Ala. Const. Art. 6, Sec. 148
11. Ariz. Const. Art. V, Sec. 13
12. 3 Mich. Comp. Laws Ann. Sec. 15,217 (1974 Supp.)
13. American Judicature Society, Compensation Commissions, September, 1973, p. 5.
14. N.Y. Exec. Law, Art. 27-A, Sec. 815 (1974 Supp.)
15. Wash. Rev. Code. Ann. Sec. 43.03.028
16. Conn. Gen. Stat. Ann. Sec. 2-92 (1974 Supp.)
17. Ga. Code Ann. Sec. 89-716 et seq.
18. Iowa Code Ann. Sec. 2A.5 (1974 Supp.)
19. Fla. Stat. Ann. Sec. 112.192 (1974 Supp.)
20. 127 Ill. Ann. Stat. Sections 551-556, inclusive.
21. Mont. Const. Art. XIII, Sec. 3; Rev. Codes of Mont. Sections 59-1401 to 59-1404, inclusive.
22. 2 S.D. Comp. Laws Ann. Chap. 38 (1973 Supp.)
23. 7A Utah Code Ann. Sec. 67-8-13.7 (1973 Supp.)
24. American Judicature Society, supra Note 13
25. Considerable duplication of material in Memorandum of July 8, 1974.
26. Ohio Legislative Service Commission, The Ohio Court System: Its Organization and Capacity, Staff Research Report 47 (Jan., 1961) 27
27. Ibid.
28. Ohio Legislative Service Commission, Problems of Judicial Administration, Staff Research Report 75 (Feb., 1965) 35
29. Id. at 37
30. Id. at 80
31. Milligan and Pohlman, supra Note 4, at 835
32. Ibid.
33. L. L. Anderson, "Age Discrimination: Mandatory Retirement from the Bench," 20 Loyola L. Rev. 153 (1973)
34. Id. at 154
35. Milligan and Pohlman, supra Note 4, at 833
36. Ibid.
37. 47 Journal of the American Judicature Society No. 1 (June, 1963) 11
38. Ibid.

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Check list on Alternatives in an Appointive-Elective System of Judicial Selection

If the committee decides to recommend a change from the elective to the appointive-elective system of judicial selection, which it has not yet done, the following points are suggested for consideration as possible alternatives.

I. Generally

A. Details of plan set forth primarily in

(1) Constitution

(2) Statutes

(3) Supreme Court rule

B. Implementation of plan

(1) Mandatory for all courts

(2) Permissive for all courts

(3) Mandatory for appellate courts; permissive for trial courts

(4) If permissive for trial courts, option to convert to appointive-elective system to be exercised

(a) by legislature

(b) locally, through referendum

II. Number of Commissions

A. Supreme Court

(1) One, statewide

(2) Other

B. Appellate and trial courts

(1) One, statewide for all such courts

(2) One, for all appellate and trial courts within appellate district

(3) Separate, for appellate court in district and for each trial court

(4) Other

III. Number of Commissioners

A. Supreme Court Commission

(1) One from each appellate district

(2) One from each congressional district

(3) Other (e.g. fixed numbers such as 5, 7, 9 or 6, 8, 10)

B. Appellate district commission

(1) One or more from each county

(2) One or more from each district (if trial court so organized)

(3) Other (e.g., fixed number, as above)

IV. Terms of Commissioners

A. 4 years

B. 6 years

C. Other

D. Staggered terms

V. Makeup of Commission

A. Political party balance of membership specified

B. Business, labor, industrial, professional or occupational balance of membership specified

C. Geographical distribution of membership specified

D. Majority of commission

(1) Laymen

(2) Nonlawyers

E. If commission composed of judges, lawyers and laymen

(1) Judges to serve by virtue of:

(a) office (e.g., Chief Justice, presiding judge)

(b) length of service on a court

(c) election by colleagues (including trial court judges for positions on appellate district commissions)

(d) other

(2) Lawyers to serve by virtue of:

(a) election by members of bar (state or local)

(b) appointment by governing body of bar (state or local)

(c) appointment by majority vote of attorney general, chief justice, and governor (for S. Ct. commission)

(d) other (e.g., appointment by governor on recommendation of bar)

(3) Laymen

(a) appointed by governor

(b) appointed by governor with senate confirmation

(c) appointed by governor with confirmation by joint session of legislature

(d) appointed or elected by legislature

F. Filling of vacancies on commission by governor

(1) Within specified time limit (e.g., 30 days from occurrence)

(2) No time limit

G. Holding of public office by commission members (other than judges, if any)

(1) Permitted

(2) Prohibited

H. Seeking of public office by commission members

(1) Prohibited during term

(2) Permitted during term

(3) Prohibited for specified period after end of term (e.g , prohibition against seeking a judgeship for one year after end of term)

I. Commission rules and procedures

(1) Requirement for distribution and filing of rules

(2) Requirement for confidentiality of investigations

(3) Requirement for public hearing on announced slate of candidates

(4) Requirement for periodic (e.g., annual) report on activities to legislature

VI. Slate of nominees

A. Number

(1) 3 or more for all courts

(2) 3 or more for appellate courts, 2 or more for trial courts

(3) Other

B. Party affiliation of nominees

(1) To be considered by commission to assure bipartisan representation on slate of nominees

(2) To be disregarded by appointing authority

(3) Other

C. Other requirements for nomination (e.g., 6 month lapse between time that eligibility is established and individual is first placed on a slate; limit on length of time a person deemed eligible remains on list of potential nominees)

VII. Time limit for commission action--a specified number of days from death, resignation, removal or failure to file for retention

A. 30 days

B. 60 days

C. Other

D. Possibility of extension by governor for cause

VIII. Time limit for gubernatorial action--specified number of days from submission of slate of nominees

A. 15 days

B. 30 days

C. Other; (e.g., possibility of extension for cause; provision for rejection of slate.)

D. Provision covering appointment when legislature is not in session but legislative confirmation is required

IX. Passage of power of appointment upon gubernatorial failure to act within specified time

A. To chief justice or acting chief justice

B. To legislature

C. Limitation of appointment from slate submitted by nominating commission

X. Retention election

A. Initial term probationary

B. Opposition at retention election

(1) Not permitted

(2) Permitted, with incumbent identified as such; need for special majority to unseat incumbent

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Composition of Judicial Nominating Commissions

The recent American Judicature Society publication entitled The Key to Judicial Merit Selection: The Nominating Process(June 1974) contains recent information concerning commission composition and common restrictions on commission membership. This memorandum tabulates material on the composition of nominating commissions, as found in the extract from that publication already distributed to the committee, entitled JUDICIAL NOMINATING COMMISSIONS (August 2, 1974), and includes two additional tables from the AJS publication, relative to political makeup (Table IX) and restrictions on commission membership (Table X).

I. JUDICIAL REPRESENTATION - Of the 35 plans tabulated, 20 plans call for judicial representation on the commission. (Only one statutory plan calls for more than one judicial representative.) Ten of the 35 plans are constitutional. In 8 plans with judicial representation, a member of the Supreme Court (usually its Chief Justice) is designated chairman. In some jurisdictions he is a nonvoting ex officio member.

II. LAWYER REPRESENTATION - Of the 35 plans tabulated,

A. 16 plans require that more than half of the members of a commission be lawyers.

B. 9 plans do not guarantee that the commission be comprised of half lawyers.

C. 8 plans provide for half lawyers and half nonlawyers.

D. 3 plans require that half of the members of a commission be nonlawyers.

Of the 35 jurisdictions with a commission plan, 14 have a six-year term; 13 have a four-year term.

JUDICIAL MEMBERSHIP

Jurisdiction (Constitutional plans underlined)	Judicial Membership	Proportion
Alabama	1 judge, elected by judges of appropriate circuit	1 of 5
Alaska	Chief Justice Sup. Ct. (chairman)	1 of 7
Colorado	Chief Justice Sup. Ct. (chairman)	1 of 12
Denver (county)	Sup. Ct. Justice (chairman	1 of 18
Denver (city)	Presiding Judge	1 of 8
District of Columbis	Active or retired federal judge appointed by D.C. Chief Justice	1 of 7
Idaho	Chief Justice Sup. Ct. (chairman) and 1 dist. judge	2 of 7
Indiana	Chief Justice Sup. Ct. (chairman)	1 of 7
Indiana (county)	1 judge appointed by Chief Justice Sup. Ct.	1 of 7
Indiana (municipal)	1 judge appointed by Chief Justice Ct. of App.*	1 of 9
Iowa(Dist. Ct.)	1 dist. judge appointed by Chief Judge	1 of 11
Iowa (municipal)	1 judge appointed by Chief Judge	1 of 6
Mississippi	Sup. Ct. Justice elected by that Court	1 of 7
Mississippi (circuit)	Chief Judge of Dist. Ct. of App.	1 of 5
Mississippi (municipal)	Presiding Judge	1 of 5
Montana	Dist. judge elected by Dist. Ct.	1 of 7
Nebraska	Sup. Ct. Justice (chairman)	1 of 9
Pennsylvania	Sup. Ct. Justice	1 of 7
Utah	Chief Justice Sup. Ct. (chairman)	1 of 7
Wyoming	Sup. Ct. Justice selected by Chief Justice	1 of 7

* Plus circuit judge who serves as secretary.

LAWYER REPRESENTATION - A
More Than Half Lawyers

Jurisdiction	No. of Members	Lawyers	Nonlawyers
Alabama	5	1 judge elected by judges 2 lawyers elected by lawyers.	2 nonlawyers elected by legislators
Alaska	7	Chief Justice Sup. Ct.; 3 lawyers appointed by bar.	3 nonlawyers appointed by gov. with legis. confirmation
District of Columbus	7	Possible	
Atlanta city	8	6 lawyers appointed by bar associations.	2 nonlawyers appointed by mayor
Idaho	7	1 Chief Justice Sup. Ct.; 1 dist. judge; 2 lawyers appointed by bar.	3 nonlawyers appointed by gov. with senate confirmation
Idaho (magistrates)	6	Possible	
Indiana	7	1 Chief Justice Sup. Ct.; 3 lawyers elected by lawyers in districts.	3 nonlawyers appointed by gov.
Indiana (county)	7	1 judge appointed by Chief Justice Sup. Ct.; 3 lawyers elected by lawyers.	3 nonlawyers appointed by gov.
Florida	9	Possible.	
Iowa dist. ct.	11	1 dist.judge appointed by Chief Judge; 5 electors appointed by bar members.	5 electors appointed by gov.
Kansas	11	1 lawyer at large elected by lawyers; 5 lawyers elected by lawyers in dists.	5 nonlawyers appointed by gov.
Maryland	13	Possible.	
Maryland (lower courts)	11	Possible.	
Mississippi	7	1 Sup. Ct. Justice elected by Sup. Ct.; 3 lawyers elected by lawyers in dists.	3 nonlawyers appointed by gov.
Mississippi (circuit)	5	1 Chief Judge Dist. Ct. App; 2 lawyers elected by lawyers of circuit	2 nonlawyers appointed by gov.

Jurisdiction	No. of Members	Lawyers	Nonlawyers
Mississippi Kansas City	5	1 Presiding Judge; 2 lawyers elected by lawyers of city.	2 nonlawyers appointed by mayor
Nebraska	9	1 Sup. Ct. Justice; 4 lawyers elected by lawyers in dists.	4 nonlawyers appointed by gov.
New York City	24	Possible.	
Ohio (Sup. Ct.)	11	Possible	
Pennsylvania	7	1 Sup. Ct. Justice 3 lawyers appointed by gov.	3 nonlawyers appointed by gov.
Tennessee	6	1 lawyer appointed by gov.; 3 lawyers elected in divisions of state.	2 nonlawyers appointed by gov.
Utah	7	Possible.	
Wyoming	7	1 Sup. Ct. Justice appointed by Chief Justice; 3 lawyers elected by members of state bar.	3 nonlawyers appointed by gov.

LAWYER REPRESENTATION - B

Half Lawyers Not Guaranteed

Jurisdiction	No. of Members					
D. C.	7	1 judge app'td by D. C. Chief Justice	2 lawyers appt'd by bar	1 lawyer or layman appt'd by Pres.	2 members (1 may not by lawyer) appt'd by mayor	1 nonlawyer appointed by council.
(Could be 5 lawyers, 2 laymen; 4 lawyers, 3 laymen; 3 lawyers, 4 laymen)						
Fla.	9	3 lawyers appt'd by bar	3 electors appt'd by gov.	3 nonlawyers appointed by majority vote of other commissioners		
Idaho (magistrates)	6	2 lawyers appt'd by state bar	3 mayors 1 chairman bd. county commissioners.			
Md.	13	6 lawyers elected by bar.	6 nonlawyers appt'd by gov.	1 chairman appt'd by gov.		
Md. (lower courts)	11	5 lawyers elected by bar	5 nonlawyers appt'd by gov.	1 chairman appt'd by gov.		
N.Y.C.	24	13 lawyers or nonlawyers (each presiding justice selects 6 and 1 member is selected jointly)	11 lawyers or nonlawyers appt'd by mayor.			
Ohio (Sup. Ct.)	11	5 lawyers appt'd by gov.	5 nonlawyers appt'd by gov.	1 lawyer or nonlawyer appt'd by gov.		
Pa.*	5	2 lawyers appt'd by gov.	2 nonlawyers appt'd by gov.	1 lawyer or nonlawyer appt'd by gov.		
Utah	7	1 Chief Just. Sup. Ct.; 2 lawyers selected by state Bar Ass'n	2 nonlawyers appt'd by gov.	1 lawyer or nonlawyer selected by senate; 1 lawyer or nonlawyer selected by House.		

* These are members at large; additional lawyer members are appointed in judicial districts.

LAWYER REPRESENTATION - C

Half Lawyers; Half Nonlawyers

Jurisdiction	No. of Members	Lawyers	Nonlawyers
Colorado	12	Chief Justice Sup. Ct.; 5 lawyers elected by gov., atty gen., and chief justice	5 nonlawyers appt'd by gov. by Congress. dist.; 1 nonlawyer appt'd by gov. at large.
Denver (county)	8	1 Sup. Ct. Justice 3 lawyers elected by gov., atty gen., and chief justice	4 nonlawyers appt'd by gov.
Denver (city)	8	1 judge Denver ct.; 3 lawyers appt'd by mayor	4 nonlawyers appt'd by mayor
Georgia	10	5 lawyers-state bar officers	5 nonlawyers appt'd by gov.
Indiana (municipal)	9	1 judge appt'd by Chief Justice Ct. App.; 2 lawyers elected by bar; 1 lawyer appt'd by court; 1 circ. judge (secretary)	2 nonlawyers appt'd by mayor; 2 nonlawyers appt'd by gov.
Iowa	12	6 electors elected by bar members	6 electors appt'd by gov. with senate confirmation.
Iowa (magistrates)	6	1 judge appt'd by Chief Judge; 2 lawyers elected by bar	3 nonlawyers appt'd by board of supervisors
Ohio (dist.)	10	5 lawyers appt'd by gov.	5 nonlawyers appt'd by gov.

LAWYER REPRESENTATION - D

Less Than Half Lawyers

Jurisdiction	No.	Lawyers	Nonlawyers
District of Columbia	7	Possible	
Florida	9	Possible	
Idaho (magistrates)	6	Possible	
Maryland	13	Possible	
Maryland (lower cts.)	11	Possible	
Montana	7	1 Dist. Judge elected by dist. judges; 2 lawyers appt'd by Sup. Ct.	4 nonlawyers appt'd by gov.
New York City	24	Possible	
Ohio (Sup. Ct.)	11	Possible	
Oklahoma	13	6 lawyers elected by lawyers in districts	6 nonlawyers appt'd by gov.; 1 nonlawyer appt'd by other commissioners.
Pennsylvania (trial)	5*	Possible	
Utah	7	Possible	
Vermont	11	3 lawyers elected by lawyers of state	2 nonlawyers appt'd by gov.; 3 state senators (only 1 may by lawyer); 3 state representatives (only 1 may be lawyer).

* Trial court nominating commissions members at large.

TABLE IX

"BI-PARTISAN" COMMISSIONS

Commission	Provision
Colorado	
Supreme Court Nominating Commission	No more than half plus one of the members (excluding chairman) can be of same political party
Judicial District Nominating Commissions	No more than 4 of the 7 members can be of same political party
Denver County Court Judicial Commission	No more than 4 members may be of same political party.
Idaho	
Judicial Council	No more than 3 of the 6 appointed members can be of same political party
Indiana	
Allen, Lake, and Vanderburgh County Superior Court Nominating Commissions	No more than 2 of the 3 appointed members can be of same political party
Marion County Municipal Court Nominating Commission	No more than 1 of the 2 mayor appointed members, the 2 governor appointed members, and the 2 bar elected members can be of same political party
Missouri	
Kansas City Municipal Judicial Nominating Commission	No more than 1 of the 2 non-lawyer members nor more than 1 of the 2 lawyer members can be of same political party
Nebraska	
Supreme Court Nominating Commission and District Court Nominating Commissions	No more than 2 of the 4 governor appointed members nor more than 2 of the 4 lawyer elected members can be of same political party
Utah	
Supreme Court Nominating Commission and District Court Nominating Commissions	Member initially selected by senate shall be of same political party as governor, and member initially selected by house shall be of opposite political party. Thereafter, subsequent members shall be of opposite political party as their predecessors; no more than 1 of 2 members appointed by governor nor more than 1 of 2 members selected by Bar Association can be of same political party
Vermont	
Judicial Selection Board	At least 1 of the 3 senators and 1 of the 3 representatives must be of political party which is in minority in the senate and in the house

Source: Allan Ashman and James J. Alfini, The Key To Judicial Merit Selection: The Nominating Process (Chicago: The American Judicature Society, June 1974), Table IX.

TABLE X

RESTRICTIONS ON COMMISSION MEMBERSHIP

Prohibited From Holding Public Office	Prohibited From Holding Political Party Office	Limitation as to Number of Terms	Ineligible For Judicial Office
Alabama	Alabama	Cannot Serve Two Consecutive Terms:	During Term on Commission:
Alaska	Colorado		
Colorado	Indiana		
District of Columbia	Kansas	Alabama	Alabama
Florida	Missouri	Colorado	Iowa
Idaho	Ohio	Iowa	Maryland
Indiana	Oklahoma	Missouri	Pennsylvania
Iowa	Pennsylvania	Nebraska	Tennessee
Kansas	Tennessee	Oklahoma	
Maryland	Wyoming	Tennessee	During Term and Months Thereafter
Missouri		Utah	
Oklahoma			
Pennsylvania		Cannot Serve More Than Two Terms:	Kansas
Tennessee			Utah
Wyoming		Kansas	
		Nebraska	During Term and Year Thereafter
			Montana
			Ohio
			Wyoming
			During Term and Years Thereafter
			Florida
			Nebraska
			During Term and Years Thereafter
			Colorado
			Indiana
			During Term and Years Thereafter
			Oklahoma

Source: Allan Ashman and James J. Alfini, The Key To Judicial Merit Selection: The Nominating Process (Chicago: The American Judicature Society, June 1974), Table X.

Ohio Constitutional Revision Commission
Judiciary Committee
October 3, 1974

Research Study No. 42

THE GRAND JURY

History

England[1]

The origin of the grand jury is traced by most historians to the issuance of a document known as the "Assize of Clarendon", in 1166 A. D., during the reign of King Henry II. Its significance in Anglo-American legal development is more clearly understood by reference to the overlapping and at times sharply competing court systems which existed in England at the time. The king's bench was then only one of three judicial systems in the country, the others being the ecclesiastical courts--which had power not only over the clergy but, in many instances, over the laity as well--and the baronial courts and courts of limited jurisdiction, which were a principal source of income to the nobility, in derogation of the authority of the Crown and to its financial detriment. In 1164, two years prior to the Assize, Henry had forced the Church to accept a limitation on its judicial power by providing, in the Constitutions of Clarendon, which were reluctantly signed by Thomas Becket, Archbishop of Canterbury, a division of judicial functions in which both the clergy and laity could be arrested and sentenced by temporal authorities while innocence or guilt of all clergy and some of the laity would be determined by ecclesiastical ones.

The Assize of Clarendon was an attempt to further limit the power of the Church in judicial matters, and to limit the power of the nobility in this area as well.

Prior to the Assize, English trial law had provided for accusation by the allegedly injured party, followed either by compurgation--which was the swearing by eleven men of good reputation that they believed in the innocence of the accused--or trial by battle or ordeal. The Assize of Clarendon abolished accusation by individuals, substituting instead an assize--a "jury" of "twelve lawful men" assembled by the sheriff from among the men of a township. This "jury" was not restricted to hearing evidence brought before it, but its members were free to make individual inquiries and to act upon their own knowledge and belief in matters of serious crime, such as robbery, murder and theft. A "presentment" by a majority of an assize in effect raised a presumption of guilt. Compurgation, as well as the lesser forms of ordeal and trial by battle were abolished, and the "trial" under the Assize consisted of by ordeal by water, which almost always resulted in death.

Certainly, from the point of view of the Crown, the primary motivation for the promulgation of the Assize of Clarendon was not magnanimity but financial need. Chapter 5 of the Assize provided :

> "In the cause of those who have been arrested through the aforesaid oath of this assize, no one shall have court, or judgment, or chattels, except the lord king in his court before his justices, and the lord king shall have all their chattels."[2]

Also, heavy fines were levied against jurors who refused to accuse those suspected of crime.

Thus, not only were the ecclesiastical and baronial courts effectively stripped of a great deal of their judicial function but all fines and forfeitures resulting from the activity of an assize accrued to the royal treasury.

Trial by ordeal was eventually abolished and about 200 years after its inception, that is, in the fourteenth century, the functions of the petit jury and the grand jury were separated by law, and grand jurors were forbidden to sit on a petit jury. However, heavy fines continued to be levied against grand jurors who did not "present" a sufficient number of persons, and against individuals who refused grand jury duty. (This practice was, finally, held unlawful in 1667, in King v. Windham, 84 Rep. 113.)

By the seventeenth century, the distinction between the functions of the "grand jury" and the "petit jury" had become further clarified--including the secrecy of grand jury proceedings--and as the power of Parliament rose, the grand jury became less of an instrument to enforce royal edicts and policies. It is in this period, during the reign of the first Restoration king, Charles II, that the two cases which stand as the cornerstones of the ideal that the grand jury is a guardian of individual liberties arose. In 1681, the first Earl of Shaftesbury and one of his followers, Stephen Colledge, were called before separate London grand juries on charges of treason. Both Shaftesbury and Colledge were leaders of Parliament and Protestants, while the King was secretly a Catholic who sought to restore both royal authority and the Roman Church in England. The charges against Shaftesbury and Colledge were obviously politically motivated, but despite intense pressure from the Crown, the grand juries refused to indict either one--probably also for policical reasons. However, it must be recorded that neither of these cases ended happily. Colledge was subsequently taken before a second grand jury, at Oxford, where he was indicted, tried and found guilty. He was subsequently executed. Shaftesbury, fearing that he could not escape indictment by a second London grand jury due to the intervening election of a royalist sheriff--whose duty it would have been to select the grand jury--fled to Amsterdam and died in exile.

Although political motivations played a role in the creation of the "grand assize" or "grand jury" system, in its operation through the centuries, and in some of the principal cases which influenced its evolution, it would be inappropriate to emphasize the political aspects of the grand jury in a review of its history, for undoubtedly in the minds of many, both laymen and scholars, the grand jury has become a symbol of protection for individuals accused of "ordinary" crimes. Blackstone wrote that the English judicial system had "wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown."[3] Nevertheless, after nearly eight centuries of development, the indicting grand jury was abolished in England, and indictment was replaced by a mandatory preliminary hearing in 1933.[4]

United States

Conscious of the "full possession of rights, liberties and immunities of British subjects",[5] the Founding Fathers incorporated the grand jury as a protection against unjust prosecution into the first part of the Fifth Amendment of the Constitution of the United States, which reads:

> "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The states have generally, but not exclusively, followed the federal concept and provided for grand juries--either by constitution or statute--to process indictable offenses. However, in 1884, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment of the Constitution does not require the states to retain and employ the grand jury method of initiating criminal prosecutions. In 1973, the Court again noted that "the Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the States."[7]

As a consequence, marked variations, which may be divided into three general categories, exist among the states relative to the manner in which criminal prosecutions are instituted. The group of states which absolutely requires a grand jury indictment in felony cases is the smallest, numbering nine, and includes Hawaii, Kentucky, Maryland, Massachusetts, Mississippi, New York, Tennessee, Texas, and West Virginia.[8]

The largest group of states --twenty-six--permit such criminal offenses to be prosecuted either by information or indictment at the option of the prosecutor. These states include Arizona, Askansas, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, Wisconsin and Wyoming. Most of the foregoing, by statute, specifically require a preliminary hearing as a prerequisite to prosecution by information rather than grand jury indictment, and a few of these states allow information to be substituted for indictment only in noncapital cases.[9]

The third group of states, numbering fifteen, requires a grand jury indictment in felony cases, but specifically provide by statute that a defendant may waive indictment. Thir group includes, in addition to Ohio, the states of Alabama, Alaska, Delaware, Georgia, Illinois, Maine, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina and Virginia. Most of these states, likewise, allow a waiver only in noncapital cases, and some of them require the presence of counsel, the consent of the prosecuting official, or a waiver by the defendant in writing.[10]

The Grand Jury in Ohio

The Ohio Constitution of 1802 did not directly incorporate a provision creating a right to indictment by grand jury--it merely assumed that such juries would be established. Section 11 of Article VIII, the Bill of Rights, provided in part:

> "That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face; to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial . . ." (Emphasis added.)

A provision regarding the right to indictment by grand jury was inserted into the Constitution of 1851, and was continued substantially unchanged in Section 10 of Article I as adopted in 1912.[11] The pertinent portion of this section reads:

> "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or other infamous,crime, unless on presentment or indictment of a grand jury . . ."

There is a difference between a "presentment" and an "indictment" as used in the constitutional context, as well as a "report," which is often referred to in connection with the work of a grand jury. A presentment--which is rarely used today--and an indictment are both formal accusations of crime, the difference between them being that the former is made at the instance of the grand jury itself, while the latter is made at the instance of the prosecutor.[12] A report, on the other hand, is not intended to serve as a basis for prosecution. It is not a criminal accusation, and is not traditionally grounded on legally sufficient evidence of the violation of a criminal statute, which may be answered in court; rather, it is a moral condemnation or exhortation without any forum being provided, traditionally and in most instances, for explanation or defense.[13]

In general outline, an Ohio grand jury consists of nine members selected in the same manner as petit jurors except that, at the option of the court, the foreman may be a person selected and designated by the court. Seven of the nine members of the jury must concur to find an indictment or presentment. The makeup, procedures and principal duty of the jury--"to inquire of and present all offenses committed within the county"--are prescribed in Rules 6 and 7 of the Rules of Criminal Procedure, and such portions of Chapter 2939. of the Revised Code as are not in conflict with these Rules. Several other duties are also prescribed in other parts of the Code.[14] None of these aspects will be discussed in detail except as they have constitutional implications.

Although the question has seldom been raised in Ohio cases, the traditional view has been that Ohio grand juries are statutory grand juries with powers "of a common law nature."[15] However, the companion cases of Hammond et al v. Brown[16] and Adamek et al. v. Brown[17] decided in 1971 by the United States District Court for the Northern District of Ohio, the latest cases to address the question, hold that Ohio grand juries have only those powers which are specifically conferred on them by law.

The Federal Standard for Due Process in Grand Jury Proceedings

Although the states are not required to maintain grand jury systems, the constitutional rights of individuals affected by state grand jury action are invariably measured by federal constitutional standards. Therefore, the discussion of the constitutional adequacy of a state system must necessarily begin with a consideration of federal standards now applicable to grand jury proceedings, and those likely to be applicable in the future.

The grand jury proceeding has historically been considered not a trial, but an inquest to establish probable cause. It is for this reason that no United States Supreme Court decision has held the basic rules of evidence--or the right to counsel

while under interrogation, the right to face one's accuser, the right to testify in one's own behalf--applicable to grand jury proceedings. In 1956, in Costello v. United States[18], the Court traced the development of the grand jury system and sustained a conviction based on an indictment which was subsequently shown to be based entirely on hearsay evidence. In so doing, the Court held that the only due process required by the Fifth and Fourteenth Amendments to the Constitution relative to grand juries is that they be unbiased and constituted according to law.[19] The Court concluded that the probable intent of the framers of the federal Constitution was to parallel the institution as it existed in England, where "grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules."[20] The Costello case still states the prevailing view of the Supreme Court on Due Process and the grand jury.[21] Existing Ohio law meets this standard, as recognized in Hammond and Adamek.[22]

However, several recent federal decisions seem to foreshadow a refinement of the rights of potential defendants and of witnesses before grand juries. In the 1969 case of Coleman vs. Alabama[23] the Supreme Court extended the right to counsel, and the right to confront witnesses, to preliminary hearings, holding a preliminary hearing to be such a "critical stage" of a prosecution that Due Process required it.[24] In previous cases, on the same basis, the Court had extended the right to counsel to in-custody interrogation, the line-up, and to arraignment.[25] The majority holding in Coleman prompted Mr. Justice Stewart, joined by Mr. Chief Justice Burger, to say in a dissent that "/u/nder today's holding we thus have something of an anomaly under the new discovery of the Court that counsel is constitutionally required at the preliminary hearing since counsel cannot attend a subsequent grand jury inquiry, even though witnesses, including the person eventually charged, may be interrogated in secret session. If the current mode of constitutional analysis subscribed to by this Court in recent cases requires that counsel be present at preliminary hearings, how can they be reconciled with the fact that the Constitution itself does not permit the assistance of counsel at the decidedly more 'critical' grand jury inquiry?" [26] 399 U. S., 23.

Mr. Justice Black, on the other hand, rested his concurring opinion squarely on the Sixth Amendment right to counsel;[27] and Mr. Justice White, while concurring, warned that "/O /ur ruling may also invite eliminating the preliminary system entirely.[28]

Also in 1969, a lower federal court held that a potential defendant is entitled to a Miranda-type warning prior to testifying before a grand jury.[29]

Furthermore, in the companion cases of Gelbard et al. v. United States and United States v. Egan et al.,[30] some see the emergence of a constitutionally recognized right of privacy on the part of a grand jury witness. The majority in these cases simply held applicable to grand jury proceedings a federal law which directs that "/w/henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury," since a showing that the interrogation would be based upon the illegal interpretation of the witness' communications would constitute the "just cause" that precludes a finding of contempt.[31]

Mr. Justice Douglas, on the other hand, in a concurring opinion, stated that "/a/lthough I join in the opinion of the Court, I believe that, independently of any statutory refuge which Congress may choose to provide, the Fourth Amendment shields a grand jury witness from any questions (or any subpoenas) which is based upon information garnered from searches which invade his own constitutionally protected privacy."[32] (Emphasis added).

Traditional Arguments for, and Recent Criticism of, the Grand Jury System

As heretofore noted, the secrecy of grand jury proceedings has been recognized for several centuries. The reasons to justify this secrecy are generally said to be: (1) to prevent the possible escape of one who may be indicted; (2) to free grand jurors from possible harassment; (3) to encourage witnesses to disclose evidence voluntarily; (4) to prevent possible tampering with witnesses; and (5) to prevent the defamation of an accused who may subsequently be found innocent.[33] However, many today believe that each of these arguments is rebuttable: (1) As to the possible escape of the accused, in most cases an accused has already been arrested and has appeared at a preliminary hearing, and either been imprisoned or released on bond, before the grand jury deliberations begin; (2) strict laws forbid the harassment of grand jurors; (3) reluctance of a witness to disclose evidence before a grand jury is not dispelled by secrecy, because a witness must realize that evidence or testimony he provides must eventually be made public at a trial; (Under Pennsylvania Rule of Criminal Procedure 207, in fact, the name of every witness must be endorsed on a bill of indictment); (4) tampering with witnesses is, likewise, prohibited by law. Furthermore, since a defendant has a right to obtain a list of witnesses before trial, it is a simple matter to approach them, and the secrecy of grand jury proceedings will not prevent a potential defendant who is adamant about it from doing so; (5) the good name of an accused will not, in the majority of cases, be protected by secret proceedings, since most cases presented to a grand jury result in true bills, and while an individual may have a good defense at a public trial, he will nevertheless suffer the social stigma of having been indicted.[34] (Also, as the recent Watergate grand jury "leaks" illustrate, grand jury secrecy in a politically charged case may be more theoretical than real.)

The arguments often advanced in favor of the grand jury are: (1) first, that the grand jury system does stand as a shield between the individual and the government; (2) that grand jury reports (or indictments) have been a means by which widespread and serious disorders have been corrected and civil improvements achieved by the power of public opinion activated by public knowledge; (3) that grand juries are, in fact, answerable to the law, in that various procedural devices exist for challenging both the make-up of a grand jury and the regularity of its proceedings; and (4) that it increases citizen participation in the dispensing of justice.[35]

On a practical level, prosecutors are likely to be in favor of retaining the grand jury because they view it as sharing with them the burden of deciding who should be prosecuted, and they view an indictment as a shield against liability to those who are charged with crime. And, in Ohio at least, there does not appear to be a consensus among the judiciary as to whether grand juries should be retained or abolished.

Recently, however, there has been increasing criticism of grand juries[36] grounded principally in arguments that, in reality, they are overly dependent on prosecutors--who in the first instance decide what cases are brought before juries, what evidence is brought before them, what witnesses are called and, to a large degree, how they are interrogated. Prosecutors also have the duty and power, shared with the courts, of advising juries on questions of law.[37] Further, studies have shown that relatively few cases brought before grand juries are dismissed or reduced by such juries.[38] Also, as one judge has commented:

> "To encourage citizen interest and participation in civic and political life and in holding public office is of the essence of the democratic tradition. This is one thing. But to round up citizens indiscriminately and shove them onto the Securities and Exchange Commission, the Federal Trade Commission, the Central Intelligence Agency, a state public utilities commission, or any one of a number of highly specialized government agencies, is absurd. It is no less absurd to place these same well-intentioned people on a grand jury, charge them with the duty often forcing hundreds of laws, almost none of which have they even heard of, protecting individual liberties, and keeping a watch on the general level of morality and efficiency of government. Yet our present system requires precisely this."[39]

The criticism goes beyond the jury's overdependence and its inability to cope with the legal complexities with which it must deal if it is to discharge its duty as intended. Some prosecutors themselves, particularly in metropolitan areas, have cast doubt on whether grand juries are given even a minimum of legally sound evidence, and whether they have sufficient time to analyze and deliberate before having to reach their decisions. A quote from a recent Wall Street Journal article illustrates the point:

> "In Philadelphia, for example, an indicting grand jury sits every business day for about four or five hours. On the average day, it will hear 70 to 90 cases and return 100 to 150 bills of indictment. That's one indictment every two or three minutes. 'Ocasionally, we'll get an involved case that will take up to half an hour,' says Joseph Dougherty, an assistant district attorney who handles grand jury matters. In 80% to 90% of the cases, he says the only 'evidence' presented is an affidavit from a police officer."[40]

The problems faced by most large-city grand juries, including those in Ohio, are unlikely to be substantially different from those of Philadelphia[41].

An additional point which must be borne in mind is that, since Coleman v. Alabama, which granted the right to counsel and the right to confront witnesses in a preliminary hearing, in those jurisdictions in which the prosecutor has some leeway as to whether to go through a preliminary hearing or to go directly to the grand jury for an indictment--and Ohio is one of these states--it is, in effect, the prosecutor who determines some of the constitutional rights of a potential defendant, raising at least debatable questions under the Equal Protection Clause.

Provisions Relating to Grand Juries in New York, Pennsylvania and Illinois

While the Supreme Court of the United States has often been the leader in defining the individual's rights under the Constitution, and thus shaping the legal procedures to implement those rights, that has not been the case in regard to the grand jury, although, as has been indicated, strands of what may become controlling law in the future are discernable in several recent federal cases. But despite the absence of compulsion arising from Supreme Court decisions, several states, notably New York and Pennsylvania, have extensively revised their grand jury procedures and in the process have conferred some substantive rights on individuals which are not yet mandated by federal constitutional interpretation. And Illinois, in its Constitution of 1970, specifically authorized its General Assembly to abolish the grand jury in that state. Thus, refinement or abolition are the two currently dominant views on the question.

The State of New York has a long history of using grand juries as investigative tools, to uncover organized crime as well as wrongdoing in public office. It was this kind of activity which first brought Thomas E. Dewey to national prominence in the 1930's as a crusading prosecutor.[42] Article I, Section 6 of the New York Constitution, which inter alia contains the customary recitation of a right to grand jury indictment, also provides in part:

> "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.
>
> The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law."

In 1961 that state's highest court held that the only power of a grand jury in regard to public officers under this section of the Constitution or by law was to find indictments, to direct the filing of informations against them, or to keep silent.[43] There followed legislative activity, resulting in modifications of the New York Criminal Procedure Law, beginning in 1964, which brought about several notable changes in the procedures of grand juries in that state. Possibly the most significant of these is applicable to potential defendants whether they are public officials or not. That change concerns the matter of evidence. Section 190.30 (1) of the law provides that except as otherwise provided in this section, the provisions "governing the rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings." The exceptions refer to such things as official documents and reports. (In Ohio, Criminal Rule 5 (B) (2) makes a similar evidentiary standard applicable to preliminary hearings, although the Rules appear to be silent as to the standard applicable to grand jury hearings). And Section 190.65 (1) of the New York law (attached as Appendix A) provides that a person may be indicted only when "competent and admissible evidence before it (the grand jury) provides reasonable cause to believe that such person committed such offense."

In regard to grand jury reports, the statute (Section 190.85, attached as Appendix B) specifies that such reports must be (a) "concerning misconduct, nonfeasance or neglect by a public servant as the basis for removal or disciplinary action" or (b) finding that there was no such conduct, if the public servant requests the filing or (c)recommendations for legislative, executive or administrative action in the public interest based upon stated findings. Further, this section provides

that any person named in a report accepted for filing under division (a) must be given an opportunity to testify, and that any report accepted for filing under divisions (b) or (c) may not be critical of an "identified or identifiable person." There is also a provision for keeping a report filed under division (a) secret for at least 31 days after a copy has been served upon each named individual, who then has the option of filing an answer to the report, which becomes an appendix to it, and of appealing the court's decision to accept it for filing to the Appellate Division. The court to which a report is submitted may also order the taking of additional testimony before the same grand jury, and to order the report not to be made a public record if the court determines that the report does not comply with the provisions of the section.

Whereas New York spells out both grand jury procedure and the rights of individuals in great detail by statute, Pennsylvania, under its new judicial article, entrusts the operation of its grand jury system almost entirely to the Rules of Criminal Procedure promulgated by its Supreme Court. Except for a hint that grand jury indictment may be dispensed with on a local option basis by the common pleas courts, (which is confirmed by Rule 225, a copy of which is attached as Appendix C), the constitutional cornerstone of this system, Section 10 of Article I of the state constitution contains no surprises. It reads:

> "Except as hereinafter provided no person shall, for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." (Adopted November, 1973)

The distinguishing feature of the Pennsylvania grand jury system is that it separates the investigating grand jury from the indicting grand jury.[44] Pennsylvania law requires that before a grand jury investigation may begin, there must be reasonable cause to believe that a cognizable crime has been committed. If, upon the evidence presented, a grand jury concludes that there is cause to believe that a cognizable crime has been committed, and that a specific person or specific persons committed it, it may direct the prosecutor to seek an indictment or to file an information.

The function of the investigating grand jury is then at an end. In order to gain access to an indicting grand jury, however, the prosecutor must outline to the court the evidence on which he proposes to ground a presentment. The court examines it to determine whether the prosecution is on a tenable basis. It is because of this intervening step that the Pennsylvania Rules of Criminal Procedure, in Rule 212 (C), define a presentment more narrowly than it was defined at common law or it is normally defined in those jurisdictions which have abolished common law crimes and criminal procedure. Rule 212 (C) defines a presentment as "a formal accusation by a grand jury, drafted by the Commonwealth's attorney with leave of court and submitted for action by a subsequent grand jury." (Emphasis added)

Whether the coneept of thus separating the investigative and indicting functions serves a valid function is, of course, an ultimate question. Some eminent members of the bar profess to see a valid distinction:

> "The distinction between the two grand jury functions is a very real one. An investigating grand jury performs the function its name implies. It investigates whether any crime has occurred and, if so, which persons may have been involved in its commission. The indicting grand jury, in turn, passes on the evidence presented by a prosecutor against a specific person accused of committing a particular crime and determines whether that evidence meets the standard of probable cause."[45]

Implicit in such a division must also be the belief that it is desirable to interpose possibly necessary restraint on the prosecutorial instinct at the pivotal point when the investigation of what there is reason to believe is a cognizable crime turns to a specific accusation against a specific individual.

It must be noted that Pennsylvania grants every defendant a right to a preliminary hearing if he is subject to indictment, and this requirement can be dispensed with only on the order of a court. Rule 224 provides:

> "When the attorney for the Commonwealth certifies to the Court of Common Pleas that a preliminary hearing cannot be held for a defendant because the defendant cannot be found in the Commonwealth or that the statute of limitations will run prior to the time when a preliminary hearing can be held or that a preliminary hearing cannot be held for other good cause, the court may grant leave to the Attorney for the Commonwealth to present a bill of indictment to the grand jury without a preliminary hearing."

Overall, the Pennsylvania Rules of Criminal Procedure give the impression that they are designed with clear recognition of the fact that a grand jury is an arm of the court, and that its procedures, as well as the relationship of the prosecutor to the grand jury and his actions affecting the substantive rights of a potential defendant are, to the fullest extent possible consistent with traditional grand jury secrecy, the ultimate responsibility of the court.

The Impact of the Hammond and Adamek cases on Ohio Grand Jury Procedures

Hammond and Adamek arose out of the incidents on the Kent State University campus on May 1-4, 1970, in which several students were killed by members of the Ohio National Guard on May 4. This was preceded by the burning of the R. O. T. C. building on the campus on May 2. The special grand jury called at the request of the Governor as a result of these events returned indictments against 25 persons, charging 43 offenses in 30 bills of indictment. At the same time, and physically attached to the indictments, the grand jury issued a report containing certain conclusions and attempting to assess blame, naming identified or identifiable persons or groups. The court, in sustaining the validity of the indictments while ordering the report to be expunged as interfering with certain constitutional rights of those who were identified or identifiable in it, also stated that in Ohio a

grand jury "only acts as the formal and constitutional accuser of crime.[46] The court pointed out that there are only two references in Chapter 2939 to grand jury reports. The first is in Section 2939.21, which requires the grand jury to report to the court whether the rules prescribed by it for the operation of the county jail, and the laws for the regulation of county jails, have been observed; the second is in Section 2939.23, which requires the foreman of a grand jury to report to the court if no indictment is found. The court further stated that the expression of the specific power to issue these particular reports by clear implication precludes the issuance of other types of reports.[47] The court quoted with approval from the decision of a common pleas court in State v. Robinette that "/i/t must be borne in mind that outside of inspecting the County Jail, the Grand Jury's sole duty and authority are the investigation of crimes and offenses."[48]

The result of Hammond and Adamek--to the extent that they may be controlling law in Ohio--is to state that Ohio grand juries are limited to being the "formal and constitutional accuser of crime"--which has traditionally been the main purpose of grand juries--and to the performance of such other duties--including the filing of specifically authorized reports--as may be provided by law.

Conclusion

Several basic policy questions are presented for consideration: (1) whether to recommend no change in the functions and powers of Ohio grand juries, as these powers and functions are presently defined by the Ohio Constitution, the Revised Code, and the cases; (2) whether to recommend a further limitation of such powers and functions or an expansion of them; (3) if the latter course is decided upon, whether changes can or should be accomplished by constitutional provision, by statute, by Supreme Court rules, or a combination of them; (4) whether to recommend abolishing grand juries, or to recommend a constitutional provision which would give the General Assembly the power to do so when the Assembly deems it appropriate.

Since Ohio's existing constitutional and statutory provisions comply with the due process requirements enunciated in Costello, one option before the committee is to recommend no change, either constitutional, statutory, or by rule.

The committee could recommend that some of the strictly ministerial duties--such as the inspection of the county jail--be removed from the grand jury as being unnecessary. This could be accomplished by statute. If the committee concludes that there is a valid purpose to be served by grand jury investigations of, and the submission of reports on, public offices and public officials, on the New York model, this, too, could be accomplished by statute. And if it is the conclusion of the committee that the Pennsylvania procedure of separating the investigating grand jury and the indicting grand jury has merit because of increased judicial control of the grand jury process, that, too, could be accomplished by statute or even by Supreme Court rule.

Another alternative, which has been suggested for Ohio, is to leave the investigating function of the grand jury as it now is, so that the jury can act as a "community watchdog", but to substitute a mandatory preliminary hearing for its indicting function.[49] This would have the effect of removing the burden of deciding who should be charged with crime from the prosecutor alone and at the same time guarantee a potential defendant rights to which he is now entitled at a preliminary hearing but not before a grand jury--a seemingly irreconcilible conflict. This, of course, would require constitutional change.

Leaving aside the alternative of recommending that the grand jury be abolished--a recommendation which would likely meet strong opposition at this time-- there is one other alternative which merits consideration--that of permitting the General Assembly to abolish the grand jury if it deems this appropriate. For example, Section 7 of Article I of the Illinois Constitution of 1970 provides:

> "No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use.
>
> No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury of the person has been given a prompt preliminary hearing to establish probable cause." (Emphasis added)

Whatever one's view of the arguments and counter-arguments on the merits of grand juries, it is evident from several of the more recent federal cases such as those discussed in this memorandum, that in the foreseeable future the rights of potential defendants and of witnesses before grand juries are likely to be expanded, and that particularly the rights of potential defendants before grand juries are likely, eventually, to converge with those already extended to them at preliminary hearings. If that time comes, the General Assembly may conclude that the institution of the grand jury is indeed redundant and should be abolished. A constitutional provision on the Illinois model would facilitate the task.

Appendix A. -- Section 190.65 (1), New York Criminal Procedure Law

Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

Appendix B--Section 190.85, New York Criminal Procedure Law

Section 190.85 Grand jury; grand jury reports

1. The grand jury may submit to the court by which it was impaneled, a report:

(a) Concerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation or removal or disciplinary action; or

(b) Stating that after investigation of a public servant it finds no misconduct, non-feasance or neglect in office by him provided that such public servant has requested the submission of such report; or

(c) Proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one and that:

(a) The report is based upon facts revealed in the course of an investigation authorized by section 190.55 and is supported by the preponderance of the credible and legally admissible evidence; and

(b) When the report is submitted pursuant to paragraph (a) of subdivision one, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision one, it is not critical of an identified or identifiable person.

3. The order accepting a report pursuant to paragraph (a) of subdivision one, and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken pursuant to section 190.90, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal of the named public servant by the appellate division, whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report upon him. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges in said report, and, except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecessarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the district attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public servant or body having removal or disciplinary authority over each public servant named therein.

4. Upon the submission of a report pursuant to subdivision one, if the court finds that the filing of such report as a public record, may prejudice fair consideration of a pending criminal matter, it must order such report sealed and subh report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision one is not satisfied that the report complies with the provisions of subdivision two, it may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report, and the report may not be filed as a public record, or be subject to subpoena or otherwise be made public.

L. 1970, c. 996, section 1, eff. Sept. 1, 1971

Appendix C - Rule 225, Pennsylvania Rules of Criminal Procedure

Rule 225. Information: Filing, Contents, Function

(a) In counties in which the indicting grand jury has been abolished, after the defendant has been held for court, the attorney for the Commonwealth either shall move to nolle prosequi the charges or shall proceed by preparing an information and filing it with the court of common pleas.

(b) The information shall be signed by the attorney for the Commonwealth and shall be valid and sufficient in law if it contains:

(1) a caption showing that the prosecution is carried on in the name of and by the authority of the Commonwealth of Pennsylvania;

(2) the name of the defendant, or if he is unknown, a description of him as nearly as may be;

(3) the date when the offense is alleged to have been committed if the precise date is known, and the day of the week if it is an essential element of the offense charged, provided that if the precise date is not known or if the offense is a continuing one, an allegation that it was committed on or about any date within the period fixed by the statute of limitations shall be sufficient;

(4) the county where the offense is alleged to have been committed;

(5) a plain and concise statement of the essential elements of the offense substantially the same as or cognate to the offense alleged in the complaint; and

(6) a concluding statement that "all of which is against the Act of Assembly and the peace and dignity of the Commonwealth".

(c) The information shall contain the official or customary citation of the statute and section thereof, or other provision of law which the defendant is alleged therein to have violated; but the omission of or error in such citation shall not affect the validity or sufficiency of the information.

(d) In all court cases tried on an information the issues at trial shall be defined by such information.

Adopted and effective Feb. 15, 1974.

Footnotes

1. The following historical material on the grand jury is drawn mainly from Helene E. Schwartz, "Demytholigizing the Historical Role of the Grand Jury", 10 Am. Crim. L. Rev., 701-770 (1972).

2. G. Adams and H. Stephens, Selected Documents of English Constitutional History 11 (1926), at 14-18, cited in Helene E. Schwarts, "Demytholigizing the Historical Role of the Grand Jury", supra note 1, at 708.

3. W. Blackstone, Commentaries 349, cited in Helene E. Schwartz, "Demytholigizing the Historical Role of the Grand Jury"; supra note 1 at 701.

4. Karlen, Anglo-American Criminal Justice 149 (1967), at 428, cited in Note, "American Grand Jury: Investigatory and Indictment Powers", 22 Cleve. State L. Rev. 136 (1973) at 141.

5. J. Story, Constitution, Section 165 (5th ed. 1891), cited in Helen E. Schwartz "Demytholigizing the Historical Role of the Grand Jury", supra note,1 at 701.

6. See Robert Scigliano, "The Grand Jury, the Information, and the Judicial Inquiry", in Robert Scigliano, ed., The Courts--A Reader in the Judicial Process (Boston: Little, Brown and Company, 1962), 222-229. This article points out that judicial inquiry is used extensively as an alternate to grand jury action in Michigan and two or three other states.

7. The 1884 case was Hurtado v. California, 110 U. S. 516. The Court's 1973 comment is in footnote 1 of Gosa v. Mayden,413 U. S. 665 at 668.

8. Samuel Dash, "The Indicting Grand Jury: A Critical Stage?" 10 Am. Crim. L. Rev. 807 at 812, footnote 24.

9. Id.

10. Id.

11. For a concise discussion of the history of Article I, Section 10, see Decker v. State, 113 Ohio St. 512 (1925),518-523.

12. Woods v. Hughes (C.A.N.Y 1961), 173 N.E. 2d 21 at 22, footnote 1.

13. Id.

14. For example, Section 701.03 of the Revised Code gives grand juries authority to visit and inspect any of the benevolent or correctional institutions established by a municipal corporation in the county, and to examine its books and accounts. Section 2921.15 of the Revised Code authorizes the Attorney General to request the convening of a special grand jury to investigate any conspiracy to defraud the state.

15. Breining v. State (App.), 33 L. R. 648 (1931) aff'd 124 Ohio St. 39.

16. Hammond et al. v. Brown 323 F. Supp. 326, aff'd 450 F. 2nd 480, hereafter cited as Hammond.

17. Adamek et al. v. Brown, 323 F. Supp. 326, aff'd 450 F. 2d 480, hereafter cited as Adamek.

18. Costello v. United States, 350 U. S. 359, 76 S. Ct. 406, 100 L. Ed. 397, hereafter cited as Costello.

19. Costello, supra note 18, at 350 U. S. 362.

20. Id.

21. See dissenting opinion of Mr. Justice Rehnquist in Gelbard et al. v. U. S. and Egan et al. v. U.S.,408 U. S. 41, 92 S. Ct. 2352, 33 L. ed 2d 179 (1972), at 408 U.S. 76-77, hereafter cited as Gelbard and Egan.

22. Hammond and Adamek, supra note 16 and 17, at 323 F. Supp. 337.

23. Coleman v. Alabama, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1969), hereafter cited as Coleman.

24. Coleman v. Alabama, supra note 23, at 399 U. S. 9.

25. Coleman v. Alabama, supra note 23, at 399 U. S. 7.

26. Coleman v. Alabama, supra note 23, at 399 U.S. 25.

27. Coleman v. Alabama, supra note 23, at 399 U.S. 12.

28. Coleman v. Alabama, supra note 23, at 399 U. S. 18.

29. Mattox v. Carson (D.C.M.D. Fla., 1969) 295 F. Supp. 1054, cert. den. 400 U.S. 822.

30. Gelbard and Egan, supra note 21.

31. Gelbard and Egan, supra note 21, at 408 U. S. 43.

32. Gelbard and Egan, supra note 21, at 408 U. S. 62.

33. U. S. v. Badger Paper Mills, Inc., 243 F. Supp. 443 (E. D. Wisc. 1965) cited in Note, "American Grand Jury: Investigatory and Indictment Powers", supra note 4, at 148.

34. Note, "American Grand Jury: Investigatory and Indictment Powers", supra note 4, at 149.

35. See Cornelius W. Wickersham, "The Grand Jury--Weapon Against Crime and Corruption", 51 A. B. A. Journal, 1157-61 (1965).

36. See, for example, Melvin P. Antell, "Modern Grand Jury: Benighted Supergovernment", 51 A.B.A.Journal 153-56 (1965); Thomas J. Bray, "Not-so-grand Juries: Blue Ribbon Panels are Assailed by Critics from the Right and the Left", 178 Wall Street Journal, (July 29, 1971), p. 1.

37. Melvin P. Antell, "Modern Grand Jury: Benighted Super-government", supra note 36, at 154.

38. See Note, "American Grand Jury: Investigatory and Indictment Powers", Cleve. State L. Rev., supra note 4, at 143 ff.

39. Melvin P. Antell, "Modern Grand Jury: Benighted Super-government", supra note 36, at 154.

40. Thomas J. Bray, "Not-so-grand Juries: Blue Ribbon Panels are Assailed by Critics from the Right and the Left", supra note 36 at 9, column 5.

41. See, for example, Table 2 of Note, "American Grand Jury: Investigatory and Indictment Powers", supra note 4 at 145, showing the number of cases filed in Cuyahoga County in 1970 and 1971, and the number of "no bills" returned.

42. Thomas E. Dewey, "Grand Jury: The Bulwark of Justice", 19 Panel 3, 6, 10-11 (1941).

43. Woods v. Hughes, supra note 12.

44. For an illustration of this concept in operation, see Commonwealth v. Evans, 154 A. 2d 57 (1959), aff'd 160 A. 2d 407, cert. den. 364 U.S. 899, 81 S. Ct. 233, 5 L. Ed. 2d. 194; reh. den. 364 U.S. 939, 81 S. Ct. 377, 5 L. Ed. 2d 374.

45. Samuel Dash, "The Indicting Grand Jury: A Critical Stage?", supra note 8, at 809.

46. See State ex rel. Doerfler v. Price, 101 Ohio St. 50 (1920) cited in Hammond and Adamek, supra notes 16 and 17 at 323 F. Supp. 338.

47. Hammond and Adamek, supra notes16 and 17, at 323 F. Supp. 344.

48. State v. Robinette, (C.P. Pike County, 1957), 143 N.E. 2d 186.

49. Note, "American Grand Jury: Investigatory and Indictment Powers, supra note 4, at 151 ff.

Ohio Constitutional Revision Commission
Judiciary Committee
October 23, 1974

Terms in Merit Selection Jurisdictions

The Judiciary Committee has determined to recommend that all judges appointed under an appointive-elective system (which the committee has also determined to recommend) serve an initial term of two years, after which they would be subject to a retention election . At the October 9 meeting a question was raised about the advisability of providing that at such a retention election a judge would be elected for the remainder of the term to which he was appointed , if there is a remainder ,instead of being elected for the full term specified for the office. Under the draft proposal before the committee, the judge would serve the initial term, then stand for election for the remainder of the term to which he was appointed, then stand for election for a full term.

This memorandum sets forth how states which presently apply merit selection to all appellate and major trial courts handle the matter of initial term. Of the seven states examined, it was found that five provide for "floating" full terms after the appointee has served the initial term, and two (Utah and Wyoming) do not; that is, the latter two states require the appointee to run for the remainder of the term to which he is appointed at the first retention election following appointment before he can run for retention for a full term at a subsequent election. Thus, the regular judicial term remains fixed with respect to beginning and ending dates.

Alaska, Colorado, Iowa, Missouri, Nebraska, Utah, and Wyoming apply merit selection to their Supreme Courts, Appellate Courts (if they have such courts) and trial courts of general jurisdiction. Each also provides for a limited initial term upon appointment. The full term for each court, initial terms, and provisions regarding the first retention election after appointment are tabulated below on a state=by-state basis.

State	Court	Length of Full Term	Length of Initial Term	Date of Initial Retention Election
Alaska	Supreme	10 years	3 years plus	First general election held more than 3 years after appointment. Elected to full term.
	Trial	6 years	"	"
Colorado	Supreme	10 years	2 years plus	First general election held more than two years after appointment. Elected to full term.
	Appellate	8 years	"	"
	Trial	6 years	"	"
Iowa	Supreme	8 years	1 year plus	First general election held more than 1 year after appointment. Elected to full term.
	Trial	6 years	"	"
	(Note: Iowa law defines "general election" as "the biennial election for national or state officers....".)			
Missouri	SuPreme	12 years	12 months	First general election following twelve months in office. Elected to full term.
	Appellate	12 years	12 months	"
	Trial	6 years	12 months	"
Nebraska	Supreme	6 years	3 years plus	First general election following three years from date of appointment. Elected to full term.
	Trial	6 years	"	"
	(Note: Nebraska law provides that the terms of those judges who are carried over from the elective system begin on the day fixed by law, but that the terms of those appointed under the merit plan begin on the dates of their appointments.)			
Utah	Supreme	10 years	Until qualification of successor	Next general election after appointment. Elected to remainder of unexpired term, if any, or to full term, if none.
	Trial	6 years	"	"
Wyoming	Supreme	8 years	1 year plus	First general election following 1 year in office. Elected to full term or part of term, if any remaining
	Trial	6 years	"	"
	(Note: "General election" held in November of even-numbered year.)			

Ohio Constitutional Revision Commission
Judiciary Committee
December 9, 1974

Court of Claims

Attached is Research Study No. 44C, dealing with part of the Bill of Rights, Section 16 of Article I. This section deals with open courts, due course of law, and, most importantly for the present consideration of the Judiciary Committee, sovereign immunity and the newly created Court of Claims.

Committee Alternatives

The Judiciary Committee should consider some alternatives concerning sovereign immunity because the creation of the Court of Claims is contrary to its endorsement of a unified, three-tiered court structure. Its recommendations to date would vest judicial power in a judicial department consisting of the supreme court, courts of appeals, and courts of common pleas. The reference to "such other courts inferior to the supreme court as may from time to time be established by law" would be deleted from Section 1 of Article IV. If the Committee's recommendations were adopted, the Court of Claims as presently constituted would most likely be held unconstitutional.

Committee discussion has assumed the absorption of the present minor courts into a single trial court of general jurisdiction. A constitutional amendment to implement the Committee's recommendations would necessarily provide for the transition from the present statutory courts into one constitutional trial court.

Various options are available in dealing with the Court of Claims, not all mutually exclusive.

(1) The Committee may wish to recommend abolition of the doctrine of sovereign immunity by amending Section 16 of Article I to delete the last sentence or part thereof. However, it will still have to consider how claims against the state should be handled.

(2) The Committee could endorse constitutional recognition of a Court of Claims, constituted as provided by the 1974 legislation. The points for a separate court are noted in the study -- that it does not contribute to overloaded dockets in metropolitan courts, that special expertise is developed, and that a uniformity of judgment is assured.

However, one problem with recognizing the Court of Claims as a separate tribunal is to open the door on exceptions to the simple structure that the Committee has endorsed. The need for a specialized court is a popular cry -- to hear housing matters, for example, is another. The Committee, after long consideration of court structure has committed itself to the position that structural specialization in the court system sacrifices economic benefits, efficiency, and flexibility that are available in a single three-tiered system.

The same goals of uniformity and expertise of a separate Court of Claims -- or of Housing Courts -- can be realized through the creation of subject matter divisions of Common Pleas. Under the Committee's recommendation subject matter divisions of the court of common pleas would be established judicially, presumably according to need and not necessarily uniformly, pursuant to Supreme Court rules, subject to legislative veto. Moreover, divisions can be made along lines of the subject matter of the litigation, not identity of defendant (state or private person), assuring greater expertise and uniformity. In its 1973 Standards Relating to Court Organization, the American Bar Association Commission on Standards of Judicial Administration speaks to this point:

"Trial court unification does not imply that all trial-court cases should be tried in the same way or according to the same procedures. It is evident, to mention extremes, that products liability and antitrust cases cannot be prepared and tried according to rules that are also appropriate for small claims cases in which the parties are not represented by counsel. Indeed, there is a growing recognition that 'big' and 'small' cases are themselves of a variety of types that may require different procedural formats. A unified trial court does not preclude adoption of different procedural formats for different types of cases. On the contrary, developing different forms of procedure for different types of cases is made easier in a unified trial court by eliminating the impediments of fixed jurisdictional boundaries and separate administrative structures."

It can be argued that because the Court of Claims is to be staffed on a case by case basis that one criticism of maintaining separate courts does not apply -- i.e. it results in inefficient use of judicial manpower. Still a single trial court can eliminate the inefficiency of separate filing system, clerical staffs, courtroom reporters and personnel, motion calendars, trial lists and financial records. It can facilitate the disposition of actions involving different claims arising out of the same basic set of facts even more than can the provision in H.B. for removal of cases.

(3) The Committee can recommend that suits against the state be heard in common pleas court. Section 16 of Article I could be so amended, although if the Section merely authorized suits against the state, it seems clear that the same result would be accomplished. In most states in which sovereign immunity has been abrogated through legislative action the trial court of general jurisdication has been designated by statute as the forum with jurisdiction. There are exceptions (New York has long had a Court of Claims act) but Ohio would be in the majority and in accord with a trend in so providing.

Such a recommendation is in harmony with Committee posture with regard to maintaining a court of original proceedings organized as a single court. Giving constitutional permanence to an exception is ill advised.

If the Committee is to have a coherent and cohesive set of recommendations it must take into account not only the absorption or abolition of the existing minor courts, but of Ohio's newest court, the Court of Claims, as well.

Ohio Constitutional Revision Commission
Judiciary Committee
December 12, 1974

The Power of the General Assembly
to Confer Quasi-Judicial Power on
an Administrative Agency or Officer.

Judicial power has been defined in many ways in many cases over the years. Stanton v. State Tax Commission et al., 114 Ohio St. 658, 671 (1926) states: ". . . judicial power is the authority vested in some tribunal to hear and determine the rights of persons or property, or the propriety of doing an act; a power involving the exercise of judgment and discretion in the determination of questions or right in specific cases affecting the interests of persons or property as distinguished from ministerial power involving no discretion."

During the twentieth century in particular, with the increasing complexity of government, legislatures (both federal, state and local) have had a tendency to delegate quasi-judicial functions to administrative agencies and officers, who are, most often, components of the executive branch of government. This has had the effect of blurring the separation of powers between the executive, judicial, and legislative branches--a concept deeply rooted in American political thinking, although in actual practice, a complete separation of powers is, from a practical standpoint, impossible to achieve and was probably never intended by the framers of the Federal Constitution, from which the concept derives.

The complexity of government has made administrative adjudication of rights inevitable. The question of who may delegate judicial power, and under what conditions it may be delegated, is one which is a fundamental question from a constitutional viewpoint, although the general consensus appears to have evolved that, absent a specific constitutional directive investing certain judicial powers in specified courts, the legislature may delegate such quasi-judicial powers to administrative officers or agencies as may be necessary to carry out their functions, as long as there is provision for review of any final determinations made by such officers or agencies by the judicial branch. This is the holding in Stanton, supra, written when the concept of the delegation of quasi-judicial power was still at a very early stage of development. It still states the law in Ohio, and is consonant with the decision of other states and the federal courts.

Ohio courts--either by Constitution or law--have the requisite jurisdiction to hear appeals from administrative agencies or officers, and there is nothing in the Ohio Constitution now which needs to be changed to comply with the accepted standard for judicial review.

At least one state constitution--that of Michigan--specifies that in instances when a hearing is required before an administrative agency or officer, a determination must be supported by "competent, material and substantial evidence on the whole record." Whether this standard can be applied with any more precision than the "reliable, probative and substantial" test now prescribed by law in Ohio is, at best, an open question. It would seem inadvisable to freeze any evidentiary standard into the Constitution, and no such action is recommended.

Administrative due process is, of course, an implied requirement both under the state and federal constitutions. Revised Code Chapter 119, The Ohio Administrative Procedure Act, has often been criticized for making this objective difficult to attain. However, in the final analysis, the correction of its shortcomings is a matter for the General Assembly.

According to the leading case of Goldberg v. Kelly, 197 U. S. 254 (1970), which applied the concept of administrative due process to the question of the termination of a welfare recipient's payments, the elements of such due process include (1) adequate and timely notice, (2) the opportunity to retain counsel, (3) the right to oral presentation, (4) the right to confront and cross-examine adverse witnesses, (5) an impartial hearing officer and (6) a reasoned decision. Since Goldberg, this standard has been applied to several other areas, including unemployment compensation rights, discharge from public employment, and drivers license suspensions. The adjudicatory process of the Ohio administrative agencies responsible in any of the foregoing areas and several other agencies, are not subject to the Ohio Administrative Procedure Act as it now exists or under any presently existing proposals for its amendment. Therefore, the processes of each of these agencies must be judged on an individual basis.

However, the question of whether it would serve a useful purpose to incorporate specific guarantees concerning administrative due process into the state Constitution, as distinguished from having the parameters of the concept developed through judicial interpretation, while certainly meriting consideration, would appear to be more properly a subject for discussion not by this committee, but by the Bill of Rights Committee, to which this committee may wish to refer the matter.

Ohio Constitutional Revision Commission
Judiciary Committee
April 10, 1975

Report: Article IV
Judiciary

Introduction

The Judiciary Committee hereby submits its recommendations on the following present sections of Article IV:

Section	Subject	Recommendation
Section 1	Vesting of judicial powers	Amend
Section 2	Supreme court	No change
Section 3	Courts of appeals	Amend
Section 4	Courts of common pleas	Amend
Section 5	Powers and duties of supreme court; rules	Amend
Section 6	Selection of justices and judges; compensation, retirement, assignment of retired judges	Amend
Section 13	Filling of vacancies	Repeal and transfer
Section 15	Changes in number of judges, courts, districts	Repeal
Section 17	Removal of judges by concurrent resolution	Repeal
Section 18	Powers and jurisdiction at chambers	Repeal
Section 19	Courts of conciliation	Repeal
Section 20	Style of process, etc.	Amend
Section 23	Service of judge in more than one court	Repeal

The committee also submits its recommendations on two new provisions, one (new section 7) relating to the establishment of a full-time judiciary and the appointment of magistrates, the other (new section 8) relating to the payment of judicial salaries and the expenses of the judicial department by the state, and the establishment of a unified judicial budget.

In addition, the committee renews a recommendation previously made by the legislative-executive committee and the Commission that section 22, relating to the Supreme Court Commission, be repealed.

Article IV

Section 1. Vesting of Judicial Power

Present Constitution

Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.

Committee Recommendation

The committee recommends the amendment of this section to read as follows:

Section 1. The judicial power of the state is vested in a JUDICIAL DEPARTMENT CONSISTING OF A supreme court, courts of appeals, courts of common pleas, and ~~divisions thereof, and~~ such ~~other~~ SPECIAL SUBJECT MATTER courts inferior to the supreme court HAVING STATE-WIDE JURISDICTION as may ~~from time to time~~ be established by law.

Comment:

According to a recent Legislative Service Commission study, there are at the present time 261 trial courts having separate status in Ohio, excluding the Ottawa Hills Police Court and excluding mayors' courts, whose exact number is undetermined. Of these 261 courts, 88 are common pleas courts--one per county--106 are municipal courts, and 67 are county courts (if each district or area of such courts, where established, is counted as a separate court. Ohio's present minor court system, that is the system of trial courts of limited jurisdiction, was defined by 1951 legislation creating a uniform system of municipal courts and 1957 legislation creating county courts to function in areas of counties not within the jurisdiction of a municipal court. The monetary limit of municipal court jurisdiction in civil cases is $10,000, and the monetary limit of all county courts in civil cases is $500. The criminal jurisdiction of municipal courts is limited to municipal ordinances, misdemeanors, and preliminary hearings in felony matters. County court criminal jurisdiction is similar, but the bulk of cases in county courts, which supplanted justice of the peace courts, is in the area of misdemeanors and motor vehicle violations.

In addition to municipal courts and county courts, the state's minor court system contains one police court and a large but undetermined number of mayors'

courts. The jurisdiction of the police court in Ottawa Hills, is criminal only and is limited to misdemeanors, village ordinances, and preliminary hearings in felony cases. The jurisdiction of mayors' courts is likewise criminal only, and extends to ordinances and moving violations on state highways within the municipality's territorial boundaries. Since there is no provision for jury trials in mayors' courts, and the law provides that an accused is entitled to a jury trial in any matter in which the potential penalty exceeds $100, this provision effectively limits the jurisdiction of such courts to that amount.

The Ohio Constitution gives the Supreme Court supervisory power over all courts in the state. In the case of common pleas courts and municipal and county courts, this power is now exercised under specific Rules of Superintendence, which govern aspects of administrative structure and procedure and contain requirements for the reporting of caseloads and certain other information directly to the Supreme Court. Also, all judges must meet the standards set forth in the Code of Judicial Conduct. However, the judges of the various courts of limited jurisdiction in a county conduct the day-to-day business of their respective courts on a largely autonomous basis, free from administrative control by the common pleas court. One exception is the power granted common pleas courts in Section 1907.071 of the Revised Code to divide counties having more than one county court judge into areas of separate jurisdiction, and to designate the area in which each judge shall have exclusive jurisdiction. The same statute gives the common pleas courts authority to redefine county court areas from time to time, to be equal in population as nearly as possible.

While there is a statutory provision for transferring judges for temporary duty from one area of a county court to another, there is no provision of any kind for assigning municipal court judges to county courts, or county court judges

to municipal courts, or judges of county or municipal courts to common pleas courts. As a result, some judges in a county where these three types of trial courts exist may not have enough to do while others are overburdened. Likewise, some court facilities may stand idle while others are crowded beyond their capacity and there may be a needless and expensive duplication of supporting staff as well. In addition, this system of courts is financed under a highly complex, if not bewildering welter of statutes, from both state and local sources. The fines, fees and forfeitures collected by the trial courts, including common pleas courts, are distributed under an equally complex maze of statutes to the state, to political subdivisions, or for designated purposes, depending on which court collects them and whether they are collected under state law or local ordinance.

Not every type of court of limited jurisdiction is found in every county. Some counties have county-wide municipal courts. Some counties have county-wide county courts, while other counties have both one or more municipal courts and a county court. The county court, in turn, may function as a single county court district or, in the case of a multi-judge court, may be divided into "areas" by the common pleas court, as previously stated. The entire patchwork has apparently developed on a strictly ad hoc basis.

Further, while most municipal court clerks are appointed, municipal courts which serve populations in excess of a statutorily set minimum may and do have elected clerks; and while the clerk of the court of common pleas is statutorily designated as the clerk of the county court, if one exists in the county, the county court with the concurrence of the board of county commissioners may appoint its own clerk, and some courts have done so.

There is, of course, also a certain amount of overlap of subject matter jurisdiction, both on the civil and criminal sides, between common pleas and municipal courts. The committee has been advised that this has resulted in a good deal of

"forum shopping," for strategic purposes, in those counties where a choice of courts is available.

The committee considered two alternatives on trial court structure in depth--the possibility of consolidating all courts of limited jurisdiction within a county into one court below the level of the common pleas court, and the possibility of absorbing the jurisdiction of all courts of limited jurisdiction into the common pleas court. The committee concluded that the latter alternative is preferable. The rationale for this decision is succinctly expressed by the following excerpt from the commentary on Standard 1.11(c), Uniform Standards of Justice, of the American Bar Association's Standards Relating to Court Organization:

> "A. . . prevalent form of jurisdictional complexity consists in having two levels of courts of original proceedings. In such systems, the lower trial court has jurisdiction of lesser criminal and civil matters. Its criminal jurisdiction typically includes misdemeanors, petty offenses, and felony preliminary hearings. On the civil side, its jurisdiction includes actions involving limited monetary amounts, actions for recovery of personal property of limited value, and eviction proceedings. All other cases are heard in the trial court of general jurisdiction or in a specialized court. In most states that have it, this arrangement is chiefly the product of historical evolution rather than long-range planning. The creation of a trial court of limited but uniform jurisdiction has proved an effective way of reducing or abolishing justice-of-the-peace courts and separate municipal courts without having to assimilate the incumbent judges, many of whom were laymen or served only part-time, into the judiciary of the principal trial court. This transitional accommodation has however tended to become an entrenched arrangement."

"The consequences of maintaining two separate trial courts have been generally adverse. These consequences include reduced flexibility in assigning judges and other court personnel in response to shifts in workload; complexity and conflict in processing cases between courts,particularly between the preliminary and plenary stages of felony cases; and unnecessary emphasis on hierarchial rank among judges and other court personnel. Perhaps most important, the differentiation of the trial court of limited jurisdiction expresses an implicit differentiation in the quality of justice to be administered. It induces a sense of isolation and inferiority among the judges and court personnel who are called upon to perform one of the judiciary's most difficult and frustrating tasks--individualizing justice in the unending stream of undramatic cases that constitute the bulk of the court system's work."

Under the committee's recommendation for a new section 7, it is contemplated that relatively minor matters or essentially local matters would be heard and decided by a class of judicial officers called magistrates, perhaps in places other than the seat of the court. Such judicial officers, who would have to be licensed attorneys and could be part-time, would be appointed by, and responsible to, the common pleas judges. Common pleas judges would thus be free to concentrate on the more demanding judicial duties.

Finally, the proposed section 1 permits the establishment of special subject-matter courts of statewide jurisdiction by law. This provision accommodates such courts as the newly created Court of Claims, and perhaps other specisl subject-matter courts at a future date. The requirement that any such court have statewide jurisdiction precludes the possibility that the territorial jurisdiction of these courts would be split in the haphazard fashion now typical of courts of limited jurisdiction. The General Assembly is free to prescribe which special subject-matter courts are established and how the judges of such courts are selected.

Section 2. Supreme Court

Present Constitution

Section 2 (A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeal to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii)Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained;

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Committee Recommendation

The committee recommends no change in this section.

Comment:

The committee knows of no compelling reason to recommend an amendment of this section, which was last amended by the Modern Courts Amendment in 1968. However, a caveat is in order. If special subject matter courts of statewide jurisdiction, such as could be created under the proposed section 1 of Article IV are to be established as courts of original jurisdiction--as opposed to being courts of appeals--and it is desired to permit appeals of their orders or judgments directly to the Supreme Court, this section would have to be amended to broaden the appellate jurisdiction of the Supreme Court for this purpose, since this provision presently specifies appellate jurisdiction only in appeals from the courts of appeals, and revisory jurisdiction from orders of administrative officers or agencies.

Section 3. Courts of Appeals

Present Constitution

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus

(c) Habeas corpus;

(d) Prohibition

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question

by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Committee Recommendation

The committee recommends that this section be amended to read as follows:

Section 3 (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of A MINIMUM OF three judges. ~~Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges,~~ UNLESS THE PARTIES AGREE TO HAVE A CASE HEARD BY TWO JUDGES, three judges shall participate in the hearing and disposition of each case. THE JUDGES OF EACH COURT OF APPEALS SHALL SELECT ONE OF THEIR NUMBER, BY MAJORITY VOTE, TO ACT AS PRESIDING JUDGE, TO SERVE AT THEIR PLEASURE. IF THE JUDGES ARE UNABLE BECAUSE OF EQUAL DIVISION OF THE VOTE TO MAKE SUCH SELECTION, THE JUDGE HAVING THE LONGEST TOTAL SERVICE ON THE COURT SHALL SERVE AS PRESIDING JUDGE UNTIL SELECTION IS MADE BY VOTE. THE PRESIDING JUDGE SHALL HAVE SUCH DUTIES AND EXERCISE SUCH POWERS AS ARE PRESCRIBED BY RULE OF THE SUPREME COURT. A COURT OF APPEALS MAY SELECT ONE OF THE COUNTIES IN ITS DISTRICT AS ITS PRINCIPAL SEAT. The court shall hold sessions in each county of the district as the necessity arises. ~~The county commissioners of each~~ EACH county shall provide a proper and convenient place for the court of appeals to hold court, AS PROVIDED BY LAW.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition ;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district AND IN CASES TRANSFERRED FROM ANOTHER COURT OF APPEALS DISTRICT PURSUANT TO SUPREME COURT RULE, and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all ~~three~~ judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Comment:

The proposed amendments of this section affect mainly procedural matters, the substantive jurisdiction of the courts of appeals being unchanged. The following comments correspond to the divisions of the proposed section:

(A) This division is amended in three particulars: first, to provide that each court of appeals shall consist of a minimum of three judges (instead of the present "no less than three"), with three judges to hear and dispose of each case; second, to provide that the parties may agree to have a case heard and disposed of by two judges. The first of these is a wording change only, but the second is a new provision which adds flexibility and gives recognition to a practice which, the committee understands,

is not uncommon today. References to laws increasing the number of judges are deleted because the subject is covered elsewhere in the committee's recommendations.

The third and principal change in division (A) of this section is in the method of selecting the presiding judge of a court of appeals to parallel the method presently prescribed by the Constitution for the election of the presiding judge of a court of common pleas, namely by a vote of the judges of the court. This is a more logical alternative than is now prescribed, by law, for the courts of appeals--the law bestowing the post automatically on the judge with the shortest time left to serve in his term, without regard to his administrative ability, his willingness to serve, or his acceptability to other judges on the court.

Permission to select one county as a principal seat confirms a practice now permitted by law and followed by at least one multi-county court in the state. Wider implementation of the practice may, in the committee's view, increase administrative efficiency and cut costs of operation, two factors which are of particular importance in view of the committee's recommendation, made elsewhere in this report, that the state assume the payment of all judicial salaries and the expenses of the judicial department.

The amendment of the last sentence of division (A) is for the purpose of emphasizing that providing space for holding court is a county function, to be carried out as provided by law, and not the function of the county's executive or legislative body, which may change at some future date, as for example, if county charters were adopted.

(B) (2) The expansion of the jurisdiction of the courts of appeals to include cases transferred from another court of appeals complements the recommendation, also made in this report, that the Supreme Court be empowered to make such rules. The purpose of the recommendation is to provide an alternate method to the assignment of judges outside their districts to help in the disposition of court of appeals cases, as needed.

Section 4. Courts of Common Pleas

Present Constitution

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

Committee Recommendation

The committee recommends the amendment of this section to read as follows:

Section 4 (A) There shall be a court of common pleas ~~and such divisions~~-

~~thereof as may be established by law~~ serving each county of the state. Any judge of a court of common pleas ~~or a division thereof~~ may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving ~~the common pleas courts of~~ all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In ~~counties or districts~~ COURTS OF COMMON PLEAS having more than one judge ~~of the court of common pleas~~, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas ~~and divisions thereof~~ shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

~~(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts~~

Comment:

Divisions of Common Pleas Courts

The principal recommendation contained in this section is the deletion of division (C), which established the probate division as the only constitutionally recognized and distinctly separate, division of the court of common pleas, and requires judges to be elected specifically to this division and to any other divisions which may be established by law. While the committee recognizes that there is merit

in the argument that in certain areas of law, such as probate, it is desirable for both a judge and a staff to develop special expertise, the committee believes it is unwise to "freeze" any specific subject-matter division into the Constitution or to require judges to be elected specifically to divisions. Such arrangements have a tendency to reduce the flexibility of a court in disposing of its work by inhibiting the transfer of judges from one division of the court to another as the workload dictates. It also encourages the fragmentation of the judicial complement of the court. Neither of these results is desirable, and the committee believes that its recommendation that subject-matter divisions be created pursuant to Supreme Court rule, subject to amendment or rejection by the General Assembly, would enable the respective common pleas courts to adapt much more readily to changing conditions and demands.

The other changes recommended in this section are grammatical in nature, and no substantive changes are intended.

Common Pleas Court Districts

At the general election on November 6, 1973, as part of Issue 3 the Ohio Constitution was amended to permit the General Assembly to combine counties into common pleas court districts, with one or more judges resident in the district and serving all the counties in the district. The committee's recommendation leaves the substance of the provision for districting unchanged.

At its meeting on December 18, 1974, the committee received a proposal prepared by the Ohio Council for Local Judges which would reverse the change with respect to districts made by Issue 3 and require that there be a common pleas court in each county, with at least one resident judge elected in each county. The proposal would permit the combination of counties into common pleas court administrative districts.

The committee discussed the proposal at its December 18, 1974 meeting and again at its meeting on January 30, 1975, at which time it also heard comments from a proponent of the proposal, Attorney John C. Wolfe of Ironton, President of the Committee

for Local Judges, and two opponents of the proposal, Attorney John J. Duffey of Columbus, and Representative Frederick N. Young of Dayton, a principal author of S.J.R 30, which became Issue 3 on the November, 1973 ballot. Representative Young is also Chairman of the Legislative Service Commission Committee on Court Organization.

Mr. Wolfe cited as reasons for having a common pleas court and a resident judge in every county the belief that the people of a county have a right to elect a judge who hears their cases; the possible inconvenience in locating a judge in emergencies if none resided in a county; inconvenience to attorneys in travel time; possible inconveniences in certain real estate transactions if there were not a clerk in each county; and increased jury and sheriff's expenses due to increased travel.

Mr. Duffey spoke strongly in favor of retaining constitutional flexibility so as to allow freedom for change as future circumstances may require.

Representative Young reported that the Legislative Service Commission Committee on Court Organization had recently decided to recommend that, for the present, Ohio switch to a district system for administrative purposes only, in order to give the General Assembly more time to study the districting concept further. In the view of the Committee on Court Organization, this decision would not require a constitutional change to implement. Representative Young would oppose any constitutional change which would permit or require the establishment of administrative districts, although he saw no reason why the General Assembly could not establish such districts by law under existing constitutional provisions if it chose to do so.

Having considered the matter, the committee is not recommending any change in the constitutional authority of the General Assembly to create districts primarily because it believes that the present flexibility is essential in principle and should be preserved for the future. The destruction of this flexibility by constitutional change would be all the more inappropriate because the change to administrative districts, in which at least one judge would be selected from and resident in each county, can be accomplished by law under the constitutional language as it presently exists.

ARTICLE IV

Section 5. Powers and Duties of Supreme Court; Rules

Present Constitution

Section 5 (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit ahd hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Committee Recommendation

The committee recommends that this section be amended to read as follows:

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas ~~or a division thereof~~ temporarily to sit or hold court on any other court of common pleas ~~or division thereof~~ or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas ~~or division thereof~~ and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court on any court established by law.

(B) (1) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. THE SUPREME COURT MAY PRESCRIBE RULES GOVERNING THE TRANSFER OF CASES FROM ONE COURT OF APPEALS TO ANOTHER AND THE EMPLOYMENT AND DUTIES OF PERSONNEL IN THE JUDICIAL DEPARTMENT. RULES GOVERNING THE EMPLOYMENT AND DUTIES OF PERSONNEL SHALL NOT EXTEND TO AN ELECTED CLERK OF COURTS OR TO PERSONNEL EMPLOYED IN THE OFFICE OF AN ELECTED CLERK OF COURTS, WHO SHALL BE GOVERNED AS PROVIDED BY LAW. SUCH PROPOSED rules shall be filed by the court, not later than the fifteenth day of January with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be filed not later than the first day of May of that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(2) Courts may adopt additional rules concerning local practice AND PROCEDURE in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(3) THE SUPREME COURT MAY PRESCRIBE RULES GOVERNING THE ESTABLISHMENT OF SUBJECT MATTER DIVISIONS OF THE COURTS OF COMMON PLEAS AND THE ASSIGNMENT OF JUDGES THERETO. SUCH PROPOSED RULES SHALL BE FILED BY THE COURT, NOT LATER THAN THE FIFTEENTH DAY OF JANUARY, WITH THE CLERK OF EACH HOUSE OF THE GENERAL ASSEMBLY DURING A REGULAR SESSION THEREOF, AND AMENDMENTS TO SUCH PROPOSED RULES MAY BE FILED WITH THE CLERK, EITHER BY THE COURT OR THE GENERAL ASSEMBLY, NOT LATER THAN THE FIRST DAY OF MAY OF THAT SESSION. THE GENERAL ASSEMBLY MAY AMEND SUCH RULES BY CONCURRENT RESOLUTION ONLY. SUCH RULES SHALL TAKE EFFECT ON THE FOLLOWING FIRST DAY OF JULY, UNLESS PRIOR TO SUCH DAY THE GENERAL ASSEMBLY ADOPTS A CONCURRENT RESOLUTION OF DISAPPROVAL. THE GENERAL ASSEMBLY

MAY NOT DISAPPROVE A RULE WHICH IT HAS AMENDED AS PROVIDED IN THIS SECTION. ALL LAWS IN CONFLICT WITH SUCH RULES SHALL BE OF NO FURTHER FORCE OR EFFECT AFTER SUCH RULES HAVE TAKEN EFFECT.

(4) THE SUPREME COURT SHALL ESTABLISH BY RULE UNIFORM CRITERIA FOR THE DETERMINATION OF THE NEED FOR ADDITIONAL JUDGES, EXCEPT SUPREME COURT JUSTICES, AND FOR ADDITIONAL MAGISTRATES, THE NEED FOR DECREASING THE NUMBER OF JUDGES OR MAGISTRATES AND FOR INCREASING, DECREASING, OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS. THE SUPREME COURT SHALL ANNUALLY, BEFORE EACH REGULAR SESSION OF THE GENERAL ASSEMBLY, FILE WITH THE CLERK OF EACH HOUSE OF THE GENERAL ASSEMBLY A REPORT CONTAINING ITS FINDINGS, IF ANY, THAT A NEED EXISTS FOR INCREASING OR DECREASING THE NUMBER OF JUDGES OR MAGISTRATES OR INCREASING, DECREASING, OR REDEFINING THE BOUNDARIES OF COMMON PLEAS OR APPELLATE DISTRICTS, AND ITS RECOMMENDATIONS, IF ANY, IN REGARD THERETO. THE GENERAL ASSEMBLY SHALL CONSIDER SUCH REPORT, AND ANY FINDINGS AND RECOMMENDATIONS IT MAY CONTAIN, AT THE REGULAR SESSION FOLLOWING THE FILING OF THE REPORT. NO DECREASE IN THE NUMBER OF JUDGES SHALL VACATE THE OFFICE OF ANY JUDGE BEFORE THE END OF HIS TERM.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas ~~or division thereof~~. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Comment:

This section is amended with the primary purpose of broadening the Supreme Court's rule-making power in order to more clearly define that Court's role and responsibility in the administration of the state's judicial system, with a view toward making the system more flexible and responsive to changing needs, while giving due regard to the General Assembly's interest in rule-making. The amendments are incorporated mainly into division B, which is expanded to four paragraphs from the present two. For ease of reference, each of these paragraphs is numbered separately. The following comments correspond to the divisions of the proposed section:

(A) (3) (C) The deletion of the references to divisions of common pleas courts from these provisions is not intended to bring about substantive changes in them. The committee considers such references to be superfluous, and possibly confusing, and for that reason recommends their removal from the Constitution.

(B) (1) The amendments recommended in this paragraph constitute several significant additions to the Court's rule-making authority. The first of these concerns authority to promulgate rules for the transfer of cases from one court of appeals to another. The committee was advised that the transfer of cases for hearing and disposition from one court of appeals to another would provide a less cumbersome and less costly alternative to the assignment of judges outside their own appellate districts, and would be a useful tool in expediting the disposition of some appeals. The committee concurs in this appraisal and recommends the adoption of this provision.

The proposed authority to promulgate rules governing the employment and duties of personnel in the judicial department is intended to assure fair and uniform hiring and promotion procedures, and uniform job descriptions and salary scales. It is also part of the concept of a unified judicial budget. Such rules would eliminate the present statutory confusion as to the types of employees a court may have. This confusion is illustrated by Revised Code Section 2501.16, which allows courts of appeals to appoint shorthand reporters, whose salaries are paid from state funds, and Revised Code Section 2701.07, which allows such courts to appoint constables whose salaries are paid from county funds. For each class of employees, the statutes prescribe some duties and powers, while the courts are given authority to prescribe other duties. There is no other statutory authority for the hiring of other classes of employees, such as law clerks, for example. Thus, courts have at times been forced to resort to employing necessary personnel to perform duties quite different from those which their official titles would suggest. Further, the salaries of those employees whom the courts of appeals are statutorily authorized to

employ are not uniformly established, nor are the salaries of employees who perform similar functions paid uniformly from either state or county funds. The committee views this situation as interfering with the fiscal management of the courts and incompatible with a unified judicial budget, and for that reason recommends this amendment.

Elected clerks of courts and their employees are specifically excluded from the operation of rules governing employment and duties. Such clerks and employees would continue to be subject to statutory regulation, as at present. Further, any rules promulgated by the Supreme Court in the area of employment and duties of personnel would be subject to review and disapproval by the General Assembly to the same extent as rules of practice and procedure are at the present time, so that the authority granted in the proposed amendment would be limited. A further and very real check on the cost of the employment of personnel in the judicial department would be held by the General Assembly in that it would control the appropriation of funds for the operation of that department.

(B) (2) This paragraph would be amended to allow local courts to adopt rules of "practice and procedure" not inconsistent with Supreme Court rules, whereas the present provision refers only to rules of practice. The intent is to parallel the language now in the Constitution describing the power of the Supreme Court in this area.

(B) (3) The recommendation contained in this paragraph permits the Supreme Court to promulgate rules for the establishment of subject-matter divisions of courts of common pleas and the assignment of judges thereto. Such rules would be subject to disapproval or amendment by the General Assembly under the same procedure and within the same time-frame as the General Assembly may, at present, disapprove proposed rules of practice and procedure.

The recommendation in regard to subject-matter divisions is made in the belief that the existing provision on this point is not sufficiently flexible to permit the maximum use particularly of the judicial manpower of a court, and that,

as previously stated, the present provision specifically recognizing the probate division as a separate division, and requiring all judges to be elected specifically to a division, has an inherent tendency to fragment or "compartmentalize" the judicial complement of a court. While the committee recognized that it is desirable for judges to develop special expertise in certain phases of the law, and that it is desirable to have a degree of continuity within such divisions, the committee believes that the creation of subject-matter divisions, and the assignment of judges thereto, should be regarded as an essentially internal matter for the courts, decided on the basis of local need, and that such matters should not be "frozen" into the Constitution.

It should be noted that rules affecting subject-matter divisions and the assignment of judges thereto, unlike rules of practice and procedure, would be subject not only to disapproval by the General Assembly, but also to amendment.

(B) (4) The recommendation contained in this paragraph gives the Supreme Court a constitutionally recognized and continuing advisory role in the matter of determining the number of judges (except Supreme Court justices) and magistrates, and in the make-up of judicial districts, while leaving the ultimate decision to the General Assembly. The committee recommends this provision in the belief that such a role is a proper, if not necessary, concomitant of a judicial system in which the ultimate administrative responsibility lies with the Supreme Court.

The committee believes that the determination of the number of judges and judicial officers and the determination of the need to adjust judicial districts to meet changed circumstances is an area in which the Court, being charged with the ultimate responsibility of administering the judicial system and having unique knowledge of its needs, can and should make a major contribution. The Court's recommendations for change should be treated with appropriate respect. However, since any changes in this area would, with near certainty, involve both fiscal and political considerations, the

committee believes that the General Assembly--which is essentially political in nature and would retain fiscal control by virtue of its power to appropriate funds--should retain the power to determine which changes are implemented. Parenthetically, a number of states--including Florida and Pennsylvania--have adopted provisions of similar import as part of recent revisions of their respective judicial articles.

The last sentence of this paragraph, which prohibits any change from vacating the office of any judge until the end of his term, preserves the protection afforded by present section 15, whose repeal is recommended in this report. No substantive change from the equivalent provision of section 15 is intended.

Article IV

Section 6. Selection of Justices and Judges; Compensation; Retirement; Assignment of Retired Judges

Present Constitution

(A)(1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All

votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

Committee Recommendation

The committee recommends that this section be amended to read as follows:

Section 6 (A) (1) ~~The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.~~ THE FULL TERMS OF THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT, OF THE JUDGES OF THE COURTS OF APPEALS, AND OF THE JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE SIX YEARS.

(2) (a) ~~The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.~~ WHENEVER A VACANCY OCCURS IN THE OFFICE OF CHIEF JUSTICE, OR ANY JUSTICE OF THE SUPREME COURT, OR OF ANY JUDGE OF A COURT OF APPEALS, OR WHEN ANY ADDITIONAL JUDGESHIP ON THE SUPREME COURT OR A COURT OF APPEALS IS ESTABLISHED BY LAW, THE GOVERNOR SHALL FILL THE SAME BY APPOINTMENT UNDER AN APPOINTIVE-ELECTIVE SYSTEM, FROM A LIST OF NOT FEWER THAN THREE QUALIFIED PERSONS, WHOSE NAMES SHALL BE SUBMITTED BY A JUDICIAL NOMINATING COMMISSION.

(b) THE NUMBER OF JUDICIAL NOMINATING COMMISSIONS AND THEIR ORGANIZATION; THE NUMBER, METHOD OF SELECTION, COMPENSATION AND EXPENSES, QUALIFICATIONS,

AND TERMS OF OFFICE OF MEMBERS OF EACH COMMISSION; AND PROVISIONS FOR FILLING OF VACANCIES, SHALL BE ESTABLISHED BY LAW; PROVIDED, THAT NOT MORE THAN ONE HALF OF THE MEMBERS OF A COMMISSION SHALL BE FROM THE SAME POLITICAL PARTY AND LESS THAN ONE HALF OF THE MEMBERS OF A COMMISSION SHALL BE MEMBERS OF THE BAR OF OHIO; AND PROVIDED THAT THE TERMS OF OFFICE OF SUCH MEMBERS SHALL BE STAGGERED. HOLDERS OF PUBLIC OFFICE MAY SERVE ON A JUDICIAL NOMINATING COMMISSION.

(c) ANY JUSTICE OR JUDGE OF THE SUPREME COURT OR A COURT OF APPEALS WHO IS APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM ESTABLISHED PURSUANT TO THIS CONSTITUTION SHALL SERVE AN INITIAL TERM OF TWO YEARS FROM THE DATE OF HIS APPOINTMENT AND UNTIL FEBRUARY FIFTEENTH FOLLOWING THE NEXT GENERAL ELECTION OCCURRING IN AN EVEN-NUMBERED YEAR. NOT LESS THAN SEVENTY-FIVE DAYS PRIOR TO SUCH GENERAL ELECTION, ANY SUCH JUSTICE OR JUDGE MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF. THE QUESTION OF HIS CONTINUING IN OFFICE FOR A FULL TERM SHALL BE SUBMITTED TO THE ELECTORS AT SUCH GENERAL ELECTION AS PROVIDED BY LAW. IF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION AS TO ANY SUCH JUSTICE OR JUDGE VOTE "YES" HE SHALL BE CONTINUED IN OFFICE. IF A MAJORITY VOTING ON THE QUESTION VOTE "NO" THERE SHALL BE A VACANCY IN SAID OFFICE ON THE FIFTEENTH DAY OF FEBRUARY FOLLOWING THE ELECTION, WHICH VACANCY SHALL BE FILLED AS PROVIDED IN DIVISION (A) (2) (a) OF THIS SECTION.

(d) THE CHIEF JUSTICE, ANY JUSTICE OF THE SUPREME COURT, OR ANY JUDGE OF A COURT OF APPEALS SERVING ON THE EFFECTIVE DATE OF THIS AMENDMENT IS ENTITLED, UNLESS REMOVED FOR CAUSE, TO REMAIN IN OFFICE. NOT LESS THAN SEVENTY-FIVE DAYS PRIOR TO THE ELECTION PRECEDING THE END OF THE TERM TO WHICH HE WAS ELECTED OR APPOINTED, HE MAY FILE A DECLARATION OF CANDIDACY TO SUCCEED HIMSELF. THE QUESTION OF HIS CONTINUING IN OFFICE FOR A FULL TERM, TO BEGIN ON THE DAY PROVIDED BY LAW UNDER WHICH HE WAS ELECTED OR APPOINTED, SHALL BE SUBMITTED TO THE ELECTORS AT SUCH GENERAL ELECTION, AS PROVIDED BY

LAW. IF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION AS TO ANY SUCH JUSTICE OR JUDGE VOTE "YES" HE SHALL BE CONTINUED IN OFFICE. IF A MAJORITY OF THOSE VOTING ON THE QUESTION AS TO ANY JUSTICE OR JUDGE VOTE "NO" THERE SHALL BE A VACANCY IN SAID OFFICE AT THE END OF THE TERM, WHICH SHALL BE FILLED AS PROVIDED IN DIVISION (A) (2) (a) OF THIS SECTION.

3 (a) The judges of the courts of common pleas ~~and the divisions thereof~~ shall be elected by the electors of the counties, OR districts, ~~or, as may be provided by law, other subdivision,~~ in which their respective courts are located, ~~for terms of not less than six years,~~ and each judge of a court of common pleas ~~or division thereof~~ shall reside during his term of office in the county, OR district, ~~or subdivision~~ FROM WHICH HE IS ELECTED ~~in which his court is located.~~ IN CASE THE OFFICE OF ANY JUDGE OF A COURT OF COMMON PLEAS BECOMES VACANT BEFORE THE EXPIRATION OF THE TERM FOR WHICH HE WAS ELECTED, THE VACANCY SHALL BE FILLED 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 WHICH OCCURS MORE THAN FORTY DAYS AFTER THE VACANCY OCCURS EXCEPT 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.

(b) (1) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, JUDGES OF ANY COURT OF COMMON PLEAS MAY BE APPOINTED UNDER AN APPOINTIVE-ELECTIVE SYSTEM, UPON THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING ON THE QUESTION WITHIN THE TERRITORIAL JURISDICTION OF THE COURT. THE METHOD OF SUBMISSION SHALL BE PROVIDED BY LAW.

(2) THE PROVISIONS OF DIVISION (A) (2) GOVERNING AN APPOINTIVE-ELECTIVE SYSTEM FOR THE CHIEF JUSTICE, JUSTICES OF THE SUPREME COURT AND JUDGES OF THE COURTS OF APPEALS SHALL APPLY TO JUDGES OF ANY COURT OF COMMON PLEAS MADE SUBJECT TO SUCH A SYSTEM BY THE ELECTORS, EXCEPT THAT THE LIST SUBMITTED BY

THE JUDICIAL NOMINATING COMMISSION SHALL CONTAIN NOT FEWER THAN TWO NAMES, AND THE DATE OF COMMENCEMENT AND EXPIRATION OF THE TERM OF EACH COMMON PLEAS JUDGE SHALL BE PROVIDED BY LAW.

(4) ~~Terms of office of all judges shall begin on the days fixed by law; and laws shall be enacted to prescribe the times and mode of their election.~~

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and ~~divisions thereof and~~ of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. THE COMPENSATION OF ALL JUDGES OF THE COURTS OF COMMON PLEAS SHALL BE THE SAME. ~~Common pleas judges and judges of divisions thereof and judges of all courts of record established by law shall receive such compensation as may be provided by law.~~ Judges shall receive no fees or perquisites, EXCEPT SUCH PERQUISITES AS MAY BE PROVIDED BY LAW, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for an elective office, except a judicial office, ~~under the authority of this state, given by the general assembly or the people~~ shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he ~~shall assume~~ ASSUMES the office and ~~enter~~ ENTERS upon the discharge of its duties, he ~~shall have~~ HAS attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing for retirement benefits

for judges.

Comment

Introduction

This section is extensively amended and provides for the selection of all justices of the Supreme Court and the judges of the courts of appeals under an appointive-elective, or merit, system of judicial selection. Judges of common pleas courts continue to be elected, but the General Assembly is required to provide a procedure by which, upon the vote of the people served by a particular court, the judges of such court are selected under an appointive-elective system.

There are five methods of judicial selection currently in use in the United States. These are:

1. Gubernatorial appointment, usually with the approval of the legislature.
2. Legislative election.
3. Nonpartisan election, although partisan primaries may be used for nomination. (This is the largest single group.)
4. Partisan election.
5. Appointive-Elective Method. This method, which has come to be known popularly as the Merit Plan or Missouri Plan, has three essential elements: first, slates of candidates are chosen by a nonpartisan nominating commission usually composed of some designated members of the judiciary, several lawyers appointed or elected by bar associations, and several lay persons appointed by the governor; second, the governor selects a judge from the list of names submitted by the commission; finally, voters review the appointment by means of a referendum in which the judge runs unopposed on his record.

U.S. History

Immediately following the American Revolution, the thirteen original states entrusted the selection of judges either to their respective legisla-

tures, or to the governor acting with the approval of a specified committee or council. Gubernatorial appointment or legislative election, where in use today, is confined to some of the thirteen original states.

The concept of the election of judges did not gain momentum until the mid-nineteenth century, and is a by-product of Jacksonian democracy. Most of the states which opted for election thereafter elected their judges on a partisan basis. The de facto domination of judges by political bosses, the worst example of which probably is the Tweed Ring which controlled the City of New York from 1866-1871, brought sharp demands for changes in the judicial selection process. Near the turn of the century, the Progressive Movement resulted in a massive switch in those states which elected their judges, to "nonpartisan" election which was, in theory at least, to correct the worst shortcomings of partisan election.

However, many considered the change from partisan election to nonpartisan election more a matter of form than of substance, since judicial candidates elected on a "nonpartisan" ballot were--and are--chosen through the political party machinery and in many instances could readily be identified with political parties.

The concept which became known as the appointive-elective, merit or Missouri plan was first advanced in 1913 by Albert M. Kales of Northwestern University Law School. Its intent was to preserve the best features of both the appointive and elective systems while minimizing the worst features of both -- the best feature of the appointive system being the accountability of the appointing authority for its appointments; the best feature of the elective system being the retention by the voters of the ultimate power to decide the worthiness of an appointee. The unique feature added to the appointive and elective concepts by the Kales proposal was the nonpartisan nominating commission to generate and submit a list of qualified nominees to the appointing authority.

The Kales proposal was championed from its inception by the American Judicature Society, which was founded principally for that purpose. The idea met with limited success until, in 19[illegible], the American Bar Association adopted the principles of the Kales proposal as its own. Merit selection thereafter became an integral part of the A.B.A. Model Judicial Article (1962) and Standards for Court Organization (1974). It is also endorsed in the National Municipal League's current Model State Constitution, and by several other groups interested in judicial reform. Missouri in 1940 was the first state to adopt the concept in a constitution. Today, Alaska, Colorado, the District of Columbia, Iowa, Kansas, Missouri, Nebraska, Utah and Wyoming apply merit selection "across the board" to all their courts. Several states apply it to their appellate courts, and in several other states nominating commissions have been established, either by executive order, or locally, on a voluntary basis. Altogether, there are approximately thirty jurisdictions which employ the merit plan in the selection of their judges as of this time. According to a recent American Judicature Society study, the size of nominating commissions varies from five to twenty-four members. Commissions may be statewide, districtwide or local. Significantly, no jurisdiction has changed to anything but merit selection in the post-World War II era.

Ohio History

From 1803 to 1851, Ohio's judges were appointed by the General Assembly. From 1851 to 1911, they were elected on partisan ballots. From 1911 to the present, they have been elected on nonpartisan ballots. By Executive Order dated June 14, 1972, former Governor John J. Gilligan voluntarily established a system of nominating commissions for Ohio courts, under which several judges were appointed. On January 17, 1975, Governor James A. Rhodes revoked this order, and others under which members of the various commissions were appointed, having determined that such a nominating mechanism "represents a sharing of the Governor's appointing authority not clearly authorized by the Consti-

tution of the State of Ohio."

Recommended Changes

The committee heard extensive testimony and received substantial amounts of staff material outlining the pro's and con's of the five methods of judicial selection prevalent in the United States today. It has concluded that while the merit plan is not free of possible criticism, the essential elements of the plan, particularly the nonpartisan nominating commission, are most likely to lead to a thorough screening of potential judicial candidates -- screening being pivotal in the selection process, since the performance of a judge once he has been appointed is, as a practical matter, extremely difficult to assess under normal circumstances. Thus, the committee recommends the adoption of merit selection for all appellate courts and, on a "local option" basis, for courts of common pleas.

The provisions of the proposed section 6 are discussed in more detail below, the lettering of each paragraph corresponding to the respective division of the proposed section:

(A) (1) This paragraph fixes the terms of all justices of the Supreme Court, including the Chief Justice, all judges of the courts of appeals, and all judges of the Courts of Common Pleas, at six years, instead of the present "not less than six years." The committee views a retention election as being of such significance that the terms of justices or judges should be fixed by the Constitution in order to assure that such elections occur at constitutionally prescribed intervals.

(A) (2) (a) This paragraph requires the Governor to fill any future vacancy on the Supreme Court and courts of appeals, and any additional judgeships on such courts, under an appointive-elective system, from a list of not fewer than three nominees per vacancy, submitted by a judicial nominating commission. The committee feels that at least for appellate courts the list of nominees ought to consist of not fewer than three names.

(A) (2) (b) This paragraph prescribes the mechanism of establishing judicial nominating commissions, in which rather wide latitude is given to the General Assembly. Two provisions are particularly noteworthy: (1) Less than half of the members of any commission may be members of the bar of Ohio and (2) holders of public office may be members of such commissions. The first of these provisions is, to the knowledge of the committee, unique among the approximately thirty jurisdictions which employ an appointive-elective system of judicial selection. The committee believes that requiring that fewer than half the members of any commission be members of the bar is the most effective constitutional means of assuring that nominating commissions do not become bar-dominated, an apprehension which is commonly voiced in the literature on the subject.

The committee also believes that holders of public office ought not, ipso facto, be excluded from membership on judicial nominating commissions. Such officials may, in fact, contribute valuable perspectives during the process of selecting nominees, stemming from their practical experience in public life. Further, the committee believes that judicial nominating commissions which derive their existence from the Constitution as implemented by law will have a tendency to isolate public officers who may become members of such commissions -- as well as other members -- from undue outside influence.

(A) (2) (c) This paragraph sets forth several requirements for justices or judges of the Supreme Court or courts of appeals who are appointed under an appointive-elective system established under the Constitution as distinguished from any who may have been appointed by a nominating commission established by executive order, who would be treated as incumbent judges at the time the proposed amendment became effective. Like common pleas court judges, all justices or judges of appellate courts would be subject to an initial term of two years. The terms of all appellate judges first appointed under a

constitutionally established appointive-elective system would end, uniformly, on the fifteenth day of February following a retention election. Any such judge would have to declare his intention to stand for retention in office no later than 75 days prior to such election -- the latter to give the Secretary of State sufficient time to certify the form of the ballot. Under another proposal contained in this report, the terms of judges in office on the effective date of this amendment, on the other hand, would be determined by the law under which they were originally elected. A majority of the vote of those voting on the question would be required for retention in office, and, if the office of a judge became vacant as a result of a majority "No" vote at a retention election, the Governor would be required to fill it from a list submitted by the appropriate nominating commission, in the same manner as if he were making an initial appointment.

(A) (2) (d) This paragraph provides that the Chief Justice, any justice of the Supreme Court, and any judge of a court of appeals serving on the effective date of this proposed amendment is entitled to remain in office, unless removed for cause. Any such justice or judge would have to declare his intention to stand for retention 75 days before the election preceding the end of the term for which he was originally elected, and his succeeding term would begin on the day fixed by the law under which he was elected. Any vacancy occurring as the result of a majority "No" vote at a retention election would be filled by the Governor from a list submitted by the appropriate nominating commission in the same manner as provided for judges who were initially appointed under the appointive-elective system.

(A) (3) (a) This paragraph continues the present constitutional requirement that judges of courts of common pleas be elected by the electors of the counties or districts in which their respective courts are located, and that such judges continue to reside within such county or district during their terms of office. References to divisions of common pleas courts are deleted, because

divisions are created by Supreme Court rule, subject to amendment or rejection by the General Assembly, under another section of the committee's recommendations. References to "subdivisions" are deleted because they are confusing, having no constitutional definition, and because a majority of the committee believes that judges of courts of common pleas, who exercise at least county-wide jurisdiction, ought not to be elected only by the electors of a subdivision within counties or districts as the word "subdivision" is presently, or may in the future, be defined by law.

The method of filling vacancies on common pleas courts is also set forth, and is a transfer, with some amendments whose sole purpose is to achieve consistency of style, of the provisions of present section 13 of Article IV.

(A) (3) (b) (1) This paragraph prescribes that, notwithstanding any other provision of Article IV, judges of any court of common pleas may be appointed under an appointive-elective system, if the majority of the electors voting on the question within the territorial jurisdiction of a court vote for the adoption of such a system for their common pleas court. In effect, this gives the voters a "local option" on the question. This division also prescribes that the method of submitting the question to the voters shall be prescribed by law.

(A) (3) (b) (2) This paragraph makes every provision governing an appointive-elective system for appellate judges applicable to common pleas judges selected under an appointive-elective system, with two exceptions. The first exception is that the list of nominees submitted by a nominating commission for each common pleas judgeship must contain a minimum of two names, while the list of nominees for each appellate judgeship must contain a minimum of three names. The second exception is that the General Assembly has the authority to fix the beginning and ending dates of common pleas judges' terms,

while the beginning and ending dates of appellate judges' terms are fixed in the Constitution. The first of these exceptions is recommended to accommodate the possibility that the number of individuals available as, or interested in becoming, potential nominees for a common pleas judgeship may be smaller than the number of such potential nominees for an appellate judgeship. The second exception is recommended in order to give the General Assembly additional flexibility in regard to common pleas judges' terms, which flexibility could be especially useful in providing continuity of judicial personnel on metropolitan area courts having a large number of judges. As an example of this flexibility, the General Assembly could provide that the terms of some of the judges on such courts begin in odd-numbered years.

The provisions of present (A) (4), referring to the terms of judges and the mode of their election, are deleted because these subjects are covered in other sections of the committee's recommendations.

(B) This division, which refers to the compensation of judges and perquisites, is amended in two substantive particulars: (1) It provides that the compensation of all common pleas judges shall be the same and (2) It prohibits the receiving of perquisites, except as authorized by law. The first of these is based on the assumption that the workload inequities which may be found to exist under Ohio's present common pleas court structure will be corrected legislatively, to the extent that this is reasonably possible. The implementation of this proposed amendment, of course, will require that the present formula system of determining common pleas judges' salaries be repealed and a new salary schedule be adopted. The second substantive amendment of this division in effect permits the receipt of such perquisites as are authorized by law. The committee does not view perquisites as necessarily inappropriate, but believes that it is more honest to recognize and sanction them in the Constitution.

The last sentence of this division, which refers to votes cast for judge, is broadened to state that votes cast for any judge for any elective office except a judicial office shall be void. The present section voids such votes only if cast for an office "under the authority of this state." The proposed amendment thus applies the rule to any elective office other than a judicial office, whether local, state or national. The sentence makes a simple statement concerning the evil it is intended to prevent, namely the election of a judge to a partisan political office while he is still a judge -- a statement fully in accord with the Canons of Judicial Ethics, which even forbid a judge to become a candidate for non-judicial office.

(C) This division, which contains the so-called "mandatory retirement provision", is amended only to conform it to contemporary bill-drafting practice, and no substantive change is intended.

ARTICLE IV

Section 7

Present Constitution

Vacant. Former Section 7 repealed effective May7, 1968.

Committee Recommendation

The committee recommends the adoption of a new section 7 to read as follows:

Section 7. JUDGES SHALL DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES, BUT THE COURTS OF COMMON PLEAS MAY APPOINT MAGISTRATES, WHO SHALL BE ATTORNEYS LICENSED TO PRACTICE LAW IN THE STATE, AND WHO NEED NOT DEVOTE THEIR FULL TIME TO THE PERFORMANCE OF JUDICIAL DUTIES. THE NUMBER OF MAGISTRATES WHO MAY BE APPOINTED BY EACH COURT OF COMMON PLEAS, AND THEIR COMPENSATION, SHALL BE PRESCRIBED BY LAW. THE MANNER OF THE APPOINTMENT AND REMOVAL OF MAGISTRATES, AND THEIR DUTIES, SHALL BE PRESCRIBED BY THE SUPREME COURT PURSUANT TO ITS POWER OF GENERAL SUPERINTENDENCE OVER ALL COURTS IN THE STATE.

Comment:

The committee recommends the establishment of a full-time judiciary, aided by a class of judicial officers to be called magistrates.

Ohio's appellate and common pleas court judges are, without exception, full-time judges now. However, there are part-time municipal court judges and part-time county court judges. The committee recommends that the courts of limited jurisdiction (including the Police Court of Ottawa Hills, whose judge is also part-time) eventually be absorbed into the existing common pleas courts as provided by law. The committee believes that a full-time judiciary, free from the distractions and pressures of having to maintain a private practice, and at all times available to meet the needs of judicial business, best serves the interests of the administration of justice. Full-time judges, equal in rank and pay, have a tendency to raise the morale of the court on which they serve.

At the same time, the committee recognizes the reluctance of many full-time judges to devote a large portion of their working hours to relatively minor matters, which could be competently handled by a qualified individual other than a judge, with adequate legal training. There is a need to provide for both an adequate number

of such individuals within the framework of the trial court and an adequate number of places within the territorial jurisdiction of such a court to make the disposition of these minor matters fair, relatively inexpensive, and convenient for the population to be served. For this purpose, the committee recommends the establishment of the office of magistrate in the Constitution. Such magistrates would be appointed, under rules promulgated by the Supreme Court, by the respective common pleas courts. Supreme Court rules would also prescribe their duties and the method of their removal. The general outline for the establishment of this office and the method of selection of such officers is consistent with Standards 1.12 (b) and 1.26 (b) of the Standards Relating to Court Organization. As stated in the commentary to section 1.12 (b):

> "There is a wide range of functions that judicial officers can perform. These include conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as a referee or master, hearing short causes and motions, and sitting in lieu of judges by stipulation or in emergency. These functions can be classified into two general types. The first is the hearing of parts or stages of larger proceedings that are before regular judges in their main aspects. The other is presiding over the trial of smaller civil and criminal matters, under the general authority and supervision of regular judges. In the latter capacity, the judicial officer would perform the functions now performed in many instances by judges of courts of limited jurisdiction. This arrangement economizes the time of the regular judges and recognizes the fact that smaller civil and criminal cases ordinarily do require different legal skills, experience, and authority, particularly the capacity to function fairly and efficiently in handling large volumes of cases. At the same time, it brings the trial of smaller

> cases within the ambit of the principal trial court and makes them subject to the supervision of its judiciary. It can serve also as a training ground for judicial advancement."

A number of states--including Hawaii, Idaho, Illinois, and North Carolina--have recently adopted some variation on the theme of magistrates within trial court structures. Each of these variations, however, has one thing in common with the others. The magistrate exercises authority through, and under the direct supervision of, the trial court of general jurisdiction. This is a departure from the essentially autonomous manner in which separate courts of limited jurisdiction--including those of Ohio-- have historically functioned. The committee recommendation made here would establish a flexible framework for a magisterial system which, if properly implemented, would be most convenient and economical for the people. It would also remove a traditional roadblock to a truly unified trial court system.

While the committee believes that the manner of appointment and removal of magistrates, and the prescription of their duties, ought to be regarded as essentially an internal matter of the judicial department, it also believes that the matter of the number of such magistrates and their salaries should be left to the ultimate decision of the General Assembly.

The committee believes that the recommendation for a full-time judiciary should be implemented at a time sufficiently in the future to permit a thorough study of its practical impact, so as to minimize the possible disruption in the delivery of justice, and of the careers tied to the present structure.

ARTICLE IV

Section 8.

Present Constitution

Vacant. Former Section 8 repealed effective May 7, 1968.

Committee Recommendation

The committee recommends the adoption of a new section 8 to read as follows:

Section 8. THE SALARIES OF ALL JUDGES AND EXPENSES OF THE JUDICIAL DEPARTMENT SHALL BE PAID FROM THE STATE GENERAL FUND AS PROVIDED BY LAW. THERE SHALL BE A UNIFIED JUDICIAL BUDGET AS PROVIDED BY LAW.

Comment:

The committee recommends the payment of all judicial salaries and expenses of the judicial department from the state general fund, under a unified judicial budget, as the most rational approach to the problem of financing. According to a study released by the U. S. Law Enforcement Assistance Administration and the U. S. Bureau of the Census, by 1970 at least seven states had adopted this method: (1) Alaska (93%); (2) Colorado (100%); (3) Connecticut (99%);(4) Hawaii (99%); (5) North Carolina (91%); (6) Rhode Island (99%); (7) Vermont (100%). According to a presentation at the National Conference of Court Administrators held in Columbus in mid-1973, at least one other state, Delaware, had adopted a unified judicial budget although it had not, as of that time, adopted complete state financing.

Since Ohio has no standard auditing or reporting procedures for this purpose, information on the total cost of its judicial system is, for all practical purposes, impossible to obtain. The problem arises not from the Supreme Court or the courts of appeals, which are, respectively, completely or to a large extent state-financed, and whose expenses are, therefore, completely or very nearly ascertainable. The difficulties arise in attempting to determine the expenses and incomes of the trial courts. For example, a recent Legislative Service Commission study was conducted to determine the income and expenses of these courts--common pleas, municipal, county, and mayors' courts. The study was based on an examination of the reports required to be filed by county auditors with the Auditor of State for calendar 1972. Mayors'

courts, as an example, showed no expenses for that year, while showing a total income of approximately $10 million. This appears to indicate that the expenses of mayors' courts (the pro rata share of a mayor's salary and the salary of a deputy or secretary, the cost of overhead, etc.) were simply not attributed to court expense. In this study, it also proved impossible to determine the state's share of the income of common pleas courts from such sources as fines collected for violation of state statutes, because these amounts, which are deposited in the state general fund, are not shown as separate items in the local reports, and neither the State Auditor nor the State Treasurer keeps a separate account of them. It appears proper to conclude from this study, however, that the total expenses of common pleas courts, taken as a whole, exceeded the income of such courts by some amount while the income of the courts of limited jurisdiction, taken as a whole, exceeded their expenses by approximately $20 million in 1972. But the practical impossibility of determining the exact cost of the trial court system for that year--or any other--in this committee's view underscores the evident need for uniform accounting and financial reporting in the judicial department and the desirability of a unified judicial budget. However, aside from the question of whether it is the proper function of any court to be a producer of revenue, it is a practical fact that some legislative solution must be found to replace the revenues which would be lost to political subdivisions if the state simply took over financing and at the same time deprived its political subdivisions of the revenues they now apparently derive from the courts of limited jurisdiction. A number of arrangements between the states and their political subdivisions exist in those states which have adopted unified budgets and state financing, and it is not the purpose of this report to suggest that one arrangement is preferable to another, but merely to suggest that a thorough study of these alternatives, and of the statutory changes needed to implement the chosen one, be undertaken before the constitutional recommendation made here is implemented.

For the above reason, and in recognition of the need for further study of the impact of switching to a full-time judiciary as suggested in the comment to the

proposed new section 7, the committee recommends that the schedule to be transmitted by the Commission to the General Assembly with the report on Article IV specify the postponement of the effective dates of proposed new sections 7 and 8 to a time by which, in the Commission's view, the desired objectives can be accomplished.

ARTICLE IV

Section 9.

Present Constitution

Vacant. Former section 9 repealed effective September 3, 1912.

Committee Recommendation

The committee recommends that present section 20 be retained, and amended by being renumbered section 9.

Comment:

See comment following present section 20.

Section 13. Filling of Vacancies

Present Constitution

> 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 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.

Committee Recommendation

The committee recommends that this section be repealed and its provisions, with modifications, be transferred to proposed section 6 (A) (3) (a).

Comment:

This section presently prescribes the manner in which a vacancy in any judicial office is filled. Under the committee's recommendations contained in the proposed section 6, any vacancy on the Supreme Court and any court of appeals, as well as additional judgeships on any such courts, would be filled by the Governor from a list of no fewer than there nominees. Likewise, a vacancy on any common pleas court which, as the result of the majority vote of the electors served by such court was subject to an appointive-elective system of judicial selection, would be filled by the Governor from a list of nominees submitted by a judicial nominating commission, as provided by law. However, unless the electors served by such court exercise the "local option," judges of courts of common pleas will continue to be elected. In the committee's view the number of courts of common pleas whose judges are elected will constitute the majority of such courts for the forseeable future. As long as there are elected common pleas judges, there will continue to be a need for a provision governing the filling of vacancies on such courts, such as is contained in section 23. The committee recommends the transfer of the provisions of section 23 to proposed section 6, since the procedure prescribed in section 23 would apply only to elected common pleas judges.

Aside from limiting its operation to elected common pleas judges, no substantive change is intended.

Section 15. Changes in number of judges, courts, districts, etc.

Present Constitution

> Section 15. Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

Committee Recommendation

The committee recommends that this section be repealed.

Comment:

The repeal of this section was previously recommended to the General Assembly by the Commission in Part 1 of its report, relating to the administration, organization, and procedures of the General Assembly,on the basis that the two-thirds requirement contained in it was "an outmoded restriction, inconsistent with the power of the General Assembly to adopt enactments affecting courts specifically named in the Constitution or as may be established by law." (Part 1, page 64). This committee shares that view, and offers as an additional reason for repeal the fact that the last sentence of proposed section 5 (B) states as follows: "No decrease in the number of judges shall vacate the office of any judge before the end of his term." That portion of section 15 which would save the office of any judge would therefore be superfluous, as would that portion which states that any existing court heretofore created by law shall continue in existence until otherwise provided by law, since such courts (except for those specifically authorized in proposed section 1, which could be saved in a schedule) would cease to exist as of the effective date of proposed section 1.

ARTICLE IV

Section 17. Removal of judges by concurrent resolution

Present Constitution

> Section 17. Judges may be removed from office by concurrent resolution of both Houses of the General Assembly, if two-thirds of the members, elected to each House, concur therein; but, no such removal shall be made, except upon complaint, the substance of which, shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.

Committee Recommendation

The committee recommends that this section be repealed.

Comment:

This section, which became part of the Constitution in 1851, has never been used. There is no equivalent provision prescribing the same method of removal for any other class of public officers. The committee considers its presence in the Constitution as superfluous, because there is another constitutional method available--namely impeachment under section 23 of Article II--to accomplish the same result, as well as one purely statutory method, one statutory-rule hybrid, and one purely rule-based method of removal. In the committee's view, these methods are sufficient.

Revised Code Sections 3.07 to 3.10 set forth one statutory method, which is applicable to all public officers, and which is instituted by the filing of a complaint in the appropriate court of common pleas or court of appeals. Parenthetically, this is the only method which can involve a citizen directly as the initiator of removal proceedings.

The second statutory method the General Assembly has authorized for the removal of unfit judges is found in Revised Code Sections 2701.11 and 2701.12. This method applies exclusively to judges, and these statutes are expressly subject to the rules of the Supreme Court and outline the procedure more fully implemented by Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio. Briefly stated,

Revised Code Section 2701.11, which also concerns the retirement and suspension of judges who are physically or mentally disabled, provides for a proceeding before a commission of five judges, appointed by the Supreme Court, who may cause the removal of a complained-of judge when cause, as defined in Revised Code Section 2701.12, exists.

Finally there is the purely rule-based procedure outlined in Rules IV and V of the Supreme Court Rules for the Government of the Bar of Ohio. Rule IV binds all attorneys to the Code of Professional Responsibility and all judges to the Canons of Judicial Ethics. New standards for judicial behavior became effective in December 1973, as the Code of Judicial Conduct. The procedure for imposing discipline under these sets of standards (which involves a seventeen member Board of Commissioners on Grievances and Discipline) is set out in Rule V, provides yet another approach to the removal of unfit judges.

In actual practice, resignations of judicial office on the part of unfit judges have have in recent years been accomplished almost exclusively without formal proceedings of any kind, under threat of disciplinary action.

ARTICLE IV

Section 18. Powers and jurisdiction at chambers

Present Constitution

> Section 18. The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

Committee Recommendation

The committee recommends that this section be repealed.

Comment:

The committee views this provision as unnecessary. It became part of the Constitution in 1912, and the exact reason for the addition is uncertain, although its aim appeared to be the prevention of the issuance of ex parte orders in chambers. However, since the powers of any court are derived either from the Constitution, the statutes, or to a more limited extent, are inherent, this provision is, in one sense unduly limiting, and in another sense simply surplusage. It should, therefore, be removed from the Constitution.

ARTICLE IV

Section 19. Courts of conciliation

Present Constitution

> Section 19. The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment, in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Committee Recommendation

The committee recommends that this section be repealed.

Comment:

This provision also became part of the Constitution in 1912. The Debates of the Convention shed little light on its intended purpose, although the general tenor of the discussion which is recorded there indicates a desire to provide a forum in which parties could settle legal differences by means short of a formal trial. It is interesting to note that the statutory references following this section in Page's Ohio Revised Code are to Revised Code Section 2711.01 et seq., which govern arbitration clauses in written contracts generally, and to Revised Code Section 4129.02 et seq. which govern the powers and duties of the Industrial Commission and procedures before that body. The committee believes that the validity of the foregoing statutes would not be affected by a repeal of Section 19. And, although courts of conciliation as such, never have been established in Ohio, there is no reason to believe that a subject-matter division serving the same function--that is, the settlement of disputes in a less formal atmosphere and with simplified rules and procedures--could not be established within the structural framework for common pleas courts which the committee recommends in this report.

ARTICLE IV

Section 20. Style of process; etc.

Present Constitution

> Section 20. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude "against the peace and dignity of the State of Ohio."

Committee Recommendation

The committee recommends that this section be amended by being renumbered section 9, to read as follows:

Section ~~20~~ 9. The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the State of Ohio; and all indictments shall conclude, "against the peace and dignity of the State of Ohio."

Comment:

This section prescribes certain formalities to be followed in relation to the style of process and the form of indictments, and states that all prosecutions shall be carried on in the name and by the authority of the State of Ohio. It states sound constitutional principles, and its parameters are well known and understood. The committee believes that the section should be retained, but, because section 9 is presently vacant, that the section should be renumbered section 9. It would thus become the last section in the revised Article IV as recommended by the committee. No substantive change is intended.

ARTICLE IV

Section 22. Supreme court commission

Present Constitution

Section 22. A commission, which shall consist of five members shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of, shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the Governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the Governor, but in such last case, such appointments shall expire at the end of the next session of the General Assembly. The General Assembly may, on application of the supreme court duly entered on the journal of the court and certified,

provide by law, whenever two-thirds of such house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

Committee Recommendation

The committee recommends that this section be repealed.

Comment:

The Legislative-Executive Committee, and the Commission itself, have already recommended the repeal of this section, which was adopted in 1875 to alleviate extraordinary circumstances in the workload of the Supreme Court. Two such commissions were actually established--both in the last century. The previous recommendation of the Legislative-Executive Committee and the Commission was accepted by the General Assembly and placed on the ballot in May 1973, at which time it was defeated, apparently as a result of inadequate voter information. However, this committee concludes that the reasons initially given in support of the original recommendation to repeal the section are valid, and for that reason renews the recommendation.

ARTICLE IV

Section 23. Service of judge on more than one court.

Present Constitution

> Section 23. Laws may be passed to provide that in any county having less than forty thousand population, as determined by the next preceding federal census, the board of county commissioners of such county, by a unanimous vote or ten per cent of the number of electors of such county voting for governor at the next preceding election, by petition, may submit to the electors of such county the question of providing that in such county the same person shall serve as judge of the court of common pleas, judge of the probate court, judge of the juvenile court, judge of the municipal court, and judge of the county court, or of two or more of such courts. If a majority of the electors of such county vote in favor of such proposition, one person shall thereafter be elected to serve in such capacities but this shall not affect the right of any judge then in office from continuing in office until the end of the term for which he was elected.
>
> Elections may be had in the same manner to discontinue or change the practice of having one person serve in the capacity of judge of more than one court when once adopted.

Committe Recommendation

The committeerecommends that this section be repealed.

Comment:

The overall concept of the committee's recommendations for a Revised Article IV is the establishment of a three-tier court structure in which there would be only one level of trial courts of general subject matter jurisdiction, namely, the courts of common pleas. It is contemplated that existing county and municipal courts, and the lone police court, would be absorbed into the common pleas court structure, and mayors' courts would be abolished. The creation of subject matter divisions, and the assignment of judges to such divisions, would be governed by Supreme Court rule, subject to amendment or rejection by the General Assembly. The provisions of section 23 are inconsistent with this concept, and for that reason the committee recommends the repeal of this section.

Memorandum

To: Members of the Ohio Constitutional Revision Commission
From: Don W. Montgomery, Chairman, Judiciary Committee
re: Letters commenting on the report of the Judiciary Committee
Date: May 29, 1975

Enclosed are six letters received by me or the staff concerning the report of the Judiciary Committee. These letters are from the following individuals:

1. Geoffrey C. Hazard, Jr., the reporter for the A. B. A. Standards Relating to Court Organization.

2. The Honorable Richard B. Metcalf, Probate Judge of Franklin County. *

3. John T. Milligan, Esq., a member of the Trumbull County Bar Association Executive Committee.

4. The Honorable George L. Forrest, Judge, Probate Division of the Seneca County Common Pleas Court.

5. Edwin F. Woodle, Esq., a member of the Cleveland bar and a member of the Modern Courts Committee.

6. James S. Wachs, Esq., Member, Board of Governors, Probate Division, O. S. B. A.

The purpose of this memorandum is to bring the issues raised in these letters specifically to the attention of the Commission. The comments contained in the memorandum are my own.

Geoffrey Hazard states that, in his view, "(t)he proposal...on the whole...(is) very well conceived and would bring Ohio near the forefront among jurisdictions that have sought to improve the structure and administration of their court systems." His letter also contains two points upon which I would like to comment: (1) providing a fixed term for a presiding judge instead of making his tenure dependent on the vote of his colleagues and (2) abolishing the elected office of clerk of courts. As to the first of these, the committee recommendation is in line with historical and constitutional precedent in Ohio. Whether a change would be appropriate is a matter for the Commission to decide. As to the second point, the committee concludes that, since the clerk of courts is not a constitutional officer but a statutory one, the status of the office is more appropriately left to the General Assembly. The committee proposal, therefore, specifically exempts the clerk and his employees from the operation of Supreme Court rules governing personnel.

The remaining letters concern mainly the proposal to eliminate the constitutional recognition of the probate division, and the proposal to eliminate the requirement that judges be elected specifically to divisions. Mr. Woodle's letter also raises some additional issues, and I address all of the issues in the order in which they are raised in his letter:

1. Section 2 (B) (2) (iii) of Article IV provides for appeals as of right to the Supreme Court "in cases involving questions arising under the Constitution of the United States or of this State." The Court presently construes this as requiring that a "substantial" constitutional question be involved before it will hear an

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* Note: This letter is not published because neither the original nor a copy was addressed to Mr. Montgomery or the Commission staff.

appeal. It is suggested that this provision be modified to require that, in any appeal dismissed by the Court, the dismissal "be accompanied by a reference to a prior reported decision which the Court considers to have disposed of the issue sought to be presented."

This matter was not raised as a problem area at any time during the Judiciary Committee's deliberations, and the Committee did not consider it. If the Commission is disposed to open this matter to debate at this point, research is required to determine whether the problem exists as described and whether any methods are needed, and what they might be, to screen frivolous or spurious appeals.

2. Section 3 (B) (3) of Article IV provides, in part, that no judgment resulting from a trial by jury may be reversed except by all three judges hearing the case. It is proposed that the following provision of Section 2321.18 of the Revised Code be added to the Constitution: "** nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case."

This matter, likewise, was not raised as a problem area during deliberations and was not passed upon by the committee. Mr. Woodle indicates that the above statute has been the subject of controversy. The full impact of the statute is not known, and no conclusions about its effect can be drawn without further research. It would be inadvisable to recommend writing the statute into the Constitution unless the effect of the statute had been established, and the Commission decided that it would be desirable to lock the statute into the Constitution.

3. It is suggested that there be no changes in the provisions of the Constitution directing the election of judges specifically to the probate courts. This suggestion is based on (1) the essentially administrative and supervisory nature of the work of a probate judge, (2) the need for the proper selection of, and job security for, the employees of the probate division and (3) the perceived need for personal knowledge by the probate judge of the qualifications of persons appointed as fiduciaries, appraisers and in other capacities.

This is an area which the Committee has considered in detail. It has concluded that both the constitutional establishment of a division, such as probate, and a requirement that all judges be specifically elected to divisions, introduces an element of undesirable inflexibility into judicial organization.

It must be pointed out that the Committee proposal does not result in the abolition of the probate division, nor of any other division presently existing in any common pleas courts. What the proposal does do is to remove the matter of the creation of divisions from the Constitution and makes it an essentially internal matter for the judicial system under Supreme Court rules, subject to approval, disapproval, or amendment by the General Assembly. Neither does the proposal make the rotation of judges mandatory. Therefore, should the Supreme Court conclude, and provide by rule, that the selection of judges specifically to the probate division, or any other division, is desirable, this could continue to be done. Further, there is nothing in the proposal which would threaten the job security of those persons who are employees of the probate division, since the persons now employed and supervised by the probate judge and employees of other divisions would be employees of the common pleas court, subject to the rules regarding the employment and duties of personnel promulgated by the Supreme Court. If anything, the positions of probate division employees, and

the positions of employees appointed and supervised by judges of the divisions of a court would be more secure, since their employment would be regulated by Supreme Court rule, and not be dependent on which judge or judges occupy seats on particular divisions at any one time.

As for the matter of the appointment of fiduciaries, appraisers and others by the judge of the probate division, there is nothing in the committee proposal which would prevent this from being continued as at present unless changed by statute.

In recommending the constitutional changes relative to the probate division and to the other divisions of the court of common pleas, the Committee was aware that some statutory changes would have to be made in implementing the recommendations, and the Committee recommends a delayed effective date for these recommendations for this reason.

4. It is suggested that the provision relating to the adoption of local rules not inconsistent with Supreme Court rules be further amended by adding, at the end of the section, the phrase "and which are not inconsistent with law." The rationale for the suggestion is the belief that there are some local rules which are, in fact, inconsistent with law.

Only Supreme Court rules which become effective supersede inconsistent state laws. Local rules, however, do not take such precedence. Should there be local rules inconsistent with law, such rules can be voided either by an appeal in a case where they are applied or in an action testing their validity. Therefore, a constitutional provision such as that suggested would appear to be surplusage, particularly in light of the fact that the insertion of the suggested language could do very little, if anything, to assure that inconsistent rules were not adopted.

5. Section 5 (B) (3) of the committee recommendation deals with the Supreme Court's rule-making power relative to the creation of subject-matter divisions of the common pleas court and the assignment of judges to such divisions. The section provides, in part that "(a)mendments to such proposed rules may be filed with the Clerk, either by the Court or the General Assembly, not later than the first day of May of that session. The General Assembly may amend such rules by concurrent resolution only."

It is suggested that the last-quoted sentence be rewritten to read as follows: "The General Assembly may amend one or more of such rules by concurrent resolution only". The suggestion is made with the thought that the language, as proposed, might lead to the conclusion that the General Assembly might accept or reject a set of rules submitted to it under this section <u>in toto</u>.

While the Commission may wish to consider such a language change, I point out that the committee does not intend the result that the General Assembly must either accept or reject every such rule submitted to it at any one point in time, and proposed Section 5 (B) (3), read as a whole, demonstrates this. For example, proposed Section 5 (B) (3) also provides, in part, that "(t)he General Assembly may not disapprove a rule which it has amended as provided in this section", thus indicating that the General Assembly may approve or disapprove each such rule individually, except a rule which it has amended.

In his letter, Mr. Woodle mentions the Rules of Criminal Procedure, which are covered in a separate part of Section 5, Section 5 (B) (1). His comments are, therefore, presumably directed to this part of the section. The General Assembly has no power to amend rules under that part of the section.

6. There is a suggestion that the use of the word "rule" in proposed Section 6 (B) (4) is misleading, since the Supreme Court would be given only an advisory role in the

matter of changes in the number of judges and magistrates and changes in common pleas and appellate districts.

The word "rule", as used in this context, is not a rule in the sense that it prescribes a standard by which lawyers, litigants or lower courts, or the General Assembly, are bound. The medium setting forth the criteria to be developed under this proposed section could, indeed, be called something else. However, the committee is concerned that whatever criteria are developed for purposes of this section be fixed ahead of time, and made public or published. And, since courts are accustomed to acting pursuant to rule, and expect adherence to rules from others, the use of the word appears appropriate here. It is contemplated that the rules incorporating the criteria upon which the Court's recommendations to the General Assembly are based would become part of the Rules of Superintendence.

7. There is a suggestion that the requirement that less than half the members of any nominating commission be members of the bar of Ohio be deleted from the recommendation referring to judicial nominating commissions. Whether this should be done is a matter of policy for the Commission to decide. The Committee's rationale for making the recommendations, as stated in its report, is to provide for one constitutional means to safeguard against bar domination of such commissions. Parenthetically, if the provision were removed, the General Assembly could make the same provision by law, since it would have the power to decide the composition of nominating commissions, except as limited by the Constitution.

8. It is suggested that the committee, through oversight, failed to provide for the filling of vacancies from a list submitted to the Governor by a judicial nominating commission, in Section 6 (A) (3) (a). This section refers to elected common pleas judges.

The committee report, in Section 6 (A) (3) (b), makes the selection of common pleas judges by the appointive-elective method optional as to common pleas judges, by a vote of the people affected. In jurisdictions where the people have voted for this method of selecting their common pleas judges, Section 6 (A) (3) (b) (2) would make it mandatory that a vacancy in the office of a common pleas judge be filled by the Governor from a list submitted by a nominating commission.

However, the Committee does not feel that it would be appropriate to impose a feature of the appointive-elective method in those instances where the people, by not exercising the option to convert to this method, chose to elect their common pleas judges. For this reason, the committee recommends no change in the method of filling vacancies in the office of an elected common pleas judge from that presently in the Constitution.

I wish to thank all of those who have taken the time to write in order to set forth their comments, suggestions, and positions, and I trust that their letters together with this memorandum will aid the Commission in its deliberations.

YALE LAW SCHOOL
NEW HAVEN, CONNECTICUT 06520

April 1, 1975

Julius J. Nemeth, Esquire
Research Attorney
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Mr. Nemeth:

I appreciate the opportunity to comment on the proposed revisions of the Ohio Judicial Article. The proposal seems to me, on the whole, very well conceived and would help bring Ohio near the forefront among jurisdictions that have sought to improve the structure and administration of their court systems. There are obviously a number of provisions, particularly that dealing with selection of judges, that represent a compromise with what many of us would think is the most desirable set of arrangements, but clearly this is the kind of resolution that has to be worked out on practical grounds in each state. Generally, the compromises seek well considered.

I have only two specific points:

1. On pages 11 and 15, the provisions dealing with selection of presiding judges prescribe that if the judges of the court cannot agree in selection of a presiding judge, the office shall go to the judge most senior in service. Could it not be provided, instead, that if they are unable to agree, the presiding judge should be appointed by the chief justice? In either event, I would have thought it better to provide for a term, of say three years, for a presiding judge. If a presiding judge is subject to removal as such at any time, he simply cannot undertake the vigorous action and long-range measures that good administration requires. Of course there are risks that a person so selected may turn out to be unsatisfactory, but on the other hand the judges voting on the question will most always avoid serious blunders, and the same is true for appointments by the chief justice.

2. Is there no possibility of eliminating the elected office of clerk of court? I realize the political strength of these officers and realize also that the office of elected county clerk is one that might well be retained. But it could be possible to retain the office of county clerk without perpetuating that aspect of his duties that have to do with the courts.

I hope these suggestions may be helpful. Every good wish to the Commission for success in its important work.

Sincerely,

Geoffrey C. Hazard, Jr.

GCH:9

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April 30, 1975

Mr. Julius J. Nemeth
Research Attorney
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Mr. Nemeth:

RE: The Ohio Constitutional Revision Committee - Courts of Common Pleas

At a meeting held April 29, 1975, the Trumbull County Bar Association Executive Committee unanimously passed a resolution opposing the proposed Constitutional Amendment as presently framed. We are advised by the Franklin County Probate Court that the purpose of the suggested amendment is to create a system of rotation of judges from Common Pleas to Probate to Domestic Relations to Juvenile.

This effect we consider most regressive in nature in that it is impossible for any one judge to acquire competency in all of the involved fields of law. We think it most desirable that we continue at least the limited specialization we have with separately elected probate judges who then are able to develop expertise in that field of law.

Accordingly, it is the recommendation of the Trumbull County Bar Association that the proposed Constitutional Amendment be defeated.

Very truly yours,

John T. Milligan

JTM/rmt

cc: The Honorable Reed S. Battin
The Honorable Richard B. Metcalf
Mr. James Annos

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

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May 7, 1975

Mr. Don W. Montgomery, Chairman
Subcommittee on the Judiciary to the
Ohio Constitutional Revision Commission

Dear Mr. Montgomery:

As a member of the Modern Courts Committee of the Ohio State Bar Association I have been favored with a copy of the report recently issued by the Subcommittee pertaining to a substantial revision of Article IV of the Ohio Constitution, being the Article on the Judiciary.

Simply for the purpose of indicating very briefly that I believe I have a background for presenting some comments and suggestions with reference to the report of the Subcommittee, be advised that I have been in the practice of law for fifty years, during which I served for three successive terms as President of the Cuyahoga County Bar Association, and for more than forty years I have been actively engaged in working with the members of the judiciary of this county pertaining to all types of problems involving the administration of justice. With this background, I offer the following comments.

I note that the Subcommittee has recommended no changes in Section 2 of Article IV dealing with the jurisdiction of the Supreme Court of Ohio. I suggest that changes are required.

In Section 2(B)(2)(III) the Supreme Court is indicated as having jurisdiction

> "In appeals from the Courts of Appeals as a matter of right in ** cases involving questions arising under the Constitution of the United States or of this State."

This language would appear to be as simple and direct as any that could be devised. It would also appear to be language which is not subject to interpretation or construction.

As students in law school more than fifty years ago, we were taught to believe that under the Constitution of Ohio <u>any</u>

case "involving questions arising under" either the Ohio or the Federal Constitution could be appealed to the Supreme Court of this State "as a matter of right". The fact of the matter, however, is quite to the contrary.

For many years during the period in which Chief Justice Weygandt presided, the Supreme Court cases were dismissed by the score upon the ground that there was involved no "debatable" constitutional question. Beginning with the advent of Chief Justice Taft, the Court began dismissing cases involving constitutional questions on the ground that they did not involve "substantial" constitutional questions.

It is understandable that numerous counsel may present what purport to be questions under the State or Federal Constitution when the questions were either spurious or have already been decided. The fact of the matter is that it has been the practice of the Supreme Court, even in cases where the existence of a constitutional question is recognized, that counsel are requested to and do, together with an appeal as a matter of right, file a further appeal on the ground of the existence of an alleged case of public or great general interest and the case is then admitted on that ground.

It has of course never been possible to appeal from, or to alter the existing policy of, the Supreme Court of Ohio pertaining to the "construction" and "interpretation" of an appeal as a matter of right which, in fact, does not exist. The present language of the Constitution in this regard is accordingly a trap for the unwary and a signpost which leads to nowhere.

The purpose of the inclusion of a right of appeal in cases arising under the Constitution is one which I must consider to be both historically and practically self-evident. It would not require extensive research to reveal the number of appeals on constitutional questions which were denied consideration of any kind by the Ohio Supreme Court but subsequently admitted and decided by the Supreme Court of the United States.

On the surface of it this would appear to be a considerable embarrassment to the members of the Ohio Supreme Court, but since this procedural aspect of the situation never comes to the attention of the public that embarrassment, if it exists, is minimal. Nevertheless, the problem is one which deserves more and careful consideration by the Subcommittee.

While it is recognized that a constitution should in the normal course of events contain no orders or directives to any court, it might well be considered whether the clause in question should not be modified by the addition of a directive

to the effect that the dismissal of a case allegedly involving a question arising under the State or Federal Constitution should be accompanied by a reference to a prior reported decision which the Court considers to have disposed of the issue sought to be presented.

Such a clause appears to be of even greater necessity at this time in view of the practice adopted by the Supreme Court of Ohio, of recent origin, whereby that Court issues regularly, almost weekly, a list of a large number of cases which have been dismissed by the Court sua sponte for the alleged reason that they contain no debatable constitutional question, but with no other or slightest explanation.

.....

My second observation relates to Section 3(B)(III). The present Constitution contains the clause:

> "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause."

At the present time the above quoted language of the Constitution is being implemented by the provisions of an Ohio statute, Ohio Revised Code, Section 2321.18, which provides, as pertinent to this subject:

> "** nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case."

This statute has led to some considerable litigation, and in this connection I respectfully refer to Sections 811 and 812 of 3 Ohio Jurisprudence under the title Appellate Review. The statute has been held by the Supreme Court of Ohio to "implement" the above quoted language of the Constitution.

Nevertheless, notwithstanding decisions of the Ohio Supreme Court, there has been a further restriction placed upon the application of the statute by the Hamilton County Court of Appeals. I suggest that in the interest of justice and in the interest of clarity, the quoted portion of R.C. 2321.18 should be incorporated as a part of Section 3(B)(III) of the Constitution.

.....

My next observation relates to the proposed elimination of the requirement that judges be elected specifically to

the Probate Division of the Court of Common Pleas as it now exists "and to any other divisions which may be established by law". I find no objection to the elimination of the Probate Court as a division of the Court of Common Pleas. If my recollection is correct, the incorporation of the Probate Court as a division of the Court of Common Pleas came about, at least to a significant degree, for the purpose of equalizing salaries of the members of the bench rather than for any important purpose directed at the administration of justice.

I respectfully suggest, however, that the nature of the jurisdiction of the Probate Court and the manner of its operation sets it apart legally, administratively and practically, from the entire work of the Common Pleas Courts of this State under the jurisdiction conferred upon those Courts.

There are sound and important reasons why individuals particularly competent to become, and particularly desirous of becoming, judges of the Probate Courts should be specifically elected to that position. By far the greatest portion of the work of the Probate Courts of this State is supervisory and administrative in nature, and the determination of adversary issues initiated by civil litigation, to the extent that the Probate Courts may hear and determine such cases, is in fact a minor part of their work. It would not serve the interests of the people of this State to make it possible, constitutionally, to "rotate" one or more of the judges of a Court of Common Pleas by assigning such judges to the probate bench.

The Committee speaks of the undesirability of "fragmenting" "the judicial complement of the Court". This is not an appropriate description. It is not the election of judicial candidates to the particular office of judge of the Probate Court that "fragments" any portion of the work of the Court of Common Pleas. Quite the contrary, it is the very distinct and separable nature of the work of the Probate Court that inevitably results in what the Committee may choose to call, if it desires, "fragmentation".

Much of the work of the Probate Courts in the more populous counties of this State is involved with the employment, and frequent changes, in personnel and in the appointment of individuals as fiduciaries, appraisers and in other capacities in which only the Probate Court has the authority to make such appointments. Far more than in the Criminal Division of the Court, uniformity in policies of appointment and personal knowledge of the qualifications of appointees are factors which are of importance in the Probate Court in sharp distinction to the lack of the importance of such facts in the performance of the duties of the judges of the Courts of Common Pleas.

I suggest that there be no change in the present provision of the Constitution directing the election of judges specifically to the Probate Courts.

.....

My next observation refers to the comment appearing on page 20 of the Subcommittee's report with reference to rules of court. The Subcommittee recommends the addition of the words "and procedure" to the provision permitting the adoption by local courts of rules "concerning local practice". The suggested addition is in order. However, there has been some language omitted from the sentence containing that suggested addition which is important and which should be included. I believe that the sentence in question should read as follows:

> "Courts may adopt additional rules concerning local practice and procedure in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court and which are not inconsistent with law."

I believe that the additional language, "and which are not inconsistent with law", is both necessary and desirable because of experience which has transpired in various courts of this State with reference to the adoption of rules which are in fact inconsistent with the law in this State.

A few examples may suffice. The Court of Common Pleas of Cuyahoga County has adopted a rule which requires in every personal injury case the exchange of medical reports, which necessarily includes the furnishing by counsel for the plaintiff of reports provided by a plaintiff's physician concerning his physical condition. I have no quarrel with the objective of such a rule or with the circumstances that in many, if not most, instances this is a procedure which counsel for the parties would willingly pursue. Nevertheless, the furnishing of such reports by counsel for the plaintiff constitutes a compulsory waiver of the provisions of R.C. 2317.02 pertaining to the subject of privileged communications. To this extent, the rule is contrary to law and rules which are contrary to law should not be adopted.

A second example will be found in a rule adopted by the Court of Common Pleas of Erie County in which the Court undertakes to require an extensive use of the presentation of testimony by videotape. Again, the purpose may be desirable and laudable. Nevertheless, the procedure in many instances is one which requires the expenditure of considerable amounts of money for the convenience of the Court. This is a situation which under no circumstances should be made mandatory, and in situations where such an expenditure is beyond the means of the party, or is not

desired by a party, the rule would deny the equal protection of the law required by the Federal Constitution.

A third example is the adoption by the Probate Court of Cuyahoga County of a rule requiring substantial deposits as security for payment of court costs before any Letters of Administration, Letters Testamentary, or Letters of Guardianship, will be issued by the Court. There is no authority in law permitting the Probate Court to adopt such a requirement or to require any security for the payment of costs in the administration of an estate in advance of the issuance of Letters other than the precise costs relating to the issuance thereof.

These examples are cited merely to indicate the existence of a prevailing tendency on the part of many courts to disregard the authority extended to the courts by law or to disregard the general law of the State in the promulgation of local rules. Hence the necessity for the language above suggested.

.....

I make a further, and what I believe to be an important, suggestion with reference to the proposal of the Subcommittee pertaining to rules of the Supreme Court of Ohio. The proposal of the Subcommittee appears on page 20 of the Subcommittee's report. I refer to the following language:

> "Amendments to such proposed rules may be filed with the Clerk, either by the Court or the General Assembly, not later than the first day of May of that session. The General Assembly may amend such rules by concurrent resolution only."

I suggest that the latter sentence read, "The General Assembly may amend any one or more of such rules by concurrent resolution only". This suggestion is again prompted by experience.

Little more than a couple of years ago, the Supreme Court of Ohio submitted to the General Assembly proposed Rules of Criminal Procedure. There was a dispute which arose in the General Assembly with reference to only a few of such Rules. As a result, the General Assembly, having no other choice, rejected the entire body of Rules submitted by the Court. In view of the fact that the General Assembly is accorded the authority to consider and to review the Rules submitted to it by the Supreme Court, there is no justifiable reason whatsoever why the General Assembly must accept or reject the Rules submitted to it in toto.

If it is proper for the General Assembly to be given the authority to review those Rules, there is no justifiable reason why they may not reject one or two or three, as the General Assembly sees fit, and approve the remainder. This could not be

done, however, unless the provision proposed by the Subcommittee is amended to include the above suggested language.

.....

I should like to refer next to the recommendation of the Subcommittee appearing on page 21 of the report of that Committee providing for an annual report by the Supreme Court of Ohio pertaining to "a need for increasing or decreasing the number of judges or magistrates, or increasing, decreasing or redefining the boundaries of appellate districts and its recommendations, if any". This is a salutary addition to the Constitution and the same is true of the remaining portion of the recommendation to the effect that "the Supreme Court shall establish by rule uniform criteria for the determination of the need for additional judges".

However, as the Subcommittee report has been written, there are inconsistencies and an omission. If the Constitution is to provide that "the Supreme Court shall establish by rule uniform criteria for the determination of the need for additional judges" this "rule" becomes in fact not a "rule" at all, but simply a recommendation which the Legislature may, or may not, follow as it chooses, for a variety of reasons. Accordingly, the use of the word rule in this connection is misleading at the least.

.....

Some further comments are required regarding the recommendation of the Subcommittee concerning Article IV, Section 6, dealing with the selections of judges. I find particularly objectionable the provision in the recommendation of the Subcommittee to the effect that "less than one-half of the members of a Commission (referring to the Judicial Nominating Commission) shall be members of the Bar of Ohio".

If the purpose of the amendment in question is to improve the quality of the judiciary of this State, then this objective should be kept in mind at all times with reference to every portion of the suggested recommendations. It may be "politic", or it may be "popular", to provide that more than one-half of the number of members of a Judicial Nominating Commission shall be laymen. However there is little or no probability that such a limitation upon the membership of the Judicial Nominating Commission would result in an improvement in the quality of the judiciary.

There is far more likelihood that the members of such a Commission, even knowledgeable citizens, would be inclined to give weight to the same considerations that now affect the operation of the popular election of judges in this State. The

desirability of including as members of such a Commission persons who are not members of the bar is easily recognized. This practice was followed by Governor Gilligan in his selection of the previously existing Nominating Commissions pursuant to a voluntary agreement with the Ohio State Bar Association.

It is difficult, however, to contradict the proposition that the members of the bar are far more capable of judging the quality of candidates for judicial office, and far less likely to be affected by some brief appearance before, or submission of data to, a Nominating Commission than would the lay members of that body.

Accordingly, the provision to the effect that "less than one-half of the members" shall be members of the bar could easily prevent the accomplishment of the very objective for which the Commission is to be appointed.

.....

As a part of the same recommendations of the Subcommittee dealing with the selection of judges, I find an undesirable omission from paragraph 3(A) appearing on page 29 of the Subcommittee's report. The recommendation in question relates to the appointment by the Governor for the filling of vacancies which may occur on the bench by reason of death or retirement of a judge before the expiration of his term of office. The Subcommittee recommends that "the vacancy shall be filled by the Governor until a successor is elected and has qualified".

However there is utterly no reason for omitting from selection by the Governor a provision to the effect that such a selection shall be made from a list to be submitted by a Judicial Nominating Commission. If such Commission is to function in general with reference to placing members of the legal profession upon the bench, the same objective and the same logic requires the use of that Commission to recommend candidates to fill a vacancy occurring during term. It is difficult to believe that this omission from the recommendation of the Subcommittee took place for any reason other than pure oversight.

At the same time, I should like to add that I have had considerable personal experience with the Judicial Nominating Commission in this county while serving as a member of the Judicial Selections Committee of the Bar Association of Greater Cleveland for several years, during which many appointments were made by Governor Gilligan. On the basis of that experience and for many other cogent reasons, I would suggest that each recommendation to the Governor for an appointment to the bench should contain not less than three names and perhaps preferably not more than three.

Mr. Don W. Montgomery, Chairman (9)

I shall be pleased to discuss with the Subcommittee, or with the members of the Committee as a whole, or with the Commission, the various suggestions and recommendations which I have set forth, solely in the interests of the improvement of the administration of justice in this State.

Very truly yours,

Edwin F. Woodle

EFW:rs EDWIN F. WOODLE

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CABLE ADDRESS "FROSTJAC"

May 9, 1975

Mr. Julius J. Nemeth
Research Attorney
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Mr. Nemeth:

I am Chairman of the Board of Governors of the Probate Section of the Ohio State Bar Association. I received notice of the Public Hearing of the Commission's proposed revision of Article IV of the Ohio Constitution.

At the meeting of the Board of Governors of the Probate Section on Thursday, May 8, 1975, I described the Commission's proposal to eliminate Paragraph (C) of Section 4 of Article IV from the Constitution. I further explained the Commission's belief that "it is unwise to 'freeze' any specific subject-matter division into the Constitution or to require judges to be elected specifically to divisions. Such arrangements have a tendency to reduce the flexibility of a court in disposing of its work by inhibiting the transfer of judges from one division of the court to another as the work load dictates. It also encourages the fragmentation of the judicial complement of the court."

It was the feeling of our Board of Governors that, contrary to your proposal, the Probate Division should be kept separate and distinct from other divisions of the Common Pleas Court. We feel that the talents and legal expertise required of a judge who serves on the Probate Division are quite unique. The administration of Probate Court matters would not, in our opinion, be aided by the transfer of judges from one division to another.

I have been directed, by unanimous vote of our Board of Governors, to advise you that our Board will oppose any effort to revise Article IV of the Ohio Constitution as the Commission has proposed. Although we cannot at this time speak for the Ohio State Bar Association as such, if the Commission proceeds with this attempt to revise the Ohio Constitution, it is our intention to recommend that the Ohio State Bar Association establish its opposition to the proposed revision and take every step necessary to defeat it.

Very truly yours,

James S. Wachs

JSW:spb

cc: Mr. Starbuck Smith, Jr.
Honorable Neal F. Zimmers
Mr. Martin C. Hoeffel
Mr. George R. Reiser
Mr. H. L. Mason
Mr. Edward C. Thompson
Mr. Richard F. Sater
Mr. Robert K. McCurdy
Mr. Fred Barry, Jr.
Mr. A. Robert Matthews
Mr. J. P. Kelley
Mr. Carl G. Schluederberg
Mr. Paul T. Zellers
Mr. Donald A. Eberly
Mr. David H. DeSelm
Mr. William B. Balyeat
Mr. Erle Bridgewater

Ohio Constitutional Revision Commission
July 10, 1975

Judicial Qualifications Commissions

Introduction

The most common traditional method of dealing with judicial disability or disciplinary problems has been for a state's supreme court to handle such matters, either by itself or with the aid of a statewide board or committee or commission appointed by the court and consisting of judges or a combination of judges and members of the bar. Such boards, committees and commissions generally have investigatory and recommendatory powers only, with the supreme court alone having the power to impose retirement or discipline. In such a system, the function of establishing probable cause is vested in the appropriate committee of a local or state bar association, and a formal complaint against a judge may be filed with the statewide body only by a bar association committee or a designated officer of such a committee. In Ohio, the the statewide body, whose 17 lawyer members are appointed by the Supreme Court from 17 districts in the state, is called the Board on Grievances and Discipline, and is established under Rule V of the Supreme Court Rules for the Government of the Bar of Ohio. Complaints filed with the Board originate in the usual manner. (Research Study No. 32, dated February 5, 1974, more fully details the operation of this body.)

Traditional methods of dealing with judicial disability and discipline make no provision for lay persons to be members of the statewide body, nor for the filing of complaints by lay persons, or individual members of the bar, with such a body. Neither are the statewide bodies staffed to conduct thorough investigations of complaints on their own. They were therefore compelled, at least in the initial stages of a matter, to rely on the fact-gathering apparatus of the state or local bar associations.

In the opinion of some observers, the absence of lay input in the process (both in terms of membership on the board or commission and the right to file complaints directly) makes it in effect a "closed shop", which in the area of judicial disability and discipline seems inappropriate; further the inherently cumbersome nature of the process makes it less likely that judges who are not behaving with moral turpitude or illegally, but are nevertheless behaving in a manner not befitting a member of the judiciary, will be called to account for it.

To remedy these perceived shortcomings, a new approach to the problem has gained momentum since about 1960, when California became the first to establish a judicial qualifications commission by constitutional amendment. Today, approximately one-half of the states, and the District of Columbia, have such commissions. While their composition, scope of power and methods of operation vary about as much as do those of judicial nominating commissions, judicial qualifications commissions share several common characteristics, among which are :

1) The presence of lay persons on the commission

2) A provision permitting anyone, including a lay person, to file a complaint with the commission

3) The existence of a full-time staff with the authority to conduct investigation of complaints

In most instances, the power of the commissions is investigatory and recommendatory only. However, in Illinois, at least, it is final.

California

The California Judicial Qualifications Commission consists of the following, as prescribed in Section 8 of Article VI of the state constitution:

1. Two judges of the courts of appeals
2. Two judges of the superior (trial) court
3. One judge of a municipal court
4. Two ten-year members of the state bar
5. Two nonlawyer citizens.

The judges on the commission are appointed by the Supreme Court, the lawyers by the governing body of the state bar, and the nonlawyer citizens by the governor with the approval of the senate. The commission has a permanent staff, including a full-time executive officer, and submits an annual report on its activities to the governor.

The rules of the commission are made by the Judicial Council of California, (which shares administrative responsibility for the court system with the Supreme Court), and are codified as Rules 901-921 of the California Rules of Court.

The commission may conduct a preliminary investigation on its own motion or upon receiving a verified complaint "not obviously frivolous or unfounded." The commission may recommend retirement based on disability, or censure or removal for other causes. Article VI, Section 8 (c) defines the bases of a recommendation as "willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that he has a disability that seriously interferes with the performance of his duties and is or is likely to become permanent . . ."

As of 1974, each instance for the imposition of discipline had to go to the Supreme Court with a full record as a recommendation for censure or removal. This process, in the commission's view, was too lengthy, cumbersome, and expensive for lesser offenses. Therefore, the commission recommended to the Judicial Council that private admonition and commission reprimand be added as disciplinary measures. The Council advised that this would take a constitutional amendment. As far as the staff can determine, the question of adding these alternatives to the list of disciplinary measures is still pending.

The commission actually holds few formal hearings. Even before a preliminary investigation is begun, the commission has the option of asking a judge for an explanation of the facts constituting the basis of a complaint, and under a commission rule the judge is required to answer the substance of such a letter within a reasonable time prescribed by the commission.

In its 1973 report, the commission states that in 1973, 197 complaints were filed with it. Of these, the commission determined that 157 "did not state a basis for further checking," and that some inquiry or investigation was conducted in 40 instances. In 32 of these matters, there was a written communication to the judge, and in some of these instances, the judge's response "satisfactorily explained the question which had arisen." The commission further notes that, in several other instances "a corrective influence was served by the investigatory procedure." In 1973, 11 preliminary investigations were conducted, and two judges chose to resign in the course of commission proceedings.

In its 1974 report, the commission states that it received 247 complaints, 211 of which were closed as "groundless or outside commission jurisdiction." Thirty-six matters were the subject of inquiry. There were 33 communications with judges about complaints, and "/m/any of these resulted in improvements and changes in judicial conduct." In 1974, the commission recommended the removal of one judge from office. In another case, the Court censured a judge whom the commission had recommended be removed.

In 1973 and 1974, approximately 1100 judges were subject to the commission's jurisdiction.

If a formal hearing is to be held, the rules provide procedural and substantive rights much the same as in a trial court. The hearing may be either before the commission or special masters appointed at the request of the commission by the Supreme Court. Once arrived at, the commission recommendation, including findings and fact and conclusions of law, must be certified to the Supreme Court, and within 30 days of filing, the judge may file a petition to modify or reject the recommendation. Importantly, Rule 920 (b) provides that "/f/ailure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record as filed by the commission." While the Court makes an independent evaluation of the record, its power to retire, censure or remove a judge is contingent on a commission recommendation, and the Court has said that it views the factfinding and recommendatory function as representing "an allocation of judicial functions to the commission by the Constitution." Geiler v. C. J. Q., 20 Cal. 3rd 270 (1973).

Illinois

The 1970 Constitution of Illinois illustrates an alternate approach. Section 15 of Article VI, the Judicial Article, creates a Judicial Inquiry Board, which has a fact-finding and accusatory function, and a Courts Commission, which has an adjudicatory function. The board consists of two circuit judges appointed by the Supreme Court, and four lay persons and three lawyers appointed by the governor, with no more than two of the lawyers and two of the nonlawyers from the same political party. The board is convened permanently, and may receive and initiate complaints against judges and associate judges on much the same bases as the California commission. The Courts Commission, which is also permanently convened, consists of a Supreme Court judge as its chairman, and two appellate court judges and two circuit court judges appointed by the Supreme Court. Both of these commissions are empowered to promulgate their own rules. Further, Section 15 (f) specifically provides that "/t/he decision of the commission shall be final", so that no appeal to the Supreme Court is provided.

Other States

Twenty-one other states in 1972 and the District of Columbia also had variations of the judicial qualifications commission concept. Among these, Alaska, Colorado, the District of Columbia, Idaho, Indiana, Missouri, Nebraska, Oklahoma, Tennessee, Utah and Vermont also have an appointive-elective system of judicial selection. In at

least two of these states--Colorado and Nebraska--the two concepts were adopted in the same "personnel package." In Idaho and Indiana, both functions are carried out by the same bodies.

To the knowledge of the staff, only the Judicial Qualifications Commission of New Mexico has a majority of lay persons among its membership. That nine-member body has five lay members, two judicial members, and two lawyer members.

In at least two states--Hawaii and Maryland--all members are appointed by the governor, and in at least one state--Tennessee-- the commission reports not to the supreme court but to the legislature.

Ohio

The Ohio Board of Commissioners on Grievances and Discipline came into existence in 1957. It is unique in its composition in that it is the only body of its type in the nation with an all-lawyer membership. Another characteristic which makes direct comparison with judicial qualification commissions in other states somewhat difficult is that the Ohio Board is charged with deciding cases involving not only judges, but lawyers as well. An Ohio Bar Foundation study published in 1967 and analyzing cases before the Board from January, 1957 to December 1966, found that in that period the Board completed 106 cases. In that number, there were three cases involving judges or former judges. In one case, the judge had not resigned his judicial office before becoming a candidate for a political office; in another, the judge permitted the taping and radio broadcasting of court proceedings; in the third case, the judge regularly failed to appear for scheduled trials because of intoxication. Indefinite suspension from the practice of law (on the part of the former judge) was the harshest discipline imposed.

From the inception of the Board to the present, approximately 225 formal complaints encompassing both lawyers and judges have been filed with the Board. The cases are numbered consecutively, and the staff is not aware of a break-down of the cases showing the number of complaints against judges, although this could be ascertained and would probably follow the pattern reported in the 1967 Bar Foundation study. It is known that Superintendence Rule VI, specifically governing the removal of judges, has been formally invoked only once since the Rule became effective in 1966. However, it must be noted, as the Committee has been previously advised, that most resignations of judges occur without formal charges, under threat of Board proceedings. It may also be noted that the Court is presently in the process of recommending the amendment of the Rules of Superintendence to create the position of Disciplinary Counsel who would have statewide jurisdiction to investigate "serious and complex" matters involved in a disciplinary investigation, at the request of the appropriate local or state bar association committee, and to report his findings to such committee. Ohio Bar, May 19, 1975, page 738. His function, therefore, would not be one of providing staff support to the Board on Grievances and Discipline.

Most of the features of a judicial qualifications commission could probably be incorporated into the Rules of Superintendence without constitutional change. For example, the composition of the Board on Grievances and Discipline could be changed by an amendment of the Rules. The direct filing of complaints with the Board could be accomplished in the same manner. However, the Rules could not be amended to provide ~~either~~ that, impeachment aside, this should be the only method for removing judges. Neither could the Rules provide that the decision of the Board be final. The first obstacle arises from Section 38 of Article II, which authorizes the passage of laws governing removal of public officers, including judges; the second from Section 5 of Article IV, which provides that the Chief Justice or a justice of the Supreme Court

shall pass upon the disqualification of any judge of a court of appeals or a court of common pleas. The possible impact of these existing constitutional provisions must also be considered in any proposal to insert a judicial qualifications commission section into the Constitution.

Education and Bill of Rights Committee

Chairman, Mr. Joseph Bartunek

First Meeting, February 11, 1974

Last Meeting, August 14, 1975

Minutes begin on page 4330

Research begins on page 4421

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
February 11, 1974

Summary

Present at the meeting were Mr. Joseph Bartunek, Chairman, Mr. John Skipton, and Mr. James Shocknessy as committee members. Dr. Martin Essex and Dr. Paul Spayde attended from the Department of Education. Also appearing were Mr. Robert Zeigler, Director of the Student Loan Commission, and Assistant Director Joe Seipelt; Dr. James Norton, Chancellor of the Ohio Board of Regents, and his assistant, Glenn Stein; Mr. John Hall of the Ohio Education Association. Mrs. Liz Brownell of the League of Women Voters and Mrs. Eileen Evans and Mrs. Marie Pfeiffer of the Ohio State Division of the American Association of University Women were present. Mr. Julius Nemeth and Mrs. Brenda Avey represented the Commission's staff.

Mr. Bartunek: I'm going to call the meeting of the Education and Bill of Rights Committee to order. (He noted that Mr. Shocknessy would be late in arriving, and the other committee members who had planned to attend, Mr. Corsi, Senator Ocasek and Mr. Skipton, were probably delayed by the weather.) Dr. Essex, if you wouldn't mind proceeding. We are very grateful that you are here and we would like to have your ideas on the mission of this committee and what we can do.

Dr. Essex: Thank you, Mr. Chairman. It's a pleasure to renew old friendships here this morning. As you know, we used to appear on Cleveland radio together and I have a tremendous admiration for Judge Bartunek. I should like to suggest, Mr. Chairman, if we may, that we share some copies of what we've put together here. Some of these recommendations, Mr. Chairman and members of the Commission, could be enacted by statute, that is through the legislature, though they aren't likely to be. They seem to me to be rather major matters in the improvement of education in the state, as we've gone over them with our staff.

Recommendation number 1 would be a proposal for the reorganization and elimination of small, inefficient school districts. Ohio has fallen behind in the last 10 or 20 years, depending on where you want to set your base line, in the elimination of the very small school district. There is a tremendous resistance to their elimination, and usually results in long, constly litigation. Hence, one cannot pursue many cases in a single year, because of the time consuming character of the litigation that is involved and the costly character of the litigation that is involved. Of the 620 school districts, and we did make one breakthrough just recently in Gallia County, combining it, so it's 617, local, city and exempted village school districts, more than 100 of them enroll less than 1000 pupils. These school districts are economically inefficient and are educationally inadequate; a high percentage of the funding for the operation of many of these districts comes from state sources. So the state does have a fundamental interest in them, not only from the standpoint of the constitutional responsibility to have a good efficient system of common schools, but it also is investing money unwisely, uneconomically. Such school districts are too small to provide an effective educational program despite, in some instances, abnormally high expenditures. Some of them are small pockets of wealth. They spend high dollars for pupils, but really have a very limited program that they can offer to those pupils.

The potential for educational improvement through appropriate course offerings- I refer to such courses as advanced sciences, advanced mathematics, advanced foreign languages, advanced english composition, or if you want to look at the other end of the spectrum, courses which are suited to youngsters who are not endowed with unusual intellectual or educational capacities - as we look at the course offerings, utilization of teaching manpower, and of course, the duplication of

administering costs, among other advantages, make this proposal a vital one for the future of "an efficient system of common schools throughout the state." (Article VI, section 2.)

The joint vocational schools are now sweeping the state. The state is nearly covered, and we've nearly accomplished that mission - 87% of the youngsters who would be eligible for vocational education instruction, now either have it available, or they have their local money voted for it. This is one of Ohio's tremendous achievements. So as I look down the road,thinking of things that should be corrected, I suppose I should mention that achievement. But when that takes place, and is taking place, it still reduces further the number of students in these smaller districts, and hence, again, compounds the difficulties that I have indicated.

One of the important elements of school financial reform relates to the gross inequities in taxable sources. You're all aware of that. It varies all the way from slightly more than $3000 per pupil up to $200,000 per pupil, in those kind of dimensions. Whereas significant progress has been made in Ohio, vast responsibilities confront the citizens of our state in this vital area. Although the U.S. Supreme Court in the Rodriguez decision has generated a nationwide interest, perhaps at best it has merely given visibility to the magnitude of the issues, because it caused the news media and others to become aware of the disparity in the local resources. School district reorganization tends to reduce the inequities in taxable resources, because you cover larger areas, and hence, tend to balance out more effectively.

Recommendation 2 is a proposed amendment to permit state taxation of public utility property for statewide distribution of the receipts. Reorganization of school districts in Adams, Gallia and Monroe counties has improved both the financial base and potential for educational advancement. In these three counties along the Ohio River, all three which were considered to be impoverished - great liabilities to the state - once we combined them, either with their power plants or their large industries, they became among the three wealthiest counties per pupil within the entire state. I think this exhibits what reorganization might accomplish. Similar consolidations have not been successful in other counties. It's a terrific struggle, because the hours devoted to it and the factors associated with it are so complex. With the growth of vast electrical power generating plants, utilizing both nuclear and fossil fuels now under construction, the additional wealth will result in even greater disparities in the support of educational programs. They tend to be constructed in small school districts, largely around the sources of water supply, because the water supply is an essential, as well as the fuel supply. It's easier to ship coal by water than in any other manner. Hence, they do tend to concentrate along the Ohio River where we have a great many poor school districts. Since all of the people are consumers of electrical energy, it appears unfair that only those living in a school district where a generating plant is located should benefit from the property tax on such utilities. I'm not unaware of the magnitude of this kind of thing. I recognize that this is a big matter, but it's a matter which Ohio someday will face.

Recommendation 3 would provide for the recodification of school laws periodically. We're merely suggesting here each twenty-year period, in order to set up some means of getting rewritten. Because it's one of those things, again, that the legislature is reluctant to start because it is a very time consuming operation. Dr. Spayde, who had been publishing Baldwin's and Anderson's publications on school laws, could tell you of the duplication, conflicts, and ambiguities that exist. Each session compounds these in some way. And I suspect that's inevitable because when you start a bill through, as some of you experienced legislators know, it gets amended on the floor or in conference committee. In some manner it emerges as a compromise, and frequently it duplicates something else, or contradicts some-

thing else, not, perhaps, entirely, but in part, that complicates the operation. The recodification of school laws appears to be long overdue. Unnecessary confusion could be eliminated which now results from conflicting statutes, duplication of laws, and lack of effective organization of the laws governing operation and management of schools. Court decisions and opinions of the Attorney General should also be reflected in the codified statutes. If we had something in the constitution requiring this, or if this isn't necessary, perhaps the legislature could take that kind of action. They just don't get around to doing it and that is the problem.

Recommendation 4 is a proposed amendment to provide that technical schools be under the supervision of the State Board of Education. May I hasten to say here that we are not seeking additional empires to look after. We have 2,500,000 youngsters, one-fourth of the total population of Ohio, enrolled in the elementary and secondary schools. And the complexities associated with it are such that we're not seeking more responsibility, I can assure you. But the federal government does not recognize two state agencies in the administration of the funding of vocational and technical schools. In other words, the federal government says it shall come to one state agency. Hence, due to the involvement of two state agencies, unnecessary complexities in management and operation are inevitable. Conflicting, that kind of thing.

The funding for technical schools is directed from the federal government to the State Department of Education. The state responsibilities for the management of the technical school is lodged with the Board of Regents.

When vocational school and technical school facilities are on the same campus, as we attempted to arrange in the early days when it was under the direction of the department, or even when they were in close proximity, we found that it is highly desirable to share the facilities and personnel, rather than duplicate the costly laboratories, libraries, classrooms, cafeterias, equipment and faculties or other manpower. I think this is evident if you look at a site where you could combine the management, utilizing the facilities. But again, although the legislature could correct this, the problem is that they aren't likely to.

The aspiration of two year institutions to gain four year status is well known. Historically, across the country, you can document this. This traditional pressure on the part of two year technical institutes is demonstrated by the change in nomenclature in the recent session of the legislature from "technical institutes" to "technical colleges". This represents the typical initial action toward becoming four year institutions which cease to serve the functions for which these technical institutes are designed. The technical institute is designed for the development of technicians - hand skills, the ability to repair or direct others to repair. We need these technicians. Nearly every housewife has at her disposal more power equipment than an industry had in 1900. She can turn on more things with electrical power than the industry could. Hence, the technician becomes a very vital person in our society. But if you let him go on up to the four year level, then he becomes an engineer, he wants to draw, design and so forth, and he doesn't learn to do things with his hands. He can't repair a motor, he can't direct other people in the operation. So that's our concern.

If such institutions were under the direction of the State Board of Education, the tendency for this misdirection of function would be essentially eliminated, because we are committed to developing the hand skills rather than the supervisory or design skills.

Recommendation 5 is a proposed amendment to equalize assessments in all counties, with annual adjustments in valuation due to inflation and other factors, rather than after the sexennial time for counties scheduled for reassessment in 1975, 1976, and 1977.

The actions of the Ohio Supreme Court in the Park Investment cases along with the action of the General Assembly and the Board of Tax Appeals has seriously affected the use of school foundation formulas for equalization purposes. Only 59 of the 620 school districts are now receiving a subsidy on current formula. The other 561 districts receive subsidies based on guarantees at a cost of approximately $47,000,000 this year, (1973-74).

Two inequities are being generated and perpetuated by Section 5705.11 Ohio Revised Code and resulting practice. First, county auditors are expected, under law, to make annual adjustments, in real property values without reducing the current school operating tax rates, so that schools could be tied into inflation or a change in the economy without being stalemated. Most auditors are not following this requirement but are awaiting an order from the BTA to increase values, in other words, to increase the valuation according to the survey, but to make a required reduction in the school operating tax rate in accordance with laws. This is the contradiction in the law. This was carried to the Supreme Court and the court concluded, I believe last week, that they didn't want to hear it.

The second inequity involves the school foundation formula charge-off in counties where the assessed values have not been increased to 35% of the true value. Stated another way, there is a 23½ mill charge-off against the local tax duplicate before the state applies the foundation funds. With this arrangement, leaving out all of those counties which have not been reappraised or brought up to the 35% and all of them will not be until 1977, you generate an inequity because some of those counties are valued at say, 23, 27 and 29%. With thirteen counties being moved up, and the five others, it ends up with them being valued at 35%. Hence, they get less state money, you see, because the charge-off is higher against their valuation and hence, they get less state money while these others go on for their free rides. The result is that the local portion of the basic school foundation funding is disproportionately low when compared to the state portion. It's very serious inequity, as you look at it. I'm surprised the other counties haven't brought some kind of suit alleging the inequities.

Ohio is in the second year of the six-year period ending in 1977, starting in 1972, during which time real property in all counties is to be adjusted to a 35% assessment of true value and kept at 35% of true value by annual adjustments each year thereafter, without further decreases in school operating tax rates. But it's generated inequities in a couple of ways until we can get to 1977, and in some other ways as well. The problem is generated by the fact that the property in the 70 counties which have not been reassessed (13 in 1972; 5 in 1973) is falling further and further below the 35% of true value. In other words, as if inflation takes place. No annual increase due to inflation is provided by law. Hence, they are really getting much more state money than they deserve because their charge-off is so low. And we are going to live with this until 1977 unless we do something to correct it.

The local property tax is a vital part of school support and provides a base for state school foundation equalization. It's intended to be an equalizing force. Here it is serving the opposite purpose, because it's generating inequities as far as equalization is concerned. However, the formula is seriously jeopardized by the guarantees required when the equalizing of assessments is delayed by the spread over a six-year period. Now, at some time this will be corrected. The Park Investment case and all that goes with it is a monumental movement, but the process of getting there is generating serious dislocations of fairness, I suppose one could say.

The last recommendation that I was proposing is to make the tax year compatible with the fiscal and the school year. School districts are now required to submit budgets in July for the calendar year ending December 31 of the following year. The primary fiscal planning, including contracts for employees, is on the

basis of the school year beginning July 1 and ending June 30. Funding of federal programs is also based on the fiscal year ending June 30, which compounds it even further. Uncertainties and overlapping of the tax year and the fiscal years disrupt and make efficient planning an impossibility. Hence, the optimum use of financial resources is thwarted with this arrangement. The tax year is the calendar year but the other operations are on a school year basis, at which time salaries change, numbers of pupils change, reimbursements change, a whole host of things take place. Now, I realize that this would not be a simple process to change this.

Mr. Shocknessy: Mr. Chairman, I wonder if Dr. Essex has any form of amendments that he could leave?

Dr. Essex: I didn't prepare any specific words, just recommendations.
Dr. Essex agreed to submit suggested constitutional language for his recommendations.

Mr. Skipton: How many of your recommendations are affected by the constitution now?

Dr. Essex: Your question is very pertinent. Many of them could be handled through law. They are not handled directly by the constitution, but constitutional amendments could correct the conditions which prevail. The legislature is not likely to correct them because of the nature of the legislature, that is, the conditions under which it functions. Taking number 1, whether the citizens of Ohio recognize the gross inefficiency both educationally and economically in those say 100+ school districts with less than a thousand pupils, the legislature will not face that. Or at least they will not face it in the immediate future, have been unwilling to face it for the last couple of decades. Whereas, if the larger communities were to say, "Now, we're tired of sending these large amounts of money to these small, inefficient school districts. We should prefer to have them cleaned up, because we're really investing a great amount of money, and it's not just that, but those youngsters are coming to our cities to live or to our metropolitan centers, and hence, we would like to see them have improved educational opportunity as well as the capacity of using dollars more wisely." Now, whether that would appeal to the metropolitan centers is a matter on which your sagacity would exceed mine.

Mr. Shocknessy: Well, I doubt that, but it's a kindly way to say it. I'm always opposed to putting into the constitution anything that can be otherwise handled by putting into the constitution authority to have it done by law. And even though the legislature might not be willing to make the many changes that would have to be made to change the school's fiscal year, if you can make a recommendation for an appropriate amendment to the constitution or for appropriate language in a new constitution which would accomplish the basic purpose by giving the authority that's needed and at the same time leave the implementation, giving the legislature the authority to do what it does, and then it's up to you, Martin, and your confreres to get the legislature to do what you think has to be done.

Mr. Skipton: This is what disturbs me. For example, there are powers now for consolidation.

Dr. Essex: If you want to go through the courts, and litigate with very expensive and lengthy procedures. In Trumbull County, for 3 or 4 years we have been attempting to eliminate two obviously grossly inadequate school districts. Litigation is a very costly and time consuming process. It's due process to which all persons are entitled but there is no fundamental right in the U.S. Constitution which entitles you to ignorance. This is the fundamental right we would like to eliminate in this instance.

Mr. Skipton: The only point that I was making is that if you put something in the constitution, providing for it to be done, you're right back at the same point because somebody has to implement it.

Dr. Essex: Mr. Chairman, may I say this. If you gave that authority to the State Board of Education, they'll exercise it promptly.

Mr. Shocknessy: That's if, unless, there is a better way of doing it. And I think that's what we're here for is to examine whether or not what needs to be done can be done within the existing structure, or whether the existing structure has to be improved in order to accommodate the purposes which are envisioned and which are deemed to be valid.

Dr. Essex: Mr. Chairman and members of the Commission, in 1965, after 20 years of effort, the legislature did give the authority to the State Board of Education to eliminate all elementary school districts which did not provide grades 1-12. And the State Board gave the districts 3 years in which to comply, and very few of them complied. The 50 districts remaining in 1968, the State Board eliminated all of them except for two of the island districts which were exceptions in being very small and having one-room schools. And we're in litigation right now and that's been under way since we gave them the two-year extension for various reasons.

Mr. Skipton: Your recommendation 2 says that you advocate state taxation of public utility property. I wondered if you had considered the possibility of proposing, as has been done in a number of other states, 100% state financing of education.

Dr. Essex: Yes, we have talked about it numerous times, and the conferences which we hold talk about it. Michigan tried it with no success. Of course if you have a state such as Hawaii where you have only one school district, it works out.

Mr. Skipton: One of the asides to this is that I've always felt that you could have separate school systems and separate school boards to determine curricula and everything else, with individual football teams and basketball teams, identified by districts anyway you wish, but that doesn't mean that you couldn't have 100% state financing.

Dr. Spayde: If you did this, then you would need to increase the income tax by 3 or 4 times to bring in the money if you no longer used the local property tax to support schools.

Mr. Skipton: I'm not saying not to use the property tax, but have it collected by the state.

Dr. Spayde: But to do that, you would also need a constitutional amendment.

Mr. Skipton: Well, if you wrote an amendment, you would probably include all that.

Dr. Essex: When I was working in the Detroit area, what we termed the primary fund, came from utilities, railroads, etc. This was distributed on a per capita basis. And I suspect that it led to fairer taxation statewide. It seemed to me that it was a more equitable approach to taxation than our hodge-podge arrangements here.

Mr. Bartunek: I think Mr. Skipton's point is well taken, that we are considering

constitutional changes. It's interesting to me to note that it's been 10 years since I have been in the legislature and these problems still have not been resolved, the consolidation of small districts, and so on. I'd like to ask one question. I don't understand the difference between a technical school and a vocational school. I thought that vocational schools were within the high school years, and technical schools beyond high school.

Dr. Essex: Mr. Chairman, that's essentially correct.

Mr. Bartunek: Are there any other programs for education beyond grade 12 that are under the Board of Education?

Dr. Essex: Adult education, but no two-year programs. When the Board of Regents got under way, the Chancellor stated that he would not permit transfer of credit, and of course, this is the controlling factor. The State Board of Education gave up the struggle to retain the technical schools, pointing out the difficulties that would be encountered. Technical schools being the post one and two year opportunities to train persons in hand skills. We said to him at that time, "You will ultimately move to four year institutions, you will destroy the purpose of technical schools because they tend to be ambitious, the faculty wants to have as high a standard as the engineering schools." And the first move, as I saw it in the last session of the legislature was, one, the persons who head the technical schools are all presidents now so they sit with the Board of Regents the same as the presidents of the state universities. And, secondly, they changed the name from technical institutes to technical colleges, which makes it easier to move to four year institutions.

Mr. Stein: My name is Glenn Stein and I am assistant to the Chancellor of the Board of Regents and we feel very strongly that they should not be moved to four-year institutions. I think our Task Force, which is scheduled to come out in May, will make a statement that no two-year institution should become a four-year institution. The Vice Chancellor of education feels that there is absolutely no way that we can support more four-year institutions.

Mr. Bartunek: We appreciate your information. Dr. Essex, we do appreciate your coming here and giving us the benefit of your thinking. And if you could have that amendment prepared for us we would appreciate that or any additional thoughts that you felt would be important for us to consider. We're trying to solve some problems, and you certainly are more expert than we are. Are there any further questions of Dr. Essex? (There were none.) I want to introduce to the members of the Commission Mr. Robert Zeigler of the Student Loan Commission. Mr. Zeigler, you may proceed.

Mr. Zeigler: Thank you, Mr. Chairman. I appreciate this opportunity to appear before the Commission. And, of course, many of my remarks are my own opinion and would require some validation by the Commission in case of dispute. Let me acquaint you with the function of the Commission. The Commission guarantees loans for students to attend vocational and general colleges as well as post-graduate education. We presently have loans in force for 40,000 students who are in college and we have loans for over 18,000 who are in repayment. Seventy-nine percent of these students attend school in the state of Ohio and 20% attend schools in other states and in foreign countires. The primary provisions of our program are dictated, perhaps, by federal legislation because we not only have the Ohio law, but we also have certain federal laws that we have to comply with. In the guaranteed loan program, the major amount of the money that is laid out for the program is appropriated by the Congress.

With respect to the revision of the Ohio Constitution, there might be one or two things that you would like to consider and I'll discuss them briefly and respond to any question that you desire. Some of the matters which occur to the Commission sometimes result from pressure from a great many different sources and corners. Fortunately we are not charged with solving some of these things, so we can perhaps, look at the thing independently. Certainly at the present time the federal picture is changing with respect to student aid. No one is too clear how it will come out. There is a federal grant program that was implemented on July 1 of this year, and the Congress appropriated $122 million for this program and it appears that perhaps, only half of it may be used. Part of that was due to the late start. The Ohio Instructional Grant program is a program which we have here in the state which is administered by the Regents and in that program there is about $2,000,000 this year that will not be used. Dr. Essex touched on one point that I think also has a bearing, and that is that he mentioned the existence of small, inefficient school districts. There probably are also small inefficient colleges, but people would be reluctant to name them. This gets into the proposition of tuition equalization which is beyond the competence of the Commission, certainly. But there has been a fair amount of pressure on the part of guarantors to produce enough money to pull small schools out of difficulty, and of course, that's a difficult thing to do particularly when you are talking about a voluntary loan program.

Mr. Shocknessy: Do you consider that your mission?

Mr. Zeigler: No, sir. I'm saying that people have come to us indirectly from schools attempting to obtain more loan money through us in some way and through a bank.

Mr. Shocknessy: That's an indirect accomplishment of a purpose which is not your mission.

Mr. Zeigler: That's right. And we have no way to respond to it. I'm merely saying, sir, that we've had this put to us as something we should do more in a given community to obtain loans. I think we've worked fairly hard in that respect, on behalf of a given college. We've also been asked to administer a direct loan program, on behalf of the state. This, of course, would be up to this committee and the legislature because it would require a constitutional change. There are direct loan programs in some states. Most of them depend on revenue bonds for the money to lend. This practice probably cannot be utilized in the future, and some of the people in some of the states that are in this business now, may have their programs terminated because the office of management and the budget is about to publish revised circular A-70 which will stop this. And so that's where the revenue bond situation stands at the present time. Also, the Commission has been approaced on several occasions to get into the income contingent plan so the feeling there is lower income students could borrow more money and pay it back over a period of years. This has not been seriously considered in Congress since 1968, and doesn't look too promising at the moment.

In respect to what this committee might want to consider for the Student Loan Commission, specifically, you might want to consider the substitution of the full faith and credit of the state for the reserve fund of the Commission. Now that would relieve the legislature of future appropriations for our reserve fund. I might say that in respect to the reserve fund, the state has contributed $840,000 to our reserve fund, the federal government contributed $896,259 to it, and the Commission, after it paid all of its operating expenses, has contributed $1.6 million to it. So we have, through the guaranteed function and management,

added more money to the reserve fund than we obtained either from the State of Ohio or from the federal government, after we paid our operating expenses. The problem here is that, philosophically, or however you might want to consider it, there seems to be a move across the country, not necessarily in Ohio, to shift more of the responsibility for the payment of higher education to the students. And it seems that regardless of what sort of a subsidy arrangement you have within the state, or how much you pay, that many students are going to have to borrow sums of money, and significantly large sums of money, to pay for the cost of higher education. Of course, this has been debated at great length. There have been reams of material written on it. The situation is pretty much the same across the country and the substitution of full faith and credit of the state would ease our reserve fund problem. And we've also been asked, on a number of occasions, to request that the constitution be modified to permit us to lend money as opposed to guarantee money. Section 5 in Article VI applies to us and it says that "it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education." But it does not say that we can lend money. And the Commission has been approached on a number of occasions to become a direct lender, and we have, based on requests from the administration and various legislators, looked into what would be required. Of course, this would require very significant sums of money on the part of the state if we became a direct lender, and perhaps it would require $30-50 million to be worth the effort, and it would also be very expensive to administer. Under the present arrangement we have $148,000,000 that we've guaranteed at practically no cost to the state, and if you expect to run a direct loan program, then you in effect become a central bank. At the present time we have about 500 lenders in the program, and the banks pay the salaries of a lot of full-time people who in effect work for the Commission, so if you want to get into the direct lending business as an alternative to the provision of credit for students who can't get help any other way, then you are in a central bank operation and it would become quite expensive to administer. I say that I think you would have to lend or guarantee $30,000,000 a year to make it pay off.

Mr. Bartunek: Is it your recommendation that we do change the constitution to permit that?

Mr. Zeigler: That's a hard question, Mr. Chairman. I think, very frankly, that the facts are that the educational community was slightly overbuilt in the '60's. Enrollments are certainly down now, and the projections are that the enrollments are going to drop 20% by 1980, and that's due to the fact that you don't have the population to fill the schools. And I think personally, that the public at this time is trying to decide, frankly, how many people should be in college. I think that, from a solid point of view, perhaps the full faith and credit of the state might be helpful, but I don't think that the Student Loan Commission would care to state that the State of Ohio should set up a direct loan program because, with perhaps less federal money coming in, the legislature would have to appropriate $50,000,000 a year. That's the way it looks.

Mr. Shocknessy: I'm almost led to believe, based upon what I have heard, quite informally, that it's almost a distinction without difference to change from guarantee to direct lend. Because I think your guarantees are moving toward being in fact loans.

Mr. Zeigler: Yes, sir. They are loans.

Mr. Shocknessy: But they're almost guaranteed loans. They are guaranteed loans.

Mr. Zeigler: Yes, sir. They are.

Mr. Shocknessy: And I don't see where you come out. I don't see how much better off anyone would be by constitutionally providing for direct loans than people already are on the guaranteed loan program because the money comes the same way and is paid back with no greater conscience or no less conscience than I think it would be under direct program. However, I think it's something that, if it is suggested that we consider it, that we might well consider it here. But it get's to be more philosophical than factual. And I'd be interested in a recommendation from you. I don't want to push you to the wall, but what you have already said indicates that you are something near skeptical on the program even as it exists.

Mr. Zeigler: No, I wouldn't say that I'm skeptical as it exists, sir.

Mr. Shocknessy: Well you certainly would be skeptical based upon what I've heard you say about going much farther.

Mr. Zeigler: Well, I would be skeptical about the direct loan program on several accounts.

Mr. Shocknessy: All right, I think that get's what I was looking for.

Mr. Zeigler: Well, I might say that the impetus behind the direct loan program is because there are a lot of students in the state who can't obtain bank credit. That's the problem and that's the justification for some people desiring a direct loan program. But, of course, there are about 6 or 7 student aid programs and they are very complex and a person's got to take a fairly hard look at the other forms of aid. And when you get into that sort of thing one doesn't like to overload the low-income student with too many loans because it's more difficult for him to repay than for a student from a middle-income family.

There were no more questions of Mr. Zeigler, and the chairman thanked him for coming and invited him to prepare an amendment on the substitution of full faith and credit for the state reserve fund, for further consideration by the committee. Mr. Bartunek introduced Dr. James Norton, Chancellor of the Board of Regents.

Dr. Norton: Mr. Chairman, I want to express my appreciation for the opportunity to visit with you, and I want to suggest that we make it literally a conversation among all of us. I was brought up as a political scientist with the idea that the simplest constitution was probably the best one, and that it is not necessarily good practice to overburden the constitution with great detail on matters that are in a state of flux. I think that the constitution of the state of Ohio has provided a good basis for the development of what is, really, an outstanding system of higher education. Changes are being made by the state legislature, as they have been for the past decade or decade and a-half that provides us with a greater variety of types of educational institutions than we've had in the past. They are aiming at increasing access to those institutions and they are working to guarantee that there can be some coordination and efficiency in the system so that we may not spend more money for a given result than is necessary. All of this is being done legislatively, and there are changes being made yearly. I think that the legislature could have very possibly stepped forward this last year when it appropriated funds for a task force on higher education which is taking a look at some of the basic issues. The Task Force is raising questions concerning

governance of the state system including what powers of the Board of Regents ought to have and how they ought to relate to the different types of universities and colleges. They are taking a look at the question of finance, whether the formulas for distributing funds are appropriate ones, whether the levels of finance are adequate. They're taking a look at questions of articulation among the schools, 2-year, 4-year, professional schools, at the basic questions of access. They are raising again, questions about the basic missions of the different types of institutions. And we are, as a staff of the Ohio Board of Regents, moving at the present time to develop parts of what will be, within the next two years probably, another master plan for higher education. We view the term "master plan" as something which sets forth where you are at a given period of time with the aspirations which seem to be appropriate at that time rather than something that we would like to have written down and put into tablets of stone. That's not the idea of a master plan in a field like this one. But with these types of activities going on, both within our staff, and by the task forces on higher education, and in discussions with the legislature, I think the picture for higher education in the state is a sound one. I wouldn't call it the brightest in the world, but it is not for any place at the moment.

I think that we have the authority under the constitution to continue this process of development and unless there are specific problems that arise or are brought into being by new questions raised, I would encourage you to continue for the constitution of the State of Ohio a simple approach.

Mr. Bartunek: There are no specific areas in connection with your task that you feel could be considered or reconsidered, or the Task Force might suggest that we consider?

Dr. Norton: I would think that they can all be handled legislatively.

Mr. Shocknessy: Good, I hope all the rest of the witnesses feel the same way about the existing constitutional law.

Mr. Bartunek: All right, Dr. Norton. Mr. Skipton, do you have any questions?

Mr. Skipton: No, I happen to be very much in accord with Dr. Norton.

Mr. Bartunek: Do any of our guests care to ask Dr. Norton a question?

Mrs. Brownell: I'm Liz Brownell of the League of Women Voters. Are there any financial limitations you can find?

Dr. Norton: There are a great many financial limitations on things we wish were done slightly differently, but I don't think they are constitutional issues. One of the questions that has come up that our attorney has not given us an answer on that we are interested in is whether we could devise under state law what would essentially be a state community college, within which the people of that area could vote a property tax levy if they chose to do so. I don't have an answer to that but I assume that there would be no constitutional limitation on that.

Mrs. Pfeiffer: Marie Pfeiffer, AAUW, Ohio State Division. Then you probably would say the same thing to me when I would be interested in articulation among the different levels. Is this something again that would not come through the constitution?

Dr. Norton: I would think not. We don't see it as a major problem other than practice. Practice gets to be one, but that's something we can work out.

Mr. Bartunek: Are there any other questions of Dr. Norton? (There were none.) Well, Dr. Norton, we certainly appreciate your coming over here and giving us the benefit of your thinking. I hope the committee listened carefully.

Dr. Norton: Mr. Chairman, may I ask that if the committee decides to do something with regard to higher education, I'd like to have the opportunity to come back and to respond to it.

The last speaker was Mr. John Hall of the OEA.

Mr. Hall: I would mention two areas of educational controversy at the present time that are basically covered by constitutional language in one way or the other. Those dealing with the requirement or the mandate of the state to furnish an educational program, adequate or effective or whatever language you wish to use. "Efficient and thorough" is what our constitution says now. And the issue is whether that must apply to every child in the state regardless of where they live, the local situation, their race, creed or what ever. The other issue is that of the question of the use of public funds for nonpublic education.

On the first one, the U.S. Supreme Court has refused to overturn the New Jersey Supreme Court decision there, which, using exactly the same language of the New Jersey constitution as we have in the Ohio constitution, requires the state of New Jersey to furnish an adequate educational program for every child in the state. It's their responsibility to insure that that's present and the New Jersey constitution uses exactly the same language, "a thorough and efficient system of common schools". In fact, a number of states seem to have picked that specific wording about the same time. We would like to have that language stay as it is. We think it covers the issue and apparently now it has been reviewed to the point legally where it should be left alone.

On the issue of nonpublic funding, our position, going back longer than 10 years, has been pretty clearly defined in terms of the use of public funds in nonpublic schools of the state. We haven't opposed it, in fact, at points, we've supported it, with certain limitations which we felt should be met for it to be used properly. Part of our reason for this has been to avoid what we saw happen in a number of other states, particularly several large industrial states during the '60's and that was a severe confrontation between public and nonpublic school people or to put it more clearly, between the people who support the concept of public schools and people who support the concept of nonpublic schools and...

Mr. Shocknessy: I don't think it's fair to imply that the people who support the concept of nonpublic schools do not at the same time support the concept of public schools.

Mr. Hall: We have a significant history of several school districts in this state that indicate that we do get into situations where people who are determined to finance their nonpublic school programs oppose public school funding until certain things occur with which they are satisfied.

Mr. Shocknessy: I'm only speaking about the state of Ohio.

Mr. Hall: I am. In Ohio we have specific districts which...

Mr. Shocknessy: But I'm not speaking about specific districts within Ohio. Ohio is Ohio from border to border.

Mr. Hall: Going back to my statement, we are talking about the people who support

nonpublic school education and the people who support public school education on a religious issue basis rather than an educational basis. We have tried to avoid getting the school business, whether it's public or nonpublic, caught in between a public confrontation between these two groups of people who really are there for a different reason. We've seen this happen in other states, we've gone into those states and watched closely in statewide campaigns where the fights have been, we know the pressures on us to take positions one way or the other and we know where those pressures come from. They come specifically face to face with us by name and by organization and so on. We have tried to avoid that and we still want to avoid that. We do not see, at this point, any reason to change the Ohio constitution, the language that covers this issue, because to this point, having a public confrontation would not resolve in any way the issue that the people who need more funding for nonpublic schools, the problem they have faced. Their problem has been solely limited by federal court, U.S. constitutional decisions, not by state court state constitutional interpretation, and until such time as they can find a way to get around the U.S. constitutional provisions in the federal courts, whatever you do in the Ohio constitution is not going to make funds available to them or cut it off to them any more than it already is. So what we're really saying to you is that we hope you will accept our position that a confrontation of this type in this state at this time has nothing to gain and a great deal to lose, and that if the time comes when the federal constitution is changed, then at that time we may very well have to face it in Ohio on the same basis as they have already done in a number of other states. We'd like for that day to be put off as long as we can put it off.

Mr. Shocknessy: I take no exception to the witness's general statements with regard to basics, but I do not want it to be understood here that the witness is saying that those people who are interested in nonpublic education are not interested in the same measure in public education nor that their interest in nonpublic education is not an interest generally in education with a religious factor. But it is not solely religion. Now that's the difference that I have with you on that statement of yours. You said that it's solely religion and I don't believe it...

Mr. Hall: No, sir, I did not say that....

Mr. Shocknessy: As long as you say you did not say it, that's all right with me.

Mr. Bartunek: Mr. Skipton, do you have any questions of Mr. Hall?

Mr. Skipton: No, I believe I understand his position. I understand Jim's too.

Mr. Shocknessy: Well, Jim's is within the framework of the constitution as has been interpreted by the United States Supreme Court, and I don't think that the constitution has to be changed. It has been said a long time ago that the Supreme Court follows the flag and so on, and the constitution does also. By the same token, the constitution has been interpreted to mean someting other than separate but equal between 1890 and 1954, we don't know what this constitution might be interpreted to envision or to provide in the future! I may not be here for it, but one thing I know is that the constitution has survived as long as it has because it's interpretation is fluid!

Mr. Bartunek: Do any of our guests have any questions? (None did.) Mr. Hall, I want to thank you very much for coming. We certainly do appreciate your thoughts and your information and your taking time from your busy schedule. If you have any further thoughts, or your organization has any proposals that you think we ought to consider, we'll be glad to hear them.

Mr. Hall had nothing further to add and requested an opportunity to respond to any changes that might be suggested. The meeting was adjourned.

Constitutional Revision Commission
Education and Bill of Rights Committee
September 25, 1974

Summary

The Education and Bill of Rights Committee received testimony on the education provisions of the Ohio Constitution on September 25 at 10 a.m. in House Room 10 of the State House in Columbus.

Present were committee members Mr. Joseph Bartunek, Chairman and Mr. James Shocknessy. Staff members were Ann Eriksson, Director and Brenda Avey. Persons giving testimony were Henry Rumm of the Ohio Association for Children with Learning Disabilities; Glenn Workman of the Ohio Coalition for the Education of Handicapped Children; Paul Taylor, Assistant Executive Director of the Buckeye Association of School Administrators; Eileen Evans, President of the Ohio State Division of the American Association of University Women; Dr. James Norton, Chancellor and Dr. Rupert of the Ohio Board of Regents, and William Harrison staff director of the Education Review Committee. Several spectators were present.

Mr. Bartunek opened the meeting by explaining the function of the education and bill of rights committee. He noted that, although all committee members were not present, the proceedings were being recorded and would be made available to the members of the committee.

Mr. Bartunek - I apologize to those of you who have come to give testimony and help us do our job. We have had a previous hearing of this committee and had tentatively come to the conclusion that there were no changes that we were going to recommend in the educational provisions of the Ohio Constitution. However, that's always open to later information and later study. I think that this will probably be the last inquiry into the problems of education unless we receive requests in writing to go further into it. We will go ahead with the agenda as planned, and then whoever wishes to speak will be given a chance. Mr. Henry Rumm, will you come forward please, and for the record state your name and your organization, and then submit your testimony.

Mr. Rumm - My name is Henry Rumm. I am a resident of Upper Arlington, Ohio. I'm here to testify as a representative of the Ohio Association for Children with Learning Disabilities. This organization has a primary interest in special education for handicapped children, and particularly for a group of children that are classified as learning disabled. This group represents about 2-3% of Ohio's school population and at the present time only about 1/4 of them are being served by special education. Handicapped children as a whole represent about 10% of our school population--those that would require some special services of education. And probably only slightly over 50% of this total handicapped population is being served. Many of us who are here have testified before the legislature and to some degree have been successful in motivating them to provide programs for children, but it has been a matter of motivation. Education of children is not a right in the state of Ohio, it is a permissive act, and this is a part of the Constitution I'd like to address myself to. Logically, the next step would be the litigation route, and parents have brought suits in the courts. The difficulty we have in addressing a suit in this state is the fact that there is no basic mandatory education law, as such, that covers all children and there is no right to an education for all children in our state constitution. If you do enter into a lawsuit you

must address yourself in a federal court to the provisions of the federal constitution, under the basic bill of rights. These things are very difficult to file. They're very expensive. They go a long route, and normally have not been successful, unless there is a state law that has been violated, or a state constitutional provision that's been violated. There is an example in Pennsylvania in a recent suit, where the federal court did judge them to be in violation of their own laws and constitutions, and did enforce the education of all children. Under present legislation, the mandatory school act requires parents of children to send them to a public school from ages 6-18, or until they have finished high school, with legal penalties assessed to the parents who fail to fulfill this duty. On the other side of the fence, though, the schools, under our present legislation have the right to exclude those that will not further benefit from instruction in the system. There is an exclusion act which is an administrative process. Until this past term, the legislation provided for almost totally no review--it was conducted by a local board at board level. There have been some changes that provide, for the first time, a record of who is excluded be filed with the state department of education and there are some provisions now for some review. However, at best county, at least 50,000 children in the state of Ohio, and because of the lack of a record, it is very difficult to determine who are excluded. As a normal course, all children judged as "trainable retarded" are excluded from the public schools. In our state we have provided by legislation for a separate school system for these children with attendance based upon the availability of facilities in a local county district and this has been the way around this. I happen to be the parent of a learning disabled child who has arrived at high school and who is one of the fortunate ones who at entry-level in the first grade was able to receive a three-year special education class and some tutorial follow-up for another couple of years and is now making it in standard classes. The ones who don't make it are the ones who haven't had this help. The term "learning disability" is defined as children who have normal intelligence, who have a problem that the medical people describe as a minimal brain dysfunction. It is a problem in the neurological make-up of the child, that puts them in a position where they have conceptual or perceptual or coordinative problems. And these are the kids who can read and can't write; can write and can't read. They pass intelligence tests and are told by the teacher "You're not working to your level" and the problem is the child isn't seeing or hearing the same thing the teacher is saying; is not able, in many cases and in my daughter's case, to put things down on paper, but verbally can express herself very well.

Our Ohio Constitution was written in the 1850's by an agrarian society where you didn't need an education to earn a livelihood. It took a period of time with several mandatory actions, to 1912, to really put in this section in Article VI, paragraph 2, providing for a state-wide school districting and setting up the basic constitutional provisions for putting an enforceable law in. And it took a few more years--in 1921, we had the Bing Act which provided for the compulsory attendance I referred to. Even in those days, a child did not need an education to go out and earn a living. Now, you can't enter the job field without at least some basic abilities to read and write, and usually a diploma. The kids that miss this system are the kids that are populating our prisons. There was a study done in Colorado with juvenile delinquents and with members of their prison population. They came up with the remarkable figure that about 1/3 of their prison population and juvenile delinquents should have been served by special education.

Some of these kids, in spite of it all, they do pull through. They don't have too great a struggle in life. But most of them never achieve the potential that they were endowed with and it's basically because of communication lacks in the case of the learning disabled child. In the case of other handicapped children, even the trainable retarded have been found to have a useful work record rather than being warehoused in institutions if they are educated. Our basic request to this committee is that you consider, possibly not in the education details under Section 6, but the basic bill of rights part of the Constitution which, in passing, mentions education in a rather negative sense, providing that no religious affiliation shall become involved in it, and provide in the Ohio Constitution the right for an education to all children. And implying in that word "all" that this education is to be fitting to their needs. The schools are available and all children must attend but all children don't learn alike, and those that don't either drop out, or are carried in the system and are total failures. In the case of the learning disabled, usually they have such hang-ups that you can judge them emotionally disturbed after a while, and you can exclude them as being emotionally disturbed children which is one of the reasons why they end up dropping out of school. There are many kids that drop out without any legal reason. Many schools like the other way without any process at all when the child becomes 14 or 15 or 16, although in theory the parents have a liability until they are 18 or until they get that high school diploma. We need some provision for this whole group of children to take a suit in our state courts and to take a local school board to court to take care of all of the children. This is really our message. Some other states have gone through this. In the literature that you've sent out regarding some provisions that you've come across, the state of Illinois, in addition to providing an education for all children expressed a philosophy in its constitution to provide education for all persons to the limits of their capability. The state of Wisconsin has recently gone through the legislative process and have overhauled their state laws in this area. Their constitution differs only slightly from ours. Their state laws on education and education financing probably come as close as any other state to resembling Ohio's--or did, until last year. They had one difference in that they do have the words "education for all" in their constitution, and, based upon this, they have adopted a mandatory special education program that each district must incorporate within a certain time, which we have been trying to get in Ohio for years. We are one of only 10 states that do not, in some form, have a mandate for special education. We did manage to persuade the legislature several years ago to enter into a mandatory planning process where each district was required, with penalties if they did not, to submit a proposal, have a plan for educating all of these kids, an improvement in identifying them, but from that point forward, we have been unable to reach the next logical step of mandatory education through the legislature. The basic argument we get is that this is a permissive, extra thing, and that we should be thankful for where we are today. But this is denying a large group of children access to something that the other 90% do enjoy.

We feel that we ought to have this back-up of a proposed constitutional amendment. If nothing else, it would bring this whole thing into focus. There are many different categories, and these kids do have to be labeled from a legal standpoint, or many of the programs have been taken care of in different ways. I mentioned the trainable retarded who are external to our public school system. The groups who represent these children, until recently, have kind of gone it alone. I'm representing the learning disabled child. I'm not totally going alone, because the next person waiting to give testimony is from the Ohio Coalition for Handicapped Children and this is a pooling of all of the handicapped, into a legislative effort

to attempt to move Ohio into the line of some other states. The basic problem is with the right and this right is implied in the federal constitution, it is not guaranteed, there have been court cases, particularly in federal districts. There was a case in Washington, D. C. schools where the constitution was interpreted to mean this, but it was limited to that district because it was under federal jurisdiction. There have been decisions in Pennsylvania based on the federal constitution and based on Pennsylvania law. We have gone to attorneys, and parents have, and generally we are discouraged because of this lack of a state law to address a suit to. Our feeling is that the constitution should define education; include some provision that this be a right and emphasizing the word "all". Wisconsin put that word in their bill--they spelled it out as a philosophy that the legislature intended to follow. I'd like to quote a little bit of it. It says "It is the policy of this state to provide as an integral part of free public education, special education to meet the needs and maximize the capabilities of all children with exceptional education needs." We feel that that philosophy ought to appear in our Constitution. Thank you.

Mr. Bartunek - Thank you, Mr. Rumm. Do you have any suggested language other than what you have mentioned?

Mr. Rumm - Not other than adding this as a right. I've seen two places where it could be added. I think the right way out is to put it in as a separate section, in the bill of rights that these other educational processes provided by the Constitution apply to all children.

Mr. Bartunek - I'm going to ask Mrs. Eriksson to please prepare some language to the effect that you have recommended, and I will personally see that all eight members of our committee consider this problem that you've brought up. I appreciate your coming here and testifying.

Mr. Rumm - I do have some copies of a brief outline of the testimony if you would like to have it for your reference.

Mr. Bartunek - One other thing. I don't see why throughout your testimony you said it should be implied. Why shouldn't it be spelled out? Why can't we use the word "all" and say what it means?

Mr. Rumm - This is what Illinois has done. That's the only constitution I have come across that really spells it out. But it is really a philosophical matter.

Mr. Bartunek - You recognize, of course, that we are just a committee who reports to the Commission who reports to the legislature who has to report to the people. But certainly, we appreciate your bringing this to our attention. I personally didn't realize that. So we will see that some kind of an amendment is considered and if it is adopted by the Commission, we hope that your organization will support it in the legislature.

Mr. Rumm - It is kind of amazing to me that really the whole education thing is developed with so much legislation with so little constitutional background. It would look to me as if many things could be challenged in the courts--even the mandatory school attendance act--if someone should so choose, because it isn't spelled out.

Mr. Bartunek - Well, thank you very much, Mr. Rumm, and, again, I appreciate your being here.

Mr. Rumm - Thank you.

Mr. Bartunek - Next on the agenda is Glenn Workman of the Ohio Coalition for the Education of Handicapped Chidren.

Ms. Workman - Thank you for allowing us a chance to give you our suggestions from our frame of reference. I am representing the Coalition for the education of handicapped children. If you notice on the paper that has been prepared, we are dealing with three major issues that we would like to suggest. The first major issue being definition of terminology used in the Constitution such as "insane person", and deletion of nondefinable, outdated, and inappropriate language, which you will find in Articles VI and V. We would like to suggest deletion of the terminology "deaf and dumb" which is used in Article VII, Section 1. It really seems that the deaf, dumb, and mute are perceived as synonomous. The word "idiot" as used in Article V, section 6 and "dumb and deaf" in any other area of the Ohio Constitution when applicable. We would like to see a revision and update of the term "insane person" used in Article V, Section 6 and defined in the cross reference of Baker vs. Keller. Consideration as to consultants on the subject of the revision of the terminology, we suggest some options there: The Division of Special Education, the Division of Mental Retardation and the American Medical Association.

Issue No. 2 involves the equal educational opportunities for handicapped children. If you take a look at the education article, we suggest amending Section 3 of Article VI to the effect that "all persons beginning with age of identification through legal school age which may be extended commensurate with their abilities to profit from an educational program, be granted their legal right to equal educational opportunities under the law, appropriate to their individual needs."

Issue 3 deals with equal rights opportunities for handicapped people. Article I, amended Section 1, suggestion: "to include handicapped people and all enumerated rights applicable to free citizens and to foster equal protection under the law to these citizens in judicial, employment, education, and all areas of daily living, including those adjustments necessitated by their individual handicap to insure equal rights under the law." These issues seem to fall in the Articles of elective franchise, education, and public institutions.

There are two examples that I would like to cite that would give you some background as to what kinds of things are happening because we feel that these things are not established within the Constitution. One boy, Tony Slagle, is an autistic child who lives in the north central part of Ohio and I know the family personally and have worked with them through the years. He went into 18 months of withdrawal where there was no communication at all and this was before he entered school and therefore they decided that he could not profit from school. His parents were quite upset over this, but intelligent people always find ways to help children. In working with some consultants, they did come up with some individualized programs and tutoring, on their own, with a speech therapist and that king of thing and they were able to bring Tony out of his withdrawal. Within about a year and a half of working individually, Tony was testable, and they came up with an exceptionally high I.Q. result. Because they were able to achieve the testing, and that area did have special class facilities, to take care of Tony, he attended his first year in school after having been told for many years that there was no way for the child to be accepted into the Ohio school system. That's one of the good things that can happen. Another instance is a person who was involved in a program this summer which required him to be away from home for 6 days. They said he would never make it, but he did. Another example I'd like to cite, that you may have heard a little bit about, is the Bobby Hunt case. This fellow is a 22 year-old who has never been in a school situation. There was never any legal dismissal for Bobby Hunt. What has happened with Bobby Hunt is that he is a deaf boy with no educational background, with no other avenues apparently suggested for Bobby Hunt. He has been accused of fatally beating a 56 year old woman, in Chillicothe. At the hearing, Bobby faced the court on his charges, without benefit of a formal or certified interpreter. That caused a lot of problems. His hearing did come up in Chillicothe, and, the judge who was presiding

at that hearing decided that Bobby was not able to stand trial because of his inability to communicate, so the judge ordered that Bobby be committed to Lima State Hospital for a period not longer than 2 years, and he provided for his transfer to another institution, if necessary, to enable him to learn universal sign language, that would enable him to stand trial on another date. The controversy in this situation is the fact that during his placement in Columbus State Hospital and Lima State Hospital for evaluation, the evaluations were brought out that he is mentally capable of standing trial. The status of this case at the time, and the last hearing was September 4, is that Bobby Hunt is still in Chillicothe in the jail waiting for whatever they are going to do to him. As far as the universal sign language goes, there isn't any universal sign language. There is a committee that is working on setting up a universal sign language. I'm stating these facts to give you an idea of some of the things that are happening because things are not defined in certain areas. The issues that we feel in Bobby's case, or any of these cases, would be their right to have their guilt or innocence and future determined by the same judicial process as is available to nonhandicapped persons. Legal rights of all handicapped persons, not that they have more rights, but the special step sometimes needs to be taken to insure that these rights are observed and protected. Also, legal implications for compliance with current laws and the drafting of future laws, and of course, their right to an appropriate education. Are there any questions?

Mr. Bartunek - I guess civil rights would be considered at another meeting of this committee. I'll ask Mrs. Eriksson to prepare some amendments to the Constitution pursuant to this writing that you have given us. I assume that you don't have any other specific language that you would want to have added to the Constitution.

Ms. Workman - No, pertinent to the area that we are dealing with, this is what we would like.

Mr. Bartunek - We are certainly grateful that you came here this morning to give us the benefit of your testimony, and the amendment that you suggested will be considered by the full body of the committee.

Ms. Workman - You are suggesting that some of these suggestions belong in a different committee?

Mr. Bartunek - They are all in our committee, but we are devoting our time this morning to education and I think some of the things that you brought out deal with civil rights. I think the proper procedure for you would be when we convene on that matter to reiterate your testimony about Bobby Hunt.

Mrs. Eriksson - Might I ask one question?

Mr. Bartunek - Yes.

Mrs. Eriksson - Concerning some of this language, in the proposal to amend Section 3 of Article VI you refer to "beginning with the age of identification" and I'm not clear what you mean by that.

Ms. Workman - This terminology was developed by consulting with some people in the education field and also with a lawyer. We're not saying this is exactly the way it should be so this is just a suggestion. These are thoughts that we had come up with, consulting with some special people in the field. We feel strongly in our hopes, also, that you will consult us in your final draft.

Mr. Bartunek - We certainly will. Thank you very much, Miss Workman. Is Paul Taylor here? Eileen Evans?

Mrs. Evans - I am Eileen Evans, the state President of the Ohio State Division of the American Association of University Women. The purposes of the Ohio State Division of the American Association of University Women include the fostering of the development and maintenance of high standards of education, strengthening the fellowship among university women in order that their influence may be felt throughout the State in the solution of social and civic problems and securing broader opportunities for women. We have a membership of around 8,500 in 87 branches throughout Ohio.

Our legislative principles include educational issues that support an expanding public educational program of quality as essential to a free people in a democratic society. We support measures that provide: (1) Equalization of educational opportunities at all levels. (2) Improving the economic and professional status of the teaching profession, and those associated therewith administratively, and to assure the recruitment of such personnel. (3) Adequate and equitable financial support for all public school education including education for the gifted, special education, vocational education, technical education, career education, continuing adult education and higher education. (4) Legal framework for equalizing high quality public elementary and secondary education programs and services to school districts on a regional basis. (5) Early childhood programs for all children during the critical formative years. (6) Family living courses for all secondary school students.

The American Association of University Women has taken a clear position on public support for public schools only. AAUW members also worked for elected school boards in areas where they were appointed. When the National Defense Education Act was proposed, AAUW added an "interim" higher education item in order that we support the higher education provisions.

The Ohio State Division has taken no official action, so the following suggestions are mine.

Article VI - Education - Constitution of the State of Ohio

Section	Subject	Recommendation
Section 1	Funds for education and religious purposes	No change
Section 2	Common school fund to be raised; how controlled	No change
Section 4	State board of education, superintendent of public instruction	No change
Section 5	Loans for higher education	No change
Section 3	Public school system	Amend
Section 6	Post secondary education	Add

Section 3, amend by adding after public funds "for the educational development of all persons to the limits of their capacities."

The goal would state the responsibility of the State of Ohio for the education of all. If an efficient system of common schools is now in operation as required in Section 2, are the needs of all persons being met? (And the answer is no) When provisions are cut back, often those which are considered special services are the first. And last year, I know of a school district in which the first cut was the tutoring program for the handicapped children. Then I would suggest the addition of Section 6, Post Secondary Education. Add, "There shall be a board of regents which shall be selected in such manner and for such terms as shall be provided by law. The respective powers and duties of the regents shall be prescribed by law."

To only refer to loans for higher education seems to omit the section providing for this education. The importance of post secondary education in the changing society seems to merit inclusion in the Constitution of Ohio.

We appreciate the committees' and the Commission's giving their time and attention to the task of considering revision of the Constitution of the State of Ohio. We are interested in the work that you are doing. Thank you for the opportunity of appearing before the committee.

Mr. Bartunek - We thank you very much. Have you given your suggestions to the Ohio State Division?

Mrs. Evans - No. We do not have another official meeting until October 25th.

Mr. Bartunek - We are going to give it the same attention and consideration as if they had taken this position.

Mrs. Evans - Thank you.

Mr. Bartunek - I am going to ask Mrs. Eriksson to prepare amendments which will be submitted to the entire committee for its consideration. Thank you very much for appearing. We are very grateful.

The committee recessed for five minutes.

Mr. Bartunek - Dr. Norton, Chancellor of the Board of Regents.

Dr. Norton- I'd like to introduce Dr. Rupert who is on our staff as vice-chancellor for health matters.

Mr. Bartunek - Let me explain to you, Dr. Norton, we have eight members of our committee and three of them couldn't be here, and three of them may be here, so I'm here and I'm the committee. However, we are taking a tape recording of the presentation plus I have assured the previous witnesses who have appeared that their remarks will be reduced to appropriate amendments and presented to a full working session of the committee. And if you recall, you had appeared here before, and testified that you had no recommendations at that time, and then you contacted us to say that you did have some recommendations. We would be pleased to accept them this morning and I will assure you that they will get to all of the other members of the committee for their full consideration, and we will reduce them, as appropriate, to amendments.

Dr. Norton - Fine, thank you very much. I have brought along a summary of my remarks, although I am asking Dr. Rupert if he will assist me in this presentation. Some of his remarks, I think, specifically, we would appreciate your circulating to the other members of the committee, and of course, any help you can give us in connection with it. You know that inflation has hit all of the service industries extremely hard and one that's being hit hardest is higher education. At this time, when absolute demand on higher education is at an all time high, when we are really readjusting some of the programs to provide life-long opportunity financing in this industry, it calls for a variety of efforts on the part of the state and the students. Over the years there has been a very complex and interwoven structure of finance in higher education that you are familiar with. It's developed not only here in Ohio but across the country. We have tried to devise programs so that students who have ready access to higher education; you are familiar with the Ohio situation, in large part, because of your own participation in it. The federal government has devised grant programs which now seem to be moving toward more adequate funding; programs of student loans; work-study programs. The state has developed programs for lower income students and has provided a loan guarantee program and, in addition, certain institutions make certain gift moneys available for student assistance and make special efforts to provide student employment. As we raise this question of access to higher education to an even higher level of priority, the various efforts take on increased inportance. And it's important to note that diversity of assistance programs is the key to meeting diverse student circumstances. We are initiating this month a review of the entire student-aid situation in Ohio, especially regarding the Ohio Instructional Grant Program. But that is expected to meet only part of the needs. Other resources have to be included, and these will be those that are provided by the federal government by such things as holding student fees constant at universities and colleges; by student loan programs, and of course family and student contributions to their own support. Coincidentally, this week's edition of the "Chronicle of Higher Education" carries a stody which reports that the college scholarship service has sharply reduced its estimates of how much money parents should be expected to contribute to the cost of their children's college education. At least on a current basis.

You will remember that several years ago the Ohio Constitution was amended to make possible a guaranteed student loan program. In retrospect, it would appear to be a mistake that we did not seek a more general ability to devise student loan programs; limited ability, for Ohio colleges and universities, for the Board of Regents to lend money for student assistance would give increased flexibility to our efforts. The absolute landing barrier, which is represented by Article VIII, is a serious impediment to progress. We do not have access to a full range of programs either to guarantee access or to address other problems in the field.

We have two specific proposals to make at the present time that are designed to enhance our ability to retain physicians in the state of Ohio. You are probably aware of the fact that at the present time, something less than 50% of the physicians that we train remain in Ohio for their careers. As we address this problem, we feel that it is important to include within our options two loan programs. I'm going to ask Dr. Rupert if he will describe these programs as examples of the things which we believe ought to be options which the legislature authorizes. At the moment, we have only these specific plans, but it would appear wise to seek some general relief from the lending prohibition, so that the legislature could allow limited use of landing to balance our current efforts in student aid, and to allow specific programs which seek to achieve particular public purposes. Dr. Rupert, would you outline the specific programs we have been discussing?

Dr. Rupert - Thank you, Dr. Norton. There are two aspects to the loan program which we are vitally interested in. The first is a program made available to medical students and that loan program will have the option of a forgiveness, if you will, on a year for year basis; subsequently, when they enter practice, if they remain in Ohio for the practice of medicine. So that a student who receives a loan may have the loan cancelled, based on remaining in Ohio for the practice of medicine. And this then gets at the retention of medical students in Ohio, which is really a very critical need for the state. Ohio loses many of its medical student graduates for a variety of reasons. One, of course, is the attractiveness of the state. Whether we like it or not it is a fact. The second is that we have not developed adequate methods to secure him or assist him during his educational program and place some kind of premium on remaining in Ohio, and we believe this is one of the routes of the endeavor.

The second is a specific loan program to physicians who have completed and received their M. D. degree, in which if they enter the fields of primary care, such as family medicine, or general practice, or general pediatrics, they also will be eligible to a loan program. Again, with a forgiveness break if they remain in Ohio in the practice of medicine. In this particular program for the post M.D. loan program and primary care, we are also suggesting that we place into it the forgiveness based on entering an area of critical need. So that if he enters an area where there is a physician shortage or health-care shortage this has an added incentive in the forgiveness of the loan. These are basically our two programs that we believe will be an asset towards increasing the numbers of physicians and increasing the types of physicians and where they are located in Ohio.

Mr. Bartunek - Do you have any specific language to offer?

Dr. Norton - Mr. Chairman, we have not prepared specific language. We would ask for the assistance of your Commission in that respect and fitting it into, not higher education as a special category, but in that section on debt and loans.

Mr. Bartunek - I am going to ask Mrs. Eriksson to prepare such an amendment and to mail it to your office for consideration. I will make certain that all eight members of the committee are advised about it and will have an opportunity to discuss it. Can I ask a question? Have you given any consideration to what it would take to provide free higher education?

Dr. Norton - Yes, we have. The costs get to be very substantial. We are proposing to the Governor for this coming biennium that fees be held constant, that is, that the maximum fee be held constant. We figure our spending based on including the maximum fees in the expenditures. Just the cost of doing that for the coming biennium will be about $150,000,000. Now, for us to replace those figures, I'm sorry I do not have a figure at the present time, but it's obviously going to be a very large amount of money which would be surely on the order of 3 or 4 times that.

Mr. Bartunek - So it's really a problem of money rather than philosophy.

Dr. Norton - No, not entirely. As a matter of fact, I reported to the Board of Regents on Friday at their regularly scheduled meeting, and I laid out the recommendations that we not increase fees but we hold them constant. But if we do that, we will lower the fees and increase state appropriations so that there will be approximately a 25-75 balance. And this would mean that a student would be making an investment of some sort in his own education. First, I think, as a practical matter, this is something that people treat as an investment. It's been built into our understanding of the way we behave with regard to higher education, and I don't think it's viewed as the sole burden that we have. Secondly, I think there's an argument for it, that an investment in something of this sort that does add to our own economic advantage--really gets more work out of us. We invest in it because

we believe in it and we put out harder in the other ways that we have to put out. The third thing is that we feel there are other ways of approaching the question of fees. Now, Ohio's fees, even if held constant, are not low. As a matter of fact, they are the fifth highest in the United States. But at the same time, we have to recognize that the pressures are on for others to move in our direction and if we can hold them constant and work through student loan programs or Ohio instructional grant programs to take care of the basic question of access for people in the lowest income categories, we think that access can be provided. But it's both a matter of practice and philosophy that we are recommending about the approach that will come out in this next biennium.

Mr. Bartunek - I think that's probably a good idea. Yes, sir?

A person in the audience asked Mr. Bartunek whether he would ask the chancellor to react to the proposal of Mrs. Evans regarding adding Section 6 to the Constitution under the Article of education.

Mr. Bartunek - Well, I'll be glad to ask him, but I would venture a guess as to how he would reply. Mrs. Eileen Evans who is the President of the American Association of University Women, Ohio State Division, has been studying the problems of education and she has testified before this committee that she recommends a change in Section 6 which refers to secondary education by adding in the Constitution of Ohio the following language: "There shall be a board of regents which shall be selected in such a manner and for such terms as shall be provided by law. The respective powers and duties of the regents shall be prescribed by law." And she states in support of it that only to refer to loans for higher education seems to omit the section providing for this education. The importance of post secondary education in the changing society seems to merit inclusion in the Constitution of Ohio. Do you have any thoughts on that? I recognize that this is abrupt, but the gentleman wants to know your reaction.

Dr. Norton - When I appeared before your committee earlier, Mr. Chairman, I commented that I generally favor a constitution which is as succinct as possible and one that provides broad general principles. Needless to say, as an exponent of higher education, I welcome anything that the committee would think would be appropriate by way of increasing a statement of commitment to higher education--this would be fine. I do not believe, however, that we will gain significantly if we establish either the board of regents or any other institution in the Constitution. I think that what we're going through right now is a period of evolution. Higher education's strength comes from the fact that it is at this given point in its evolutionary process. I think that for us to move too rapidly or if you try to freeze past practices or current practices, would be less advantageous than just operating under the general legislative procedure. I recognize that there have been comments made within this current year that indicate some doubt on the part of some people as to whether we should continue to exist. I think if those doubts exist they should be settled by public debate in the legislative halls. We will not be weaker for re-examining and having the legislature reassert the position of the board of regents.

Mr. Bartunek - Is there anything else that you would like to bring to our attention this morning?

Dr. Rupert - Mr. Chairman, one thing about the philosophy is that this approach to the loan system is building in an incentive program to come to Ohio to go into specific areas. So that I think we are supporting this loan concept because it has an incentive factor to it. And therefore, just increasing subsidy or increasing state support to higher education in the health field, may not get at what

this package is attempting to get at, to obtain.

Mr. Bartunek - I'd just like to make a comment without indicating how I'm going to vote at this time. It seems to me unfortunate that we have to provide an education for a physician, loan him the money, and then forgive the loan because he stays in Ohio. We taxpayers, in the first place, provided the institutions and the people from which he is going to earn a substantial living. I don't know any better solution at this time, but I feel that all Ohioans should be treated the same. Too bad we have to bribe physicians. We have to deal with these problems as they occur, and perhaps by considering the whole problem there may be other uses for these kinds of plans or other for giving some loans for some other kinds of people. If a kid has to borrow money to go to a mechanics school, why shouldn't you be able to forgive him that money and that loan if he stays in Ohio. These are some practical problems, and I'm sure that we don't have the time to discuss them all although we do appreciate your coming over here and giving us the benefit of your thoughts. And I certainly will pass it on to the eight members of the committee. Do you have anything further?

Dr. Norton distributed copies of his remarks and expressed his appreciation for the opportunity to appear.

Mr. Bartunek - Mr. Paul Taylor.

Mr. Taylor - Mr. Chairman, I am Paul Taylor, Assistant Executive Director of the Buckeye Association of School Administrators. Our association represents about 800 chief school administrators and assistants from the state of Ohio. I have chosen to respond very briefly to the five issues which may be raised on the constitutional level that were delineated in the paper entitled "Education Constitutional Provisions and Issues" on November 20, 1973. First of all, No. 1, Should the Goal of the Educational System be Expanded? We believe that the present direction of the Constitution to provide a thorough and efficient system of common schools is broad enough to permit an education beneficial to each person whether it be academic, vocational, or special. I might add that you probably have heard of the case in northern Ohio where they are trying to prove that vocational education does not come under that. However, the courts so far have felt that it has, and we feel that this issue can and will be settled through the courts. And at this time there is no need for further constitutional revision. The second point raised: should there be a specific provision for higher education? At this point, we say, no. Should there be a board of education? Yes, we believe that the present procedures for electing the board of education at the local state level is a satisfactory way of governing our schools and providing a forum for citizen input. The present method of selecting superintendents is also satisfactory. As you well know, there is a move throughout the state, and from time to time we hear dissatisfaction with boards of education, but we believe that there is no better way at this present time. I think the problem of the citizen is getting responsible and reliable people regardless of their status in life to take an interest in the schools and run for the board. Number four, should any changes be made in the Constitution with respect to private, including parochial schools? We say no, not at this time. Five, should any provision be made with respect to school financing or any constitutional provisions changed which relate to the method of financing schools? Probably not. Our greatest concern is that revenue lost due to the elimination of any tax be replaced with other sources of revenue and that school districts be allowed to maintain voted outside millage on years subsequent to reappraisal when valuations are adjusted upward toward 35%. Both of these matters probably are legislative rather than constitutional. And that would be the extent of my remarks, Mr. Chairman. I would be happy to respond to any questions.

Mr. Bartunek - I have one question. We have had previous testimony that the language in the Constitution should be clarified with respect to the right of education to all children, fitting with their needs, which means handicapped kids. I would take it from your testimony that you would not be in favor changes in that language.

Mr. Taylor - Well, I think that would encompass what we believe. We believe that the Constitution now provides for it. However, if there are those who didn't, we certainly would not object to that.

Mr. Bartunek - You would not object to that.

Mr. Taylor - Oh, no. We want education for every child no matter what.

Mr. Bartunek - No matter what his capacity?

Mr. Taylor - Right. No problem.

Mr. Bartunek - You would have no objection, as I understand your testimony, to it being included in the Constitution so that it would follow what you believe as it exists today.

Mr. Taylor - Absolutely.

Mr. Bartunek - Very well, Mr. Taylor. If you have no specific language . . .

Mr. Taylor - No, we do not.

The committee recessed for five minutes.

Mr. Bartunek - The committee will be in session. I ask William Harrison to come forward please. Mr. Harrison, there are eight members of this committee, three of them couldn't be here and the others got detained some way so we proceed with the committee hearing and we are taping the proceedings and the information as to the testimony will be handed out to the other members. If you have specific suggestions I will see that that gets to their attention at a regularly scheduled meeting.

Mr. Harrison - Fine. Thank you very much, Mr. Chairman. I am Bill Harrison, staff director of the Education Review Committee. The Education Review Committee is a joint study committee of the Ohio General Assembly. It is a bipartisan group. There is equal membership from the House of Representatives and from the Senate and equal numbers of Democrats and Republicans. The suggestions I have today are my own views, and although they stem, in part, from the work of the Education Review Committee they should not be taken to represent the views of the committee or to be endorsed by the committee.

The Education Review Committee was authorized in the budget bill of the 109th General Assembly. It was directed to do three things: to study the administration and effectiveness of the state programs in elementary and secondary education; to study the adequacy and equitability of the school finance system for meeting the needs of all Ohio students; and to review the policies and practices of local school districts to see if any community groups are suffering from discrimination or being arbitrarily denied the use of public school facilities. The committee has commissioned several research studies, has heard testimony from many state organizations and has conducted public hearings in four cities around the state.

The Education Review Committee has found that many citizens and many local school people feel frustration when they try to ascertain just what the state's goals are for the system of public education it was creating. Indeed, several members of the committee expressed their own concern that the system of school finance in Ohio has been changed and patched up so many times and is now so complex that the goals of the system may not be clear even to those who make the state policy for the system. They have expressed concern that the goals are not understood clearly throughout the system, and that perhaps, in some instances, what the state does with one hand is contradicted by what the state does with another hand. The report of the Education Review Committee, which will report their legislative recommendations by December 15, promises that there will be efforts to clarify state goals for the public schools, that is legislative goals for the public schools, and to insure that state, fiscal, and other policies are consistent with each other.

But in my judgment, and I hasten to emphasize that this is my judgment only, the proper place for some of the goals of the state system of public education is in constitutional law. The rather sparse language present in the Constitution is insufficient to guide even our present system much less to guide our efforts to construct public education problems for future needs. In the past half dozen years, several states have adopted new education goal statements in their constitutions. The most common changes have been to specify that all children are to have equal access to the public schools, that schooling is to be appropriate to each child's needs, including those with special learning needs that the system of financing public schools should overcome local differences in wealth and ability to support schools, and in some cases, that the goal of the state is to educate all children "to the limits of their capabilities." While I think that most of these changes have been wise, there are some deficiencies even in these statements which I should like to point out. First, in referring to schooling for children, most of the statements fail to recognize that some state responsibility for persons beyond childhood is already a state goal. In the future we can anticipate the changes in social and occupational structures may well make it desirable or necessary for greater numbers of adults to return to school than has been the case in the past. And it may become desirable for the public school system to assume more responsibility in this area than it currently does. The Constitution should allow for such a possibility. Second, the behavioral outcomes which systems of education are expected to produce are not made clear in the constitutional goals statements. Most of the statements are input statements and we don't have clear statements of what results are intended to be achieved. Third, the amount of schooling to which an individual is entitled is not stated. Nor is it clear whether the goal of educating all children to the limits of their capabilities is a mandatory requirement here and now or simply a desirable goal for some dim and distant future. I suggest that the state does not now intend to educate all persons to the absolute limits of their capabilities. I question whether we should ever expect the state to assume such responsibilities. Rather, it seems to me, that we do and should attempt to prepare all persons who are able to a level of competence which would permit them to function as successful adults in society. Finally, in speaking specifically of schools, and in Ohio, without even mentioning institutions of higher education, many state constitutions fail, in my judgment, to allow sufficiently for possible future changes in the needs of public education and the institutional structures, changes in the institutional structures which might most effectively serve those needs. The education goals statement in the Ohio Constitution is no exception to the deficiencies that I've outlined here. In essence, it requires the

state to establish a thorough and efficient system of elementary and secondary schools, which gives few clues to what these key terms mean--no statement of the individual's rights or entitlement to educational services and no mention of post secondary education whatsoever. It's more difficult to suggest an alternative than to criticize what we have. I would suggest the following goals statement as containing some of the thoughts that I feel should be in a constitutional goals statement for public education. "The goal of the public education system shall be to provide for all persons in Ohio regardless of wealth and place of residence within the state, equal opportunities for educational programs which will prepare them to the extent of their individual talents and ability to live as self-reliant adults and to exercise the social, economic, and political rights and responsibilities as independent citizens in a democratic society." Mr. Chairman, I don't have copies of my presentation but I will have some shortly after lunch and I will be happy to provide copies of those for the members of the committee. I thank you very much for inviting me to speak and I'd be happy to answer any questions you might have.

Mr. Bartunek - Do you suspect that the Education Review Committee might come out in a similar statement of goals?

Mr. Harrison - We have not made a decision on this, but I anticipate that they will try to make some statement of goals and aspirations of their committee.

Mr. Bartunek - Will that be for constitutional consideration or legislative consideration?

Mr. Harrison - I think for legislative consideration.

Mr. Bartunek - Would you ask them for me to consider your proposal here and to take action of some kind of recommendation for a constitutional change, if the committee, of course, feels that it would be desirable?

Mr. Harrison - I would be happy to do so. We have a meeting on Tuesday of next week, October 2, and I'll be happy to bring it up with them at that time.

Mr. Bartunek - Alright. And I would ask that you make, if it isn't already set up in mimeograph form, that you make a separate page with your statement or your suggested amendment and I will guarantee that it will get some of the attention of all of the eight members of the committee and that it will be given full and thorough consideration. I appreciate your coming and giving us the benefit of your testimony. Is there anyone else who wants to appear before this committee hearing today? There not being anybody else, I thank you all for coming, not only for participating but listening, and you will be notified of the date of the next meeting. Thank you very much. The meeting is adjourned.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
April 10, 1975

Summary

The Education and Bill of Rights Committee met on April 10 at 10 a.m. in the Commission offices in the Neil House. Present were committee members Bartunek, chairman, Clerc, Cunningham, Mansfield and Skipton. Staff members in attendance were Ann Eriksson, Director, and Brenda Avey.

Mr. Bartunek: What I want to first do, if the committee doesn't mind, is to review. This is actually the third meeting of the committee. We have had testimony before. On February 11, we had Dr. Martin Essex, the Superintendent of Public Instruction who gave us testimony but made no recommendations for any constitutional change. We had Robert Zeigler of the Student Loan Commission, and he suggested substituting the full faith and credit of the State of Ohio for the reserve fund of the Student Loan Commission, but he hasn't presented any recommendations for constitutional change, and we had Dr. James Norton, Chancellor of the Board of Regents, and he recommended no specific changes at the February meeting. We had John Hall of the Ohio Education Association, and he suggested that we leave the court mandate to "furnish an efficient and thorough education" alone and make no changes in that provision, and not change the language on aid to non-public schools. There were no proposed amendments and the committee, at that time, voted no change in the educational provisions of the Ohio Constitution. At a later meeting, on September 25, Henry Rumm of the Ohio Association for Children with Learning Disabilities presented his testimony and he said that the present system of education excludes a large percentage of children of school age with learning disabilities. He recommended a constitutional change to provide all children with equal education commensurate with their capabilities to learn. Glenn Workman, a young lady of the Ohio Coalition for Educationally Handicapped Children requested that we remove terms such as "deaf", "dumb", "idiot", "insane" and other outdated and non-definable language from the Constitution. She also recommended that the Constitution have a statement that the handicapped persons are entitled to equal educational opportunities appropriate to their individual needs. And she also recommended that there be an equal rights amendment for handicapped persons. And then we had Mrs. Eileen Evans who is also with us today from the American Association of University Women, Ohio Division. She recommended adding to the Section 3 of Article VI, providing for public school system, provisions for "the educational development of all persons to the limits of their capacity" and also recommended a new section on post-secondary education providing for a board of regents in the Constitution selected according to law and with powers and duties provided by law. She stated that these were her own personal opinions and not necessarily that of her organization. We had Paul Taylor of the Buckeye Association of School Administrators, also present today. He proposed no constitutional changes. He said everything could be solved by legislative action. And Dr. Norton came back with Dr. Rupert and recommended two changes in the Constitution permitting the forgiveness of loans made to students who become physicians when they remain in the state of Ohio and practice where there is a shortage of doctors or in family practice in urban areas. Dr. William Harrison of the Education Review Committee said we ought to amend the Constitution by adding a goals statement designed to provide all persons, regardless of wealth or place of residence, with equal opportunity for educational programs which would permit them to live as self-reliant adults. And he said this was his personal view, not that of his committee.

There have also been additional recommendations for change addressed to this committee. The Ohio Commission on the Status of Women sent us a letter asking for an amendment prohibiting discrimination on the basis of race, color, religion, sex, national origin or ancestry. And the American Association of University Women, Ohio Division, sent us an

official letter asking for the principle of equality and equal rights under law for men and women providing all persons with equal treatment without differentiation.

Various research papers have been prepared by the staff on education. Number 31, State Aid to Non-public Schools, noted that both the state and federal constitutions contain provisions prohibiting governmental support of religion and the state cannot offer assistance to parochial schools in violation of the federal constitution as interpreted by the courts. And there is another study on governance, and that pointed out the constitutional provisions for a state board of education and the appointment of a superintendent of public instruction, and gave some emphasis to the fact that it was an elected body. Research Study No. 34, Governance of Public Higher Education, reported that the Ohio Constitution does not contain any provisions relating to higher education except for the section authorizing the state to guarantee repayment of loans. The query is whether there should be other provisions about higher education in the Constitution. No. 35, Financing Elementary and Secondary Education, noted some court decisions and pointed out that the Ohio Constitution could make a stronger statement than it does about the state's obligation to support financially the system of elementary and secondary education. Research Study No. 37, Goals of Education, noted that in other state constitutional revisions, the statement of the states' objectives and obligation to provide equal educational opportunity to all persons regardless of their abilities have been strengthened. The Ohio Constitution, as you know, merely states that the legislature should encourage schools and secure a thorough and efficient system. Also, Governor Gilligan made a statement to another committee wherein he stated that the head of the department of education be appointed by the governor rather than the board of education and that the equalization of educational finance resources should be expressed in the constitution or with the educational goals. This morning we ought to make a decision on the amendments which were recommended. Please look at a report dated October 16th, "Suggested Constitutional Language on Education". If you do not disagree, I think we can just go right down from one onto the end and make a decision on whether we want to make any changes. The first one deals with Mr. Rumm's testimony, which I have summarized earlier. Do we have an amendment to that effect, Mrs. Eriksson?

Mrs. Eriksson: Just what is in this summary. If you note, at the bottom of the page, we have made some suggestions.

Mr. Bartunek: You don't have a specific section or change in language?

Mrs. Eriksson: No.

Mr. Bartunek: Do you have some view on this?

Mrs. Eriksson: We made some comments on most of these proposals. If language with respect to the goals of an educational system is to be included, we felt that there are some problems with some of the language that Mr. Rumm has suggested...

Mr. Bartunek: What is your thought on whether goals should be included or not?

Mrs. Eriksson: I think that that is perhaps the basic decision, of course, that this committee needs to make. If you want to include in the Constitution a statement about goals, then I think that some of the language proposed is, perhaps, more suited to that end than other language. The language suggested by Mrs. Evans, or perhaps the language suggested by Dr. Harrison contains fewer ambiguities, we felt, than the language suggested by Mr. Rumm or by Ms. Workman. It's all geared toward whether there should be a goals statement expressed in the Constitution.

Mr. Bartunek: Does anyone have any thoughts on whether there ought to be a goals statement?

Mr. Skipton: I'll make a motion that we pass over it. If you're going to put in goals on education, you ought to put in economic goals; I've got a long list of them to put in. This state has legions of special interest groups, all of which would like to have their particular interests mandated in the constitution.

Mr. Mansfield: John, do you consider education per se as a private interest group?

Mr. Skipton: The people that are proposing these recommendations obviously are. And there is an expression in the Constitution now on education. The effect of all these proposals is to expand the spending on educational programs in particular areas. They are not really goals statements except for the limited audience that they're intended for. If we want to look at, say, the existing provisions and decide if, philosophically, this expresses what we believe the people of Ohio wish, then that's perfectly alright with me. But I'm very leary of these tailored proposals. It's just so patent what they're after. And they're not talking about education. They're talking about money.

Mr. Bartunek: Does that mean that you feel that there should not be a statement in the Constitution or the law encouraging the spending of money on, say, physically handicapped or retarded children?

Mr. Skipton: That's right.

Mr. Mansfield: Where is the goals statement we now have?

Mrs. Eriksson: Article VI, Section 2 says that the general assembly shall make such provision as will secure a thorough and efficient system of common schools throughout the state.

Mr. Skipton: Language like that can be cleaned up. I don't know what "common schools" means, myself, right now.

Mr. Bartunek: I have the philosophical position that I don't believe that changes should be made unless there is some reason. Not even changes for clarification of language. In many respects, these have been through court tests.

Mr. Skipton: That position is consistent with the attitude of most of the study committees. Don't make changes unless they make some substantive change. We've done it where the provision was being rewritten anyway, and we may clean up the language in the process. I believe we've followed that as a commission quite well.

Mr. Bartunek: Dr. Cunningham, what is your opinion on this matter?

Dr. Cunningham: I think we shouldn't particularize. I'm very much opposed to detail. And this, I think, transgresses the detail. And I think the general definition is adequate.

Mr. Bartunek: Mr. Clerc, do you have any thoughts on this?

Mr. Clerc: I agree. We're currently in an expansion move in the Hamilton County and Cincinnati School area but this was generated locally in the legislative process rather than in the Constitution.

Mr. Bartunek: Do you feel it can be done under the existing language?

Mr. Clerc: Yes.

Mr. Bartunek: What about you, Mr. Mansfield?

Mr. Mansfield: I don't think that I know enough about it to give a well-informed opinion,

but off the top of my head, I don't think there's any change necessary, unless you want to clarify what "common" means. We must have some interpretations down through the years, so I doubt very much that there is anything necessary.

Mr. Bartunek: Alright, Mr. Skipton. If I could ask that your motion be to the effect that the present statement of goals is sufficient, or however you want to word that.

Mr. Skipton: I move that we eliminate from the agenda consideration of a change in the statement of educational goals that is in the present Constitution.

Dr. Cunningham seconded the motion.

Mr. Bartunek: Is there any discussion, gentlemen?

Mr. Mansfield: I have a question. I'm a little confused about how the word "goals" gets into this discussion.

Mr. Bartunek: Because these people came to testify and they stated that Ohio was weak in educational goals statements in our Constitution as compared to other recent constitutional enactments in other states. For instance, we have practically no language at all about higher education.

Mr. Mansfield: I realize that.

Mr. Bartunek: And we do not have the language in other constitutions that state that we should provide an education to the extent of a person's ability regardless of what those abilities are. Our constitution, apparently to some, guarantees that an ordinary normal guy gets a shot at education. But if they are retarded, crippled, or a poor student, it does not have...

Mr. Mansfield: I would say that you're stating now a proposed obligation rather than a goal.

Mr. Bartunek: I think it's a semantic problem. The people who brought these to us considered these as goals rather than obligations.

Mr. Mansfield: I'm quarreling with John's inclusion in his motion of the word "goals".

Mr. Skipton: Let's eliminate the word "goals" and just state that we eliminate from the agenda consideration of proposals for changes to the existing provisions in the constitution relating to the formation of an educational system. Phrase it in terms of what is in the existing constitution.

Mr. Bartunek: Would you favor that, Dr. Cunningham?

Dr. Cunningham: Yes.

Mr. Bartunek: Any further discussion? All those in favor please say aye - (All present voted aye). That would deal with Mr. Rumm's statement and would handle Mrs. Evans and Ms. Workman's and Mr. Harrison's. The next is the recommendation of Mrs. Evans. "There shall be a board of regents which shall be selected in such manner and for such terms as shall be provided by law. The respective powers and duties of the regents shall be prescribed by law." Any comment, gentlemen?

Mr. Mansfield: Would someone tell me how the duties and responsibilities of the board of regents dovetail with the state board of education?

Mr. Bartunek: In two different areas. The state board of education handles primary and secondary education. The board of regents was created when I was a member of the legislature, to provide for a combination of controls, if you will, over higher education. Because they had at that time about six state universities go by themselves to the legislature and fight for money. It was an uneven coalition of university presidents and the Ohio State University got most of the money and the others got none or very little. So then they created the board of regents, over my opposition in the legislature, to oversee all of this. And it has been operating ever since. Its budget has increased tremendously. As a member of the board of trustees of Cleveland State University, it's not so good in my opinion. You have to go to them if you want to award other degrees, and they substitute their judgment for the legislature's, and put more restrictions on higher education. There are many people in the state that like it and think they're doing a good job. Dr. Norton, when this recommendation was made, said as Chancellor that he didn't feel that it was necessary to give constitutional status to the board of regents. This is all you're going to do by putting this in. You're giving constitutional status rather than legal status, which would make it harder to change.

Mr. Skipton: Mr. Chairman, I imagine, too, that some interest in an amendment of this type has arisen since the current governor has expressed a desire to abolish the board.

Mr. Mansfield: Well, this is an area, though, isn't it, that ought to be left to the legislature? It was created by the legislature.

Mr. Skipton: If they want to abolish it, let the legislature do it.

Mr. Mansfield: I've had some qualms about having a board of regents at all for some of the reasons that you said, Joe. I don't think we ought to freeze it or prohibit it by the Constitution.

Mr. Skipton: All of those problems that people find with the board of regents, under this amendment, are still left right where they are now. So the only thing you would do by adopting this is to just assure that there are going to be 9 guys appointed to a board. And everything else you leave just as it is now.

Mr. Mansfield: If the legislature wanted to abolish it, they could give it no power.

Mr. Skipton: That's right. They could make the board a non-entity under this amendment.

Mr. Clerc: But that's a sloppy way of abolishing them.

Mr. Bartunek: What this does is put something in the constitution which is not very broad. Although we do have the state board of education. Of course, that was a problem, too. Well, what is your pleasure, gentlemen?

Mr. Skipton: I'm always willing to hear anybody expound on this, but the form of this proposal in front of us I just believe it doesn't mean anything. I move that the committee declines to recommend the constitutional creation of the board of regents for higher education.

Mr. Mansfield: I'll second that.

Mr. Bartunek: Any discussion? Very well. All those in favor of the motion please state aye - (All present stated aye). The motion has carried unanimously. I guess we should proceed on to number 2, Article VI. This is a suggestion by Dr. Norton, which, as I understand it, carries out his recommendation that we give free tuition to doctors, and bribe them to stay in Ohio.

Mrs. Eriksson: This language is language that they proposed and we worked with them on it.

Mr. Bartunek: To refresh your recollection, Dr. Norton and one of his associates appeared before us and stated that they wanted to have a system whereby students who were in medical school should be given a loan, and then if they promise to stay in Ohio and practice in urban centers or in rural areas where doctors are needed, they would be forgiven the repayment of that loan. I personally am very much opposed to such a plan.

Mr. Clerc: I don't see where it's proper for the constitution at all. If a program like this were enacted through the legislature on a short-term basis for a need or critical situation, that would be one thing, something which would be proper for the legislature to debate and to wrangle with. But to include this forever in the Constitution, to lock into the Constitution...

Mr. Bartunek: I think the need for it is due in part to the fact that student loan provisions are in the Constitution now.

Mrs. Eriksson: Also, there is some question that if a loan is to be forgiven, it would amount to a gift, and there is some question about the present constitutional provision which prohibits the state from lending its aid or credit for private purposes. I think the board has proposed legislation and a number of persons believe that it might be unconstitutional. That's why they're suggesting that there be a constitutional amendment.

Mr. Skipton: There are a lot of hidden issues here, too. We could get into a debate over the parochial public school issue. These things are open-ended, and you just don't know where they'll lead. We might be surprised 10 years from now what it would be interpreted to cover.

Mr. Bartunek: I agree. I feel that this is an adhoc kind of thing that you wouldn't want to put in the Constitution. Well, what's your pleasure, gentlemen?

Mr. Clerc: I would move that the committee declines to recommend the proposed addition to the Constitution regarding loans.

Mr. Mansfield: I'll second the motion.

Mr. Skipton: These things never work. It's the old question of how are you going to enforce personal services.

Mr. Bartunek: Yes. It's abhorrent to the constitution in and of itself. Is there any further discussion of the motion? Alright. All those in favor please state aye (All present voted aye). The motion is adopted by unanimous vote. There will be no more consideration of educational provisions. We thought we had concluded it before, but this time, for sure. Alright. Then let us turn our attention to the overview on the bill of rights provisions. Did you propose to give us an overview, or do you want me to do that?

Mrs. Eriksson: I would prefer that you would express whatever your thoughts are.

Mr. Bartunek: Alright. I'm just going to give my thoughts and then I would like the committee's suggestions, because I'm just one member here and we just want to do the job.

Mrs. Eriksson: I'd just like to make one preliminary comment and that is that you have received everything except the research on the habeas corpus section and that's presently being typed.

Mr. Bartunek: My thought is that what we ought to do is to take them in the order that they have been presented to us and to give people an opportunity to be heard and to vote on it and to move as quickly as we can to conclude our task. It's rather a formidable task. It's

a large Article and it's got a lot of hidden implications and a lot of problems. My personal feeling is that I don't see why we just don't take them in the order of the dates of the research work and proceed from then on. There's a lot of reading to be done and a lot of interesting law that we are dealing with. As I told you before, and I don't know if you share the philosophy on this, but it is my personal view that the least change you make in the constitution the better unless you are really getting something definite for it. I would like to get the suggestions of the other members of the committee to find out how it would be convenient for you to attend meetings and proceed with this study.

Mr. Clerc: I have no problem with what you have outlined, Mr. Chairman. I think taking it in the chronological order of the studies, and I share your philosophy of being very cautious as to change. But I would have no problem at all with proceeding along these lines.

Mr. Bartunek: Mr. Skipton?

Mr. Skipton: I don't have any feeling about any priorities of how we take up these things and I share your views too.

Mr. Bartunek: Dr. Cunningham, how about you?

Dr. Cunningham: I have no objection either, but I've always been in doubt as to just how far we should go with the Bill of Rights because it is already covered by the 14th Amendment of the Federal Constitution. Much of it is moot. Are we going to unscramble that which is moot and that which isn't or are we going to limit ourselves to the rights of women or something of that sort as the so-called new civil rights?

Mr. Bartunek: I've expressed my opinion but I want you to express yours. It's not so important whether we agree or not, as long as we get both sides. I'm still a state's rights guy. Even if the federal government has these provisions in its constitution I don't know what's going to happen in the federal government and I don't have as much control of that as I do of what happens in Ohio, where I have a tiny influence. I think Ohio should retain these provisions as a basic indication of our sovereignty and our way of life in a very troubled century.

Dr. Cunningham: It's historic, such as on the quartering of troops, and is current because of the 200th year ceremonies. So, are we going to go all through that here or are we going to ignore it? We'll have the D.A.R. down our throats if we do, that's just one example, because we're abolishing, if we do, history, and so forth. What policy should we take: repetition and reprint for no purpose at all, because the Supreme Court has repudiated the real meaning of the quartering of troops and that sort of thing.

Mr. Bartunek: There is another thing, too, and I think it's the entrance to the courts. You can plead the federal constitution in a common pleas court, but it may be useful to have both.

Dr. Cunningham: You can if you can convince the judge that that's controlling. If he thinks that the Constitution of Ohio supports his position, he'll say "take it up, young fella, take it up".

Mr. Bartunek: In other words, Dr., you want to give consideration to eliminating all of the civil rights that are granted to the states under the Fourteenth Amendment?

Dr. Cunningham: Academically, I'd say yes, but practically, I'd say no because I know that you can't get away with it.

Mr. Bartunek: But it would be a nicer and cleaner constitution if you did.

Dr. Cunningham: It would be a cleaner cut thing to do. We could then decide where the Fourteenth Amendment has gone and where it is going.

Mr. Bartunek: That was just recently that the Fourteenth Amendment applied to all of the earlier amendments through the states. It would be a federal guarantee and not a guarantee of the states. I admire your practicality. I agree with you both ways, that it would be, perhaps, a neater way. But I also agree that as a practical matter it would not be good to make that kind of a recommendation.

Dr. Cunningham: I don't think we would get away with it. The D.A.R. and the Veterans of the Foreign Wars and everybody would be down our necks.

Mr. Bartunek: Well, that shouldn't impede us if we think it's right.

Mr. Skipton: The only other side of the coin is that by the state expressing itself on some of these issues it helps guide public opinion on to interpretation of the federal Constitution.

Dr. Cunningham: I think that as a technical matter, going through it seriatum and taking a position on it and include it or exclude it or limit it in our application would be an approach.

Mr. Bartunek: I think that's a good idea. Mr. Mansfield, what are your views?

Mr. Mansfield: I think we ought to ignore the federal Constitution and act as though it wasn't there. We could change this but change it in the light of trying to make the state sovereign.

Mr. Bartunek: Well let's proceed on that and build a schedule based upon the research studies.

There was discussion about days and dates for meetings.

Mr. Bartunek: I think we have a duty to the Commission to face this thing, listen to testimony and make decisions based upon the evidence and our philosophy and make recommendations.

Mr. Skipton: How many of these studies are there actually?

Mrs. Eriksson: There are 12 separate memos but that's not to say that they all need to be the subject of a separate meeting. As a matter of fact, I would think not.

Mr. Skipton: How many different groups of people would want to be heard on this? I imagine there is a great deal of overlap anyway.

Mrs. Eriksson: Yes, sir. I would think that probably two groups would come to mind. One would be the Civil Liberties Union and the other would be the Prosecuting Attorneys Association that I would imagine would want to at least consider each of the topics. Thoee two groups have indicated a strong interest in the bill of rights provisions.

Mr. Skipton: I was thinking of an all day meeting.

Mr. Bartunek: Why don't we try that for the first time and see how it works. I can't really see doing much from 10 to 12 frankly when you have a controversial and difficult subject. Especially if you want to give everybody a chance to be heard which we all want to do. What you have said just poses another interesting problem. If some people want to talk on all subjects, maybe we just ought to schedule a first hearing on the entire Article and let

people present their testimony if they want to be heard on some or all, so that they don't have to come back 6 or 12 times. What do you think about that?

Mrs. Eriksson: I think that that might be a good way of approaching it. Then the committee itself could discuss the memos in the order in which you received them.

Mr. Bartunek: Right.

Mrs. Eriksson: Some people might have comments on a lot of different sections.

Mr. Bartunek: Why don't we schedule the public testimony onthe whole bill of rights Article. And why don't we devote a whole day to that, or more if necessary.

Mr. Mansfield suggested May 2. That date was agreeable to everyone present, and the all-day meeting was scheduled for 9:00, May 2, depending on how many people want to be heard.

Mrs. Eriksson: It might be preferable to get a room in the state house and that should be no problem. Mr. Bartunek, do you want to have people who want to suggest new things, like the women's groups, notified, and have everybody come on that date?

Mr. Bartunek: Right. If we see that the agenda is getting too filled up then we will have to postpone some of them. If it looks like it's going to be a two-day hearing, then you make the cut-off where you think it's reasonable. We want to make full assurance to the people of Ohio that we are going to sit here and listen to what they have to propose. I think this is the most important article in the whole Constitution, these are our fundamental rights. So I'll leave that up to your discretion. Are there any other questions or thoughts? I thank you gentlemen for taking time from your busy calendar to be here and if there is no objection we're going to proceed with or without a quorum, especially if there are going to be people here and there are always adequate minutes provided of all of these meetings.

(Arrangements were made to mail new packets of the research memos to committee members who indicate they need them).

The meeting was adjourned.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
May 2, 1975

Summary

The Education and Bill of Rights Committee of the Ohio Constitutional Revision Commission met on May 2 at 9 a.m. in House Room 10 of the Statehouse in Columbus. Present from the committee were its chairman, Joseph Bartunek, and members Robert Clerc, Warren Cunningham, Bruce Mansfield, and John Skipton. Ann Eriksson, Director of the Commission, and Brenda Avey attended from the staff.

Mr. Bartunek called the meeting to order and the roll was called.

Mr. Bartunek: Before we go ahead with the live testimony, we have received a letter from the director of the Ohio Task Force for the Implementation of the Equal Rights Amendment, and they have stated that they will not have any testimony to present to us. They were notified as were many other groups. As you recall, Mrs. Eriksson had indicated that there would be a large number of people that would want to testify, perhaps taking 2 days, but we only have five people registered and if there is anybody else, of course, we will hear them. First of all, I want to call on, if she is here, Audrey Matesich, of the Ohio Commission on the Status of Women. Would you please come forward and present your testimony.

Mrs. Matesich: Mr. Chairman, members of the committee, I am Audrey Matesich of Newark, Ohio. I am currently serving as president of the Ohio Commission on the Status of Women, Inc., a non-profit, Ohio corporation with membership open to individuals and organizations interested in the problems of rights and responsibilities, especially of women. We presently have 25 organizational members and about 200 individual members. The Commission appreciates this opportunity to appear and offer our recommendations.

During the 1973-74 legislative session, obtaining Ohio's ratification of the equal rights amendment to the federal Constitution dominated all other issues relating to women. The individuals who were on this commission devoted the greatest amount of their energies to this cause, with fruitful results, on February 7, 1974, when Ohio became the 33rd state to ratify the federal equal rights amendment. This commitment by Ohio to equality for its citizens can be continued by including our proposed recommendation of a separate section being added to the Bill of Rights of the Ohio Constitution prohibiting discrimination on the basis of race, color, religion, sex, national origin, or ancestry.

Mr. Bartunek: Thank you. Are there any members of the committee who wish to ask Mrs. Matesich any questions?

There were none. Mrs. Matesich presented her testimony in writing.

Mr. Bartunek: I apologize that there aren't more members of the committee available, but the testimony is all being recorded and it will be presented to them so they will know about it. Thank you very much.

Mrs. Matesich: Thank you.

Mr. Bartunek: Next I want to call Dr. Marie Pfeiffer of the American Association of University Women.

Dr. Pfeiffer: Mr. Chairman and members of the Ohio Constitutional Revision Commission, Education and Bill of Rights Committee, I thank you for giving me this opportunity to appear before you on behalf of the Ohio State Division of the American Association of University Women. Two purposes for which this organization was chartered over 75 years ago were, one, the concern for human dignity and second, an improvement in the status of women. These

purposes are implemented through developing policy and taking action on legislation, governmental measures, and policies in the public interest. The A.A.U.W. supports measures that protect the rights of the individual under the U.S. Constitution such as equal rights to vote and representation, right of peaceful dissent, right of privacy, equal opportunity in education, training, employment, housing, elimination of discrimination based on sex, race, color, creed, national origin, or age, and civil rights of minors.

As we study Article I, the Bill of Rights of the Ohio Constitution, it is our belief that certain items need to be emphasized for clarity and they are: equal protection, equality, the right to bear arms.

I'm not a lawyer and I do not speak for an organization of lawyers, so I would ask that the committee view the language I prepared and am going to propose as a suggestion of principles which we feel are very important and should be expressed in the Ohio Constitution. If other language accomplishes these purposes better than ours, we will be pleased to support it. The language we propose is as follows: "No person shall be denied the equal protection of the laws, nor shall any person be denied equality of his civil or political rights, or be discriminated against in the exercise thereof because of sex, race, color, creed, national origin, or age." We believe that all human beings should enjoy the rights that are theirs by virtue of their being human. And it's only when all human beings are granted complete equality that they will be fully able to realize themselves.

The Association is concerned about the availability and control of handguns and we support handgun control legislation, but recognize the possible unconstitutionality of any such legislation in view of the first part of Section 4 of Article I of the Ohio Constitution as it now reads. So perhaps the people of Ohio should be allowed the privilege of deciding if they want the regulation of handguns. And should this committee present language that would make this possible, we would be pleased to support it.

Mr. Bartunek: Are there any questions from members of the committee?

Mr. Mansfield: One, Mr. Chairman. My recollection is that in the federal civil rights statutes, the word "age" is not included.

Dr. Pfeiffer: That's right.

Mr. Mansfield: I would like to hear why you think it's necessary to add age.

Dr. Pfeiffer: Because we do feel that there is discrimination against older people and that they should have the opportunity and the privilege of being considered equally when they are trying to apply for a position if their other merits are equal.

Mr. Mansfield: This effect, then, would, I presume, preclude the possibility of forced retirement.

Dr. Pfeiffer: On the basis of age. I know that this is going counter to what a lot of the laws are doing now. It used to be 65, and then 60, and they keep coming down, down, down. Some of us are getting to the point where we think this is definitely discrimination.

Mr. Mansfield: So what you're saying, in effect, is that if your language were adopted, it no longer permits the employee to be retired solely because of age.

Dr. Pfeiffer: Yes.

Mr. Bartunek: Mr. Clerc?

Mr. Clerc: What effect would this have on the opposite end of the spectrum, the age of

majority and so forth. I'm thinking about teenagers' responsibilities and so forth.

Dr. Pfeiffer: If you take a look at the age of the population, you find that the percentage of younger persons is becoming smaller. And/will we find ourselves in time that we're going to be needing the people that are older to fill jobs? But because of regulations they can't.

Mr. Clerc: But wouldn't the employers be inclined to adjust and amend their own hiring and employment practices? I'm still interested in the age of majority and parental control and so forth. If we were to write something of this nature into the Constitution what does that do to the family unit and parental control? If we say that there shall be no discrimination because of age, what is to stop someone who is 16 years of age when they have just opted to drop out of school just to go ahead and do whatever he wants to do without concern for parental control?

Mr. Mansfield: While you are thinking about that, what might that do to the whole juvenile court system?

Dr. Pfeiffer: I am not an attorney. I have been down here representing the American Association of University Women, Ohio State Division, as their legislative chairman and registered lobbyist because of that position because I do testify before committees. There is legislation concerning legal age for drop-out from schools right now. Of course, there are some people who would like to even have this lowered, you see. Every attempt is being made to keep youngsters in school by building curriculum that will meet their needs. There is great interest in vocational and technical education. These youngsters are working on a co-op program right now. While they are in high school they are out on the job working, receiving minimum wage. I don't think that is as much of a factor as taking a strong look at the other continuum of the age range and what we are doing to these people so early with regard to their productivity.

Mr. Bartunek: Mr Skipton?

Mr. Skipton: Since Bob started that line of question, I have had some thoughts. I think you've wiped out compulsory education, you've wiped out parental control of where their children go to school. You're wiping out a lot of the restrictions in the social security system. We are extremely discriminating against people who are aged when we say that they can't get a certain type of social security if they earn more than a certain number of dollars a year and this sort of thing. I would really like to see an analysis of the actual practical effects of this. I know these things sound very admirable, but when we start to look at all of the places it affects people, I'm afraid that people are going to say " I only meant for this to apply to certain cases. I don't mean for it to apply across the board." When someone puts this in the constitution, it must apply across the board.

Dr. Pfeiffer: Perhaps then, Mr. Chairman and members of the committee, as I said earlier, the way you would arrange this language, you may wish to clarify this in the manner in which you do it. So it wouldn't necessarily, as you say, range across the board. But it is our feeling that this is an area that is very important and at sometime we are going to have to take a strong look at this and it may be very wise to look now while we are looking at the Constitution. Because, as statistics will show, we are getting to be an old society because of the rapid drop in birth rates. And so these are the things I'd like to bring to the consideration of the committee.

Mr. Bartunek: Any further questions?

Dr. Pfeiffer: I'm delighted that you have these questions for me.

Mr. Bartunek: We have one more question.

Mr. Clerc: I didn't want to let you go without talking about Section 4 a little bit and the gun control issue. The practicality of the matter is staggering. Is it, therefore, the proper place or should we think of a constitutional ban when we seem to be having so much trouble with state, local and federal bans?

Dr. Pfeiffer: I don't know quite how to answer that. As I have gone over the state, and as I was up in Cleveland, I realized that the availability and the use of these handguns is becoming such a big problem, especially in some of our schools. It would appear as though many of our citizens are greatly concerned. I take a look at the first part of Section 4 of Article I, and I thought how could the legislature possibly write legislation that would be constitutional? So that's why my recommendation is that perhaps this committee could write some language that would first present this issue to the people and let them vote. Let them have a say as to whether or not there should be control.

Mr. Bartunek: You are certainly entitled to your opinion which I am violently opposed to. But that's why we're here, to learn all kinds of opinions. I just personally feel that it is an important part of the constitution and should remain. I don't see that having a vote on it is going to solve anything. Thank you very much for giving us the benefit of your testimony. Mr. Bovard, are you the representative from the Department of Transportation?

Mr. Bovard: Yes, your honor. Mr. Chairman, members of the committee, and ladies, I'm Howard Bovard, legislative assistant to the director of transportation. We came with no prepared statement. And our purpose is to point out to you people that we have no suggestions for change in the eminent domain phase of the law. If there are conflicts, then we would appreciate having an opportunity to take a position on them if and when they do arise. We are satisfied with it as far as the Constitution is concerned. Admittedly, there are statutory changes that come about and we take a position pro and con on it. As far as the Constitution, we are completely satisfied with its application of the eminent domain law.

Mr. Bartunek: Alright. Does anyone have any questions of Mr. Bovard? Mr. Skipton?

Mr. Skipton: Are there proposals to change the Constitution in this respect?

Mr. Bovard: We hear rumors that there may be some attempts to remove the Department of Transportation from the quick-take provisions of the eminent domain law. And to that extent, this is why I'm addressing myself to this. If this is contemplated, we would like to have a rebuttal to the advocates if that does occur.

Mr. Bartunek: To refresh my memory, quick take is the ability of the state of Ohio to pay the deposit to the court and take the property before the jury assesses the value. And it is only permissible for the purpose of building roads, and no other purpose.

Mr. Bovard: There are two other purposes; times of war and national emergencies, and the department if transportation. And there are some people who feel that there should be only two occasions. We hear this rumor but we don't find the bodies and we hope they don't arise.

Mr. Bartunek: Are there any other questions of Mr. Bovard? Well, thank you very much, sir, for giving us the benefit of your testimony. You certainly will be advised should this committee consider any change in that. And the representative from the League of Women Voters, who has patiently sat through all of our deliberations...

Mrs. Brownell: Thank you Mr. Chairman and members of the committee. I'm here today to speak on two principles that we think should be included in the Constitution: one is the right to know and the other is the right to participate. A little background here. The League of Women Voters, as one of its basic principles, encourages informed and active participation in government. We believe that citizen participation in government is basic to the democratic

process and is, therefore, a cornerstone of the League's political purpose. We act to enlarge citizen participation, to open up electoral and other governmental processes, to make facts on issues and on the political process more accessible. Well, where is the basis now? The only basis for principles of the right to know and the right to particiate is actually section 11 of Article I which provides for freedom of speech. And this really does not guarantee in our mind the citizen's right to know what the government is doing or the citizen's right to participate in governmental deliberations. By the right to know, we feel this includes the right to examine public records, to observe public deliberations and to receive advance notification of meetings. Under the right to participate we would include such things as the opportunity to be heard by both executive/administrative and legislative levels and the opportunity to have citizens participate as direct members of study committees, planning commissions, boards and other advisory and policy making bodies.

All levels of government should provide for open meetings and the right to be heard. Here I think we can all name an instance when governmental officials have held meetings at inconvenient times or contemplated major decisions in executive session. This type of action leads to suspicion and does not promote confidence in government. It is only through guarantees of the right to know and to participate, we believe, that government will be responsible to all the people.

In your Revision Commission Study No. 44E, you did have a paragraph referring to this. I'll just refresh your memory by going over it. You mentioned that in the recent Montana Constitution, Article II, Section 8 guaranteed the people the right to participate in the decision of governmental agencies which would probably be interpreted as the right to be heard on matters of interest. Article II, Section 9 guarantees the right to know, in the Montana Constitution. It provides that no person shall be denied the right to examine public records or to observe public deliberations of public bodies on all levels unless the right to privacy clearly outweighs the merits of public disclosure.

Legislators are currently concerned about the right to know. This legislative session Representatives Hartley and Brooks have introduced H.J.R. 26 which proposes to amend Section 13 of Article II to require that "all proceedings of both houses including the proceedings of the committees and commissions thereof shall be public." The present wording only says the proceedings of both houses, and they are adding the words "committees and commissions". This, in our opinion does not go far enough. It only provides for open hearings at the state level. This principle should apply to all levels of government.

There also are efforts currently to revise Section 121.22 of the Ohio Revised Code and there are four bills that have been introduced in this area, one senate bill and three house bills, attempting to amend the present section to forbid secret meetings and close the current provision judged to be a loophole. The League of Women Voters has testified in support of one of these bills which would eliminate executive sessions of state and local boards or agencies unless specifically authorized by law, and to insure open public meetings. It is vital we said, when we testified, for the democratic system to insure that all people can find out about the action, or inaction, of their governing entities. Whenever secrecy exists, there is an erosion of confidence in the decision made and in those making the decisions. It may seem easier to decide some issues quietly out of the public glare, but that technique can only undermine a system which rests on the faith of the people in it.

In addition to the right to know, which is considered by all those things that the legislators have introduced, we are adding and believe strongly in the right to participate . The League has always encouraged citizen participation through the franchise. In recent years we have encouraged more participation through membership on boards and commissions and other advisory as well as policy making bodies. We encourage our members not only to observe meetings but to react and monitor meetings, lobbying really. Government has found, over the past decade, I believe, the need to allow more citizen input. You can see this in the

model cities type programs. Only by this input can government be more responsive. Provisions need to be made for direct citizen input as the plans and programs develop. If the citizens participate as these programs develop, support for the programs will be far stronger. To reiterate, the League believes the right to know and the right to participate are fundamental principles that should be guaranteed in the Bill of Rights of the Ohio Constitution.

The details of how to implement these principles certainly should be handled by the General Assembly or local public body. Senate Bill 74 is one such step forward in that direction. But a guarantee of the citizen's right to be heard, to observe, and to examine public records, is appropriate, we believe, to our basic document, the Ohio Constitution.

I want to thank you for having me here. We've followed, as you know, with much interest, the work of the Ohio Constitutional Revision Commission. These hearings at all steps of your work and the effort by the commission to keep the public aware of their opportunities to be heard have been truly commendable. I'm really just asking that you do make this kind of opportunity available for all governmental agencies in providing for a right to know and a right to participate.

Mr. Bartunek: Thank you, Mrs. Brownell. Are there any questions? Mr. Mansfield.

Mr. Mansfield: I'm not objecting to your general principles. On the other hand, I find it more and more difficult to define what participation really means. Would you mind commenting on that a little more?

Mrs. Brownell: I agree. This is probably the more difficult area. I think we feel that there should be opportunities, particularly in the development stages, to give citizens a change to sit in and participate on some of these developing programs of governmental agencies.

Mr. Mansfield: What I have observed from time to time, in organizations where you have a paid staff and this kind of thing, they are more able to know what is coming up and what isn't. And if there is open, public participation, so to speak, it seems to me they have opportunities to bring, I think, undue pressure, as opposed to what may really be the will of the majority, who aren't in that position because they are not organized. It strikes me that there must be some fine line of demarcation where participation, per se, conflicts with representation. We elect people to represent us. I don't know where that line is. I find myself unwilling to put in the Constitution the simple words "the right to participate" because I don't know where that ends.

Mrs. Brownell: I certainly understand your concern, but I think we feel that this is the way government will be more responsive.

Mr. Mansfield: As far as I know, Judge Bartunek would know far better than I, because he has been there, so far as I know, any citizen has the right to appear before any hearing held by a legislative group or committee, and can express his views either in person or in writing. Except for when the chairman, whoever he may be, has designated some session as a closed session. But if you put in the right to participate, what you are really saying is that no longer will there be any "executive sessions" of any governmental unit. I just worry about that.

Mrs. Brownell: The current bill is providing exceptions to this, dealing, for example, with personnel decisions.

Mr. Mansfield: Our local newspaper thinks the exceptions make the bill rather innocuous. I can't say because I'm not familiar with it.

Mrs. Brownell: I think you have to keep them down to very few exceptions.

Mr. Bartunek: Mr. Skipton.

Mr. Skipton: I'd like to pursue the same thing. I find it difficult to visualize how this right to participate as it was described would apply. Take the Constitutional Revision Commission, for example. If I understood you correctly, you used the example of model cities. You get 200 people where everyone is supposed to be able to put his input in. How would it apply to, say, the creation of the Constitutional Revision Commission? How would this provision control the General Assembly and the status of the group? What would they have to say about the memrship and the right of the citizenry to participate and act in the deliberations of this commission? We have a group that has legislative members on it, it has lay members on it, it's bi-partisan. What more is the legislature going to have to say to comply with what you're suggesting?

Mrs. Brownell: I already believe that in that sense this is already having citizen participation. I would interpret that the creation of the commission is in a sense already having that participation in the actual make-up of the commission. That's just my interpretation of it.

Mr. Skipton: I have two other questions. To toss around words like "public records" and the way those words are defined, what is a public record? Is my income tax return a public record?

Mrs. Brownell: I believe that means the deliberations of all public bodies.

Mr. Skipton: You said the right to examine public records. There are a lot of things about a lot of people that are lying about in public property - public file cabinets. Is all of that data public record? I'm always afraid that people define these terms to suit some particular need they recognize, but I'm worried about how somebody else is going to define that term, what they include in the definition. And you also spoke of "secret meetings". What is a secret meeting? You walk out the door and Bruce Mansfield and Dr. Cunningham and I sit and discuss what you have testified to, but have we had a secret meeting?

Mr. Bartunek: Under the Florida law you did.

Mr. Skipton: Yes. And you want to ban that?

Mr. Bartunek: I think what she is getting to, Mr. Skipton, is what I call secret meetings and everybody gets mad at me. At Cleveland State University I am on the board of trustees and they have what they call an "agenda planning session". And there, they don't really take a vote but they talk over all of the tough things and everybody is advised and then you go to the regular meeting and the newspaper reporters sit there and there isn't very much discussion. Or when a city council has a meeting, they always have a caucus before hand where everything is pretty well thrashed out and then the public meeting becomes less of a real examination of the issues.

Mrs. Brownell: Yes, that's what I was referring to.

Mr. Bartunek: That does seem to be a problem. Of course, in our days, Mr. Skipton, they used to have secret meetings of the rules committee and the reference committee and I believe those are now abolished. And there is a state law now that permits anyone access to public records and requires the public officer to give a copy to the individual requesting it for a reasonable cause.

Mr. Mansfield: Let's take the P.U.C.O., for example. I'm sure that there are certain

records which they consider to be private records, as opposed to public records. I think John is saying that perhaps someone else could be making that decision whether those records are public and therefore the commission has no guarantee that some court might not say "These aren't private, these are public".

Mr. Bartunek: I would imagine that any of the possessions of the Public Utilities Commission would be a public record.

Mr. Skipton: This is correct, and the great danger in this is you're going to stultify the processes of decision-making. One, I'm never going to give any public agency any information voluntarily. I'm not going to discuss with any public official my opinions or views on a subject if I believe that everything I say to that man is going to go into a public record and be drawn out 10 years later to be used one way or another. That information may be very important in making a good decision on a public plan, but it just isn't going to be available. People are not going to be giving this private kind of information to help them make a decision.

Mrs. Brownell: I would presume, of course, this would be a principle you would put in the constitution, and in the right to know which was referred to in some of these cases, would be a principle and you would implementing legislation which would clear up some of these problems.

Mr. Skipton: Everybody is always hoping that somebody's going to clear it up.

Mrs. Brownell: I think we have constant definitions of other sections of the Bill of Rights on eminent domain or whatever it is.

Mr. Clerc: In discussing this, has the League taken into consideration such moves now to protect the citizens' privacy that Senator Aronoff has been campaigning for in the Senate? I'm intrigued by what Mr. Skipton says. It seems to me that we can sit here today and discuss just exactly how this provision, this right to participate, or the right to know, should work, but who knows 5 years from now or 2 years from now or 1 year after such an amendment were implemented, how someone else will interpret it or to what use someone else will put it. Isn't there some sort of contradiction here with the new attention towards citizens rights?

Mrs. Brownell: This is certainly a concern. There are guarantees of citizen privacy in the Bill of Rights and this is referring to the right to know in terms of governmental action.

Mr. Mansfield: If you have this amendment you are suggesting, what would prevent anyone from demanding to appear and speak on the floor of a house of the General Assembly? Wouldn't it hamstring the orderly conduct of the legislative session?

Mrs. Brownell: This is certainly something that could be implemented in such a way to handle that.

Mr. Mansfield: Well, we are leaving ourselves wide open from the constitution point. It is conceivable that implementation would be useless. I think you might end up with a chaotic situation.

Mrs. Brownell: I don't think so.

Mr. Bartunek: Any other questions of Mrs. Brownell? Well, we thank you very much for giving us the benefit of your testimony. We appreciate your being here today and every other day. (Mr. Bartunek asked that copies of Mrs. Brownell's speech be distributed.) Next we have Jeanne Desy. Mrs. Desy, would you come forward please, and you are representing the National Organization for Women, is that correct?

It was observed that both the N.O.W. and the League of Women Voters have male members.

Mrs. Desy: Mr. Chairperson, members of the committee, before I even start I would like to say that my testimony may appear to be slightly teacherly. I am an English teacher. I apologize if I seem to be over-explaining. I assure you it's only about 300 words.

I wish to thank the Ohio Constitutional Revision Commission on behalf of the National Organization for Women for the invitation to testify before you.

In presenting our proposal for changes in Article I of the Ohio Constitution, we would like to refer to the "Guidelines fo Combatting Sexism in Language" issued by the National Council of Teachers of English. The Guidelines give this example of the importance of subtle distinctions in language;"... when a speaker uses "chairman" in a generic sense and a listener interprets it in the literal masculine sense, then a misunderstanding occurs and females are unintentionally excluded from the thought."

In other words, without our being conscious of it, the language we use shapes the way we perceive reality. This is sometimes obvious. There is more dignity in being referred to as an economically underprivileged senior citizen than as a poor old man. As Harvard linguist Dwight Bolinger has pointed out, "...we do unquestionably 'structure' our universe when we apply words to it."

A good example of unintentional sexism in English is the word "chairman", mentioned in the Guidelines. You probably noticed I addressed you as Mr. Chairperson. The American Heritage Dictionary of the English Language defines "chairman" as meaning "One who presides over an assembly, meeting, committee, or board." The neutral pronoun "one" seems to mean that any person can be a chairman. But further down on the same page we find another word, "chairwoman: a woman who serves as a chairman." Thus it is plan that in custom chairmen are males; all others are chairwomen. It is because of this quiet distinction that feminists have introduced the word "chairperson", which is fully non-discriminatory.

Although the word "man" has long been similarly used as a generic term to signify people, such usage is not desirable. As the guidelines suggest, this language unintentionally excludes women. If a linguist from Mars were to examine Article I of the Ohio Constitution, he would be justified in concluding that the freedoms it enumerates are only applied to males. In fact, the usage of "man" to signify people or citizens grew from an historical attitude that men were full citizens and women were not.

The importance of sexism in language is recognized in a recent ruling by the Equal Employment Opportunities Commission, which stated that "we cannot ignore the historical pattern of referring to male employees as men while referring to female employees as girls. Inherent in this historically disparate treatment is an implication of feminine immaturity and, thus... infericrity." For the same reasons the Federal Government, with reference to Title 7 of the Civil Rights Act of 1964 changed job classifications so that sexual delineations are no longer present. In this line, the McGraw Hill Publishing Company has noted that it is important that children's textbooks use fire-fighter rather than fireman, police officer rather than policeman.

With these facts about language in mind, we propose the following changes in Article I of the Ohio Constitution:

(1) That the word "men" appearing in paragraphs 1 and 7 be changed to read "people";
(2) That the masculine pronouns "him, his, and himself" appearing in paragraph 10 be changed to include the feminine pronoun: "him or her; his or hers, himself or herself".

While substituting "people" for "men" and altering specifically masculine pronouns will n ot change the customary intent of the Bill of Rights, it will substantially affect the implications. In making such a change we state our concern for women's equality; we bring to the public awareness the fact that the Bill of Rights does apply to women too; we correct the error of history. The persuasive value of this change as a recognition of women's rights is far stronger and more important than it may at first glance appear.

Mr. Bartunek: Are there any questions, gentlemen? Gentlepersons?

Mr. Mansfield: As an English teacher, does it bother you to hear someone say or read that someone has written or used the word "mandate" as a verb as much as it does the kind of thing that you're talking about? So far as I know, there isn't any word "mandate" as a verb. It is solely and exclusively a noun. Now, if someone incorrectly uses a noun as a verb and talks about something being mandated, which is very common, does this bother you at all?

Mrs. Desy: No, it doesn't.

Mr. Mansfield: Does it bother you when one of your students woud say, rather than " it is I", "it is me"?

Mrs. Desy: I must confess, it doesn't.

Mr. Mansfield: And by the same token then, if one of your students said "between him and I" it doesn't bother you?

Mrs. Desy: It doesn't bother me the way that a lot of other sloppy useages ot language do. What you are referring to there is incorrect grammar. Conventionally educated people have a particular usage. In the instances you've mentioned, someone has deviated from usage. Where language bothers me is where it leads to sloppiness or thought.

Mr. Mansfield: What is the alternative for "fellowman"?

Mrs. Desy: I would suggest "humankind".

Mr. Mansfield: Would you then, in effect, outlaw the use of the word "fellowman"?

Mrs. Desy: No, I would not outlaw it but I would prefer not to see it used in the law as such and I personally prefer not to use it.

Mr. Mansfield: When you have a modern version of the Bible, would you suggest changing all of the masculine words to him or her or his and hers, and so on?

Mrs. Desy: I never thought about it, but I would prefer it, personally. That's not a thought-out opinion.

Mr. Bartunek: Any further questions? I have one question. This is unfair, but you talk about the person from Mars seeing our literature and you refer to him as "he".

Mr. Mansfield: Do you object to calling God "he"?

Mrs. Desy: Yes, and many feminists feel with me on this that it seems to imply that God is on the side of men. Perhaps, we do not really mean to apply gender to God, and, unfortunately English is the kind of language that doesn't have an absolute neutral pronoun because "it" doesn't work either.

Mr. Skipton: You just made the statement that to use the term "God" as "he" implies that God is on the side of men. Do you look at man being adversary to women?

Mrs. Desy: I'm speaking from personal opinion here and not from organizational guidelines. I do think that in a state of nature and in many of the cultures, there is no difficulty with this. I do think Western culture has been masculine dominated. Women have been oppressed without anyone ever having set it up as a conspiracy. And I don't think that I think in those terms.

Mr. Bartunek: Mr. Clerc?

Mr. Clerc: I'd like to get your feeling on one thing. When we get into the linguistics of this, for example, the use of the masculine pronoun "he" in direct reference, we run into that all the time in newspaper reporting. We get into that sort of discussion where the old rule used to be when there is no definite reference you use the masculine pronoun. Now, if I understand you, you're suggesting that we go to "his and hers" "he or she" in the Constitution. The organization NOW is bringing out all kinds of worthwhile flaws in our society's treatment of women. I can subscribe to that. But aren't you going to work against your own ends by, as Mr. Skipton said, making it a 'we' and 'they' operation? In other words, carrying it too far with the trappings. Is it necessary? Can't we rely on that old rule of English? We're budget conscious and in the newspaper, especially with the newsprint shortage, you're never going to see "he or she", it's going to be "he". Even a comma is an extravagance in newspaper writing. Do you see what I am getting at? Is it necessary? Is it carrying it too far?

Mrs. Desy: Let me offer two answers to that. What we find ourselves recommending more and more as English teachers to students is that they would avoid the problem by dealing in plural nouns: the people, they; carpenters, they; linguists, they. As long as we do it in the plural we can use that genderless plural pronoun of the newspapers. Now, for the Constitution it seemed to me that it would require such intensive rewriting of paragraph 10 to work it into the plural so that "they" could be used, so I thought the simplest, most economical change is "he or she", thus we include it. In my opinion, this sort of thing is very important, particularly in the Constitution because, and this is what I was hoping to present to you, this language, unconsciously, shapes our attitudes. We think "he" is a masculine pronoun. Therefore, when it is used we tend, unconsciously, to assign these rights to men. For example, many persons are bothered by the word "chairperson" and yet I feel that it is vital. When I say "chairperson" everyone's ears go up. They think. It causes a change in attitude.

Mr. Clerc. This is what I was referring to. Maybe we are in an awkward transitional period right now. Someone walking into a meeting seeing a woman sitting at the head of the table presiding over a meeting is not offended by her presence, but may be offended by rubbing it in linguistically; going against the grain of the language we have become accustomed to. Do you follow what I'm saying? It's not a question that we're more than happy to see women taking their place in business and government and so forth, but it's a question of saying, "There, we've been wrong all those years." And it has been an innocent wrongness if it has been a wrongness.

Mrs. Desy: Yes, and I think I know the feeling, and some of the inequities of race have come on us this way where I, as an individual, can say "I never participated in this". Perhaps, in that limited case a woman may wish to have herself called "Madam Chairwoman" and to say I have the post, that's enough. My feeling would be when we say "Okay, let's elect a new chairman" we are unconsciously making an exclusion and at that point I want to say "chairperson".

Mr. Bartunek: You said that other cultures handle it differently. Could you give me an example of how other cultures and which cultures refer to men and women in the same vein? All of the foreign languages which I havestudied, which have been very few, don't seem to do that.

Mrs. Desy: What I referred to was the historical fact of oppression of women by the law and by cultural standards. This is true in all of Western culture, in the European cultures. It is true, to my knowledge, in all the Eastern cultures. Where we find a matriarchy rather than a patriarchy or where we find civil equality tends to be in the less organized and less technological cultures, what we like to refer to as primitive.

Mr. Bartunek: Where would we find such a society where they had a solution to refer to man and woman with the same kind of pronoun?

Mrs. Desy: A linguistic solution, I wish I knew. Right off hand, I don't. I will try to get that information to you.

Mr. Bartunek: I hate to burden you with that, but I think you have presented some very provocative things here this morning and we certainly appreciate the benefit of your testimony. Thank you for coming.

Mrs. Desy submitted copies of her testimony. Mr. Bartunek asked that they be distributed to the committee.

Mr. Bartunek: That ends the persons who have been scheduled to appear here this morning. Is there anyone in the room who wants to give further testimony on any subject relating to the Bill of Rights of the Ohio Constitution? (There were none.) Very well, I thank you all for coming.

Mrs. Eriksson indicated when she learned we weren't going to have as large a schedule as we anticipated that we either change the time of the meeting or go on now after the testimony to sections of the Constitution. I have rejected both of those premises, for the reasons, number one, that I make my plans a long time in advance, and I don't want to change it a couple of days ahead of time, and I assume that the other busy persons on this committee feel the same way. Also, although I have read all of the material, I don't feel that I'm qualified this morning to start into the very detailed discussion of any section. If it would be agreeable to you, I note that there are about 13 reports that we have to go through. That's about 5 hours reading time, as I recall. I would like to suggest that at our next meeting we consider the first 7 reports and be prepared to devote as much time of that day as it takes to discuss them and arrive at a conclusion and move on. And if we finish at 10 o'clock then we're finished. If we have to go to 6 or 7 at night, depending on the situation we would have. Because I like to face a problem, talk it out, and resolve it one way or another. Are there any questions. We'll start with 44A through 44G. Is that agreeable to members of the committee?(It was.) And that way we can prepare ourselves for any discussi that we might want to have and anticipate that we're going to vote on that. It's a pretty big chunk.

The date of the next meeting was set at Friday, June 6, beginning at 10 a.m., and later changed to the same time on June 13th.

Mr. Bartunek: Is there any other business to come before this body this May day? I thank you all for coming. I hope I haven't inconvenienced you too much by making you come so early and leave so early but I felt it was important to make our time available to the people of Ohio which we have done.

The committee meeting was adjourned.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
June 20, 1975

Summary

The Education and Bill of Rights Committee met on June 20 at 10 a.m. in the Commission offices in the Neil House. Committee members present were Joseph Bartunek, Chairman, Robert Clerc, Warren Cunningham, and Rep. Alan Norris. Ann Eriksson, Director, and Brenda Avey attended from the staff.

Mr. Bartunek: We'll start with Research Study No. 44A, Article I, Section 1. Are there any comments or thoughts about that? Is there any objection to keeping it just as it is?

Mrs. Eriksson: Mr. Bartunek, you asked me to point out where there had been testimony regarding any proposed changes.

The representative from NOW pointed out that this was one of the sections in which "men" was used, that she was proposing to change.

Mr. Bartunek: I don't see any reason to change that, unless the members wish to do so. (No one did). Article I, Section 1, no change. Then we skip to Section 3, giving people the right to assemble together in a peaceable manner to petition the government. Are there any comments on this from the outside sources?

Mrs. Eriksson: No sir.

Mr. Bartunek: Does any member of the committee want to comment or make any changes?

Mr. Clerc: The only thing I got out of reading this was the inclusion in some state constitutions of the peaceful protest phrase. I think the statutes can handle that well enough.

Mr. Bartunek: I think so too and that comes together anyway when you say they have the right to assemble in a peaceable manner.

Does anybody recommend any change in this section? Unless there are objections, it will be approved as it is.

The next one is section 4, the right to bear arms. Did we have any comment on that?

Mrs. Eriksson: Yes we did have, Mr. Chairman. One of the witnesses, the representative from the A.A.U.W. addressed herself to that question. She did not make a specific suggestion for language change. She said that she did support hand gun control legislation and that perhaps the people of Ohio should be allowed the privilege of deciding whether they want regulation of handguns and I assume that she was indicating the method that has been proposed in the resolution that's presently before the G.A. introduced by Rep. Lehman, although she did not indicate by what method she was proposing to submit that question to the people. (A copy of Rep. Lehman's resolution and also the one he introduced last year was circulated.)

Mr. Bartunek: Rep. Lehman tried to amend the constitution giving the people the right to bear arms, but prohibiting the manufacture, sale and use of handguns having a barrel length of six inches or less, except when they're allowed under licenses. And he correctly spelled "defense". Does any member of the committee have any thoughts about this section 4? Any changes?

Dr. Cunningham: I think it boils down to a definition of "bear arms" and under what circumstances.

Mr. Bartunek: Right.

Dr. Cunningham: And that becomes a legislative problem and a constitutional problem in the final analysis as to the defense and security of individuals. Certainly a "Saturday-nite special" is not in that category, I would say.

Mr. Bartunek: Without objection we will leave section 4 unchanged. We will let that stand on the theory that it is a legislative determination. We will proceed now to section 6 of Article I, which says that there will be no slavery or involuntary servitude in this state.

Are there any thoughts or comments? Mrs. Eriksson, has anybody commented on this one?

Mrs. Eriksson: No, I have no comments on section 6.

Mr. Bartunek: Without objection then, section 6 will remain as it is. We will proceed now to section 9. The reason we are jumping around is that some sections are the subjects of other studies. Section 9 says "all persons shall be bailable by sufficient sureties except for capital offences where the proof is evident, or the presumption great." Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Mr. Norris: I have a problem with that. There are two kinds of bail provisions in this country as far as I can tell. We're involved in some legislation concerning bail, problems with repeat offenders particularly, specifically offenders out on bail who then commit another crime. The federal provision in the federal constitution is one against excessive bail. Our constitution, on the other hand, is one of those that says all persons shall be bailable. Now the federal government and the federal courts have, on several occassions, upheld the ability of Congress to restrict bail under the federal Constitution. It's only a protection against excessive bail, where you set the bail so high that you can't get out. But it doesn't guarantee bail. So the United States Supreme Court has said that the Congress may, by category, exclude some people from bail. So, if they want to say that no person charged with burglary is eligible for bail, it is possible. It's that simple. Congress recently enacted for the District of Columbia legislation that permits the revocation of bail for offenders already on bail and also the denial of bail for certain dangerous offenders. I have introduced legislation here attempting to do some of these things, but I really don't think we can do them.

Mr. Bartunek: Constitutionally.

Mr. Norris: Yes, because it seems to me that a court could very well hold under our constitutional provision right now, even if a person commits 5 offenses of violence in a row, if he can come up with bail, he's going to be bailed, even though he has never been tried for the first crime. We just have to keep letting him out. I would like to recommend that we simply adopt the federal provision and that can be done very easily by just striking the first sentence. Then you end up with "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Our provision historically, as far as I can tell, is really a throwback' to the concept that you ought not be arresting political prisoners. The only reason everybody should be bailable because they were afraid that the legislature would create some classification of political crimes and then not let you out. I don't think this is the case any more and yet we do have a real problem. Whether adopting the federal provision would open it up too much, of course, is a matter for debate, but I think as between the two alternatives the federal is the better approach. Maybe you want to modify it a bit, but nevertheless a change is needed.

Mr. Bartunek: Wouldn't that open it up where it could imply that we were allowing bail for capital offenses where proof is evident and the presumption is great?

Mr. Norris: With just the second sentence, the legislature could say that capital offenses are not bailable.

Mrs. Eriksson: There would be no implication of requiring that all persons be bailable.

Many persons assume that the federal constitution requires admitting all persons to bail but, as a matter of fact, it does not. This has been made clear in federal acts that all persons are not bailable under the federal system. But a number of state constitutions apparently have added a provision similar to the first sentence of the Ohio Constitution that all persons shall be bailable, making an exception for capital offenses, and in one case I think it's an exception for persons who have committed a crime subject to life imprisonment.

Mr. Norris: I wasn't aware that the distinction was that well drawn, until I became involved in drafting the legislation. I read the cases and a number of law review articles and I was suprised, quite frankly, with this.

Mr. Clerc: If we were just to strike the first sentence, and begin with "Excessive bail" would that throw a great deal of latitude under the rules of criminal procedure under statutory discretion?

Mrs. Eriksson: I don't think that it would change the position as far as the rules are concerned.

Mr. Bartunek: It would give judges a right to bail a murderer where the proof was great. Although I remember that one judge did give bail to Sam Shepard the first time around.

Mr. Norris: What kind of a question would we have? Who then would decide? Would the Supreme Court under the modern courts amendment be

able by rule to decide who is eligible for bail or would it still be up to the legislature?

Mrs. Eriksson: Isn't it true that the court rule does now pretty much cover the situation?

Mr. Norris: It certainly does cover the bail procedure. The Rules clearly decided the method, but who decides who is eligible? Whether it is procedure or substance I don't know.

Mr. Bartunek: What you really are trying to do is to tighten it up rather than to loosen it?

Mr. Norris: Yes.

Mr. Bartunek: And not make bail so freely available to third and fourth offenders and people out on bail for an offense not yet tried.

Mr. Norris: Right. And, again, I'm not saying that going all the way to the federal provision is the ideal solution, but of the two alternatives, that is the better alternative. There may be something in between. I do think that the situation has changed drastically, especially in our urban centers where it's just awful.

Mr. Bartunek: Would you consider "All persons shall be bailable upon the first offense" by sufficient sureties..." I understand your intent to be to avoid the possible criticism that we are opening this up because what we are really trying to do is to tighten it, knowing that our gutless judges are letting them out. Or, rather, maintain it as it is but put some language in there to restrict them. I think that you share my philosophy that criminal laws are far too loose. Certainly bail is one of them, and people and shock probation and I don't like plea bargaining. By going to what the federal government has, it seems to me that it looks like we were going along with that kind of trend.

Mr. Norris: "Upon first offense, all persons shall be bailable" that might do it, but perhaps is not the best language. "Offense" might not be a good word there.

Mrs. Eriksson: No, we might want to look at that word a little bit. Are there instances in the federal law where even first offenders are not bailable?

Mr. Norris: The D. C. law I don't think covers that. There may be some other statutes that do. I was mainly interested in the D. C. law because it was pepeat offenders, dangerous offenders, bail revocation. It's very difficult to define in the constitution.

Mr. Bartunek: Maybe you could get that for Ann and then we could incorporate some of those provisions into our constitution. We could have something prepared for us for the next meeting. So on section 9 we will consider change to eliminate easy bail. I think you've got a good idea there. Mr. Clerc, what is you opinion?

Mr. Clerc: I'm all for it.

Mr. Bartunek: How about you Dr. Cunningham?

Dr. Cunningham: Yes, I agree.

Mr. Bartunek: Very good. We will now proceed to section 12. "No person shall be transported out of the State, for any offence committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate." Any testimony on that?

Mrs. Eriksson: No testimony at the public hearing. We had previously received a letter from the prior head of the Dept. of Corrections indicating that he felt that provision prohibiting transportation would prevent Ohio from participating in multi-state correctional facilities that were being proposed and for which, he said, federal funding was available. I sent a notice of the public hearing to the new head of the Dept. of Corrections and I did not receive any response from him so I have no idea whether he feels that it's a problem. I'm not sure that Mr. Cooper's interpretation is correct. If I may read his comment, he says, "The existence 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 amended or eliminated. The United States Department of Justice through its law enforcement assistance administration has offered funds for this multi-state cooperation among various states but we have not been able to respond to such proposals." Historically, the provision prohibiting transportation was intended simply to prohibit the state from transporting out of the state and saying "Don't ever return" as a punishment for a crime.

Mr. Bartunek: I think it could be considered as prohibiting what Mr. Cooper suggests.

Mrs. Eriksson: The language of the section says you can't transport any person.

Mr. Norris: I think he makes a good point. If we could come up with some other simple language allowing transportation for purposes of incarcerating, this leaves the legislature able to cooperate. I have no problem with that. At one time the concept of regional drug treatment centers was attractive. Since then they have closed down Lexington because none of it works, they just maintain them, so that I don't know of anything cooking in that area, but there may be something else...

Mr. Clerc: Governor Carroll, right now, has a special committee convened looking into the prison system in Kentucky and the possibility of an expansion into a regional effort under LEAA-so it is alive.

Mr. Norris: Yes, there might be some programs that are being done.

Mr. Bartunek: Of course I get frightened by all of this federal money coming in. The city of Cleveland is practically supported by federal money. I think 90% of our police expenditures come from federal funds. If somebody in Washington suddenly turns the spigot, I don't know what's going to happen.

Mr. Norris: We've passed legislation that allows regional jails for counties to cooperate. Perhaps LEAA is talking about some logical extension of that. Nothing occurs to me where you really need it today. Most states are pretty well self-sufficient. But it may well be that we ought to think about it, because it could happen.

Mr. Bartunek: Alright. I think we ought to just leave it alone for the time being. If it ever comes up, the legislature can act and then it will have the fire of being needed rather than us sitting in a room talking about it. So, without objection, there will be no change in this section.

Mr. Norris: Do we need to stick with "corruption of blood"? Is that still a modern enough term that anyone would know what that means or should we use just a little more modern terminology?

Mr. Clerc: I confess that I'm not quite sure what it means.

Mrs. Eriksson: According to the research, it does not have any significant meaning simply because no state has attempted this nor has the federal government. In fact, I don't think it has ever been used in this country. It was a reaction to the British system which deprived a person of his property, his family, everything. It was called "civil death" for certain types of crimes and this was written into our constitution simply because it was an abhorrent idea.

Mr. Norris: There isn't any other term that expresses it any better than corruption of blood, is there?

Mrs. Eriksson: Not that I know of, not unless you wanted to use the term "civil death" but I don't know that that would have any more meaning than "corruption of blood."

Mr. Norris: I have no objection, then, to leaving it the way it is.

Mr. Bartunek: Some of our original discussions, many of us felt that there should not be any change just for change's sake.

Mr. Norris: I thought there might be a better term.

Mr. Bartunek: These are rights that people think they have now. Let us go on to section 13. "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law." Was there any testimony on that?

Mrs. Eriksson: No.

Mr. Bartunek: Any comment by any members of the committee? Okay, we'll leave section 13 the way it is. That takes care of research study No. 44A wherein the only considered change would be in Section 9 of Article I. By our next meeting, Mrs. Eriksson, you'll have some material for us. Now we will proceed on to study No. 44B, which is Article I, section 19 and Article XII, Section 5. Section 19 reads "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." Section 5 of Article XIII reads: "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." Do we have any testimony on that?

Mrs. Eriksson: A representative from the department of transportation said that he was only concerned lest the "quick take" power be taken from highways, he asked that if that should be the feeling of the committee, he would like to be notified so they could present some evidence on that. That was the only testimony. We had previously received some correspondence concerning eminent domain and, of course, there are some issues that have been raised in the legislature in the past few years. The correspondence concerning eminent domain was from Mr. Summers in the Division of Real Estate in the Department of Public Works. Mr. Summers has now retired. I wrote to him when we had the public hearing but received word back that he was retired so I really don't know whether anyone in the Department of Public Works is currently concerned with the problems. Mr. Summers pointed out some problems that the department encounters in eminent domain proceedings, and these are the standard problems. Occasionally people improve their property after proceedings have been begun which increases the cost to the state in taking the property because there, of course, is no permissible quick take for any property other than in a war, or emergency, or for roads. It's difficult, of course, to find a solution to these problems for protecting both the property owner as well as the public agency that wants to take the property. So that's what some of the research was directed to. The Department of Public Works had proposed a bill which would have permitted the date of appraisal to be the date of the notification to the property owner providing the department made the security deposit by that time. And the owner of the property would have been permitted to take the money and still receive more money for his property later if, after a jury trial, it was determined to be worth more than the money that had been deposited. However, it would effectively have prevented the property owner from increasing the value of his property after that date of taking. The date of taking would have been the date at which time the department made its deposit. But the judgment was that it would have been unconstitutional because it, in effect, amounted to a quick take because you were preventing the property owner from making use of his property after that date of taking. I just present this as one of the problems that does come up.

Mr. Bartunek: Having spent 6 years as a judge trying these cases, and 4 years as a lawyer trying these cases, I find that the public authorities have too much power. Certainly setting the date of take as the date of notice would work a cruel and unusual hardship against the property owner because sometimes these trials take literally years, not months to be tried and if the property owner ever does try to

improve between the time he is notified and the time the trial is held, that certainly can be brought out at the time of testimony. I have one case now where a company had a brick plant and they make it out of shale, I guess. Twelve years ago the state of Ohio said we're going to take that for I-480, and they kept talking to him on and off. Here it is 12 years later and they have not filed any notice of the attempt to take. And these people have stopped making bricks there because of the uncertainty of the future of the property.

Mrs. Eriksson: This is the other side, that once it is known that property is going to be taken it effectively prevents the owner from selling it or even making proper use of it. The other problem is whether the power to quick-take should be expanded. It has been proposed in recent years and resoundingly rejected by the people at the polls.

Mr. Bartunek: From my research of the various laws and decisions of other states, I can see them in Georgia sit around a table and they say, "Well, Ann, they're going to take your property and there is all of that federal money so let's give you as much as we can." So they go out of their way to help the people. But in Ohio, they go out of their way to destroy the value of the property and give them as little as possible. I don't know how the constitution would correct that. From my experience, and limited experience, I don't see any solution. I would certainly be against expanding the quick-take provisions and I would certainly be against fixing the date of take by action of the highway department.

Mr. Clerc: It doesn't have any possibility for citizen advantage by speeding up the entire process?

Mr. Bartunek: No. With the quick-take what they normally do is take pictures of the property as it exists then, and they put the money in, knowing that the jury trial is not going to be until sometime later on. It effectively sets the date of take as of the time that the money was put in and that they notified the property owners.

Mr. Norris: They can tear it down before the trial.

Mr. Bartunek: Right.

Mr. Norris: Mr. Chairman, I agree with those two points. There are just a couple of points I would like to raise on page 15, section 5. First, I would think we ought to be eliminating in the next to last line "of twelve men". One is that the word "men" is a little offensive to some and aside from that, we should eliminate the 12 requirement.

Mr. Bartunek: I was afraid you were going to bring that up because in our county, all of the trials are either with 8 or 6 jurors, not, of course, men, but because of this provision, in eminent domain matters they have twelve. I'm a lawyer who likes to talk to twelve jurors rather than six or eight. No, I think you ought to take that out, I think that's a good recommendation. To finish that, it would say, "shall be ascertained by a jury in a court of record, as shall be prescribed by law", eliminating "of twelve men".

Mr. Norris: Then I would like at least to discuss a more radical proposal which I assume will be covered by this committee and that is the entire question of civil juries, and because we've hit it here, this is the first place I'll raise it. We just agonized over in the House a couple of days ago over this malpractice bill. It raises the question again in my mind of the ability of civil juries to cope with solvent defendants. I've become increasingly convinced over the years that while I'm still going to defend to criminal juries, in civil cases those juries are becoming increasingly less able to hold down their passions when it comes to the second part of their determination- how much? I've not had much problem with liability, we all have problems with individual cases whether or not they decide it right, but I think probably still in balance, they decide liability okay. But then when they move onto the next point, having found liability, how much, when faced with a solvent defendant, I'm against them in the long run. They're just going wild. I've not had a chance to research this, but it seems to me there are two alternatives. One is simply to allow the legislature to decide whether or not there ought to be civil juries, and just eliminate any constitutional guarantee of a jury trial in civil cases. The other would be, and this is one I don't know the answer to, whether the authority of a judge to order a remittitur to reduce jury awards is a matter of statute or of constitution. If it's a matter of constitution, then maybe that's another approach. A more limited approach that would get the same way if it gets us any place is allow the judge more authority to reduce some of these verdicts. Insurance premiums reflect all this. I've been working on malpractice cases, and recovery is not a problem. It's how much you recover.

Mr. Bartunek: I understand your concern. I also understand in Puerto Rico they don't have juries at all in civil cases. Someone sits at the table and passes around the money like a used car dealer. I'd be very much opposed to any change now. The remittitur is the one to consider, but to take away the right of someone who has been deprived of the use of a limb to a jury trial...I don't even like workmen's compensation because they say an arm is worth so much, a leg is worth so much...

Mr. Norris: Yes, I don't want to go to that either. What would you think of allowing the legislature to provide that the jury still makes the determination of liability but that the judge sets damages?

Mr. Bartunek: I don't think I'd like that. Personally, from what I have seen of the jury system, and I have never been involved in one of these big malpractice cases, of course, from what I have seen of it, they come out right 99% of the time. And I must have tried literally, as a judge, hundreds of cases.

Mr. Norris: You think on the amounts of awards as well as the findings?

Mr. Bartunek: Yes. My greatest experience has been in eminent domain, Maybe all of the testimony has been on acreage and the jury will come back on lot price or something, but they will come in with it. Out of twelve people there is always someone who knows a little bit about valuation, and in the cases I have seen, they have done a remarkably good job. I haven't had that many personal injury trials, although I did have an instructor who gave an example of his final summation to the jury and I would have given him the court house had I been a juror,

knowing nothing of the case. So there no doubt are abuses but weighed against the right to a jury determination... If I were a criminal and had to go before a jury of 12 people or one guy who may have had a fight with his wife that morning, I'd pick the jury. And it is the same thing in the civil. Of course there is the chance of fate where one guy gets hit by Standard Oil and gets millions of dollars or maybe his family does, and another guy gets hit by Joe Doe who doesn't even have a drivers license and the family gets nothing.

Mr. Norris: Could I ask Ann to check on remittitur then? We've not had a chance to look at that and see whether that's constitutional or not.

What we might find is case law, guaranteeing the right to trial by jury which prohibits remittitur.

Mrs. Eriksson: Section 5 that gives the right to trial by jury and that is in one of the memos that will not be considered until the next meeting of the committee. It wasn't in the first group so I haven't gone over that yet, but I will see what I can find on that.

Mr. Bartunek: Mr. Clerc, what is your pleasure on Section 5 of Article XIII?

Mr. Clerc: I see no reason to change.

Mr. Bartunek: Dr. Cunningham?

Dr. Cunningham: No, I agree.

Mr. Bartunek: There will be no change except the elimination of the words "of twelve men" in section 5 of Article XIII.

Mrs. Eriksson: Is it your feeling that section 5 should be retained? The only basic difference, I guess, is the twelve man jury which is not specified in Article I.

Mr. Bartunek: I think in line with our earlier discussions, we're not going to make any changes just to clarify the language unless the committee wishes otherwise.

Mr. Norris: Is your thought to combine the two sections rather than having two separate sections?

Mrs. Eriksson: Yes.

Mr. Norris: That other section is obviously one that applies to utilities?

Mr. Bartunek: Right.

Mrs. Eriksson: Of course, it does not give corporations any powers. The General Assembly must confer any such powers upon corporations.

Mr. Norris: Do we need section 5 of Article XIII?

Mr. Bartunek: I think we do.

Mr. Norris: Is there another section that grants to corporations the right to eminent domain?

Mrs. Eriksson: No.

Mr. Norris: This has been implied from section 5?

Mrs. Eriksson: It would be an inherent power of the General Assembly under Section 19 of Article I. I think section 5 of Article XIII was intended to be more restrictive of the right of corporations exercising that power, growing out of some abuses in the canal days and the railroad days.

Mr. Bartunek: Unless someone wishes to propose further changes, section 5 of Article XIII will remain with the deletion of "of twelve men." Then let's proceed with study No. 44C, which deals with section 16 of Article I, which says, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner as may be provided by law." There's a lot of cases on this section. Was there any testimony?

Mrs. Eriksson: There was no testimony on this section. Many of the cases revolve, I think, around the phrase "due course of law" which is the equivalent in the Ohio Constitution of "due process of law" in the Fifth and Fourteenth Amendments, and one suggestion that might be made would be to make that language more parallel to the federal constitution. A combination of section 16, section 1 and section 19 of the Ohio Constitution have pretty much resulted in the same due process of law interpretation as are obtained through the federal constitution. It's just a slightly different language.

Mr. Norris: You say there are some court decisions saying that "due course" means "due process"?

Mrs. Eriksson: Well, when you combine due course of law with the inalienable rights of section 1 and with other provisions, you get the same result.

Mr. Bartunek: It's listed under "due process" in the annotation.

Mrs. Eriksson: Yes.

Mr. Norris: If the courts have already said it means due process, I don't see any reason to change it. If we change it, somebody might think we were doing it on purpose to change something.

Mr. Bartunek: Dr. Cunningham, what is your pleasure?

Dr. Cunningham: I feel we should keep it as is.

Mr. Bartunek: Mr. Clerc?

Mr. Clerc: I agree also.

Mrs. Eriksson: The study also involves the sovereign immunity question which is the last sentence of section 16, and it is really an exposition on the court of claims because it was necessary to bring that to the attention of the judiciary committee.

Mr. Bartunek: Let's proceed now to study No. 44D, this is Article I, Section 7. It says "Rights of conscience; the necessity of religion and knowledge." "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience... No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent and no preference shall be given, by law, to any religious society; nor shall any interpreference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." It sounds pretty good.

Mr. Clerc: How does that square with the federal constitution? Have recent laws encouraged schools and the means of instruction?

Mr. Bartunek: Yes, that's an interesting question, because it's conflicting in its own language here. I suppose they mean encourage by go ahead and do it and we'll give you state qualification but we won't give you any money.

Mr. Norris: Are there any state cases under this section of the constitution?

Mrs. Eriksson: Yes there have been some. At the end of the memo, the recent cases have been brought both under this section and under the federal constitution. Since this memo was written, there has been a court decision holding the Ohio Statute for Aid to Parochial Schools unconstitutional.

Mr. Norris: Under the state or federal constitution?

Mrs. Eriksson: Under the federal constitution. Most of the decisions have been under the federal constitution. Even if you wish to amend the state constitution to permit something which is now prohibited it probably would not accomplish that purpose because the decisions have been more reflective of the federal constitution than the state constitution.

Mr. Norris: The only thing that I can see that we ought to delete is that last sentence, but we can't do that.

Mr. Bartunek: You'd just be creating greater havoc, especially in these days. Religion, morality, and knowledge being essential to good government.

Mrs. Eriksson: This section is much more detailed than the federal constitution and reflects specific concerns that people had. I might point out, Mr. Chairman, from the testimony, it's again the word "men".

Mr. Bartunek: Well we decided not to make any changes just for that. Without objection, there will be no change in Article I, Section 7.

Mr. Norris: I have to admire the style of that section. That's the first one that really has had any class to it. It doesn't sound like a lawyer wrote it.

Mr. Bartunek: It makes you feel great to belong to a state that believes in those things. Our next study, 44E deals with Article I Section 11 which reads: Freedom of speech; of the press; of libels. "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquited."

Mr. Norris: Why are the asterisks in there?

Mrs. Eriksson: Because of the misspellings of the words "libelous" and "acquitted".

Mr. Bartunek: Mr. Clerc, what is your thought on the freedom of the press?

Mr. Clerc: I don't see any reason for change in here. I think it says all and says it well.

Mr. Bartunek: Dr. Cunningham, what is your pleasure?

Dr. Cunningham: I agree. It certainly should satisfy the press and the rest of the media.

Mr. Bartunek: Do you recommend any change in this?

Dr. Cunningham: No, I do not.

Mr. Bartunek: Representative Norris, what is your pleasure?

Mr. Norris: The only question that I would have aside from the spelling, that next to the last clause "and was published with good motives, and for justifiable ends", maybe not so much the justifiable ends, but for good motives. Have the courts ever tried to grab hold of that and place that as a burden on the defendant? That kind of surprises me.

Mr. Bartunek: Yes that's a criminal question.

Mr. Clerc: To the best of my knowledge the court assumes good motives as cases go now and actually the person who would be claiming libel would have to, in fact, prove that there was a malicious intent.

Mr. Norris: That would be a problem if case law places a burden on the defendant to prove he has good motives. Has there ever been a decision like that?

Mrs. Eriksson: I believe Mr. Clerc is correct that the cases have not interpreted that to place a burden on the defendant to show good motives but rather assuming good motives and then requiring the proof of malicious intent.

Mr. Bartunek: This is limited to criminal, too, and not to civil application, which goes through obscenity laws and all of that. There's a case here, State ex rel. Sensenbrenner v. Adult Book Store, what constitutes obscenity. Without objection then, Section 11 will have no change.

Mrs. Eriksson: Mr. Chairman, may I point out that one of the persons who did present testimony was not necessarily suggesting a change of section 11, but the League of Women Voters did propose something that's related to section 11. I don't know whether you would want to take that up now or later. It's this business about right to know and right to participate. Perhaps you would like to consider that as a separate subject.

Mr. Bartunek: Why don't we consider that as a separate subject. We will go on now to section 44F, Article I, Section 14. "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particiularly describing the place to be searched, and the person and things to be seized." There have been a lot of cases on this. Was there any testimony on this, Mrs. Eriksson?

Mrs. Eriksson: There was no testimony on this.

Mr. Bartunek: It is very closely parallel to the federal constitution.

Mr. Norris: I can't see anything wrong with that.

Mr. Bartunek: Okay. Dr. Cunningham, what is your thought?

Dr. Cunningham: There is nothing wrong with it in my opinion.

Mr. Clerc: Nor mine.

Dr. Cunningham: Even the spelling.

Mr. Bartunek: Without object then, there will be no change recommended for Article I, Section 14.

Mr. Norris: Mr. Chairman, in the previous one we did recommend a change for corrections in spelling, didn't we?

Mr. Bartunek: I don't believe we did.

Dr. Cunningham: I think that was raised.

Mr. Norris: We better put that in our action.

Mr. Bartunek: Is it the wish of the committee to make corrections in spelling in section 11?

All said yes.

Mr. Bartunek: There have been other spelling changes, too, that we have not done. Is it the wish of the committee to consistently, every time there is a misspelling, make a change in that?

Mr. Clerc: I think we should.

Mr. Norris: I'd like to at this point, Mr. Chairman, unless we get to the point later on where we decide we've got to substitute, or we've got to split them up into separate resolutions I don't want to change spelling just for a separate resolution on the ballot, but at this point I think we ought to.

Mr. Bartunek: Let's start at the beginning and look at each section. In section 4, defense is misspelled, in Section 9, we're going to consider a recommendation be prepared by Mrs. Eriksson, there is a misspelling in 9 in any event. I think whatever we do we ought to do consistently. In section 12, offense is misspelled. There are misspellings in section 11. Very well that will conclude our work this morning. There are 6 studies left and one recommendation. Are there any other recommendations you want to consider other than the League of Women Voters?

Mrs. Eriksson: No other recommendations have been proposed except that one and the other one that was proposed by some of the other witnesses for an equal rights provision in the Ohio Constitution. Those are the two things that were proposed.

Mr. Bartunek: Could you add that to our agenda.

Mrs. Eriksson: Mr. Chairman, did you intend to dispose of 44G this morning?

Mr. Bartunek: The letter said G but the agenda says F. Why don't we go through G then since everyone was notified that G would be considered. That's article I, Section 17, 18 and 20. Section 17 says "No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State." What is your pleasure gentlemen?

Mr. Norris: Hesitantly, I move it be retained.

Mr. Bartunek: Okay, then without objection, it shall be retained as is. The next, 18, is "No power of suspending laws shall ever be exercised, except by the General Assembly." Without objection there will be no change in section 18.

Section 20: "The enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." I think that's pretty good. Okay,

without objection then there will be no change in these three sections, and that really does conclude the hard work of the committee today. The time for the next meeting was discussed, and was set for August 14, Thursday, to begin at 9 a.m. in the Commission offices.

The meeting was adjourned.