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Pages 4956 - 5243
What's Left Committee

Pages 5244 - 5480
Grand Jury and Civil Trial Jury Committee

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What's Left Committee
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Summary

The What's Left Committee held a meeting on June 15 at 1:30 p.m. in the Commission offices in the Neil House. The meeting was attended by the following committee members: Craig Aalyson, Chairman, Katie Sowle, Dick Carter, and Robert Huston. Ann Eriksson, Director, and Brenda Buchbinder were present from the staff.

Mr. Aalyson: Mrs. Eriksson has provided us with a brief summary and also with alternative language to what has previously been discussed for Section 1 of Article VII and I understand that she has handed this out to those of you who were present during the last meeting and to others. We're open for comments.

The staff draft reads: Laws may be passed to provide facilities for and services to persons who, by reason of age, disability, or handicap require care, treatment, or habilitation. Aged, disabled, or handicapped persons shall not be deprived of their freedom unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if deprived of their freedom, have a right to habilitation or treatment.

Professor Hopperton: A couple of brief comments. The ad hoc committee has since the last What's Left Committee meeting considered the staff draft. We are in a position of supporting the staff draft but we would like to submit two fairly minor amendments, I think. Let me give you copies.

The ad hoc draft reads: Laws may be passed to provide facilities for and services to persons who, by reason of disability or handicap require care, treatment, or habilitation. Disabled or handicapped persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if civilly confined, have a right to habilitation or treatment.

I will quickly point out what the changes are in the suggested amendments. In sentence one, we deleted "age" from the categories covered. We deleted "aged" in sentence two, and we changed the term "not to be deprived of freedom" to "civilly confined" both in sentence number two and sentence number three.

The reason for the changes were these. There was significant concern about the use of the word "aged" in the second sentence because arguably that would set up constitutional authority to confine or to deprive persons who are aged because they are aged. There is no statutory provision that does that right now, while there is statutory authority to confine persons in terms of disability or handicap. To make it clear that the provision was dealing with disabled and handicapped persons we also deleted "aged" in sentence number one. With regard to the change from "not to be deprived of their freedom" that phrase caused concern particularly with the representative of the Department of Mental Health and Mental Retardation. He felt that it was fairly broad language and he argued for confining it and narrowing it a bit. We agreed upon "civilly confined". We substituted that in the second and third sentences. So again, the ad hoc committee supports the staff draft with the suggested amendments. However, Walt Lawson, representative of the Department of Mental Health and Mental Retardation, called me this morning to say that he would be in a director's staff meeting all day long, and he asked me to convey his position with regard to one other point. He is concerned that the word "harm" in sentence two should comprehend the grounds for commitment found in H.B. 244, and that the

committee so state in the transcript for the record or the report, if this draft of Section 1 of Article VII is to be adopted. He has some concern about the term "harm" meaning only physical harm, which is one of the grounds for commitment under H.B. 244. However he felt that the department could live with just the term "harm" if it were indicated in the record that the committee meant the basic grounds for commitment found in H.B. 244, which indicates two or three different kinds of harm; physical harm, and also grave and imminent danger to substantial interests.

Mr. Aalyson: Thank you, Professor Hopperton. Does anyone else care to be heard?

Mr. Lobosco: We were very happy to see the draft drawn by the staff here. And I felt that it is an improvement simply in terms of clarifying what was intended by the other draft.

Ms. Workman: On behalf of the Commission on Aging, we support what this draft is doing. We do not feel that it is quite what we originally stated with regard to age, but we do agree with the deletion of the word "aged". We feel that it does clarify exactly what is intended.

Mr. Aalyson: Ann, do you care to make any comments with regard to the suggested changes in your draft?

Mrs. Eriksson: As I worked on this problem, I, of course, encountered many language problems. As far as the word "aged" is concerned, I went back to the original concept of the committee and put "aged" back in because we had talked about it and because I was a little concerned that if the word "aged" were not in there, it might at some future time be construed that because it is not there, the aged should be excluded. If the General Assembly should choose to pass laws providing facilities and services only for aged persons, could it do so? As a matter of fact there are such laws presently providing services for aged persons. That was really the reason I put it back in. Not that I think it was necessary to the other concepts. I agree that the concept of the aged should be divorced from the concept of mentally handicapped persons. I am just not positive whether there would be an adverse interpretation by removing "aged". Putting it in the second sentence may leave an implication that you can confine an aged person only because he is aged. Although I would think that it might be read again in the context of harming themselves or other persons. As far as the substitution of the term "civilly confined", I don't have any reason to think that changes the meaning. In fact, I don't like the language "deprived of their freedom" because I don't know exactly what that means, I like "civilly confined" better. I intended "harm" to be a broad term with a broad meaning. I certainly did not mean that it should only be physical harm although generally speaking, that is what we think of in terms of confining persons who are mentally ill. But it would not necessarily have to mean physical harm, and I didn't intend it to mean just physical harm. Maybe somebody has a better word.

Mrs. Sowle: I have one question, Professor Hopperton, from your remarks. What does the phrase mean, and I didn't get it down exactly, "imminent and grave risks to substantial interests" as used in that provision?

Professor Hopperton: Professor Kindred who is on his way here might be better able to answer that question because he dealt very deeply with H.B. 244. As I understand it, it means at the risk of financial harm or some other risk, other than a physical harm.

Mrs. Sowle: And that's the basis for confining?

Professor Hopperton: It is one of the bases for confinement. It is tied to treatability as well.

Mrs. Sowle: I see. You mean he is going to go out and give all his money away.

Professor Hopperton: The fourth category for hospitalization under H.B. 244 reads as follows: "would benefit from treatment in a hospital for his mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or himself."

Mrs. Sowle: Then it is in addition to the requirements of mental illness. It does not define mental illness in itself. I have one comment, Ann, about the question of the aged. It seems to me that perhaps leaving "aged" out of this would not have any implication that laws could not be passed to provide such facilities for the reason that "aged" are not now in Article VII, Section 1.

Mrs. Eriksson: That's correct. No, they are not. The section now talks about the blind and deaf, etc. It may be clear enough from the record that it was not in any way the committee's intention to deprive the General Assembly of power to provide facilities for and services for the aged. I just put that in so it would call to your attention that that is a possible objection to any kind of a list in the constitution, that the people that aren't included might be therefore excluded. Would Glenn Workman explain her comments a little more. I'm a little confused.

Ms. Workman: When I first came before the committee to discuss the situation, the intent was to assure, by coming up with language, that people would not be committed to an institution by the criteria only of age. That was our original intent of using that term.

Mrs. Eriksson: The Commission on Aging is not worried about the fact that the General Assembly might be found not to have power to provide services for the aged if "aged" were removed from that first sentence.

Ms. Workman: I haven't taken this for the second time before the commission, but I would imagine that that would be a problem that all of us would have if it were not specified in the language of the constitution, was the basic reason for it to begin with. But with the time that all of you have put into this, and I realize your intent and the problems you have to deal with. We are willing to go along with this. I don't believe that the committee would be willing to assure us that facilities will be built to take care of our aged people.

Mrs. Eriksson: No, of course, that's not the intent.

Mr. Aalyson: If an aged person has a problem, he is probably going to have a disability or a handicap requiring care. It seems to me that requiring a disability or handicap requiring care I think would include the aged as well as a disability or a handicap arising from other sources.

Mrs. Eriksson: Right. To the extent that facilities are going to be provided for such persons, I think you can assume that they would be either disabled or handicapped, but to the extent that services are provided for aged persons, they're not necessarily disabled or handicapped. Some services are provided only because they're old.

Mr. Carter: Why do we need the first sentence?

Mrs. Eriksson: I'm not sure that we do need the first sentence.

Mr. Carter: It seems to me that as I understand the situation, the General Assembly would have that authority even if it were not put in the constitution.

Mrs. Eriksson: The reason I started with that first sentence was because this was pretty much the way the committee ended up the last time. This is really the committee's original proposal.

Mr. Carter: Yes, I remember that.

Mrs. Eriksson: And then the last time, as the discussion evolved, it really ended up that most of the members of the committee felt that a combination of that sentence plus the concerns being expressed by the ad hoc committee be combined somehow to express a general constitutional principle of providing services for disabled and handicapped persons, but limiting the circumstances of confinement.

Mr. Carter: I'm wondering if we couldn't do that by simply saying "Disabled or handicapped persons requiring care, treatment, or habilitation, shall not be confined, etcetera..." I would hate to put something in the constitution that isn't necessary.

Mr. Aalyson: I think, Dick, that there was some concern on the part of the ad hoc people and others who were here that there should be a statement in the constitution of this nature which would serve as notice to the legislature and/or the public at large that it was intended that there be constitutional approval for providing facilities. The deletion of it they seem to feel would tend to indicate that this was not the general purpose of the state as expressed in the constitution. Now, I sort of agree with you but they felt that a positive statement was necessary rather than an assumption of powers on the part of the legislature in the absence of a positive statement. It seems to be more of a statement of purpose to actually set forth in the constitution itself that laws may be passed.

Mr. Carter: Is that a fair statement? I seem to recall from reading the minutes of the last meeting some weeks ago that there was an objection to having "Laws may be passed..."

Professor Hopperton: Standing alone, there was. Sentences two and three are the core of our concern. We feel that that's essential. When sentence one is added in front of sentences two and three, I believe it is a helpful inclusion.

Mr. Carter: So you would just as soon leave it in the context with the rest of it, then.

Professor Hopperton: Speaking for myself, as we didn't talk about this issue specifically at our meetings, I would say, yes. But other committee members may want to express their own opinion.

Mr. Lobosco: We assumed in the ad hoc group that we would be working with language similar to what the present section contains, which as I recall is "the state shall always foster and support institutions..." And that is, of course, a stronger statement of principle. Whereas a statement that laws may be passed, in view of the fact that the laws are certainly within the purvue of state power anyway, under the police power, is not a very substantive statement. But our first offering was something more in line with what is currently in the constitution, and there was some objection to that, so that this language was later adopted. And, as Bob has said, we were afraid that just that language standing alone would do us more harm than good. But in connection with the second and third sentences in this draft, it is acceptable.

Mr. Huston: I have one question with regard to the overall theory behind this. Is there anything in the constitution today that carves out rights for any particular segment of society or other than the public at large? I'm wondering whether the constitution has carved out rights for a particular group.

Mrs. Eriksson: To some extent. There are a number of provisions carved out with respect to the welfare of employees that were added in the 1912 convention. There are rights carved out having to do with an eight hour day, workmen's compensation, where a particular group was, in fact, given specific protection by the constitution.

Mr. Huston: Workmen's compensation merely provides that the state may enact laws, does it not?

Mrs. Eriksson: Yes. That's all this does, too. But the section with respect to an eight hour day says, "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of employees."

Mr. Huston: But that really is merely saying that laws may be enacted. It really doesn't provide a specific obligation that something be done. Don't we create an obligation on the state or a restriction on the state that they may not be civilly confined without a right to habilitation or treatment? Don't you create a positive obligation on the state to do something?

Mrs. Eriksson: If such persons are to be confined, yes, then they have a right to habilitation or treatment.

Mr. Huston: I question whether we should get into the constitution rights requiring the state to do something for a particular segment of society when you really are not permitting the legislature the right to allocate the resources of the state. Because they have to allocate resources for the efficacy of carving out rights for particular segments.

Mrs. Eriksson: I think the response to that would be that probably the state is under no obligation to confine mentally ill or handicapped persons in the first place. This is the basic right that the Supreme Court has upheld now.

Mr. Huston: I realize it. I just wonder whether it should be carved out from the basic rights of an individual covered by the constitution to a specific right in the constitution, because it is supposedly covered now by the constitution and by the court decisions.

Mrs. Eriksson: I think that the rights to habilitation and treatment have pretty well been.

Mr. Huston: By court decisions. So do we really need a specific provision covering it?

Mrs. Eriksson: I see your point.

Mr. Aalyson: Professor Hopperton?

Professor Hopperton: I was going to suggest that there is another group of people provided rights in other circumstances when the state has taken drastic action, and that is in a criminal proceeding. There is a right to trial by jury, there is a right to habeas corpus, there is a requirement of only indictment by a grand jury.

Mr. Huston: Those are broad rights that cover everyone. You are not carving out a specific segment of society such as the handicapped or disabled.

Professor Hopperton: If you consider everyone potentially will be charged in a criminal offense. It might not be dissimilar to indicate that given the incidence of

mental illness these days, everyone is going to potentially be mentally ill at some point as well. I don't think it is saying that an easily definable group is being segregated out.

Mr. Carter: Bob, is it your point that it is not necessary to have this in, or inadvisable?

Mr. Huston: I was just looking at both areas. To me, when the court decides these constitutional issues, they generally decide them in light of the circumstances of the problem arising, such as in the Brown school case, and so forth, where they have overturned previous decisions in that connection. Once you carve it into the constitution, it makes it much more difficult for the court to find solutions for these problems. Do you have to put something in specifically on this point, or is it not covered by the general provisions of the constitution?

Mr. Carter: I think it's some of both.

Mr. Huston: Yes, and once you put something in, does it not take away from the people of the state through the legislature the opportunity to allocate the resources of the state as to what is required. I just wanted to get other people's views on what they thought.

Mr. Carter: I'm not bothered at all by the allocation of resources with this language. It seems to me that there is still plenty of flexibility for the legislature to allocate the state's resources under this. I have no objection to putting a statement like this in the constitution. It doesn't bother me a great deal. The fact that you might be carving some group of people out for special treatment in the constitution I think is perhaps justified in this area. I cannot speak to the other point - that is, are we inhibiting the courts to make judgments in the future. I don't know.

Mr. Aalyson: Other discussion?

Mr. Carter: I think this is a lot better than what we had before.

Mr. Aalyson: Professor Kindred, did you have a comment to make to the committee?

Professor Kindred: No.

Mr. Aalyson: Then I think it would be proper for the committee to proceed with the discussion of the matter alone, unless you folks do have a desire to remain present.

Mr. Carter: It is public.

Professor Hopperton: I have one question. Have you received anything from the Ohio Municipal League? We have not received anything from them.

Mrs. Eriksson: No, they have not made any presentation in writing. I did send them the committee's request and also sent them a copy of this memorandum. John Gotherman called to say that they would try to get someone here this afternoon but that they would probably be late. Their objection was to the "least restrictive alternative" because they view it as a threat to zoning laws, and I am sure you are aware of their objection to that language. They have no objection to the language that I proposed, and I cannot imagine that they would have any objection to the changes in that language you have proposed.

Mrs. Sowle: I am interested that they object to "least restrictive alternative" but that they don't object to sentence two, because I think it says pretty much the same

thing.

Mrs. Eriksson: They think that the least restrictive alternative is a specific provision which would at least offer an opportunity for courts to overturn specific zoning regulations, and I think they would oppose any language like that. But they do not view this language as doing the same thing.

Mrs. Sowle: The language "nor to a greater extent than".

Mrs. Eriksson: No.

Mr. Carter: I would like to make a comment in the event that these people might elect to leave. Ann, when did we start this commission?

Mrs. Eriksson: 1971.

Mr. Carter: And I don't believe that any of these other three members of the commission were around at that time. I'm the only one. I feel that the consideration of this matter has been one of the finest examples, I think, I've seen in the way this commission should work. I think this ad hoc committee has done a fine job in presenting their point of view, of understanding the problems in implementing what they are trying to do and considering a broad scale. In my own mind it is one of the finest examples of citizen participation that I have seen on the commission. So I want to congratulate all of you who are involved in this as well as the members of this committee.

Professor Hopperton: Thank you for inviting us to the committee meetings. We also enjoyed the ad hoc committee meetings ourselves, in the four or five months that w worked on this.

Mrs. Eriksson: I think you might also note that if something like this becomes a part of the constitution, the Ohio Constitution will be unique.

Professor Hopperton: The Montana Constitution contains a somewhat similar provision that might be called a right to services. But this is much better language.

Mr. Aalyson: Thank you, ladies and gentlemen. We've appreciated having you today and in the past. You have been very very hepful to us.

Mr. Carter: You are welcome to stay. I hope you all understand that. I guess it kind of boils down to either we have this or nothing. Isn't that about it?

Mrs. Sowle: Yes. I like the proposal as changed, because I think the arguments for a couple of changes made sense. I don't like present Article VII, Section 1. It is antiquated and I don't think it has any longer any place in the state constitution. I would be reluctant to recommend simply taking it out. I think that something ought to go in its place. I think the original sentence that the committee was working with is not enough and the ad hoc committee's objections to having just that sentence made sense to me. I don't think that the first sentence of the third sentence made substantive changes. To the extent that the second sentence does, I like it. I think that it is a worthy objective, and I don't think it hurts to pay special attention to this category of persons because I think in many respects they have long needed such special attention. I like this very much.

Mr. Carter: Bob, I assume your concern is not related to the thrust of this thing.

Mr Huston: My principle concern is putting something in the constitution that is already covered by another provision by virtue of the court decisions. They have actually

extended the present constitution. And the fact that we are carving out one segment of society, a right for them that is not necessarily applicable. And I am afraid that once you start down that road, you have so many groups of so many people that want state aid or want a right to state aid, that you are going to find them coming in also for special treatment. That is my concern, you might say, more so than objection. Generally, the provisions of the constitution deal with the rights of the public at large and anybody in the public at large has a right. I recognize that anyone in the public could become a handicapped or disabled person. I guess it's a question of do the rights of the individuals as already protected by the constitution protect them to the extent that this does. I guess that the court decisions say that they do. Those are just my comments on what my thoughts are on this. It's more of a policy question as to how you want to structure the constitution. Once you have a right, to redefine that right, it seems to me that you are putting something in that really isn't essential. My understanding is that the case law pretty much substantiates this. From what I read.

Mrs. Sowle: To the extent that the cases go along with this, it is the third sentence that the cases go along with.

Mrs. Eriksson: Yes.

Mrs. Sowle: Has there been much case law about the problem addressed by the second sentence, Ann?

Mrs. Eriksson: No. There are cases that have established that if you are going to confine persons, that that person has a right to treatment. However, as far as cases are concerned there have only been one or two cases that have gotten to the Supreme Court. There aren't any Ohio cases. The most recent one is the one that I sent to you, O'Connor v. Donaldson.

Mr. Huston: This was the celebrated case.

Mrs. Eriksson: The Court talked about a right to treatment. The Court also said it didn't see any reason why he was confined in the first place. And, as a matter of a fact, he was offered treatment and refused it. To me, that comes much more under the second sentence than under the third sentence. I think the right to treatment is something that isn't as well established by the cases as some of the discussion indicates.

Mr. Aalyson: That was my feeling. Has the Supreme Court of the United States actually said that a person confined for a disability or a handicap is entitled to treatment or is this an inference that is drawn from the language?

Mrs. Eriksson: It probably said in this case...

Mr. Aalyson: In the syllabus?

Mrs. Eriksson: I really think that it really is more an implication that there really was no reason that this man was confined. That's the way I read this case.

Mr. Aalyson: That was my feeling. That they were more concerned with the fact that he was confined without adequate basis than they were concerned with the question if he was entitled to treatment if he were confined. And they mentioned something about treatment but I think that had to do with saying that the state can't leave it up to the psychiatrists to decide whether he should be confined for treatment. Not whether he needed treatment if he were confined.

Mr. Huston: Bazelon said in his article that as he interpreted it, the Supreme Court has recently decided the case of O'Connor v. Donaldson that a person institutionalized solely because he is in need of treatment is deprived of the constitutional right to liberty if they are denied treatment while confined. As described in Justice Stewart in his opinion to the court, the case involved a mix of the right to treatment and less restrictive alternative in the Catherine Lake type issue. Bazelon indicated that he interpreted the case to do that. But I do think that the case dealt more with the second sentence than the third.

Mrs. Eriksson: It seems to me, in line with what Katie said, that the second sentence is more important. I would not view the third sentence as offering an opportunity to demand allocation of the resources of the state.

Mr. Aalyson: If we do view the constitution as imposing primarily restrictions on what the legislature may do, it seems to me that it would be well served just to state the second sentence. But I am sympathetic to the position of these persons, because of the peculiar nature of their disability, perhaps, need our assistance more than others might, and therefore I have no objection to providing in the constitution that they shall be entitled to treatment or habilitation if they are confined.

Mr. Carter: Does "civilly confined" mean by operation of law?

Mrs. Eriksson: Yes, by operation of civil law as opposed to criminal law.

Mr. Aalyson: I sort of agree with Dick, although he hasn't stated it in these terms, that if we put the final sentence in, you really don't need the first sentence because the final sentence presumes the first sentence. You are going to entitle them to have habilitation and treatment then the obvious inference is that laws may be passed to provide it. On the other hand, I really don't have any objection to the sentence as it is set forth now.

Mrs. Sowle: One thing I like about that section, too, is that it may or may not be adding anything. I'm not at all sure that it is adding anything to constitutional law. But I think that I could support it on the basis alone of a kind of statement of state policy. It seems to me perfectly justifiable as a worthy public policy to state. I've been trying to think how the first sentence could be rephrased and it is difficult to rephrase it. I've been trying to think though of a way that it could be rephrased that would have something of the connotation of the present section that uses the words "shall always be fostered and supported". That, to me, is not a mandating of services, but a statement of public policy.

Mr. Huston: I'm inclined to agree with you Katie, if we are giving the legislature a mandate, yes, that is what I think we should be doing, more so than carving out rights that deprive the legislature from exercising their judgment. It's a difficult area and I think it is somewhat a matter of policy as to how we are going to structure the constitution, as much as anything else.

Mr. Carter: Following through on that thought, I'm wondering whether we might not change that first sentence. I don't like "laws may be passed". Following on what you are saying Katie, say "facilities for and services to persons requiring care, treatment, and habilitation shall be fostered and supported by the state." Using the same language we have now.

All agreed to that change.

Mrs. Sowle: One possibility for the committee to consider is the presentation to the commission of alternatives. I sense a division on the committee with regard

to sentences two and three. One thing we could do is to present these three sentences as reworded, and as the other possibility, just the first sentence as reworded, and let the commission take up the problem of the policy of putting the second and third sentences in there.

Mr. Carter: I suspect they will do that whether we give them the alternatives or not.

Mrs. Sowle: No doubt, you're absolutely right.

Mr. Aalyson: It occurs to me that with a little rearrangement of the sentences you might be able to come up with something that is satisfactory to everyone. Your first sentence, as I understand it would read, "Facilities for and services to persons who by reason of disability or handicap require care, treatment or habilitation, shall be fostered by the state". Suppose we were to move the last sentence then to the second sentence and say that persons, if civilly confined...What I'm getting to is the idea that they shall have a right to habilitation or treatment in the facilities so provided. Not "so provided" because that doesn't mandate the provision of them, but that might satisfy Bob's concern to some extent. But that gets away from the ad hoc committee. I think that they feel that there has been inadequate obligation for treatment or habilitation irrespective of whether there are institutions and capital. I'll withdraw that suggestion.

Mr. Carter: I like that second sentence.

Mr. Huston: I have no problem with the second sentence.

Mr. Aalyson: I have no problem with the second sentence either.

Mr. Huston: I do feel that it is adequately covered by case law and by the existing constitution. I think that is a fundamental right we all have.

Mr. Carter: I don't know how effective case law is, but I am concerned about people being put into mental institutions by some relatives saying "put them in". It is much too easy to do and I am familiar with a number of tragedies that have taken place in this area.

Mr. Huston: I think the O'Connor case was an instance of the father putting the son in.

Mr. Carter: I kind of like the statement that we just can't do that! Unless there is a public purpose to be solved. And "harm", I think, covers it very nicely. I will make a motion that Section 1 of Article VII be recommended to the Commission as we have it now.

Mrs. Eriksson: All three sentences?

Mr. Carter: Yes.

Mrs. Eriksson: But with the first sentence starting "facilities for and services to..."?

Mr. Carter: Yes. That gets away from the "laws may be passed". And I think it supports Bob's view too that it is a statement of public policy which is what we are really talking about. It gets away from my plenary powers problem.

Mr. Aalyson: Further discussion? In favor, aye (Sowle, Carter, Aalyson voted yes, Huston voted nay).

Mr. Carter: But it is not a very strong nay, is it?

Mr. Huston: No, there is room for compromise and bargaining. My principle concern, as I say is putting something in the Constitution pointing out something that is actually covered by the general provisions.

Mr. Carter: I have a great deal of respect for your thoughts on this.

Mr. Huston: I have always felt that once you start down this road it always leads to others wanting the same type of protection.

Mr. Carter: We have a very good example of that in the property tax situation right now.

Mr. Huston: Yes, that's right. And to me it is poor policy. I'm not in disagreement with the purpose that is trying to be accomplished. It's the manner.

Mr. Aalyson: What we thought was going to be a half-hour discussion at the original meeting turned into four months. Our next subject is apportionment.

Mr. Carter: I appreciate, Mr. Chairman, your postponing the discussion until I was able to get here. I think we might focus on first what our objectives are. I have little doubt that whatever we come up with will never see the light of day in the foreseeable future. But it does seem to me that it is part of our responsibility to take up this question of apportionment and to come up with what we feel are the best things that can be done. And hopefully somewhere down the line, the League or someone else will take up the cudgel either through the legislature at the right time, and I don't know when that would ever be, or even possibly with an initiative petition of some kind. In which case, I think that the recommendations and the studies that were made by the commission would be of great value. So I do not think that it is something that we should undertake lightly. It's a very difficult subject. There is one problem that dominates the discussion and that's the "tie-breaker", because that is the guts of this question if you are going to have some kind of commission to redistrict. I think that's where the focus of the discussion is going to have to come.

Mr. Aalyson: Let us look at this discussion outline. My personal feeling with regard to item one is that we should, in our own constitution, include something with regard to congressional districting.

All agreed.

Mr. Carter: As a matter of fact, I concur with all three of those items: should congressional districting be included; the same board, commission - I think there is a great deal of justification for having one body do it all; and I also think the same standards clearly ought to apply. So I would like to see that be a part of our recommendation.

All agreed.

Mr. Aalyson: Dick, you had made suggestions earlier with regard to dividing the state into more or less equivalent districts from the standpoint of population, I believe. Would you like to restate that here today?

Mr. Carter: I would like to for the purposes of discussion rather than as a recommendation. I am fairly well persuaded that the advantages of having what I call basic election districts outweigh the disadvantages. I would like to see, I'm not

really as much of an advocate as it sounds, though, discussed the idea of having the number of election districts correspond with the congressional seats. It has been suggested by one of the things that we have, that we have four times the number of congressional seats - we have 23 congressional seats now - that we have four times the house of representatives which would give us 92 vs. the present 99, and that we have two of those districts constitute a senate seat which would give us 46 viz a viz the present 33, and of course there would be one congressional district for each four. The way this thing would work would be that you would then end up with 92 districts in the state at the present time with the present number of congressional seats and then you would build on those 92 districts and then you would aggregate them for the purposes of senate and congressional seats. I think that makes more sense than to have this mixed-up thing that we have now. I recognize that there are pros and cons on it, but I would like to have some discussion on that point.

Mr. Aalyson: I believe that probably the first thing that comes to mind would be what do you do with the even number of senators and legislators? Do you think that would cause any difficulty with regard to achieving a majority in a voting situation?

Mr. Carter: It's a complication. It is one of several negatives.

Mr. Aalyson: Ann, as one who participates fairly frequently in the legislative process, do you foresee that as a real problem?

Mrs. Eriksson: I do. I have said this before. In the setting up of something that is going to result in an even number, it is almost inviting that to happen.

Mr. Carter: What it would basically mean is that you need one more than the even division for passage of legislation. In other words, if we have 92 seats in the house, for example, it would take 47 to pass legislation. If you had an even split, it is just not a majority.

Mr. Huston: Maybe that's a good thing.

Mr. Carter: I'm not sure that's so bad, Ann.

Mrs. Eriksson: Perhaps not in passing bills, but I find the possibility of there being such an even split in parties that it even can impede the organization not good. I think I have a basic feeling that the legislative body ought to be set up so that somebody can be in charge.

Mr. Carter: Oh, that's with respect to the organization. Yes, more so than passing the legislation.

Mrs. Eriksson: In passage of legislation, too. But in organization, primarily.

Mr. Aalyson: Do you actually conceive of that as being a problem, that you could have the same number of democrats elected as republicans in the state?

Mrs. Eriksson: You know, this state is pretty close and it switches back and forth. Do you know they had a tie in the senate just the other day?

Mr. Carter: Ties don't bother me. I think the organization is the problem.

Mrs. Eriksson: It's really difficult to control. Of course, right now, when you have a partisan group doing the apportioning, it's not as likely to happen, because

they're going to apportion in order to create a majority, if it is at all possible to create a majority. But if you are going to change the apportionment board, and you are going to have an apportionment board that is going to be less partisan, I think you are going to find much more shifting back and forth in the general assembly as far as party is concerned.

Mr. Aalyson: Do you think if, for example, such a provision were to be adopted, and an election were to occur wherein there were an equal distribution of republicans and democrats in the house, that they would stalemate, that they wouldn't be able to come up with a coin-tossing solution or something like that?

Mrs. Eriksson: They would never come up with a coin-tossing solution.

Mr. Huston: Unless it would be a two-headed coin.

Mrs. Eriksson: It could be a political deal. You're inviting deals.

Mr. Carter: That is troublesome.

Mr. Aalyson: I though the legislature was above that.

Mr. Carter: In the United States Senate we have that situation now. Your point is that it is much more likely to occur in the State of Ohio than it is nationally?

Mrs. Eriksson: Yes.

Mr. Carter: And, of course, in the Senate, they do have the tie breaker in the sense of the Vice-President.

Mrs. Sowle: Would one at-large person in each chamber be a practical or an impractical way around it?

Mrs. Eriksson: That's a possibility and that would mean extensive rewriting. So far, I don't think there has been any decision holding that a mix of districts and at-large is unconstitutional. I think that that is still permitted. Now that is an element that someday the court might hold unconstitutional.

Mrs. Sowle: Actually, this would give everybody the right to vote for two senators and two members of the general assembly. Everyone would vote for two.

Mr. Aalyson: Of course, one problem that we haven't stated yet is what if the number of congressional districts changes so that your multiplier is different and then you have an at-large candidate and you are right back to where you were.

Mrs. Eriksson: If you are always multiplying by two and four you don't have that problem. You will always have an even number. But what is going to happen is you may change the size of the general assembly every 10 years, and that is going to cause some distress.

Mrs. Sowle: Yes.

Mr. Carter: One of the major weaknesses in this proposal is that every 10 years you are going to have a different number. I just don't happen to think that that is very serious as far as the public is concerned.

Mrs. Eriksson: As far as the public is concerned, I agree with you.

Mr. Carter: And one of my little things is that I think the senate is too small now to do the work that they have to cover with 33 members.

Mrs. Sowle: That's not many, is it?

Mr. Carter: No, you have so many multiple committees and functions that it is hard for them to cover the ground, so one of the little plusses out of this would be to enlarge the senate. And I thought the house was too big, so I thought this was an advantage in that respect. I thought of this business of changing the number of congressional seats. Ohio is not growing as rapidly as the rest of the country so that we can look forward to, I think, a gradual erosion of the number of seats. That doesn't bother me having a little smaller legislature as we go along, if that happens. But this business of how you organize is a real stickler, and the at-large thing would solve that very nicely. The only problem with that is that if you are going to do that you would have to rewrite major sections of the constitution to make this effective.

Mr. Aalyson: Or could we add a section?

Mrs. Eriksson: You would have to go back and look at all of the provisions with respect to the General Assembly and see how that would work out, wherever there are those provisions. And I wouldn't be prepared to say what that would involve. If you really believe in this principle, maybe you ought to think of a one chamber legislature and make your multiple two.

Mr. Carter: I don't like the unicameral legislature. I admit that there are many problems with having the two houses of the legislature, but one thing it does do is that if one house pushes something through and rushes it, you have got another crack at it on the other side. I kind of like the idea of having both of them consider it. It is not a question of black or white, but a question of shades of gray. As I say, the older I get, the less sure I am of anything. But I have seen enough legislation that passed one house, and then because of the delay, and getting it acted upon by the other house, there was a chance for the public to get involved and I've seen some bad legislation blocked by that. So I kind of like the idea of it being difficult to pass laws.

Mr. Huston: Yes, I do too.

Mr. Carter: That's why I'm not too sold on a unicameral legislature.

Mr. Aalyson: If we were to consider an at-large member, would we want to compel him to run as a member of one of the major parties? Well, you probably couldn't do that. Think of the independent sitting there with that power.

Mrs. Sowle: Wow! He controls everything! Fantastic.

Mrs. Eriksson: The chances of that happening in Ohio are pretty unlikely.

Mr. Carter: I don't know whether this is even constitutional, but another thought, of course, would be to have all matters of organization having the governor or some executive official having a vote. But then you get the executive branch voting in legislative matters and that seems like a can of worms, too. I'm not very much in favor of that.

Mrs. Eriksson: If you like the at-large idea, I can check on the recent one-man, one-vote cases and make sure that that would not be unconstitutional.

Mr. Carter: When you referred to that in your memo to the book written by Dixon, I thought that would be alright but we have to remember that this book was written back in 1968 so that it would be out of date.

Mrs. Eriksson: Right. There have been cases on that since, and what I'm not positive of is whether we could mix the two - districts and at-large. You could have them all at-large, but I'm not positive you could mix them. But that is easy to find out.

Mrs. Sowle: Another possibility for the organization problem is to write into the constitution how that is resolved. Write in the flip of the coin or some mandatory way of resolving it. I thought, maybe if the parties see that coming, maybe in order to avoid it they will just do the dealing prior to the time the problem occurs.

Mr. Aalyson: And it is highly questionable whether we could get the court to buy a coin flip, I would think.

Mrs. Eriksson: Besides what you have if that happens is you are really arbitrarily assigning a lot of power to one party when the other party has an equal electoral power. The power of organization is the power to appoint committee chairmen and other powers.

Mr. Carter: I must admit that is a very major stumbling block. We are very biased by our own experience, but in our area we generally end up with so many districts, it has come to the point that we don't know what districts we are in. We vote for three state senators in our town and for three representatives and very often two or three congressmen. It just doesn't make any rhyme or reason, and people are inclined to just give up because they can't keep track of it. To a lesser degree it happens elsewhere. But I like the idea of having district election units that have some permanence. I could see a party chairman in each of these districts that would seem to me to help on party matters, too. It would just make democracy work a lot better, I think.

Mrs. Sowle: Is the result that none of these people pays particular attention to that area? Southeast Ohio has a problem of being ignored because it doesn't have any political power. Its problems have been ignored to the extent that a lot of people were very happy when the Appalachian Commission came along because that gave a unit that paid attention to certain problems.

Mr. Carter: I'm not sure that this would change that very much, though.

Mrs. Sowle: No, I don't think this would have much effect on that. It's just a small remote area with problems different from the rest of the state.

Mrs. Eriksson: It might not change your problem, too, because you're in more than one county.

Mr. Carter: I recognize that. But we would not have so many districts. Let's suppose under the present system you have a 50-49 split and a representative dies, and they hold a new election. Do they do that at all?

Mrs. Eriksson: No, it used to be that there was an election, but now the replacement is named by the members of the body of the same party.

Mr. Carter: So that there is no question of a flip-flop once it is organized?

Mrs. Eriksson: No.

Mr. Carter: Well it would be nice if we could use the numbers three and five. That would solve this problem but it gets us too many. That's a very real problem. I don't know whether the at-large election would find any acceptance in the State of Ohio at all.

Mrs. Sowle: I wonder whether it would. Once somebody has run and won at-large that person has a name. So there might be people who would want the opportunity to run at-large. But running at-large also costs a lot more and presents a whole different picture for that candidate.

Mrs. Eriksson: I'm just thinking of other provisions in the constitution. There is a residency provision that would have to be changed, or excepted to.

Mr. Carter: Maybe this is rubber gloves for leaky fountain pens. We all agree that if you are going to include congressional districts, it greatly simplifies the task of drawing up districts, because then you only have one district procedure to go through. Ann, let me ask you a question. I was under the impression that the senate is made up of three representative seats.

Mrs. Eriksson: It is.

Mr. Carter: But when I read the memo and the constitution it wasn't clear that that was necessarily the case.

Mrs. Eriksson: In our constitution it is.

Mr. Carter: Okay. So that right now, what we are talking about now is the congressional district vs. the state district. Congressional districts that are drawn by the legislature need bear no resemblance to the other.

Mrs. Eriksson: That's right. There is a relationship between the senate and the house.

Mr. Carter: Maybe it's not worth it. Unless we can come up with some answer to this question of the organization. I must admit. That's a real toughy. And the only one is the one Katie suggested that I can think of, is at-large. That may be a case where the cure is worse than the disease.

Mr. Huston: The at-large senator would probably always come from a large metropolitan area because of the concentration of the votes. And your rural areas would never have any power in that area.

Mr. Carter: We used to have an at-large congressman. I remember that. I am willing to pass that one by then, unless we can think of some brain storm, and leave it the way it is. But I did want to see it discussed and I would like to have a discussion of it in our report.

Mrs. Eriksson: On the concept of the even number, I could very well be exaggerating the possibility of that happening.

Mr. Carter: But we would have a crisis if it did. How would you organize a body if you had an even division? You'd have to talk somebody into switching or somebody could be ill. You could have a real stalemate, where you just couldn't organize the legislature.

Mr. Huston: You would have to provide for a tie-breaker of some kind. You'd either have to have the lieutenant governor in the senate...

Mr. Carter: We've taken him out now.

Mr. Huston: Yes, I know. But you would have to put him back in as a tie-breaker and you would have to find somebody that you could put in the house.

Mr. Carter: Let me ask a question. There is precedent. The Vice-President votes in the Senate in case of a tie, so we do have a precedent of an executive officer voting in a legislative body there.

Mrs. Eriksson: We have it in our own, with the lieutenant governor.

Mr. Carter: Suppose there is a tie. The governor, if he had that power to vote to break a tie, is this good or bad in the public interest?

Mr. Huston: In view of the veto power, I would say it would be bad, because the governor does have the veto power. And it would be not as tantamount to his breaking a tie-type vote by virtue of the fact that they have to have a substantial vote of majority to overrule his veto.

Mr. Carter: But he doesn't have a veto on organization. Only on statutes.

Mr. Aalyson: It might be a good idea, because maybe the party that has got the governor there might be cooperation between the governor and that segment of the party.

Mrs. Sowle: Yes, I think that is an interesting thought. I think I agree on that. Because if he has the veto power, then maybe if he had the tie-breaking power, it's consistent. It makes for a better running General Assembly. Because the party then is going to have the committee chairmanships and so forth that will also be closer to the governor.

Mr. Carter: There is no way that you would ever get this through the legislature.

Mr. Huston: Not as presently constituted.

Mr. Carter: But again I think our job is to do the best that we see that we can rather than worrying about what the legislature will do.

Mrs. Eriksson: But that really goes contrary to the philosophy that the Commission adopted by removing the lieutenant governor.

Mr. Carter: Agreed. Except that this is a very special situation. This is an emergency type of situation.

Mr. Huston: You would not do it normally.

Mrs. Eriksson: The lieutenant governor's tie-breaking power is deemed to be that, too. That is also when the senate is equally divided.

Mr. Carter: I don't know whether you could limit the governor in the constitution. I don't know, we're talking about a tie-breaker. Are we talking only with respect to organization of the legislature or are we talking about legislation, too? And I don't care about legislation. I don't think that we should be involved in that particular area. It is the organization that I think is the major problem.

Mr. Aalyson: With the legislation, if it doesn't get a majority, it doesn't pass.

Mr. Carter: Then we are getting the governor mixed up on the basis of ties in the organization of the legislature. Is that good or bad? I don't know.

Mr. Aalyson: You might try for an arbitration panel on each side and a mutual agreement on one.

Mr. Carter: Well if I may, in order to get on, because we've got many other things to discuss on this, why don't we pass this by and reflect on it and see if anyone comes up with some brainstorms. I'd like comment on the next question. No matter what you put in the constitution in the way of standards, they can be bent and twisted. The memorandum is very persuasive on one point, quoting other sources. Even if you divide up all of the population and do it on an equal basis, there are still many other ways of gerrymandering, by ethnic divisions or non-number types of divisions. So that you really are tackling a will-o-the-wisp. There is no way in the constitution that you can spell out all of these things. So with that in mind, I read what we have now, and frankly, I don't think it's too bad. I think it is pretty good. I think they have done about as much as you can of anything. I think we've probably gone further than I would like to see it in the constitution, in the amount of detail that is in there. But what is in there, I really don't feel it is bad the way it is. It is about as good as we can do. Perhaps the committee may want to reread that and see if anything occurs to them, but I don't think it is too important what you put in the constitution. It is the way it is implemented that is more meaningful, and that's the guts of the question. Which brings us up to number four. Being that number four is going to be most of the discussion, if we could just jump to number five for a moment? The timing of the apportionment now follows every census, 1971, 1981. I have no problem with that. That makes a lot of sense to me so maybe we could dispose of that and concentrate on four.

Mrs. Eriksson: I think that on the timing, the one thing that was under some discussion was whether there was any authority in the constitution to apportion between censuses.

Mr. Carter: I would object to changing it more often than every 10 years. I like the idea.

Mrs. Eriksson: In other words, you might be in favor of writing a specific prohibition or making it clear in the constitution that it could only be done once every 10 years.

Mr. Aalyson: I can't conceive of such a radical population change in such a short period that there would be any worthwhile...

Mr. Carter: Anytime you give someone a chance to reapportion, you create problems. Once in 10 years is enough. There is a great deal to be said for the fewer changes the better. Changes should reflect long-term trends rather than jumping around and letting the current powers go in and do their job of gerrymandering. Okay, that brings us to item four. If you want to, I'll lead off on this, too. The memorandum has done a nice job in pointing out what is done in other states. It has very excellent tables. There are lots of different ways of doing it. My quick review indicates to me that Ohio has about the worst of the states. The trend is pretty much to having two partisan groups nominate a number and some way or another getting an equal number on the commission. And then you have got this terrible problem of a polarized partisan affair which it generally will be, and how do you resolve the matter? How do you resolve the tie which will probably happen? It is interesting that states have tried all kinds of ways of doing this. This discussion of Illinois in the memorandum must have been before they changed the commission and their constitution. Michigan, for example, came up with what I thought was a pretty neat solution. What most of them generally do is to end up with the courts being involved. Either the chief justice or the whole court. Could you refer in the memo to page 11? There is a good discussion on pages 11 and 12. And, of course, the problem with having a court is that in Ohio it is an elected partisan court. There are democrats and republicans identified. So that you just shift the problem of apportionment from the legislature or the commission, whichever it may be, on to the court.

But it does strike me that there is some logic to that. In other words if you have got a commission with four members on each side, and then the constitution were to spell out that the instructions to the court if it is appealled to them, is that it is their responsibility to fulfill the requirements of the constitution, which are rather detailed. So that presumably, the judges in the Supreme Court would have a little higher standard of judicial ethics in the way they would approach this than maybe the politicians below would do. So it struck me that the idea of having an equal commission and then appealing to the supreme court lets each of them submit briefs. In Michigan, you either had to take the republican plan or the democratic plan. The court didn't have any choice. The court had to pick one or the other as most nearly fitting the constitutional requirement. As was pointed out, that doesn't work very well because the court has no flexibility to take the best of both plans, so it ends up with a partisan plan. It is just a question of which partisan plan. If you don't do that, as other states have said, the court has the right to take the best of the republican and the best of the democratic plan and take the best of both and make a judgment. It seems to me that that is not too bad a way of doing it. But this question of a tie-breaker is a toughy. There are other ways of doing it other than the courts. I forget what they all are.

Mrs. Eriksson: You might want to give some thought to the elections commission procedure which is that the appointees, even in number, choose the chairman. And you could prohibit that person from being a public official.

Mr. Aalyson: Do you mean choose a chairman independent of the commission, itself?

Mrs. Eriksson: Yes.

Mr. Carter: As the tie-breaker.

Mrs. Eriksson: The elections commission is two from each party and they choose a fifth person.

Mr. Carter: And I suppose that you have to have some provision then if they can't agree which is very likely to happen. And then you are back to the courts, I suppose. If you have an equal number of republicans and democrats on the commission and they have to choose the chairman, you can't mandate that they shall agree.

Mrs. Eriksson: Of course, you can't force a choice.

Mr. Aalyson: If they can't agree on which reapportionment plan shall go into effect how are they going to agree on whose going to decide which one will go into effect?

Mrs. Eriksson: I would think that public pressure would force them to come up with some non-partisan or agreeable person. Or you could provide that they only have a limited time to do this and if they cannot select a chairman, they would be dissolved and new persons appointed.

Mr. Huston: That might be good.

Mr. Carter: You all are familiar with how we do it now, aren't you? I think it's terrible.

Mr. Huston: How are you going to get the legislature to agree?

Mr. Carter: No matter what we come up with, we may not get it through the legislature because there are such strong partisan feelings on no matter what is drawn up.

Mr. Huston: The only way would be through an initiative petition.

Mr. Carter: Yes, and I think that is very possible. I think this is the kind of an issue that might go through the initiative. And that's why I think it is our job to make recommendations for whomever might want to pick up the stick. Well let's try listing some alternatives.

Mr. Aalyson: I kind of like the suggestion that if they can't agree on a chairman tie-breaker, they will be dissolved. That really puts the pressure on them. If four people are appointed and can't come up with somebody they agree on, get out, and we'll get somebody who can.

Mr. Carter: I can picture a situation where that would go on and on and on so that you would never get a reapportionment. You would never get an effective reapportionment. Of course, you could have some sort of backstop in case they don't function or have some back up plan.

Mr. Huston: This has to occur within a very short period of time.

Mrs. Eriksson: For that reason, it seems to me that neither party is going to appoint people who are going to be unable to reach that kind of agreement. Because there are going to be pressures and there is going to be a certain amount of public focus on this.

Mr. Carter: You would like to keep it out of the court altogether, the apportionment question?

Mrs. Eriksson: Yes, I would. Other than the normal processes of appealing it.

Mr. Carter: Ideally, you want to come up with a tie-breaker who is a political neuter, who is objective.

Mrs. Eriksson: Right. I think one state used a law professor. Or the chief justice might name the tie-breaker.

Mr. Carter: I'm a little uncomfortable with the chief justice doing it. I'm more comfortable with the whole court.

Mrs. Eriksson: I don't think you would have any problem with the court agreeing. Where the court has trouble is with having to act on the final apportionment plan. That I think is bad.

Mr. Carter: Why do you say that, Ann?

Mrs. Eriksson: Because I think the court is going to be the final judge of whether the plan is proper or not and I think it is very bad to have the court adopting something that it is going to have to act on later on anyway.

Mr. Carter: Let me try this out. You have a republican plan and a democratic plan, leaving out for the moment the question of the tie-breaker for the commission. They may be able to agree by having political trade-offs, you agree to my plan, I'll agree to yours. That sort of trade-off is possible, although unlikely to happen, to get the courts to agree on a certain matter. Isn't it something like a law suit where you have got two adversaries that need a court determination of the validity of their causes under the constitution? And if you go to the court and one pleads his case, the prepublicans plead their case, the democratic members plead their

case, and then the court sits in judgment on this thing. Can't they do it once and for all?

Mrs. Eriksson: But, you see, both plans could be perfectly constitutional under whatever criteria you set up. The court is then forced to choose on a partisan basis and I think it would be better to have that choice made outside and then leave the court in a real position to make a judgment as to its constitutionality for whatever reasons somebody might raise on the other side.

Mrs. Sowle: The analogy to me is not like two adversaries before a court arguing a case. It's more like labor-management negotiations, something of that sort. The solutions are just as difficult.

Mr. Huston: In labor-management, you have the third-party arbitrating.

Mrs. Sowle: Right.

Mr. Carter: That's what we need. Now, how do you get to that?

Mr. Aalyson: I don't know. It's in labor-management. It's in medical arbitration cases in courts, and they usually seem to come up with something. Maybe you can't do that when you've got politics involved because maybe there is more at stake. But that's why I tossed out the idea of an arbitrator. It does seem to me that if you have four reasonable persons sitting down and they have a pool of persons from whom they could select a fifth, they ought to be able to agree on one as being satisfactory. I can't imagine them being that unreasonable.

Mr. Carter: Okay, how about doing this then? Let's suppose you were to have a committee of four persons and the responsibility for them is to pick a chairman. If they cannot do that, somebody is going to have to pick that chairman for them. And then maybe if we let each of them supply a list of names to the Supreme Court, and just let the Supreme Court make that selection then. They are going to be under quite a bit of pressure to make that selection because they are going to let the courts do it anyway in all probability because that is a big imponderable. That is a threat over them because they don't know what that secret court is going to do. And therefore, there would be a lot of pressure for them to make a selection. If they don't, it goes to the court who then makes the selection of the chairman. Maybe that is not too bad an idea. And that would still leave the review of the court of the constitutionality of the plan.

Mr. Aalyson: Do I understand that you would have a panel, so to speak?

Mr. Carter: You would have an even number split.

Mr. Aalyson: Yes, I understand. Where would you get the group from whom the chairman would be selected?

Mr. Carter: I'm proposing at the moment that they try to agree on a chairman, as was suggested earlier. Failing that, then it is up to the Supreme Court to make that appointment.

Mr. Aalyson: From who?

Mr. Carter: From anybody.

Mrs. Sowle: How are you getting your original group that is going to choose the chairman?

Mr. Carter: There are a lot of ways of doing that. That is another problem. I

don't think that is nearly as difficult as the tie-breaker.

Mrs. Sowle: No, I don't either.

Mr. Carter: I think if you can focus on this tie-breaker question and solve that, the rest of them will be easy. Does the League have any comments on this?

Ellen Tanck: No, we're going to be studying this next year.

Mr. Carter: That will be plenty of time, I'm sure. Well that would be a tremendous improvement over what we have now. Is Rep. Locker republican or democrat?

Mrs. Eriksson: Democrat.

Mr. Carter: He introduced House Joint Resolution 44, and I'm not sure I understand the rationale for his tie-breaker, but I must say it's novel. The seventh member would be the person who received the third highest vote for governor, or if there wasn't such a person the third highest for U.S. Senator and on down the list. I tried to picture what that would mean. That might be our independent again.

Mr. Huston: Normally you have a republican and a democrat running. Now if the republican wins the senate, then the second would be the democrat, so you would have to move down the order so that you don't pick the opposite party. Then you would have to go down to the third party, and you don't know who that would be. You might have more people running for the third place in the ticket than you would have for the office, just to get on that board. This would be the controlling party so you would have people that would run just for that purpose.

Mr. Carter: Shall we tentatively accept that then? I'd feel much more comfortable if the Supreme Court were appointed rather than elected.

Mr. Huston: That's how they do it in the article on page 12, "Seminal Issues in State Constitutional Revision".

Mr. Carter; That's where I got my idea from. I agree that it would be better to have the commission select the tie-breaker rather than going to the court.

Mrs. Eriksson: They should have the first crack at it.

Mr. Aalyson: That idea, if adopted, answers the question of selection of a chairman. Restrictions on membership? How appointed would pretty much take care of that.

Mr. Carter: I've been rather impressed with the way our commission is set up. If you were to have the four principle members of the legislature have the right to appoint a person for that job. It does seem to me that there is some logic to keeping legislators off the board, but they are going to have the appointing right, so that would be more form than substance.

Mrs. Sowle: That's true.

Mr. A lyson: But appointees don't always do what...

Mr. Carter: Not always: But they would probably be pretty careful to appoint those that would.

Mrs. Sowle: I thought you were suggesting that they would appoint members of the General Assembly.

Mr. Carter: It could. My own thought is that if it is going to be apportioning the General Assembly it should not involve the members.

Mrs. Sowle: So that under restrictions on membership you would include members of the General Assembly.

Mr. Carter: I would have a preference for that.

Mr. Huston: Would you include any persons holding political office?

Mrs. Eriksson: I would exclude at least any elected public office holders

Mr. Carter: Hopefully, what we are trying to do is get it in the hands of the citizenry. I was interested in Van Meter's approach, on the last page. It says the commission shall consist of four persons selected by the secretary of state from lists of five submitted by each of the major political parties.

Mrs. Eriksson: That's essentially the elections commission.

Mr. Carter: Yes, and I'm not at all sure that the elections commission shouldn't be given this responsibility rather than setting up another board. Tell us a little bit about the elections commission. Is that the one that Nolan Carson is chairman of?

Mrs. Eriksson: Yes.

Mr. Carter: Is this a standing commission now?

Mrs. Eriksson: Yes, the elections commission is a permanent body now which has responsibility for violations of the campaign finance laws.

Mr. Carter: How are they selected?

Mrs. Eriksson: This is the way it is selected.

Mr. Carter: I'm not sure the secretary of state should have all that much power.

Mrs. Eriksson: The parties submit the names. Senator Pease's resolution expresses pretty much the Common Cause position. It provides that each of the four legislative leaders appoints a member and the governor and the chairman of the state central committee of the political parties that in the last election received the second highest number of votes for the governor. In other words, that is keeping it three republicans and three democrats. Those six members appoint the seventh member. But they don't have any further provision if they are not able to agree.

Mr. Aalyson: Are these persons appointed for a specific term?

Mrs. Eriksson: As the provision is at the present time, they are appointed after the census and they do the apportionment and then they fade away.

Mrs. Sowle: Are there any restrictions on membership for the Ohio Elections Commission?

Mrs. Eriksson: I don't know.

Mrs. Sowle: People holding elective or appointing office, can they serve on that?

Mrs. Eriksson: I don't think so, but I am not sure.

Mrs. Sowle: If we think that no elected public official should serve on it, I wonder about appointed too, because if an appointed official is beholden to the General Assembly for the appointment or to somebody else that somebody else has some power on the commission.

Mr. Huston: They might not be reappointed if they don't vote the way the appointor wants. And most of those would be appointed by the governor.

Mr. Carter: We talked about the idea of using the elections commission which is set up for a different purpose. It is not a constitutional office. It is a statutory office. What Senator Van Meter was trying to do was to validate that in the constitution. Are the duties of those two functions in conflict? The elections commission is set up for ethics.

Mr. Aalyson: It would be good to have an ethical body apportioning.

Mr. Carter: That's what I was wondering.

Mrs. Sowle: It might be perfectly consistent.

Mr. Carter: On the other hand, if they had the mixed job, the requirements would be very different on how they are selected. Reapportionment is one thing and ethics is another thing. They might not end up doing one of the two jobs well at all. I'm inclined to think this is a little bit like initiative and referendum, and should stand on its own feet. It should be a constitutional matter that is set up and spelled out rather carefully. Like initiative and referendum, you can't leave much of this up to the legislature.

Mrs. Eriksson: The Pease proposal does leave up to the legislature whether or not public officials should serve.

Mr. Carter: Hopefully, what we are trying to get at is a citizens' commission that is trying to do the best thing for the state of Ohio.

Mr. Aalyson: It seems to me that the legislators and the public officials, if what they say themselves is true, have too much to do now to take on another responsibility.

Mr. Carter: I don't think there is much point in having a great number.

Mr. Aalyson: Seven sounds fine to me. I think 5 might be a shade small.

Mr. Huston: Do you need to have any provisions for filling of vacancies?

Mr. Carter: Yes, and the way that Pease does it is that the vacancy is filled on the same basis as the original appointment. The nice thing about four is that you have an easy way of getting it and that is by the four legislative leaders. If you are going to have seven, I have no objection, but where are the other two coming from? The chairman of the state central committees of the political parties? There can't be anything more political than that.

Mr. Aalyson: It's going to be pretty political anyhow, I think.

Mr. Carter: Yes, I'm afraid so. I would have no objection to seven. That's essentially what they have here, isn't it?

Mrs. Eriksson: Pease's proposal does.

Mr. Carter: And that's the way he is selecting them.

Mrs. Eriksson: And Van Meter's had five. Pease's would be the governor and the state central committee chairman of the other party each make one appointment.

Mr. Carter: I think that makes some sense. I think I would go along with seven on that basis. I think it is true that the more members there are the more chance there is that they would agree on a chairman, because the more numbers there are, the more likely somebody might break away. How do you feel, Bob, about seven? Does that sound alright to you?

Mr. Huston: I was just scanning the composition of the other states. Mos of them have more than five. I really don't think it makes that much difference. It is a partisan group to begin with. Whether you have five or seven or nine, it's not going to change the results.

Mr. Aalyson: When we discuss reducing the number of jurors from 12 to eight, my major objection is the lack of diversity. The fewer people, the fewer diverse view points. Of course, that can get out of hand. Seven seems to me to be a reasonable number. Five may be a bit too small, but I have no great concern as to whether it should be five or seven.

Mr. Carter: Could we have a draft on the basis of our discussion today and send it out to use so we can all reflect on it?

Mrs. Eriksson: Do you want to exclude public officials?

Mr. Carter: I think so.

Mr. Huston: Elected and appointed.

Mr. Carter: Let's be a little careful on that. Appointed by whom?

Mr. Huston: I don't think there are any in Ohio except those that are appointed by the governor.

Mrs. Eriksson: Do you want to restrict it to state officials?

Mr. Aalyson: We ought to have enough competent citizens not holding public office. I have no problem with excluding either elected or appointed.

Mr. Carter: I was talking about school boards, and things of that sort.

Mrs. Eriksson: Elected public officials would include school board members.

Mr. Carter: That's why I think we ought to narrow it down. For example, there is Jack Wilson.

Mr. Huston: To me, once you get into the election process, whether it be a school board member or otherwise, you're involved in politics.

Mr. Carter: Not necessarily partisan politics.

Mr. Huston: Not necessarily partisan politics, no.

Mr. Carter: How about saying "county or municipal officers"? "State, county and municipal officers". Although that brings up the township problem.

Mr

Mrs. Sowle: It's hard to define. What about state party chairmen? What about a purely party official? Should they be eligible?

Mr. Aalyson: Why not?

Mrs. Sowle: Are they not beholden?

Mr. Carter: There is no way they could do anything except vote a straight party line.

Mr. Aalyson: I think we can assume that those persons who are appointed as a political appointment are going to be voting the political line, anyhow.

Mrs. Eriksson: Party chairmen would probably not want to be appointed, anyway, because he would have to take too many sides.

Mr. Carter: And the trade-offs would be intra-party as well as inter-party. Well, does that give you enough to draft something for us?

Mrs. Eriksson: Oh, yes. Do you want to have something drafted on the election district boundaries, or do you want to think about that some more. With the consideration of the at-large delegate?

Mr. Carter: Why don't we just put that aside for the time being? I really think this question of organization has to be resolved. It isn't an integral part of the rest of this. It is a matter that stands by itself pretty well. Why don't we brainstorm some more and see if somebody can come up with an idea.

A date for the next meeting was set for July 9th. The meeting was adjourned.

Ohio Constitutional Revision Commission
What's Left Committee
July 9, 1976

Summary

The What's Left Committee met on July 9, beginning at 1:30 p.m. in the Commission offices in the Neil House. Committee members present were Craig Aalyson, Chairman, Senator Applegate, Bob Huston, Dick Carter, Katie Sowle, and John Leutz representing Senator Gillmor. Ann Eriksson, Director, and Brenda Buchbinder attended from the staff. Bob Graetz, Ohio Council of Churches, was also present.

Mrs. Eriksson: On the draft of the section 1 of Article VII that you received, the word "always" should have been stricken through. That was the agreement of the committee.

Mr. Aalyson: Ann, would you go over your proposal and tell us what you intend by it in order to accomplish at least what we tentatively talked about at the last meeting.

Mrs. Eriksson: This draft, which is only a revision of Section 1 of Article XI is the very minimum that could be done to accomplish what the committee is talking about. If you read this section in conjunction with the remainder of Article XI you would find places where you probably would think that the other sections should be redrafted also. But I started out with the least amount of redrafting so that perhaps there is some agreement on the principles and then decide how many other sections you feel should be redrafted for making a final decision. The first paragraph of the present section 1 should have been included in this draft stricken through. The whole first paragraph would be eliminated, because this is drafted as an amendment to that section and not as a completely new section.

What I attempted to accomplish here was to take the things that you said you wanted in a draft which were the following: the creation of a body which I have called the apportionment commission, but which you could call anything you want to, to do the districting for both the General Assembly and congressional districts. This body would be composed of seven persons, six would be chosen as follows: one by each of the four legislative leaders, one would be chosen by the governor, and one by the person who was second in the preceding gubernatorial election. This would give you six persons evenly divided as to major political parties. The seventh person would be the chairman and would be chosen by those six persons. If the six people did not agree upon the seventh within one month from the date of their first meeting, the Supreme Court would name the seventh member. The restriction that I put in here was that no elected or appointed officer would serve as a member of the commission. At the very end of the meeting you were talking about whether to restrict the membership. I wasn't absolutely positive whether you agreed on who you wanted to permit to be on it.

Mr. Carter: Nor were we.

Mrs. Eriksson: So this would be an absolute prohibition. No elected or appointed public officer could serve as a member of the commission. The commission would operate only once every 10 years. It would not be a permanent or continuing body. It would be appointed after the census, in 1981 and every 10 years thereafter, and apart from the appointment of the commission, there really would not be much in the way of change made in the present system. There would be no changes in the present system with respect to the standards to be used and applied by the commission in the drawing of districts. The districts would be drawn on the basis of a house district, you combine three house districts for a senate district and there would be no relationship between the legislative districts and the congressional districts. There would be no change in numbers. I put in a provision that the members of the commission would serve without compensation, but be reimbursed for actual and necessary expenses, which is the way this commission operates, of course. And

that the General Assembly would appropriate money for the operation of the commission. That's essential because there would be expenses. There would have to be some staff help, and probably some computer time. It's very difficult to do this kind of thing anymore without a computer. The district plan would be filed with the secretary of state within the same time framework that is required now and there would be no changes in the method of appealing. There is nothing written in here that says what happens if this group fails to file a plan. Which would mean that whatever would happen under the present constitution if there was failure to file a plan would happen, or if somebody decided that the plan was unconstitutional there would be an appeal to the court. There is no intermediate step set up here, which does not really seem necessary when you have an odd number on your body. It would appear that they probably would be able to reach some kind of agreement. But if not then the whole matter would have to be taken through the court system by whatever function or process would be applicable. I included a statement that all meetings of the commission would be open to the public and that the same standards that are applicable to the house and senate districts would apply to congressional districts. And that would be basically all that this does. The question came to my mind whether or not it should be specified that members of the commission must be electors, in this case.

Mrs. Sowle: I have one question about the applicability of the present standards to congressional districting. In the memo, it pointed out that Wells v. Rockefeller and another case mentioned on page 2 of the memorandum applied different criteria to congressional districting than are applied to state districting and a more mathematically exact formula is applied. Now if you apply that test to the current standards, there is as much as a 20% spread allowed under section 9 as I read it, which seems to me to be too broad for the federal standards.

Mrs. Eriksson: Yes, that section is probably unconstitutional as it stands.

Mrs. Sowle: I wondered, even under the state formula whether that spread would be allowed.

Mrs. Eriksson: It probably is unconstitutional. The reason that has never been challenged is that both the current and the immediate past apportionment has come to less than one per cent deviation from absolute zero, at least at the present time in all districts that is the case. It seems to me that although you might consider simply repealing section 9, since I doubt that that would be held constitutional under the one man-one vote cases, but since districting has been demonstrated to be possible to come so close in population, and I don't really consider that the population standards are the essence of what we are talking about anymore. You can get districts that are very exact, and still gerrymander extensively if that is what you want to do. So I didn't think that probably it was worth worrying about what the court cases have held to be a difference with respect to congressional and legislative population deviation. It could be that that might be an issue. But right now that is not an issue in Ohio. But you are right, that section is very questionable.

Mr. Aalyson: Ann, you indicated that one reason for designating the method of selection of the members was to achieve a political balance. I assume you felt that the balance would be achieved practically all of the time without the requirement being stated that it should be politically balanced, simply by the way you have designated these people that would appoint them.

Mrs. Eriksson: It doesn't seem to me that if you have that particular group of people making the appointment, you need to be worried about the fact that one of thos groups of persons is going to appoint someone of the opposite political party.

Senator Applegate: What about the possibility that I brought up before about each of the congressional delegations having the opportunity to appoint, since they are a part of it?

Mrs. Eriksson: Senator Applegate raised what is probably a very valid point, and that is that if you are going to include congressional districting in this body, you might find an immediate rejection of the whole idea if you did not have someone on the apportioning group who was presumably representing whatever those interests are congressionally. Now, of course, there is a lot to be said that what we are trying to do is not give the incumbents an opportunity, particularly, to apportion for their own benefit. On the other hand, you have included four people being appointed representing incumbents in the legislature, and congressmen might have the same feeling. The other major group of people not represented here would be all your third and fourth and fifth parties. This is only going to represent the two major parties, and there is not going to be any representation of any other political concept, other than the two major parties, the way this is set up.

Mr. Carter: Congressional people are not represented now though, are they?

Mrs. Eriksson: No.

Mr. Carter: But the legislature, of course, does that, so they have no voice now.

Sen. Applegate: But if there was any change, I suppose they will probably let themselves be heard.

Mr. Aalyson: Was it your feeling that there should be say, of the two major parties in contention, one from each party?

Sen. Applegate: Yes.

Mr. Aalyson: So that expanding this from a seven to a nine-member commission would essentially take care of that.

Sen. Applegate: Either that or we could replace the gubernatorial or replace something else.

Mr. Aalyson: Did you have a thought as to who might name...

Sen. Applegate: I would think that probably the delegations would caucus and elect their own since they have no leaders. I don't think there are chairmen of state delegations, so they would just have to elect them.

Mr. Aalyson: I talked I believe at one time about having the state chairman of each party appoint someone and decided that was a bad idea, that they would be reluctant to engage in that sort of thing.

Mrs. Eriksson: You talked about that and then at the end of the meeting you agreed that the governor and the person who came in second in the gubernatorial race would make the other selections.

Mr. Carter: Would it be practical, Doug, that the delegations could caucus and agree on such a person?

Sen. Applegate: I suppose you could end up with a stalemate where they couldn't reach an accord in both parties, but I doubt that would happen.

Mr. Carter: Would they have an opportunity to get together to do this?

Sen. Applegate: I imagine they would. As a matter of fact, I think they would be very willing if they knew they were going to be included. I don't even know that I would bring it up unless they said it. This is only on the assumption that they may, indeed, after they see that the board is going to be changed, that they haven't had a voice in it, that they could very well make themselves heard. It may be that they won't say anything.

Mr. Carter: One thing that I'm a little uneasy about and which we talked about last time is this question about having the defeated candidate for governor recommend a name. Sometimes these candidates walk away from politics. It is not unheard of. Gilligan hasn't come far from walking away from politics. So that if you can replace the gubernatorial selections by persons delegated by the congressional delegation...

Mrs. Eriksson: I think there is something to be said for the fact that the governor really shouldn't have any part in this process at all. And also something to be said for the fact that the defeated candidate for governor may have no concept, even if he is still around and still interested, he may have no concept of what this is all about. Because he ran for governor doesn't necessarily mean that he knows anything about the legislature or the legislative districting.

Mr. Aalyson: Something that has bothered me a little bit, too, Ann, is the opportunity for a non-appointment. For example, relating again to the defeated gubernatorial candidate. Suppose by reason of illness or death he is not available to appoint. Maybe the Supreme Court ought to appoint everybody who is not appointed. I don't know.

Mr. Carter: I think that if you incorporate Doug's idea that would solve that, because you are going to have congressional delegations.

Mr. Aalyson: Except for the defeated candidates there are always going to be persons to appoint.

Mrs. Eriksson: Yes, that's right because you are naming officers and not persons. That could be a real problem, a defeated candidate may no longer be here.

Mrs. Sowle: If we went to the congressional delegations, what guarantee is there that both parties would be represented in the congressional delegations?

Mr. Aalyson: There isn't any, that's why I was asking Doug if he was thinking along the lines that both parties would have the right to select someone.

Sen. Applegate: Rather than the heads of the delegations. I suppose it would be possible that we would have all democrats and no republicans or vice versa. However that doesn't seem likely to happen.

Mrs. Eriksson: You could have the congressional delegation appoint one person, who would obviously be a person from whichever party had the majority. And then you could have the state chairman of the other party appoint one person, if you thought it was a real possibility that you wouldn't have both parties represented in a congressional delegation.

Mr. Carter: I don't think we will ever face that in Ohio. Then we would face the question whether that party should have the right to participate.

Sen. Applegate: You could always put that extra proviso in there that in the event there

is but one major party representing the state, that the Supreme Court or the chairman of the extinct political party makes the selection.

Mr. Carter: I think I would be willing to run that risk.

Mrs. Sowle: I have another question about the size of the body. I expect that there are good answers for my question because of the involvement of politics in the apportionment commission. Those of us who were present at the petit jury meeting last time heard a very interesting presentation by the director of a study at Columbia University about the 12-person jury. And presented some very interesting findings, I thought, about the different behavior of the 12-person jury as compared with the six or eight-person jury. I forget exactly what numbers they had used in the study. And what she obviously had concluded was that there are advantages to larger juries. The better deliberation that occurs in the larger juries. Now, probably there would be no paucity of either debate in an apportionment commission because of its partisan nature, but I wondered if there was any carry-over from the reasoning we heard for the jury that was applicable to the desirable size of an apportionment commission.

Mr. Aalyson: As I recall Dr. Singer's comments in this area, and you have already answered your question I think by stating it, she said that in the smaller jury there was the tendency for one person perhaps to dominate it, or a tendency for each of the persons involved to hesitate to express a view because the small group tended toward a social type of thing rather than a deliberative type of thing and therefore you didn't get deliberation. But as you have indicated, where there is a partisan type of discussion, I doubt that that argument would carry over.

Sen. Applegate: I would think that comparing a jury to this type, with respect to size, you would be dealing with a different type of person, whereas in juries, I don't know how they pick them...

Mrs. Eriksson: At random, from the voting lists.

Sen. Applegate: Whatever they are, where here it is going to be a very select individual who probably will be somebody of leadership.

Mr. Aalyson: An extrovert, probably.

Sen. Applegate: Or one who will listen, hopefully.

Mr. Carter: I would like to, since Doug wasn't at the last meeting or Bob Graetz either, comment on the philosophy of having this kind of an apportionment commission, vis à vis what we have now.

Sen. Applegate: I really haven't had an opportunity to look it over or even think about what it is, but I don't see anything wrong with appointments by those who are to be affected, forming the make-up of the board. As opposed to the other. Of course one thing, I have never been happy with any of the plans that have been drawn up since I have been here in 16 years. I think they have apportioned three or four times, already.

Mr. Carter: Then you have no objection to the way this thing is going at the moment?

Sen. Applegate: No, I have no objection to the way it is going. Of course, I would have to talk with others and see what objections they would have. I don't see anything wrong with it. And whether or not you want to include the house of representatives of the

congress, or wait until they say something, it would seem to me that they should be part of it, because they are going to be affected.

Mr. Graetz was invited to comment.

Mr. Graetz: I think what we have here is good, because there is no way you are going to get what some of us were earlier talking about by way of a citizens group. There is no way you are going to avoid having people who are politically involved in one way or another. And by requiring an evenly divided group to select someone who is presumably more objective, I think you are going to tend to get a group who will come out with as near as possible, a plan that will be of benefit to either party. I don't know that there is any way that we can come any closer to that, unless it might be by adding to the number so that you have got the possibility of more voices being heard, and perhaps less likelihood of a party line being developed that was a firm one. I concur with Doug's suggestion of including someone representing the congressional delegations simply because I think it would be unfair to have representatives and senators on the home scene having their voice without having our Washington delegation also with the possibility of being able to speak up.

Mr. Carter: It strikes me that there is one other advantage to this, as Doug suggested, is that you have got people that are not affected, like the congressional people, dealing with the problems of the state elected officials, and state people dealing with the problems of the federal, which they can be perhaps a little bit more objective being that their own ox isn't being gored on that kind of a situation. The more I think about it, the more I like that idea.

Mr. Graetz: If I might comment further on one of the things that we were talking about before, that is of having the congressional districts and the legislative districts multiples of one another, though this plan does not do that, you might find a greater correspondence between the two simply because those who represented leaders of the legislature might be thinking in terms of creating the kinds of districts in which they could run for congress or their cohorts could run for congress and you might find the lines running closer together. We have attempted to get information from all of the states about their procedures for drawing legislative and congressional district lines. And this is a report on those states. I think we have heard from 24 out of the 37 states where there is an even number either in the house or senate or both. The responses are obviously boiled down. You will see that in most cases, there have been no major problems with having an even number. But in most cases it is because one party or the other has dominated. There are one or two places here where they have had a tie vote. Nevada speaks about having had a tie vote.

Mr. Carter: Bob, we weren't so concerned about legislation ties as we were about organizing.

Mr. Graetz: Yes. You will notice, on page 2, in South Dakota, where the house has 70 members, they indicated that in the 73-74 session they were split 35-35 but their constitution provides that the party who elected the governor then organizes. Of course, in most other cases the Lt. Governor will break the tie in the senate.

Mr. Carter: That is exactly what I had come up with, just say the party from which the governor was elected shall organize.

Mr. Graetz: This wasn't as helpful as I hoped it would be when we wrote to them, with only one state really coming back with a serious attempt to deal with the problem.

Mr. Aalyson: It strikes me that with the availability of computers and the ability of programmers to build models that will take care of nearly every conceivable situation

that one can imagine, that perhaps we should suggest that a computer do the apportionment. I see negative shakes of heads already. Apparently someone has thought of this before and reached a negative conclusion as to why it should not be.

Ms. Buchbinder: You would have to have a bipartisan committee to select the programmers.

Mr. Carter: This was actually discussed in the memorandum, as I recall.

Mrs. Eriksson: As a matter of fact, it has been done in Ohio.

Sen. Applegate: The last one that we had was computer apportionment.

Mrs. Eriksson: The last one was computer apportionment, but it has been done on an experimental basis by interns who were working out of Ohio State and had access to the computers. But as Brenda says, you'd have to have a bipartisan group to select the programmers.

Mr. Aalyson: An easy answer to that would be that you hire a programmer from out of state who has no interest in it.

Mrs. Eriksson: Right, and there are several firms which specialize in exactly this kind of thing. There is one located in Maryland and one in California, and there has been some conversation about employing one of those firms to do it.

Mr. Aalyson: I can conceive of a computer drawing a line that would just go around an individual farm and everybody would be mailed by the computer a notice that would say you are in this district, but apparently it hasn't proved workable.

Mrs. Eriksson: It may be workable, but I don't think it's politically acceptable.

Mr. Aalyson: Dick, is that why you were shaking your head no - it's not politically acceptable? Or do you think it's not workable?

Mr. Carter: I shouldn't have probably spoken so quickly. I read something, I think in what we received from the staff, about the problems with doing it by computer. At the same time, there is nothing more politically neutral than a computer. Theoretically, that is the obvious answer. We do it by mathematics rather than by having the people involved do it. But I was persuaded by what I read that this was not going to be a very good idea. There are all kinds of ways of drawing programs. Computers only compute, that's all they do. Someone has to put in a program, and I think the computer is of great help today in apportionment with these tight numbers where it's a tremendous asset to doing it. But to say that the computer makes the decisions I think begs the question. You can draw all kinds of computer programs that would meet the mathematical requirement. Let's suppose I'm a mathematician, okay, we have a certain number of criteria which are set forth in the constitution as to how these districts are to be set up. They are somewhat subjective, and we try to make them as objective as possible. But then to say that that's the only information the computer has to go by, it cannot program from there. A good deal of additional constraints and criteria have to be plugged in before it can calculate anything.

Sen. Applegate: Of course the first thing would be to get the legislature to adopt an amendment. Because you are going to start right off with political motivation because there is going to have to be someone who is going to have to lead. They may take a look at the Supreme Court to see who is the majority. I think the make-up of the committee is ideal, much better than this old way. I think this is something that is going to have to be looked at, because it is going to present some serious political problems. I'm not

sure what safeguards there are from apportioning every year. It's a 10-year appointment. So from 1981 until the following census, what built-in protections are there to prohibit the apportionment board from redistricting or reapportioning every two or three years?

Mrs. Eriksson: Under the present constitution it is pretty clear I think that it cannot be done other than once every ten years, the reason it is pending now is because you can always challenge it on the basis of it being unconstitutional and that's what is going on right now. But short of that, I don't think it could be done other than every 10 years.

Mr. Carter: Are you taling about the proposal, or what we have now, Doug? The proposal says you can only do it once every 10 years. "Such meeting shall convene at the call of the chairman between August 1 and October 1 in the year one thousand nine hundred eighty one and every tenth year thereafter." So this commission would only be in business for a short period of time to do the job and then they go out of business.

Mr. Aalyson: Does the commission die a natural death once it submits its plan?

Mr. Carter: We haven't faced that question yet.

Sen. Applegate: I suppose it would have to be available in the event that there were legal action, challenging.

Mrs. Eriksson: It depends on what the court says. The court might send it back to the commission and say do it again, or the court might appoint a special master, which has been done in some states, or the court might do it itself. But it can clearly only be based on the decennial census, because section 2, on determining the ratio, says very clearly that this shall be the ratio of representation for the next 10 years. So you could not have it done on the basis of population shifts in between the ten-year period. And I don't see on any other basis that it could be done other than its being held unconstitutional by the court.

Mrs. Sowle: Section 6 says very specifically district boundaries established pursuant to this article shall not be changed until the ensuing federal decennial census.

Mrs. Eriksson: And this of course would be a radical change from the present law with respect to congressional redistricting which contains no prohibition against changing the boundaries every two years if the General Assembly chose to do so.

Mr. Carter: Which is a good change.

Sen. Applegate: But it is going to be very difficult for a party in control of the legislature to pass upon that which is going to put them out of business, or which could.

Mrs. Eriksson: Yes, of course, I can see that it could be construed that way. The party that is in control could decide that the present districting system is what worked to their advantage and anything else may work to their disadvantage. But you must realize that the controlling factors here are not the party in control of the legislature but whoever controls two out of the three - governor, auditor, and secretary of state, and that's really who determines the districting plan.

Sen. Applegate: Right, but they probably would rather have it at least that way now than to assure that they wouldn't have it or to change it. In other words, you would have the Supreme Court, if it is a republican controlled court, they are obviously going to, in all due respect to the Supreme Court, they are as politically motivated as anyone else, they are going to put someone in that is going to look at the republican viewpoint. And if the democrats take control, then it is going to be a different situation.

Mrs. Eriksson: But they will only get a whack at it if six people don't agree to a chairman. That's the only time the Supreme Court will come into it.

Mr. Carter: Let's put Doug's point in the context of where we are today, the democrats will appoint 3 and the republicans will appoint 3. There are more republicans on the Supreme Court now. Then the republicans on the commission are going to say we're not going to agree on any seventh member because we'd rather have to deal with the Supreme Court and they are our friends.

Mrs. Sowle: Yes, and I think that is an unfortunate part of this. Is there any other way to break that deadlock?

Mr. Graetz: If the legislature is aware that there will probably be strong support for an initiative drive that would put something on the ballot over which the legislature would have no control, they may be of a mind to frame the language to their likeness as much as possible so that it didn't get out of hand and end up on somebody's petition the language of which could not be changed.

Sen. Applegate: I don't really think that would be a real strong consideration.

Mr. Leutz: If I might add here, I've been doing some work on the initiative petitions that are out for this November and none of them are going anywhere. There seems to be little interest, even with that property tax one away from the sliding scale to the percent.

Sen. Applegate: Yes, and if anything would have the statewide interest, utilities and taxes would have it, you'd think they would run to sign.

Mrs. Eriksson: I don't know a good alternate to the Supreme Court selecting that seventh member.

Mr. Leutz: What would be the matter with just saying the Supreme Court selects then rather than leaving the option there for them. Why do you need to leave an option for the six people to pick the seventh?

Mr. Carter: Hopefully you would have enough faith in the people that were sitting on this commission. You see, it is a citizens group, and they have political biases, but hopefully they would have enough responsibility to pick a seventh member that they both have respect for and that would not do violence to either party. I think there would be considerable motivation, if they were citizens and making that selection rather than going to the court. I'd rather see the six select the man rather than the court.

Mr. Leutz: How about saying if the six don't select him within such amount of time, you appoint six new ones?

Mr. Carter: We talked about that but the problem then is where does it end?

Mr. Huston: You also have got logistical problems in this particular provision.

Mrs. Eriksson: Yes, the time problem. The provisions are drafted specifically with respect to when census data become available. And there is a very limited period of time when you are going to have this plan ready before the next election, in order to give people whose districts are changed a chance to move and this kind of thing. You don't have a lot of time if you don't try to do it within the framework.

Sen. Applegate: I think the formula is very good, personally.

Mr. Graetz: This could argue for adding more members, because the larger the group the more likely it is that one member of the group or the other will decide that the choice of the other group is the proper choice.

Mrs. Eriksson: I think it is also in its favor that these cannot be public officials. You are dealing with persons who have to be non-public officials. You are not dealing with the party leaders themselves or the legislative leaders.

Sen. Applegate: I just wonder how much understanding you could get from somebody who has never had any association with these things? Of course, you could pick anybody you want. You could pick former political figures.

Mrs. Eriksson: I'm sure they would be chosen for their knowlege of what's going on.

Mr. Carter: I would like to suggest, first of all, that we incorporate Doug's suggestion on congressmen. The more I reflect on that, the more it fits. Then the second question I have, Mr. Chairman, is the question of how many should we have? Should we enlarge the group some way or another...

Sen. Applegate: In other words keep the governor and...

Mr. Carter: I don't like this defeated governor.

Sen. Applegate: I don't mean the defeated governor. You could say the governor and somebody selected by the chairman of the party of the other.

Mr. Huston: Yes, that's what I thought. You could either use the person who received the second highest vote or if he is not available, it could be the chairman of the political party of which he was a member. Or just go directly to the chairman of the political party.

Sen. Applegate: Generally I suppose the loser is the titular head of the political party, you have a paid executive head and then you have a selected, elected chairman. If he would want to choose the defeated gubernatorial candidate, it would be his choice.

Mr. Carter: What you could do, if you are talking about adding numbers, is that each of these people could select two people instead of one, you could double the size of the commission.

Sen. Applegate: Yes, if it is important that it would add that much input.

Mr. Carter: I personally have an aversion to too large a group because it is awfully hard to get things done.

Mr. Huston: They've got to work fast and the larger the group the more unwieldy it is.

Mr. Aalyson: I think there is something to be said for that after you reach a certain size, but I think below a certain size, maybe that's not true. I'm not sure. I was, as Katie was, somewhat surprised and rather impressed by Dr. Singer's comments with regard to small numbers. I don't think that it need carry over to a group characterized by this kind of person.

Mr. Huston: Actually, you are getting representatives of various groups in this. They

are going to be looking out after the interests of their groups, no matter whether you have one or two. They are going to be looking out after the interests of that particular group. So I can't see where you get any great benefits from having a larger number.

Mr. Aalyson: I'm all for the idea that the larger the number the less likely it is to be a good working unit, to a point. On the other hand, having done some considerable reading on whether or not a jury should be reduced from 12 to eight or six, I've become convinced, I think, that once you are down to 12 or less you gain more input from a wider segment of society if you have 12, for example, than eight. And in a situation of this character, it seems to me that if there is going to be someone absent that can't deliberate, the more you provide for up to a limited number, such as 10 for example, the more opportunity you are going to have for representation of a society as a whole, or the electorate as a whole. I'm not saying that I think seven is not enough, but I think it is something we ought to consider. If anything, it is on the low side. I would have no opposition to nine, for example.

Mr. Huston: But if you put the congressional people in there, you are going to have nine.

Mr. Aalyson: Unless you substitute them for the governor and the defeated candidate for governor.

Sen. Applegate: You could either talk about replacing, or you could keep the governor as the administrative person and then use the formula for the other. But I can agree, when I was in the House of Representatives, there were 137 members. I served one term with 99 members, and they reduced the number of members on each of the committees. I served with as many as 26 on the elections and federal relations committee, and it was so unwieldy, it seemed like it was chaotic all of the time. And then I went from there to a little smaller committee, but when I came to the senate and serving on committees of nine, it makes all the difference in the world. You feel more like an individual and you can do things. But you just get lost in the crowd and you can't really participate as well. And then the chairman usually takes over. I like the idea of the smaller committee, but seven, I don't know whether it makes any difference if it is seven or nine. I don't think it would make that much difference. We could keep the other two in.

Mr. Huston: Craig raised an interesting question. Supposing at the time of the meeting that was called, which is a very short interval, one of these people is unable to attend because of illness or something of that type. Should there be a method of replacing that individual? Because if you don't, that could throw the balance out of whack.

Sen. Applegate: You could name a member and an alternate, I suppose.

Mr. Huston: Yes.

Sen. Applegate: Because, theoretically, you are talking about one meeting.

Mr. Huston: That's right, but it continues for a period of two months.

Mr. Carter: I wonder if we couldn't solve that problem by saying that vacancies could be filled by the same procedure.

Mr. Huston: Yes, I would think that that's what you would do because even though you are going to be meeting for two months, it is only going to be one meeting at which the decision is going to be made.

Sen. Applegate: You could also say that the meeting cannot proceed without a full complement of all the members. That's really so important when you are dealing with this, es-

pecially when you are dealing with such small numbers.

Mrs. Eriksson: This provision states that the plan would have to be agreed to by a majority of the members.

Mr. Huston: Yes, but out of this you could still have four...

Mrs. Eriksson: Four present and if they all agree, yes.

Mr. Carter: That's a good point. It isn't a vote of the majority present, it is a vote of all of the members of the commission.

Mrs. Eriksson: As with the legislature.

Mr. Carter: Which gives us a pretty good protection against someone...Let's suppose you've got three republicans and three democrats and one Solomon, and one of them is absent.

Mr. Huston: Why don't we just have the one Solomon, otherwise you might just as well have the one Solomon making the decision.

Mrs. Eriksson: If only we could find him.

Mr. Huston: Well, you are going to have the one Solomon theoretically.

Mr. Carter: Presumably getting the various viewpoints...

Mr. Huston: It's a give and take situation.

Mr. Carter: With the trade-offs and all those things that go into that sort of thing. So I wouldn't worry too much about it, but I do think we ought to have an opportunity to fill vacancies by the same procedure as the appointment was made. If somebody is sick, the party can say, we've got to have somebody there, you resign and we'll get a successor.

Mr. Huston: One thing I think we have to have is a time frame by which these members are appointed. Because the way this works now it would never work actually. Because the chairman is the one that calls the first meeting, and the chairman is selected by the Supreme Court one month after the date of the first meeting, if he is not selected by the members.

Mrs. Eriksson: Yes, this language I think needs to be modified. I didn't put in a time in which they had to be appointed. They could be appointed early in eighty-one and they would meet and hold their appointment meeting. And that's why I said the six members so appointed shall meet at a time and place designated by law, and select a seventh member. This meeting in the second paragraph is the meeting at which they are going to begin to actually draw boundaries. But there probably does need to be some modification in that schedule or some indication as to precisely when they shall be appointed.

Mr. Carter: Maybe we could handle it by turning the meeting in the first paragraph into the appointment meeting.

Mr. Huston: Should this provision spell out the dates by which appointments should be made and the first meeting shall be held?

Mr. Aalyson: Why not?

Mr. Huston: I think it should, rather than leave it to the legislature.

Ms. Buchbinder: I wanted to say about the filling of vacancies, Ann had said earlier that the people referred to were offices, not people, but the person who received the second highest number of votes for governor is a person.

Mrs. Eriksson: That's the disadvantage of it.

Ms. Buchbinder: So he would be the one who couldn't name a delegate or alternate if he should die before the first meeting, or be otherwise unable.

Mr. Huston: We could follow Doug's suggestion - the chairman of the political party of which that person was a member.

Mr. Carter: Is there always a chairman of a political party?

Sen. Applegate: Yes.

Mr. Huston: They would be sure to get one in a hurry if there wasn't.

Mrs. Sowle: How would you describe that party?

Mrs. Eriksson: You'd have to describe it as the political party coming in second in the preceding gubernatorial election.

Mr. Leutz: What if the guy was a total independent?

Sen. Applegate: You could say the other major political party, other than the governor's.

Mr. Leutz: Is major political party defined somewhere? What do you do if you have a third major political party come into being?

Sen. Applegate: Change the constitution.

Mrs. Eriksson: It is defined in the statutes. But it is a problem. It is always a problem of trying to describe that group, and it is a problem in the present constitution in a couple of places.

Mr. Carter: Personally, I think I would follow Doug's suggestion and just eliminate the governor and the other one and just leave it at seven. His suggestion solves a couple of problems and I think it also does something good which is to get the congressional people working on this thing.

Sen. Applegate: Yes, those that are going to be affected will be making the selection.

Mr. Carter: That has a lot of appeal to me.

Mrs. Sowle: The only thing that I am still unhappy about is leaving it to the Supreme Court to name a seventh member of the six members do deadlock. Three of them, the three whose party has the majority on the Supreme Court are never going to agree. There is not going to be that negotiation process that we want from this six-member body.

Sen. Applegate: You won't have the same amount of pressure.

Mr. Huston: But who else would you have, that's the problem.

Mr. Aalyson: You could always have the six members designate two, one of whom shall be drawn by lot.

Mrs. Eriksson: Two from opposite political parties?

Mr. Aalyson: Just designate two. That gets away from the political aspect of the thing.

Mr. Carter: That puts a lot of pressure on them to agree.

Mr. Huston: I'd hate to put the future of the state in a deck of cards.

Mr. Aalyson: You've got these people designating someone. It's not a pure flip of the coin. It is somebody they would like to have.

Mr. Huston: That's right, but they are going to designate a member of their political party.

Mr. Aalyson: But the Supreme Court is going to do the same thing, and we are trying to get away from that problem.

Sen. Applegate: The integrity of the formula I think would be well served by the involvement of the Supreme Court. I think that's important.

Mr. Carter: I think the thing that supports that point of view is that what we are trying to do is to get these six guys under pressure to agree on a guy that is mutually acceptable. That's the ideal thing. And this is just a backstop for in case they couldn't agree. Now, Katie said, if they look to the Supreme Court as being a partisan body, we're going to defeat our purpose in doing this and if you had to rely on a flip of a coin, that is going to put a good deal of pressure on these six guys to agree on someone who is mutually acceptable rather than taking the chance of a flip of the coin.

Mr. Graetz: It would be much preferred to have someone who is avowedly neutral than to take the 50-50 chance of having someone who is going to leave you gerrymandered for another 10 years.

Mr. Aalyson: I think that the lot principle would tend to keep one group of three from sitting on their hands.

Mrs. Sowle: Is there any precedent for using civic groups? Common Cause, the League of Women Voters. Could a group of civic groups have the last word?

Mr. Carter: In case they couldn't agree?

Mrs. Sowle: Yes, in case they couldn't agree.

Mrs. Eriksson: I don't think there is any precedent for that. I would think you would really want to think about that before you wrote it into the constitution.

Mrs. Sowle: It would be very difficult, but that's where you would get neutral civic bodies-non-partisan civic bodies are those kinds of groups.

Mr. Huston: You can't be sure they are non-partisan, that's the problem. They've got their axe to grind, too.

Mrs. Sowle: Yes, that's always the case.

Ms. Buchbinder: All the people who are on the apportionment board are political people, or the people who appoint the apportionment board are political offices. Would there be any merit to having people appoint the apportioning board who aren't political offices - corporation presidents or something like that?

Mr. Aalyson: A lot of merit but no practical chance.

Ms. Buchbinder: They at least wouldn't be tied officially to any one party or another.

Mr. Huston: Most people are.

Sen. Applegate: Any way you look at it, it has got to have a political aspect. You just can't get away from it.

Mrs. Eriksson: You could, of course, think about the idea of a law professor or a college professor because that has been used in some other states when the court has turned to a person like this, either for, say appointment in a case like this or as a special master to come up with a plan when the apportionment couldn't do it.

Mrs. Sowle: A law school dean or OSU president?

Mr. Aalyson: To be the chairman or the one who makes the selection of the seventh member?

Mrs. Eriksson: Yes.

Mr. Carter: If our objective is to get these six people under pressure to come up with some selection, which I think is what we are saying.

Mr. Huston: With regard to the law school dean, how is he selected? Isn't he selected by the board of regents?

Mrs. Eriksson: The trustees.

Mr. Huston: Who appoints the trustees? The governor? You get right back down to the political area.

Mrs. Eriksson: It's impossible to find someone who is not political.

Mr. Carter: Is Craig's idea of drawing lots so crazy? I didn't like it at first. Doug, you are politically sensitive. Wouldn't you think this would put considerable pressure on those six people to agree on somebody who is mutually acceptable rather than taking a chance on a flip of the coin?

Sen. Applegate: Yes, I definitely think it would put pressure on them to act.

Mr. Carter: To pick a guy that is mutually agreeable.

Sen. Applegate: But I would hate to put into the constitution to try to sell somebody that a flip of the coin will decide how the state is going to be apportioned.

Mr. Aalyson: It is going to be determined by lot.

Sen. Applegate: We have it in the statutes now to select tied candidates for office.

Mr. Carter: I'd like that better than the Supreme Court.

Mr. Aalyson: The members shall designate two names. If they can't agree, they designate two and the members shall select a chairman from the two by lot.

Sen. Applegate: So it is a 50-50 proposition.

Mr. Carter: It puts a lot of pressure on them to agree. I think that's excellent, better than the Supreme Court.

Mr. Aalyson: They can sit on their hands to achieve that Supreme Court goal, that's the only thing I have against the Supreme Court doing it.

Mr. Carter: As you observed at the last meeting, if we had merit selection of judges the Supreme Court would make more sense than it would be when they are politically elected. I'd like to see us try a draft of that, Ann.

Mrs. Eriksson: And you would want the two names chosen by the six.

Mr. Carter: Yes.

Mr. Aalyson: If they are unable to agree then they submit the names of two persons.

Mr. Huston: It could either be the six or the eight.

Mr. Aalyson: Okay, whatever the number is. I'm kind of inclined to the idea of substitution rather than addition, myself. That Doug's suggestion of congressional representatives be substituted for the governor and the losing candidate for governor rather than to add two.

Mr. Carter: Then the other thing is that we want to spend some time on the schedule here, to sharpen up a little bit on what these meetings are and see that this thing moves as promptly as it should.

Mr. Aalyson: Ordinarily these various folks come into office about the first of January, is that right?

Mrs. Eriksson: Yes.

Mr. Aalyson: It seems to me that the end of January ought to be, or is that too soon?

Mrs. Eriksson: No, I think the end of January or the end of February might be time enough.

Mr. Aalyson: No more than sixty days for the appointment.

Mr. Leutz: After the November election everyone knows who they are except for choosing the leadership.

Mr. Aalyson: I think we've got to start with January 1st and go from there.

Mr. Carter: So sixty days to select the six.

Mrs. Sowle: So first a designation as to when they shall be appointed.

Mr. Aalyson: Within sixty days.

Mrs. Eriksson: And then the meeting should be, perhaps you would just want to arbitrari-

ly pick a date - Maybe March 15? giving them...

Mr. Carter: You wouldn't want to do that.

Mr. Aalyson: How about the organizational meeting, that seems a little early.

Mr. Huston: To whom should these names be submitted?

Mrs. Sowle: How about the governor or the secretary of state?

(The secretary of state was chosen).

Mrs. Sowle: And then he can call the meeting.

Mrs. Eriksson: Much as is done with the Ballot Board.

Mr. Carter: That tracks and that doesn't bother anything.

Mr. Aalyson: And he's going to be anxious to get this thing done, too. He's got a large interest in the apportionment.

Mr. Carter: He could be a darn good expeditor. That's a good thought. The secretary of state shall call the meeting not later than, I'd add another thirty days.

Mr. Aalyson: I think that is better than March 15. You've got to give guys a chance to plan their schedules.

Mrs. Eriksson: Not later than 30 days gives them til April 1 to meet and then they have one month to choose the chairman and on May 1 if they haven't chosen the chairman then I suppose the secretary of state then...

Mr. Aalyson: Choose the chairman or designate the individual, if we are going to have two and it is going to be by lot.

Mrs. Eriksson: Yes.

Sen. ApplegateL The call of the six people and then they will be given 'x' number of days to choose the chairman, and if they don't, they flip the coin.

Mr. Aalyson: Yes, they either have to designate the chairman or choose two additional people.

Mr. Carter: The secretary of state can flip the coin.

Mr. Huston: It's not by a flip of the coin, it's by lot, isn't it? Because you have got more than two people involved. The lottery should be conducted by the secretary of state. It should be spelled out who is going to conduct the lottery.

Mr. Carter: Maybe we should have more than two for the lot.

Mr. Aalyson: It has to be an even number.

Mrs. Eriksson: Why would you have to?

Sen. Applegate: If you have two names, you are going to have to pick one of them, by whatever method you use. You could have all six guys stand there watching the secretary of state do it.

Mrs. Sowle: And it would be an open meeting.

Mr. Aalyson: I see no reason to have more, but I'm open to hearing reasons.

Mr. Huston: I was thinking that each of these people would put a name in, because you see the problem is that you have different interests, you've got the congressional, and the senate, and each person would put a name in the pot.

Mr. Aalyson: He can't put his own name in.

Ms. Buchbinder: Do you run into the primary on this timetable?

Mrs. Eriksson: That's why it has to be finished by October 1 .

Sen. Applegate: We don't run in the odd year anyway.

Mrs. Eriksson: So that people can file by primary time the next year, by February.

Mr. Carter: I like that. Each member shall put a name other than his own in for the chairman.

Mr. Aalyson: Or perhaps other than himself or other than any other member.

Mr. Huston: Would you give them an opportunity to select the odd person from other than the names submitted? If they could not select the seventh person, you'd only resort to these alternatives?

Mrs. Eriksson: That's right. They would have 30 days to choose a chairman and this would only happen if they could not.

Mr. Carter: This would put a lot of pressure on them to choose a chairman.

Mr. Graetz: Conceivably you could have two names showing up three times which would hurt things.

Mr. Aalyson: It would improve the chance that he would be selected by lot.

Mrs. Eriksson: In fact, they might very well do that deliberately.

Mr. Aalyson: The lot would just put the six names in a hat and they would pick it out.

Mr. Leutz: You're saying the two names could appear on six pieces of paper.

Mr. Carter: That's right. But at least the people would have the opportunity.

Mr. Aalyson: That's possible.

Mr. Huston: It depends on how you mean by lot, whether or not you are just going to put the names in and just pull a name out or whether you are going to have them vote on that. I think if you just put all of their names on a slip of paper and have them pull it out.

Mr. Aalyson: That's what I mean by lot.

Mr. Huston: It really wouldn't make any difference to a certain extent.

Mrs. Sowle: I have one problem with that. If six people are sitting around the table and we've deadlocked, and now we are all going to throw a name in a hat, I'm going to throw a political name in the hat. If all six of us have to decide as a result of deliberating and voting by the six on two names, I think we are going to get two names that are less political more acceptable, safer.

Mr. Aalyson: I think what is going to happen is that one side is going to agree on one name and the other side is going to agree on another name. It will either be political or nonpolitical as the case may be, but you will get two names or six.

Mr. Carter: Another advantage of the six is that you don't have to worry about the mechanism with which that person is selected by the three. That solves that whole problem in case of disagreements. I think that is a beautiful solution.

Mrs. Eriksson: If they call each other up ahead of time and say let's all put the same name in that's okay.

Sen. Applegate: And they could put a slip in with the same name.

Mr. Aalyson: There is nothing to prevent that.

Mr. Graetz: Nor is there anything to prevent one person who secretly would like to side with the other party from putting in the same name as the other party has put in and not being found out.

Mr. Huston: I'm not too sure about that.

Mrs. Sowle: The commission could operate by secret ballot anyway. I don't know what the chances of that happening are.

Sen. Applegate: They could set their own rules.

Mrs. Eriksson: You would have the secretary of state draw the names?

Mr. Aalyson: Why not? Has anybody had misgivings or second thoughts or additional thoughts that they would like to submit?

Sen. Applegate: I don't like it.

Mr. Carter: Doug, this whole business of a tie-breaker, I don't know whether you have had a chance to read the memorandum, is almost an insoluble problem. No matter what you come up with you can hope to find a better answer. I think this is better than the Supreme Court.

Mr. Aalyson: This is about as nonpolitical as you can get.

Sen. Applegate: Yes, but I was looking at it from the practical standpoint, I guess you just have to wait and see what happens because the majority party is only going to pass what will benefit them.

Mr. Carter: Unless somebody picks it up as an initiative.

Mr. Aalyson: And we always work under the assumption that we have got to convince the legislature of the validity of our notions.

Mrs. Sowle: I have one lingering problem and that is should be there an alternative in case the apportionment commission is unable to come up with a plan?

Mr. Carter: That is the question that we are always faced with and I think you have to rely on the courts. I don't know any better answer than that.

Sen. Applegate: The court did do it once.

Mrs. Eriksson: In each state where they had a plan in case the original body didn't do it, it always went to that other plan. If you provide that then you can be almost sure that the body originally designated will not be able to reach agreement. So that is why it seems to me that it is better not to try to write too many safeguards and fallbacks in the constitution. Just go with the one body and assume that that body is going to do its job and if not then there is going to have to be a court decision, which is the way it will end up anyway.

Mr. Aalyson: You do have as a part of our suggestions that the appointing agency shall be able to reappoint in case one of the members of the commission is absent.

Mrs. Eriksson: Yes, a vacancy.

Mr. Aalyson: Do we have other business for this meeting?

Mrs. Eriksson: Did you reach a decision on whether you wanted to include congressional appointees to replace the governor and defeated candidate?

Mr. Aalyson: I would say to replace them. Bob, how do you feel about that?

Mr. Huston: I would have no objection to replacing them, because they are parties in interest rather than the governor. The only reason that I was thinking of adding was because of your thought that you want more people on the commission.

Mr. Aalyson: I wasn't necessarily advocating that, I was just mentioning it. I don't think that this type of body is subject to the same analysis as the jury.

Mr. Huston: It's a representative body rather than a jury.

Sen. Applegate: Plus you would probably get 23 additional salesmen for the idea, unless they like the way it is, leaving it up to the legislature, which isn't likely. They never did care for what we did. They always complianed every time we did an apportionment.

Mr. Carter: I'm rather pleased with the progress we made. I thought it was an insoluble problem.

Sen. Applegate: Just getting the seventh man.

Mr. Aalyson: That solves all of the problems.

Mrs. Sowle: Where do we stand on Dick's concept of common districts?

Mr. Carter: I don't think it will fly.

Sen. ApplegateL Bob was here and probably should have been the one to comment.

Mrs. Eriksson: That was the point of his getting this information, of course, because the problem of the even number.

Mr. Carter: The tie-breaker in the case of organization. I'm persuaded that we are probably pursuing a dead horse at that point.

Sen. Applegate: Here is an argument that backs up what you were saying. New Hampshire has 424 people in the legislature, 400-24, with no problems, so in those large bodies...

Mr. Carter: They don't do anything.

Sen. Applegate: In New Hampshire they have a representative for every political subdivision in the state, whether it is a school district, a village, or a township, city, whatever it is. It is the second largest legislative body in the world, second only to our Congress. At least it used to be, and I assume it still is.

A date was set for the next meeting - August 13.

The meeting was adjourned.

Ohio Constitutional Revision Commission
What's Left Committee
January 10, 1977

Minutes

The What's Left Committee met on January 10 at 9:30 a.m. in the Commission offices in the Neil House. Present were Craig Aalyson, Chairman, Katie Sowle, and Paul Gillmor. Brenda Buchbinder was present from the staff. John McElroy participated in the discussion.

Mr. Aalyson asked Senator Gillmor to comment on his recommendation for reconsideration of Article II, Section 4.

Senator Gillmor: My proposal was really very simple. Just to repeal the one provision of the Constitution which used to be Article II, Section 19 and I think has now been incorporated into Article II, Section 4. I do not recall in the other Commission activities that we ever made a policy decision on this particular provision. We put two sections together, simply, I presume, on the basis of shortening the provision. The provision that I have in mind says "No member of the general assembly shall, during the term for which he was elected or for one year thereafter, be appointed to any public office."

Ms. Buchbinder: This was considered by the Legislative-Executive Committee.

Senator Gillmor: I think the constitutional provision's concept was a good one, which was to prevent members of the legislature from creating positions so that they could be appointed to them or from raising the pay for positions so that they could be appointed to them. That's the kind of situation you don't want to have. As a practical matter, I don't think it's a problem. I think the thing that is a problem is not so much the provision dealing with the creating of the position but the one dealing with an increase in pay. Because when these provisions went into the Constitution, we didn't have inflation. But now, just automatically the general assembly almost has to and does raise pay for everybody in the state office every single time it is in session. So, the practical effect of the provision is, it seems to me, instead of preventing the legislature from abusing the thing, it just automatically bars any member of the legislature from being appointed. We had an instance, for example, of Harry Jump who is now the present director of the Department of Insurance. He was earlier, perhaps five or six years ago in the last Rhodes administration, appointed director of Insurance while a member of the senate. While he was a member of the senate, the pay for the director of Insurance was increased as it was for everyone else working in state government, and he was barred from serving. And in fact this provision affected a lot of people. Harry actually resigned from the senate and then ended up serving for a year as the acting director. Frank King has been around a lot longer than I have, and he said the same thing happened in the DiSalle administration. What we are really doing is taking some people who are very qualified and keeping them from being appointed to particular positions, and are being barred from doing that to protect against an evil which really doesn't exist.

Mr. Aalyson: He served as <u>acting</u> director. If this provision has any merit, he shouldn't be entitled to act if he can't be the director.

Mrs. Sowle: Right, because it says during the time for which he was elected. If he resigned, he would still be serving during the term for which he was elected. Wouldn't this preclude somebody from resigning during the term and assuming the office?

Senator Gillmor: That's what happened to Jump.

Mrs. Sowle: You want to change the business about increasing compensation, and it would still prohibit the resignation and then assuming a public office during the term for which the person was elected, as I read it.

Senator Gillmor: It would be just like at the federal level. Carter just appointed a member of Congress as the director of Agriculture. And there have been a number of appointments in the federal system that are not instances where people are creating offices to be appointed to them, and I would like to see the same flexibility in Ohio as you have in the federal system. Where if they wanted to, you could go to the legislative body for appointments the same as you could go anywhere else.

Mrs. Sowle: So you really want the whole thing eliminated?

Senator Gillmor: I think it would be preferable to eliminate the whole thing and I think the basic thing that is causing the problem is the compensation question which is just raised all of the time. If the feeling in the Committee were that there is a possibility of abuse, for example, on the creation of an office, I don't see any reason not to leave that in. Although I don't think there would be any instances of offices being created for that purpose. As a practical matter, in this day and age, you just can't do that. If you had somebody that wanted to create an office to be appointed to it, he is just not going to get that through the public hearing process and two houses of the general assembly and get it accomplished. But I think the real problem is the compensation thing because the way it works is it just automatically excludes everybody.

Ms. Buchbinder: Are you talking about just eliminating the second paragraph or the whole provision?

Senator Gillmor: I would be eliminating the second paragraph of present Article II, Section 4.

Mrs. Sowle: If you read it literally, one could not resign from term and enter public office.

Senator Gillmor: Harry Jump was elected in 1966 to the senate with his term to run til 1970. In that first session, as I recall, we increased the pay for all directors who worked for the state of Ohio. Then in 1968 or 1969 the governor wanted to appoint him as director of Insurance. He submitted his resignation to the senate accepting the appointment. And it was not until later that people found out that he was barred. But in fact, as I understand the practical effect of that provision, Harry was elected in 1966, and couldn't have been appointed to anything until after 1971. He couldn't have been appointed to anything until January of 1972. It was really five years. I just don't think that is a good idea. If you aren't in a time when you are going to give people pay raises and when inflation wasn't in existence, I don't think this would be any problem. Because pay raises wouldn't normally be given every term. In other words, an individual can resign and be appointed to anything unless the pay was increased for it or the office was created.

Ms. Buchbinder: What about the first paragraph in Section 4? Suppose Jimmy Carter called you up and wanted you to be the new U.S. Attorney General. You would be prohibited from doing that, wouldn't you?

Senator Gillmor: I would be prohibited from being a member of the general assembly and also the Attorney General. But I don't think a person ought to be both the Attorney General and a member of the general assembly. Isn't that what it says?

Mrs. Sowle: You are interpreting that paragraph as prohibiting somebody from serving in both the general assembly and holding public office.

Senator Gillmor: I don't want to change that.

Mrs. Sowle: You can read it as prohibiting somebody from resigning from the general assembly and assuming a public office. But maybe there is interpretation confirming your reading of it.

Senator Gillmor: I think you may be right on that.

Ms. Buchbinder: The way it makes sense to me is if you elect someone, maybe you want to have some guarantee they are going to be in there for a while and not take advantage of the first better offer that pops up.

Mr. Aalyson: That's probably why it's there.

Ms. Buchbinder: Which means that you couldn't resign from the general assembly to take that job.

Senator Gillmor: I rather doubt that because otherwise, why would you talk about pay and emolument as being the basis for keeping a person out. For example, I ran for the Senate as a non-office holder of anything. In my term we had about four or five state senators who ran and were elected to Congress in the middle of their term, including two this year. I don't buy the philosophy that they should be barred from running for something else, whether it is United States Congress or governor or for whatever. There are a lot of members of the general assembly that run for attorney general or for governor. I don't think you ought to bar them from doing that. That's all I'm saying. I don't agree with your philosophy on that. My intention was to just eliminate the second provision, but we might want to clarify the first paragraph.

Mrs. Sowle: If it has not been construed, perhaps the staff could find out for us if there is a settled construction of it. But I see no problem with eliminating the second paragraph in the sense that it seems to me that there would probably be sufficient political and practical controls of any abuse of it. And the inflation argument is very persuasive.

Senator Gillmor: Perhaps on that first paragraph the best thing would be to just eliminate the provision "during the term for which he was elected". In other words, that would bar him from having two public offices at the same time. In other words, suppose you have a member of the house of representatives from Cuyahoga county who was running for mayor of Cleveland, and those are in the odd year. If we construed this paragraph literally, that would bar him from being mayor of Cleveland. My idea is that we eliminate paragraph 2 and that we eliminate that sentence in the first paragraph which says "during the term for which he was elected" unless you get some kind of interpretation that would indicate that that is not a problem.

Mrs. Sowle: Yes, I guess that would eliminate the problem. Except you might have "No member shall, while serving the term for which he was elected hold any public office".

Senator Gillmor: That would be good. That would do the same thing.

Mrs. Sowle: Since drafting is always hard to do in committee, perhaps we could ask the staff first to find out whether there is construction of it, any interpretation of it, and secondly, if there is no interpretation of it consistent with Senator Gillmor's reading, that the staff recommend some language to us.

Senator Gillmor: I think this is very sensible. I think we have two possible ways of doing it, and I think either one would accomplish it.

Mr. Aalyson: Dick usually raises a question about the practical side of the thing, trying to eliminate a provision which has been in the Constitution for a long time and apparently had some merit, or it was felt that it had some merit, when the provision was inserted. How often, Senator, is it that a member of the legislature would be confronted with the problem in this?

Senator Gillmor: I don't think that for most members of the legislature they ever would. But it does preclude a whole class of people, 132, actually it precludes

more than that because it precludes them for a year after their term from certain offices. For most members of the legislature it doesn't matter but in some instances it does. I think the federal approach is better. Why should Carter, for example, have been prohibited from naming a congressman as the Secretary of Agriculture? Why should the governor be prevented from naming a member of the house?

Mr. Aalyson: I find a lot of merit in Brenda's suggestion that maybe if you elect somebody to an office that person should serve for the term you elected him.

Senator Gillmor: How about, for example, Don Pease from Lorain? Charlie Mosher retired from Congress. Don Pease was obviously thought of very highly because he won by about 60,000 votes up there in that congressional district when he ran. Do we really serve good government by barring Don Pease from being a candidate for Congress this year because he was elected to the senate in 1974?

Mr. Aalyson: There might be someone just as qualified and just as capable and just as popular. I don't know.

Senator Gillmor: In a democracy, don't we let the people make those decisions?

Mr. Aalyson: The people have in effect done it by adopting this constitutional provision.

Senator Gillmor: They did it 125 years ago, under different circumstances.

Mrs. Sowle: And I have a question as to whether this prohibits what you are talking about.

Senator Gillmor: Don Pease may be barred from assuming this congressional seat.

Mrs. Sowle: I think you can take the position that the only way the change in office from general assembly to another office is prevented is by the second paragraph.

Mr. Aalyson: Yes.

Mrs. Sowle: And as a practical matter, the way it is prevented is an accident, because of inflation. If you read the first paragraph as meaning you can't hold both offices at the same time, the only way Don Pease would be prevented from moving is because of the accident of years now of inflation. Which probably did not pertain at the time the provision was put into the Constitution.

Mr. Aalyson: The second paragraph only talks about appointment, it doesn't talk about election.

Mrs. Sowle: Yes, that's right.

Senator Gillmor: In the first paragraph, also, it doesn't relate to an increase in compensation. Even if nobody got an increase in compensation, if you read that literally, a member of the general assembly who was elected until 1978, which he was, couldn't hold an office under the United States which the United States Congress certainly is.

Mrs. Sowle: You could argue that "during the term" means while serving the term.

Senator Gillmor: Yes.

Mr. Aalyson: Yes, you could argue that, but you could argue the opposite also.

Mrs. Sowle: Yes, that's why we need to know whether that has been interpreted one way or another.

Senator Gillmor: Yes, Pease's opponent might want to file suit here. John (McElroy) is here for something else, and maybe this is not a fair question and you don't want to comment, but, did you run into practical problems on this?

Mr. McElroy: Are you talking about the constitutional provision as it is or as you are proposing it?

Senator Gillmor: I think it's the same right now, except that the section has been renumbered. The second paragraph in Article II, Section 4, is the same as the old Article II, Section 19. In the revision they just switched it over in renumbering the sections.

Mrs. Sowle: I don't think we have to wait to decide whether we want to eliminate the second paragraph. To the extent that we can act as less than a majority of the Committee I would certainly favor deletion of the second paragraph.

Senator Gillmor: I'll second the motion.

Ms. Buchbinder: On page 21, there might be something relevant; "No member of the general assembly shall accept any appointment....any such officer or employee who accepts a certificate of election to either house, shall forfeit or resign from" whatever he was before. "Any member of the general assembly who accepts any such employment as officer or employee shall forthwith resign from the general assembly and in case he fails or refuses to do so his seat in the general assembly shall be deemed to be vacant." That's in the statute.

Senator Gillmor: That's also consistent with what I want to do which is to say when he does accept it he has got to get out. Apparently the legislature thought they could do that.

Mr. Aalyson: Do we have sufficient people to act here in the Committee?

There was discussion about whether there were enough people.

Senator Gillmor: If we could, I would like to vote on the second paragraph, because it was only in the first paragraph that there were any language changes. The second paragraph was just picked up and moved verbatim from Section 19 to the second paragraph of Section 4.

Mr. Aalyson: I think we ought to treat the whole thing at once to make it simpler to present. Modify the first paragraph if that is the sense of the Committee and eliminate the second paragraph. They could be voted on separately at the Commission level, I suppose, but as far as presenting them from this committee I think they ought to go out together.

Senator Gillmor: Okay.

Mr. Aalyson: We vote on separate sections in the Commission.

Mrs. Sowle: What we might do then is when, I assume the staff will send something out to the Committee on the background of one, and perhaps that would simply state the feeling of those present with regard to paragraph 2, and then at the next Committee meeting when we take up paragraph one we could deal with the whole thing.

Senator Gillmor: What is our schedule on the Committee and do we have one or two full Commission meetings left?

Mr. Aalyson: Mr. Carter was hoping for one more Commission meeting sometime in February, and I'm sure we are almost going to have to have another Committee meeting.

That's going to have to be the last part of January because I'm leaving the first two weeks of February, although it doesn't make any difference, of course.

Senator Gillmor: Well, we'll get some dope from staff on the first paragraph and go from there.

Mr. Aalyson: Our next subject is apportionment. Does anyone feel that we should wait for more Committee members or should we just proceed?

Mrs. Sowle: If we are going to have another Committee meeting we can look into it more, but I think we should discuss....

Mr. Aalyson: I think we should go ahead. There is no assurance that any of these other members are going to be here and we've got to use the time we have available. I suppose from the standpoint of economy we should hear from the gentleman who has made a recommendation to us.

Mr. McElroy joined the Committee at the table and distributed copies of his recommendation with the addition of a new last paragraph.

Ms. Buchbinder: You also have a proposal before you from the Ohio Council of Churches which is different from their earlier recommendations.

Mr. Aalyson: Does any member of the Committee have anything to say before we hear from Mr. McElroy?

Mr. McElroy: The Commission invited me to submit some language on apportionment which I submitted to Ann Eriksson. Do you all have the copy which has the last paragraph beginning "The governor shall submit..."? That was my afterthought. (Copies of those were distributed.) The problem I have with the existing language and with the language that was tentatively proposed by the Commission is that it doesn't get at the people who really do the apportionment. As I said before, the interested parties prepare complete packages to accomplish whatever they want them to accomplish and then they are brought in and the majority adopts the package that has what it wants. There isn't any opportunity for the public to know what is in it. There isn't any opportunity for the public or for the input of any interested citizen or any interested group, and the whole thing is just done in the dark. It seems to me that a far better approach is to recognize that it takes professional skill and professional talent to put these things together correctly. And the best way to insure honesty in doing it is to have an adversary operation right from the beginning. This can be accomplished by setting up the staff that is admittedly and intentionally an adversary staff of the majority and minority members. In drafting to see how it would come out, what should be in the statute and what should be in the Constitution, I produced this document. I think the first paragraph is much the same as the present law, and the second paragraph then begins specifying the first of three meetings that the apportionment persons will hold. The first is simply to set up the staff, providing that the majority party of the apportionment persons, as far as party is concerned, gets the staff director who has the responsibility for staff supervision. Then I have the language "The staff director and the staff assistant shall have such qualifications and prior recommendations or approval, take such oath of office, and shall be compensated and reimbursed for expenses in such amounts, be provided with working space and facilities and equipment as shall be provided by law." This is the area in which the general assembly would have some flexibility. What I have in mind by "such qualifications and prior recommendations" is that the general assembly could specify that people be accountants or lawyers or demographically, or they could even require that the republican members be recommended by the republican state committee and the democratic members by the democratic committee. Things of this sort, whatever appears wise and prudent in setting up a competent adversary staff. Then the staff formulates the apportionment to begin with to satisfy the requirements of the Ohio

Constitution and the U. S. Constitution. Then the governor gives notice for the convening of the second meeting of the apportionment commission at which time the whole staff is present. The staff director reports on what they have done and what they have tried to do, what alternatives were considered, what kind of data was used. This is a free and open meeting that can be recessed as much as necessary to get the full exposure of the way in which the staff recommended the apportionment be developed. Then, after you reach that time, the apportioning persons simply vote to adopt it as their proposal. It is then published and exposed to whatever kind of review the general assembly thinks is required. They may be content with publication or they may in addition want to have some hearings on it. These are procedural matters which I think should be decided by the general assembly rather than put in the Constitution. Then, after there has been at least four weeks for public review and comment, then the apportioning persons meet again at which time they have an opportunity to discuss what has been proposed, the criticisms that have come in, suggestions and alternatives, and finally issue staff direction as to whether it is to be the apportionment which it adopts. I think this approach has three advantages. One is that it gives all kinds of opportunity for real adversary. It gives opportunity for newspaper comment on the thing, for editorial examination. And it also gives enough time during the development of the proposal for people to know what is going to happen. I think if the plan is developed this way, it overcomes the weaknesses and vices of the present situation. Our present apportionment, for example, has 81 defects under the Ohio Constitution. 72 percent of the house districts and 30 percent of the senate districts violate the Ohio Constitution. If we had gone through the procedure this sets up this wouldn't have happened.

Mrs. Sowle: I have a question about it. I think the provision for public comment is extremely good, but in the last analysis aren't you just guaranteeing that the majority political party will have their apportionment plan without this?

Mr. McElroy: Yes, but with the public watching. I think they are more apt to act in the very best way. If you take this approach they are more apt to develop a sense of fairness. Because they are most apt to be fair because they know they are being watched, beginning right at the staff level.

Mr. Aalyson: Don't the newspapers and, in effect the public, watch now?

Mr. McElroy: No, because they don't know enough about apportionment, and if you look at the language of apportionment, you will realize what a forbidding sort of text it is.

Mr. Aalyson: How does this proposal educate those who should know so that they can vote when they can't now?

Mr. McElroy: It's not going to make anybody know who doesn't.... one thing you would have, the ordinary citizen doesn't have any maps showing wards and precincts.

Mr. Aalyson: Will he have under your proposal?

Mr. McElroy: Not necessarily, but I think he would be more apt to get news media coverage, more apt to get an apportionment that arises from a sense of community. We have lost that under our present apportionment.

Mrs. Sowle: And it requires a four week period.

Mr. Aalyson: Of publishing.

Senator Gillmor: I think as a practical matter, the public would know, because the first thing all of the newspapers do when an apportionment plan comes out is look at it and get their maps drawn and it always is in the paper and this is what it means to us locally. John, I think what you are trying to do, and it might happen, is

rather than apportionment plans coming like a bolt out of the blue and that's the final version, you would have them say this is the version, and someone else would say this is the other guy's version. And then where you had things like areas left out of the last one, then this becomes available and we have counties caught up and the people in most counties, for example the democratic chairman in Sandusky county, are going to be calling the people on the board and asking "what are you guys doing to us up here and why don't you do thus and so", this kind of thing.

Mr. McElroy: As it is now, it is simply published and that's it, you see. You take it or leave it.

Mrs. Sowle: It's published after it's adopted?

Mr. McElroy: It's not published at all now, until it is adopted, and then it is published as the law.

Mrs. Sowle: I see. But it is not published prior to adoption.

Senator Gillmor: Not under the present format.

Mr. McElroy: And it is not known other than to people privy to the preparation what it does.

Mrs. Sowle: So that's done in the dark. Does the sunshine law have any applicability to it?

Mr. McElroy: Even assuming that it does , it doesn't accomplish anything. All you see is the vote, the yeas and nays on adopting the package, and you don't know what's in the package.

Mrs. Sowle: May I ask your attitude, what you might think of combining your idea of the three meetings with the prior publication with the earlier proposal the Committee came up with about composition of the board?

Mr. McElroy: I just don't have the confidence that this makes a change, the make-up of the commission. I don't think it's the people who vote on it finally so much as what they vote on that's important.

Mr. Aalyson: How do you feel the appointment of a staff which would then recommend a plan to the apportionment commission improves upon the commission formulating the plan itself?

Mr. McElroy: I don't think that the commission will actually do it. It will be a staff-prepared document in any event. You fix responsibility on the commission to hire somebody to do the work.

Mr. Aalyson: What do they use for funds?

Mr. McElroy: Somebody is going to have to provide the funding. Other than that, or if they don't have funds, you are going to have exactly what is happening now. The democratic headquarters or the republican headquarters pay to have it done.

Senator Gillmor: Or they will pull some state employees off of what they are doing and have them, but I presume democratic headquarters pay for democratic employees and republican state headquarters pay for republicans.

Mr. McElroy: The way you have it now it was done by someone on Governor Gilligan's staff.

Mrs. Sowle: Do you feel that the proposal for the apportioning group as previously made is harmful?

Mr. McElroy: Not at all. And I think that when people elect their state officials they are entitled to have them perform some duties and this is one of them. I don't think this is at all the problem. They go in and they vote the way they should as good republicans or good democrats. Another thing I leave as a separate option is a provision for the congressional districting to be handled in the same way. The reason for that is simply a practical one. You can make a proposal for a constitutional language with the hope that it will be adopted. As it stands now the general assembly has a primary interest in congressional redistricting. They don't want to give it up. So I think probably the thing to do is not to clutter up a proposed apportionment by putting other language in there, because it would just automatically go down. But I would leave the option with the general assembly if at some time it feels this is a good way to handle the matter of congressional redistricting.

Senator Gillmor: It might make it easier to get the Commission's recommendation itself through the general assembly if you left the option separate. Right now, the democrats aren't going to want to change it, because they figure they are going to have the board next time. I think the republicans after 1966 thought that. It didn't work that way. I think all we can do is make the best recommendation we can and it is up to them.

Mr. McElroy: I don't think this proposal I have weights it for one party or another. I think it is fair.

Mr. Aalyson: I have some difficulty understanding how this is basically different from the present constitutional provision except for two facets. One, we appoint a staff to serve the apportionment commission. The other one, we cause the plan to be published four weeks before the meeting is held to adopt it.

Mr. McElroy: Yes, so that there is an opportunity....

Mr. Aalyson: For people who are not familiar with the Constitution and the very involved problems of trying to apportion according to boundary and numbers of people to make a comment. In other words, we're throwing out something they don't understand and which they are not going to try to understand. It seems to me we're back in the same position.

Senator Gillmor: I don't think so.

Mr. McElroy: Not even people who have a duty to understand now have an opportunity to.

Mr. Aalyson: How are we going to improve that?

Mr. McElroy: By leaving the four weeks between the time of the public appearance and the time of the voting.

Mr. Aalyson: Those people now, are they restricted to providing the apportionment plan within a certain length of time?

Mr. McElroy: No.

Mr. Aalyson: Well, why do they not have the opportunity now to understand?

Mr. McElroy: What people are we talking about?

Mr. Aalyson: The apportionment commission.

Mr. McElroy: The present apportioning persons could, if they want, have plans submitted and published and then postpone acting on it. They don't do it.

Mr. Aalyson: That's what I'm asking. What is the publishing of the plan going to accomplish? It would seem to me that those people who are interested in apportionment they would become so involved that they would determine what the constitutional provisions were, would do that now.

Mr. McElroy: Except that they have no access to it, until it is in effect.

Mrs. Sowle: They can't see it until it is already adopted. This way they could see it before.

Mr. Aalyson: You mean nobody has an input to the people who are on the apportionment commission? They may not have any right to input, but this doesn't guarantee the right. But surely, the political bigwigs in either party talk to the apportionment commission. I can't believe that these folks just sit down and do this without consulting anybody else.

Senator Gillmor: Let me give you a couple of practical illustrations in my district going through a republican reapportionment and a democratic reapportionment. When I was first elected, the republican plan split out six heavily democratic wards in Toledo and gave them to me. I think one of the reasons was to make my district at that time about an even district and to make a district in Toledo possible for a republican to win. If, as a practical matter, that plan had been known in advance, which it was not, there would have been ... maybe not the average person in Toledo would have come down and looked at that plan ... but certainly the Toledo Blade and the T.V. and radio stations up there, the party people in both parties would have looked at it. There would have been a tremendous amount of pressure from Lucas county, I think, to do something about keeping the city intact or making some changes up there. And there are instances like that I'm sure all over the state, and probably would have.

Mr. Aalyson: Didn't the hierarchy of the political structures know whether that was going to be done?

Senator Gillmor: I don't know whether the hierarchy of the republican party in Lucas county knew exactly what was going to be done there, but I'm sure that nobody on the other side of the political fence ever knew.

Mr. Aalyson: Even though there were some members on the apportionment commission?

Senator Gillmor: The members of the apportionment commission of the minority party, whether it is going to be a republican or democratic minority, aren't going to see that plan, until they walk into that meeting to vote. That is the truth. As a matter of fact, members of the Ohio general assembly, even in the same political party as the party who is spelling the line, ususally can not see it, because it is a very secretive process, and they don't want them to know, because they know they are going to start complaining about their own district. I could go over the same set of circumstances that happened under the democratic plan in my district and all over the state. But I think if that public pressure were known I'm not real keen on having in a constitutional provision the appointment of staff directors. But the thing I do like and I think has real merit and could make a difference in getting a less partisan plan, whoever is in control, it doesn't guarantee it but it is going to make an awful lot of heat on that apportionment board if they don't make some changes. They are going to have a lot of heat to take just as a practical matter.

Mr. Aalyson: You're saying that the publication, at least, is an excellent idea?

Senator Gillmor: Yes, if you had the publication from both sides, I think you would

get some comparative comment. You know, the board could still go ahead and do what they are going to do, but it makes it a lot more difficult, I think, as a practical matter for them to ignore those considerations, which they can do right now.

Mrs. Sowle: We have a very different proposal which was given to us just today. Have you seen this proposal (from the Ohio Council of Churches)?

Mr. McElroy: Yes, this is the one to permit any elector or any group of electors to make a proposal. I certainly don't see any harm in doing this, but I think it's a little naive.

Mrs. Sowle: It goes on to require that if the plan is found by mathematical computation to be more compact, then it shall be adopted....

Mr. McElroy: That is philosophically just wrong. I think that it destroys the sense of community. The standards in the Ohio Constitution now, for example, permit a variance of up to ten per cent above or below the ratio of representation to maintain the integrity of counties. I think this is very very good because this is the homogeneity of the electorate. The papers serve the county; the radio stations serve the county. And if you just go mathematically, you are going to have so many boxes all over the state with no sense of community as far as those individual boxes are concerned.

Mrs. Sowle: Compactness is not the only value.

Mr. McElroy: Right.

Senator Gillmor: I have a little bit of a problem too just under the language of the proposal. How do you determine compactness? In other words, are you talking about population compactness, geographical compactness?

Mr. Aalyson: The present Constitution refers to compactness in terms of geography.

Mr. McElroy: The present Constitution honors county lines and political subdivisions.

Mr. Aalyson: Yes, I agree you could allow for some variation.

Mr. Gillmor: That could raise some problems. I've got two counties for example where I have got three townships in each of two counties. It's awfully hard for those people to keep track.

Mr. McElroy: The U.S. Supreme Court recognizes this too and permits the broader deviation when you are trying to preserve what is a legitimate state interest -- which is community boundaries.

Mr. Aalyson: I think it might be a good idea to stop after the first sentence. I kind of like the idea of a group of electors being able to submit a plan.

Mr. McElroy: I think that's fine. (Mrs. Sowle and Senator Gillmor expressed their approval also.) I think you can do that regardless of who does the apportionment.

Senator Gillmor: As a practical matter, I think it's going to be difficult for anyone to come up with a good plan, but I think there is no reason for them not to have the opportunity. Because, you know you have to get all that data on the number of people in each precinct in the state. I've worked on a number of congressional redistricting plans a little bit and that's extremely difficult. I don't think you have very many good plans submitted by outside observers but I think they ought to have the opportunity to come up with plans.

Mr. McElroy: I think what they are more apt to want to do is to comment on one that is published as a proposal, and say why have you done it this way, why don't you do

it that way, and I think they should have that opportunity.

Mr. Aalyson: There are groups such as the Ohio Council of Churches and the League who might have the facilities and the knowledge and ambition to propose something and I would favor that. (The others agreed.)

Mr. McElroy: I wouldn't put my faith in a computer to do apportionment.

Mrs. Sowle: Your proposal gives plenty of leeway for people to submit their own proposals.

Mr. Aalyson: I'd like to have your thoughts on why you chose to set up the staff in a political line-up just the way the apportionment....

Mr. McElroy: Because I think we live in a political world and we might as well recognize it. These are the people who are active in matters of government or the parties. I think that it is bad, philosophically, to encourage fragmentation, so I'd like to keep two dominant parties. But always leave room for another one to appear if they can. And this is what the Ohio law permits now. Keep the staff with people who are strong enough financially and new members to be truly adversary and watch each other.

Mr. Aalyson: Mightn't you tend to get a plan which was more fair if the staff was nonpolitical if that were possible? You are binding them to politics now and I'm wondering if that's a good idea.

Mr. McElroy: The people who are nonpolitical, by their own definition, usually have a point of interest to sell. It's not the total political picture, it's just a piece of the pie.

Mrs. Sowle: Is it your idea that this insures, unlike the present situation, that there will be members of both major parties?

Mr. McElroy: Yes, it does. And as it is now, the preparation of any plan is made by the people who are in the majority, and they are unknowns, we don't know who those people are.

Mrs. Sowle: And as Senator Gillmor pointed out, until they present the plan, there is no adversary input from the beginning, or people there to alert other people as to what's going on.

Mr. McElroy: When you have this meeting, with the sunshine law and everything, there is this line-up as to majority vote and minority vote, and the majority is going to vote the plan, whether it is 3 or 7 or whatever it is.

Mrs. Sowle: And yours insures input from the minority party during the preparation of the plan. Well I like that idea. At first I thought this just insures majority votes at each step of the way, but this insures minority input.

Mr. McElroy: I think the reason I have confidence in this way of working it is because of my experience in Washington and because of my experience on the staff of a Senate committee. We had majority and minority staff there and every bill that was introduced to the committee was given an examination by staff. A majority and minority report were prepared. I think that it does make for good legislation.

Mrs. Sowle: And without this, you have all one party doing it. I think that's very persuasive.

Senator Gillmor: The public input might not be followed under this approach, but at least it assures that it's there. And the practicalities of the present situation are

that you assure that there is none. I guess that's what it amounts to.

Mrs. Sowle: Senator Gillmor, what do you think the practicalities are of the general assembly being receptive to a plan like this?

Senator Gillmor: If they are going to try to get one that tends to be more fair as opposed to preserving something that they think is going to help their own party, I think they would be receptive to the public notice. But I think if the general assembly thought a little bit, they would try to get something that is that way. Because unfortunately, when you are in control, you forget that the worm may turn. All of the bad things you want to do to the other guy may be done to you. To answer your question, I really don't know what the attitude is going to be.

Mrs. Sowle: Since we have to have another Committee meeting on the other problem, perhaps we can discuss this further then, with this record going to the Committee.

Mr. Aalyson: I notice that you provide for the publication of the apportionment. This would be that apportionment plan which the commission had voted upon after receiving recommendations from both sides of the staff?

Mr. McElroy: Yes.

Mr. Aalyson: I don't suppose that in the Constitution it's necessary to provide that. Do you feel that there should be publication of the recommendations of both sides of the staff? That would probably come out anyhow. Probably the newspapers would delve into that.

Mr. McElroy: Yes, but I think if you publish the proposal itself, at least people have access to it.

Mr. Aalyson: And the news media or any media could go to the members of the staff and say, what do you have to say about this.

Mrs. Sowle: The Elections Committee, which is what we were before we became the What's Left Committee, proposed, and it is now part of the Constitution, a group to explain to the public the meaning of constitutional amendments proposals. That group is charged with the duty of publicizing those proposals. I wonder if that group would have any advantages for the purpose of publishing the apportionment plan.

Mr. Aalyson: Did we call that the Ballot Board?

Mrs. Sowle: Yes.

Mr. Aalyson: In addition to explaining constitutional amendments, to explain and publish the apportionment?

Mrs. Sowle: Yes. That might unduly complicate things.

Mr. McElroy: I think probably you don't have that problem. The problem has been up to now that there has been no opportunity for access to the plan until it's accomplished.

Mr. Aalyson: The apportionment, the drawing of lines, I don't think takes the same sort of explanation that a constitutional amendment does.

Mr. McElroy: If the C.J. or the Dispatch could get a copy of it in advance, I think that's all you need.

Mrs. Sowle: "shall thereupon be published". And I think it would be pretty hard to get around the requirement for publication. I think that's pretty clear.

Mr. McElroy: And then the news media would then interpret the publication.

Mr. Aalyson: It is to be published as provided by law. So the legislature could say where and how often.

Mrs. Sowle: Even if it were to come out in one of those little tiny newspaper things, the newspapers are going to be aware.

Mr. Aalyson: Katie may have asked you, and I'm not sure I heard either the question or the response, as to why you chose, as I believe you did choose, to retain the same representation on the apportionment board?

Mr. McElroy: I think that they can do it. They are competent and they have been elected. This is one of their functions. And I don't think that very much is gained by stepping one notch away from the elected persons to people selected otherwise.

Mrs. Sowle: Do you think it's important to have people in those posts who have that immediate responsiveness to the electorate, rather than a step away?

Mr. McElroy: I prefer it, and I think when it comes to appointing people, you can always appoint exactly the kind of person you want. You can appoint people who will check back with you for further instructions. I'd rather just not fool the public about this and use the elected officials.

Mrs. Sowle: The person chosen by the speaker of the house, the person chosen by the leader of the senate, they may be very well not elected.

Mr. McElroy: I think they may very well be senators and representatives.

Senator Gillmor: The history we have on that is that one person appointed a member of the senate and one person appointed a member of the house.

Mr. McElroy: I think they will probably do that again.

Mr. Aalyson: Other questions or discussion?

Mrs. Sowle: I think it is a very interesting and a very helpful proposal, because it deals with the practicalities of it.

Mr. Aalyson: You have evidently spent a lot of time on it and it is well done.

Senator Gillmor: John has had a wealth of experience in apportionment.

Mr. McElroy: We're just not out of the woods yet on the present one. As you probably know, an application was filed by special counsel to the governor, Bob Howarth, in the Office of Budget and Management, before Judge Batisti overruled that, so that is now on appeal to the Sixth Circuit and I think it is in the briefing stages now. But the original court did take jurisdiction on the state issues on the U.S. Constitution but it never did anything on the state issues. It prohibited the Ohio Supreme Court from taking jurisdiction. So that's why the apportionment plan violates the Ohio Constitution wholesale. And I think your own committee has found that the standards stated in Article XI are good standards. I agree with that, I think they are excellent. Thank you very much.

Mr. Aalyson: Thank you very much. Is there any other business before this committee?

A date for the next Committee meeting was set for January 25 at 9:30 a.m. and the meeting was adjourned.

Ohio Constitutional Revision Commission
What's Left Committee
January 25, 1977

Summary

The What's Left Committee met on January 25, 1977, beginning at 9:30 a.m. in the Commission offices in the Neil House. Present were the committee chairman, Craig Aalyson, Dick Carter, Katie Sowle, Robert Huston, and Paul Gillmor. Ann Eriksson and Brenda Buchbinder were present from the staff.

The discussion on apportionment began with consideration of Mr. McElroy's and Mr. Horn's (Council of Churches) proposals.

Mr. Carter: I read the earlier discussion, and was very impressed with the arguments advanced by Mr. McElroy. This idea of getting it out in the public arena is probably the element of most importance. I don't see how anyone can disagree with that, if you think about that, that's a very good idea. The second part of it, though, is I think a much more interesting argument. He advances the thesis, which may be right, that apportionment is a political decision. Let's get it out into the political arena -- identify the people, and let the sense of responsibility of the politicians govern the abuse of the system. The other side is, of course, the one that we had in our own group, of trying to make it bipartisan. It is more difficult to decide which is the better way to go. I personally have come to the conclusion that I have a slight preference for our original proposal. Maybe I'm an idealist. Maybe you can't keep it non-political, that may be an idealistic stance. But somehow or another I'd kind of like to give it a bit of a go. But I wouldn't feel too badly if it were decided, which is an entirely different concept, that it is better to make it political, better to identify the people and make them responsible -- as any politician is for his actions. Even though it is partisan. I could buy either one of those.

Mrs. Eriksson: We were talking a little bit, Dick, about possibly combining them.

Mr. Carter: I'm not sure they are compatible. It seems to me they are two almost diametrically opposed positions.

Mrs. Eriksson: If you change the board the way the committee had agreed to, then I think Mr. McElroy's staff proposal is meaningless.

Mr. Carter: I don't quite agree with that. It has a little different flavor. I think his idea of a staff, and I think the idea of a delay of a time for the public to get involved, are good.

Mrs. Eriksson: Perhaps those things could be added. But it seems to me that if we were to go the committee's way on the board, you would not want to have that strictly partisan kind of staff. That's what I mean.

Mr. Carter: No, it would have to be in the context of a so-called non-partisan approach. Something like our Commission. Or even more like Nolan's elections commission. Nolan came out, and we have such great respect for his judgment as being practical as well as sound, and he made quite a statement that the elections commission is quite involved in partisan politics, in politics, not necessarily partisan, and had found that the approach that we talked about for the elections commission had worked very well, to date, and that he was therefore optimistic that the kind of commission that we talked about for apportionment would have a similar approach and responsibility. That's one of the reasons I hate to give it up without a try.

Mrs. Sowle: It is very appealing to me.

Mr. Carter: My last point was maybe we should submit alternatives to the Commission.

Mrs. Sowle: Yes, I had raised that. I think that's a good idea. It seems to me the publication portion could be combined with our proposal. Mr. McElroy's publication language.

Mrs. Eriksson: Yes, to provide a specific period of time that it must be published and made available before the plan is adopted, and then you have a final meeting at which the board would be required to at least acknowledge that there had been public comment, if nothing else.

Mrs. Sowle: How different is the composition of the elections committee from our committee proposal, ending up with the toss of the coin?

Mrs. Eriksson: The elections commission consists of five persons, and four of them are chosen from each party by the secretary of state, but from lists submitted by the parties. And then those four choose the fifth. They choose their chairman. And of course, that basically is what we have. But then we have an alternative if the members do not choose. The lottery. And it was Representative Fauver's proposal that he would rather not go with the lottery but with the chief justice who would be the ultimate deciding factor.

Mrs. Sowle: Now, if there were a stand-off on the elections commission, is there an alternative? Does the chief justice then appoint somebody as the fifth person?

Mrs. Eriksson: No, there is no provision. And of course that worked. I suppose what they would do is just simply dissolve that commission and then the secretary of state would have to pick another four, if they didn't agree on a chairman.

The committee agreed to postpone further discussion until the matter of Section 4 of Article II was resolved.

Mr. Carter: I am personally persuaded, after reading the minutes and so forth, that logic is all on the side of removing that provision of the Constitution. I would certainly be prepared to vote in favor of it. My biggest concern is the question of educating the public on the rationale behind it rather than just the logic behind it. But I would hope that the committee and the Commission would come out four square for it, which would be helpful, and that the Ballot Board does a good job. I think a lot of this depends on the way we write it up, explaining the reasons for it.

Mrs. Sowle: I have one question on the second paragraph of Section 4. I know Senator Gillmor, it is your main concern that the compensation problem be removed. Is there a federal counterpart that covers creation of an office?

Senator Gillmor: I do not know.

Mrs. Eriksson: I don't think there is.

Mrs. Sowle: Well, I didn't think it was federal constitutional. I don't recall anything in the Federal Constitution.

Mr. Carter: I doubt it very much. There might be a statute, but I wouldn't think there would be anything in the Constitution.

Senator Gillmor: If there is a feeling to keep that provision for creation of an office, I would certainly support that, but I think the thing that is causing problems is the compensation.

Mrs. Sowle: I would have no objection myself to eliminating the whole paragraph. I simply raise the question whether it would be easier to sell to the public.

Mr. Carter: It would probably be more difficult.

Mrs. Sowle: To leave it with just the compensation removed?

Mr. Carter: Yes. I agree with the theory. I would have no objection to it, and I think this is something the Commission will probably address themselves to, but I think anytime you focus in on an issue on compensation, it is difficult to sell.

Senator Gillmor: That's a good point. Do you want a motion on the deletion of the second paragraph?

Mr. Carter: How do you feel, Bob, about that second paragraph?

Mr. Huston: I read the correspondence and agree that it does prohibit competent people from getting in. Actually, when you get right down to it, with the size of the legislature, you are not going to get too much breach of a sense of responsibility.

Mr. Carter: Not in this day and age. This is an 1851 provision, I assume, and in those days I can see why it was needed, but not today.

Senator Gillmor: I'll move that the What's Left Committee recommend deletion of the second paragraph of Article II, Section 4.

Mrs. Sowle seconded the motion.. All present voted "yes".

Mr. Carter: It is unanimously carried by those that are present. Hopefully, the staff can prepare a position paper on why this is. I assume you will go back with your usual acumen and point out when this was adopted, the circumstances that were related thereto, the circumstances have changed and that it is against the public interest today to have this as a continuation. Now I guess we can go on to the apportionment question if there is no further discussion on that.

I think John McElroy has in a very practical way identified the major problem, which is getting this thing in the public eye before it is adopted. I thoroughly support that position. That, I think, is relatively easy to do and I saw no evidence that anyone disagreed with that observation at the last committee meeting. The other question is the nature of the commission, and here, I find two diametrically opposed philosophies, either one of which I could buy. One is that it is a political process, it is a partisan process, and you might as well recognize that, and the best answer for that is to bring it out in the open and rely on the good faith of the publicly elected officials being in the public eye. The other one is the committee approach which is basically an attempt to get it out of partisan politics and into a public spirited group of people. I find considerable support for that argument, too, but I could buy either one.

Senator Gillmor: Personally, although you may not be able to get the strict partisanship removed from the process, I personally think you might be able to make some improvement there. I think it's worthwhile making an effort to come up with something that does not operate in a partisan way. Basically, I think the only way you could do that is to have two groups of partisans who have to agree on the seventh person. That is an awful lot of responsibility to put on one person. I'm not sure whether it should just be one swing vote or maybe three, but I think it is worth the effort to try to do it.

Mrs. Eriksson: That's an interesting thought.

Mr. Carter: Have them agree on three instead of one.

Senator Gillmor: That is a tremendous onus to put on one person.

Mrs. Eriksson: If you were going to have three, you might not have this problem of needing the lottery. They might be able to agree on three.

Mr. Carter: I think you have the same basic problem with either one.

Mrs. Sowle: If they were to select three, might they say, "We'll give you one republican, we'll give you one democrat", and then they'd still get down to one, that was going to be the deciding.

Senator Gillmor: That's possible. I don't know how that would work.

Mr. Carter: I think you would still get down to the one guy. (Mr. Aalyson arrived.) We went through first that question of the second paragraph of Article II, Section 4, on the question of compensation, and it was the unanimous recommendation of the committee that we strike that second paragraph. There was some discussion on just removing the compensation question and leaving the creation language in, and I think it was the feeling that that would be a tougher nut to sell. The big problem is selling this rather than the merits of it, and the public understanding it. So we decided that the best thing was to just omit the whole paragraph and try that. Would you support that change?

Mr. Aalyson: Yes.

Mr. Carter: Now, on the apportionment thing we just basically stated that we liked John McElroy's approach, as to having the thing out in the public arena and with the proper staff. Then the question is whether we should buy the frankly political process and keep that in, or to have a nonpartisan approach for the commission, along the lines of our previous discussion.

Mr. Aalyson: In our previous discussions, it was still going to be fairly partisan, wasn't it? We were just going to change the makeup of the commission.

Mr. Carter: The seventh man would become the key. Skip suggested maybe three instead of one, selecting three people, might improve the situation. And then Katie said aren't we going to be back to the same problem? The republicans would appoint a republican, the democrats would appoint a democrat, and you are still down to the third man.

Mrs. Sowle: Would it help to have a motion on it for purposes of discussion?

Mr. Aalyson: If you've got some admirable suggestion, yes.

Mrs. Sowle: My proposal would be two-fold. One, to present alternatives to the Commission. One would be Mr. McElroy's proposal pretty much as it stands. The alternative proposal to present to the Commission, with the committee's recommendation, would be to resubmit the apportionment board as the committee previously proposed to the Commission in the report of September 1, but combine that proposal with the publication principle of Mr. McElroy's.

Mr. Carter: And the appointment of staff, I suppose.

Mrs. Eriksson: In a partisan fashion?

Mr. Carter: No, I think it would have to be the commission would be empowered to appoint the staff.

Mrs. Sowle: They would have to be empowered to appoint it. I'm not sure if we go with the bipartisan commission, we need to have staff in the constitutional provision.

Mr. Carter: That's the question. Obviously, you need staff. I think that's the point. Now whether it has to be in the Constitution is another question.

Mr. Huston: Let me ask a question. Are we still going to bring the United States Representatives into this?

Mr. Carter: That's another question.

Mr. Huston: If we were not, we're going to have to reconstitute a commission.

Mr. Aalyson: I have a third suggestion, as to whether we shouldn't provide, since the ballot board is concerned with the electoral process and this really is too, for the ballot board to be the one who explains or publishes or disseminates or otherwise gets before the public the apportionment.

Mr. Carter: As a procedural matter?

Mr. Aalyson: Yes.

Mrs. Sowle: The method of publication could be left to legislation, and the general assembly might want to employ the ballot board in a kind of informal prior discussion. Another aspect of publication was brought up and Mr. Huston suggested that in addition to a constitutional requirement of publication this could be a requirement that the proposal be made part of the public record so that it would be very clear the public would have access to it. So we would require both that it would be part of the public record and that it be published. The method of publication could either be left to legislation on one hand or it could be required in the constitutional provision on the other hand. But at least if it were part of a public record, there would be no way to evade public access. I think that would be a good change no matter which form was adopted -- that we add that it be part of the public record.

Mr. Aalyson: Do you want to incorporate in one or the other of these recommendations to the Commission the recommendation of the Council of Churches?

Mrs. Sowle: No, I was not proposing that as part of my recommendation.

Mr. Aalyson: You all recall what that recommendation was: that there be the opportunity for persons other than the members to submit proposals.

Mr. Carter: My feeling on that is that we shouldn't structure the Constitution to prevent that. I'm not sure that it has to be in the Constitution. Any public group or person could come forward with a proposal.

Mr. Huston: Is the ballot board a constitutionally created body?

Mrs. Eriksson: Yes it is, it was part of our proposal for the wording of ballot language on constitutional amendments.

Mr. Aalyson: The reason I suggest it is because I think it will have an easy mechanism for disseminating this type of material. I don't know, though, whether it does or not. If it has a mechanism for explaining a constitutional amendment it seems to me that the same facilities could be used although I don't know what explanations would be necessary in an apportionment.

Mr. Carter: That's the problem I have. It seems to me that it would be in the transmittal function that they would have more of a role to play and it seems to me you could give that directly to the apportionment commission without the necessity for the ballot board.

Mrs. Eriksson: Actually the present language does require that the plan be published. Of course, at the present time that is not until after it is adopted.

Mr. Carter: That's the problem.

Mrs. Eriksson: And the difference here is that it would be published before. But I have difficulty seeing what the ballot board could do other than maybe giving statistics which are essentially not meaningful to most members of the public. If a map is published, or separate maps in different areas of the state so people can examine where they are going to be, that's about the best kind of publication.

Mr. Huston: Isn't the publication just a mechanical process?

Mrs. Eriksson: More or less.

Mr. Huston: Much more so than an editorial process such as the ballot board.... I would think that you also have a problem in connection with the publication as to how many of these proposals are you going to publish, just the one that the commission is proposing, or are you going to publish the suggestions of people that make comments to the staff. In order for the commission's proposal to be really looked at by the public, you almost should have some contra proposals. Now, do you want to go to the expense of having to publish all of these or do you want to make them available to the parties interested....

Mrs. Sowle: By making them part of a public record?

Mr. Huston: The latter to me would be more sensible than to engage in major publication throughout the state in the various newspapers.

Mr. Carter: You might have ten proposals.

Mr. Huston: Yes, that's what I say, and if they are made available to interested parties in some manner, shape or form, I think that really takes care of the public notice. You could publish a public notice that the proposals are available by writing to so and so or contacting so and so. I think that would be the least expensive way and the more practical way of approaching it.

Mr. Aalyson: The idea is to get the various proposals, or, as I understand Mr. McElroy's suggestion, only the one adopted or proposed for adoption would be published. But if the idea is to expose this process to public view, I'm not so sure that we should quibble about some expense of publishing the thing throughout the state so that the public knows. It's tough enough to get the public to participate if they have to go some place and get something as opposed to reading it in the newspaper.

Mr. Huston: I'm inclined to agree with you with regard to the staff's proposal. I think that should be published. So that the public would have something to comment on. But then the public comment should be made available to the other parties interested.

Mr. Carter: And if we simply made sure there were public records and access to the public domain, the proceedings of the staff and suggestions to the staff, I think that would be satisfactory.

Mr. Aalyson: I agree.

Mr. Carter: Skip, I want to make sure we get your comments, particularly on this congressional problem.

Senator Gillmor: I would prefer to see it stick strictly to the legislature, but I don't have strong feelings on whether we ought to cover the Congress, too.

Mr. Carter: I was rather persuaded by Mr. McElroy's approach. In essence, rather than incorporating it in the Constitution, to give the legislature the opportunity to go through this process if they wanted to do so. If they did not, go some other way. As a practical matter I think that's probably the only thing that would be of interest to them. I think that's probably the best way to proceed, myself.

Senator Gillmor: Yes, I could certainly support that type of approach.

Mr. Carter: In other words, rather than having a constitutional mandate to include congressional districting, leave that up to the legislature. From a practical standpoint, I think that's the only way it would go. I have a preference for including the congressional districting as a part of this process, but I think there are hurdles in doing that practically, and there is some validity to this argument that was stated at our Commission meeting that it is one of the few reins that we have on congressmen to tie them to the interests of the state. I think there is some validity to that argument.

Mrs. Eriksson: If you are going to permit the general assembly to include congressional districting in this board if they want to, would you also want then to say that the general assembly could add congressmen to the apportionment board?

Mr. Carter: Yes.

Mrs. Eriksson: Otherwise, it might be unconstitutional for them to do so.

Mr. Huston: An argument for including the United States Representatives in the districting is that it would give the commission more to deal with and it gives them the opportunity to say it's a political process -- more of an opportunity to "swap horses", you might say. It gives them more to trade. That's one of the practical aspects of the thing.

Mr. Carter: Getting back to Katie's motion, should we submit two alternative motions to the Commission? Obviously the details in both have to track with the concept, but the question is whether we should submit two.

Mr. Aalyson: In essence, the difference between the two propositions that we would submit under your motion would be the change in the makeup of the board.

Mrs. Sowle: The basic change would be to adopt the publication ideas and the period of time, and the four week period of time it would be open for public discussion and debate before a final decision is made.

Mr. Aalyson: I'm wondering whether this committee couldn't make a decision as to whether it would be preferable to proceed in the fashion we now use, or whether we should propose our own changed board?

Mr. Carter: We could do it on a preferred alternative basis.

Mrs. Sowle: We could say this committee prefers the original committee proposal as we have now amended it. However, if the Commission rejects that the first round, we think this is worth considering, too. I think Mr. McElroy's proposal is a great improvement over what we have now. I like our proposal as modified. So I think we could recommend that we like one better than the other of what we propose.

Mr. Aalyson: If we like one, why make two proposals?

Mr. Carter: As a practical matter, to take advantage of the time that we have.

Mrs. Sowle: Especially if we have only one more Commission meeting and they turn

ours down, it seems to me, at that point, I would very much like for the Commission to consider Mr. McElroy's proposal because as I said, I do think it's a great improvement over the present provision.

Mr. Huston: Do we actually have to have two complete proposals, or could we have a proposal and in the controversial areas have alternatives?

Mr. Aalyson: Actually, the only thing where we feel that there might be some room for difference is about the first paragraph -- the make-up of the commission.

Mr. Carter: It has some ripple effects.

Mrs. Sowle: Yes, the main ripple effect of Mr. McElroy's proposal seems to be the importance of including a staff provision.

Mr. Carter: I think we would almost have to have two alternatives if we would expect to have some action on the thing.

Mrs. Eriksson: His is very detailed with respect to exactly what the staff does -- they present it and then the apportioning persons may amend the plan, and it is a very detailed and comprehensive proposal with respect to how they operate. With the major emphasis being on the staff.

Mr. Aalyson: Are you suggesting that maybe it's a little too detailed to be included in the Constitution, Ann?

Mrs. Eriksson: Given his concept of where the emphasis should be placed, I would suppose that he would think that this is the only way to do it. And I would not suggest that you modify his proposal. I think that if you want to present the whole thing as an alternate it would be better than attempting to modify it. Because his concept is so geared toward this one idea that I think it would be difficult to play with this without removing something that he would think would be terribly essential.

Mr. Carter: It reminds me a little bit of the initiative and referendum. This is one area where you have to get fairly detailed in the Constitution for it to have the effect that you desire.

Senator Gillmor: If we go the non-partisan or bi-partisan route, do we really even need any provision in there on staff?

Mr. Carter: Only to make sure that the authorization is there.

Mrs. Eriksson: It had been my assumption all along that they would have to appoint some staff. The only thing that we had in the draft was "the general assembly shall appropriate money for the operation of the commission." I assumed that meant appointing a staff. Maybe we should add "including appointment of necessary staff persons" or something like that, to make sure that it's clear.

Mrs. Sowle: One point that Mr. McElroy made with regard to staff that I thought was very interesting was that if you don't require a staff, the persons who actually draw the plan are persons employed by the political parties. I thought that was a very important point.

Mr. Aalyson: So did I.

Mr. Carter: I do think that we ought to provide for staff in the Constitution to make it clear that the staff is part of the procedure.

Mrs. Eriksson: You really cannot do it without somebody who is devoting some time to census figures. It's a complicated process now.

Senator Gillmor: It sounds real good. If we go the non-partisan route we just provide for staff and basically that's it, and then if we go the partisan route we're going to specify the partisan staff. And then with the notice provisions, I think that's excellent.

Mrs. Eriksson: In the Committee's proposal, do you want to give any reconsideration to the lottery question with respect to Representative Fauver's proposal?

Mr. Carter: His proposal was the Supreme Court?

Mrs. Eriksson: Right.

Mr. Carter: My own view is the lottery is the best thing that I've heard. I certainly would be open to any improvements on it. But I'm still persuaded that that's a pretty powerful incentive to make a balanced commission. Maybe not nonpartisan, but balanced.

Mrs. Sowle: I would almost prefer no alternative, as is the situation with the elections commission, to anything but the lottery.

Mr. Carter: Are we all agreed that we are going to leave the congressional thing as an option for the legislature in both proposals?

All agreed.

Mr. Aalyson: From the mechanical standpoint, Katie, are you proposing that we resubmit our previous proposal or submit a proposal which in effect incorporates Mr. McElroy's suggestions except for the make-up of the commission and the staff?

Mrs. Sowle: At a minimum, this almost gets to be a drafting problem and we have discovered that you can't draft in a committee. I would like to incorporate into our proposal, the heart of his proposals that I see transferrable -- the four week period. His is a little more elaborate than that and ours could be too. But I would think a minimum of that four week period during which the public has an opportunity to study, comment, and so forth, would be appropriate. I would like to mention two changes that I would like to see made in Mr. McElroy's proposal, and to the extent applicable, would transfer them to the amended committee proposal. On page 2, he requires that at the second meeting of the apportioning persons, as he calls them, "such plan shall be reported by the staff director to the apportioning persons at a public meeting." I think that it would be good to have a public notice requirement of the public meeting in that paragraph.

Mr. Carter: Pursuant to so many days notice. I think that's an excellent idea. I think it's inferred but I think it's better to make it explicit.

Mrs. Sowle: Yes, then at the end of the full paragraph on page 2, to write into the publication requirement a provision that the proposed amendment shall be a public record, so that people have access to it. And there are public record requirements by law, certain consequences attached to a document being a public record.

Mr. Aalyson: I like that, but I'm going to suggest that all of the records of this apportionment staff and commission should be public.

Mrs. Sowle; I agree entirely with the principle of that.

Mr. Aalyson: What I am interested in is the opportunity to get before the public the minority view in the argument or discussion of the apportionment proposal.

Mr. Carter: That fits in, of course, with Mr. McElroy's thought. This is an adversary process, and the best way to do it would be on the basis of full knowledge of the process as it takes place.

Senator Gillmor: Do we have a provision in there dealing with a vacancy? Supposing one of the apportioning persons dies?

Mrs. Eriksson: Our proposal says that a vacancy should be filled in the same manner as the original appointment.

Mrs. Sowle: I would be perfectly agreeable that a broader publication requirement be written in.

Mr. Carter: Could we use the word "available for public inspection"? I don't know the implications of making it a public record. I don't know the difference.

Mr. Aalyson: I'm not sure either. I think that's what you intend, Katie, isn't it?

Mrs. Sowle: Yes.

Mrs. Eriksson: Perhaps what you want to do is include also that all proposals made to the commission be available for public inspection, both the proposals and the comments made on the commission's plan. You have the commission plan exposed to public view for four weeks, and either before or during that four week period somebody may come to this board or commission with their own proposal or comments. It seems to me that might be what you want to make sure was available for public inspection.

Mr. Aalyson: I think what maybe I have in mind, and I haven't said it so far, is it seems to me that the operation of this staff and this board should be fairly similar to the operation of this committee and Commission. The public ought to be able to sit in and to comment and to examine any proposals that are made.

Mr. Carter: Couldn't we make that statement -- all meetings shall be open to the public?

Mrs. Eriksson: Yes, I don't think there is any problem with that. I think that as staff people are sitting down and adding and subtracting and punching things into computers, it's pretty hard to say what records there are to be public records, because you have a lot of pieces of paper and you are going to throw a lot of them in the waste basket before you come up with something.

Mr. Aalyson: Open to public inspection I think is better terminology.

Mrs. Eriksson: Yes, and certainly any plans that are suggested to them and comments on it and whatever the members themselves say, certainly the meetings should be public. There is no problem with writing that in.

Mrs. Sowle: The meetings to the public and correspondence, communications, proceedings of the commission.

Mrs. Eriksson: That would be a good way of doing it.

Mr. Carter: "All communications shall be available for public inspection." I'm wondering, on the mechanics of doing it, whether we shouldn't have a subcommittee of this committee work with Ann to review what she has done and so forth, and I'm thinking particularly of Craig and Katie since they are in Columbus, and I'm wondering if we couldn't do that, to get the proposal before the Commission.

Mrs. Eriksson: And you have in mind presenting, again, the committee's proposal, with no change in the board itself, adding this language on public comments and public meetings as a recommended proposal, and taking out the congressional and making it optional with the legislature as Mr. McElroy has it. And then as an alternate to present Mr. McElroy's proposal as it is with the public things modified as we were just talking about?

Mr. Aalyson and Mrs. Sowle were named a subcommittee to review the draft before sending it to the committee for comment, so that it can be presented to the next Commission meeting.

The meeting was adjourned.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
August 6, 1974

Workmen's Compensation
Article II, Section 35

Among the constitutional amendments which came out of the 1912 Constitutional Convention was an amendment to the Legislative Article, enabling the Legislature to pass laws governing a program of workmen's compensation to be administered by the state. Proposal No. 24 was passed by the convention without debate, and adopted by the electors to become effective January 1, 1913. The language adopted read:

> Article II, Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto.

The absence of extensive discussion on the proposal at the 1912 Constitutional Convention should not be interpreted as indicating that the concept of workmen's compensation described in the amendment was not controversial. In fact, the resolution of cases involving industrial accidents by procedures established by the legislature was a radical departure from the existing method of resolving such cases. The early history of workmen's compensation laws included several challenges to the constitutionality of such laws. Constitutional arguments appear to have been laid to rest by the adoption of amendments to the constitution authorizing the legislature to enact workmen's compensation laws, and an examination of the arguments may serve as a guide in deciding whether or not the present constitutional provision should be retained, amended, or repealed.

History

The idea of workmen's compensation originated in Germany, under the government of Bismark, in 1884. Prior to that time, if a person was injured on the job, in order to collect compensation he had to prove in a lawsuit that the injury resulted from negligence on the part of the employer. The injured employee carried a heavy burden in proving that the employer was at fault, and that the accident did not result from some carelessness on the part of a fellow employee, or because of some oversight of the injured employee. Of course, the employees did not win too often, since the task of proving absolute negligence on the part of the employer was a difficult task. If the injured employee was able to trace the negligence directly back to the employer, the money awarded was often a large sum that either the employer did not have, or could not pay without hardship to his industry. The concept of workmen's compensation presented by Bismark appealed to the capitalists and the workers. To the employers, it offered an available fund to pay off compensation awards without jeopardizing the industry itself. To employees, it offered financial aid together with adequate medical

aid.

In the United States, the first comprehensive workmen's compensation law was adopted in New York in 1910, to overcome the inability of employees to recover damages for medical expenses and loss of income resulting from industrial accidents. The employee, prior to that time, had only one recourse available to him to collect damages on a job-related injury, and that involved time-consuming and costly litigation. The employer in the 19th century had three common law defenses: contributory negligence, the voluntary assumption of risk, and the fellow-servant doctrine. The voluntary assumption of risk defense was based on the individual's right of contract. The fellow-servant doctrine rendered the employee unable to recover if the injury resulted from negligence of a fellow employee.

Ohio History

In 1851, in the case of Little Miami v. Stevens, the court adopted an exception to the fellow-servant doctrine, the "vice-principal" exception, whereby a supervising or directing employee was not a fellow servant. Although the Ohio court decision was a step forward, the employee rarely emerged the victor from the costly litigation. In 1904, the assumption of risk doctrine was modified by the adoption, in Ohio, of the Williams Bill, which provided that the fact that an employee knew of his employer's negligence or omission to guard and protect his machinery and place of employment could not operate as a defense for the employer. Two laws passed in 1910, the Norris and Metzger bills, further modified the employers' common law defenses by abolishing the defense of contributory negligence and modifying the fellow servant and assumed risk defenses. The notion of "comparative negligence" was substituted and applied to certain dangerous employments, attempting to gauge whether the employer was guilty of gross negligence or the employee's negligence was only slight. These modifications still did not end the necessity of the employee's resorting to court action in order to obtain compensation.

The 1910 New York statute established the principle that the cost of industrial accidents should be charged to the industry rather than fall unevenly on individual employers. It specified eight classes of industries which were defined as hazardous, for which medical benefits and compensation were to be provided for injuries, regardless of the cause or fault, except where the injured party was guilty of serious, willful misconduct. The law was challenged on three grounds in Ives v. South Buffalo Ry. Co. 201 N.Y. 271 (1911): that it violated the due process clause of the federal and state constitutions, that it violated the right to trial by jury, and that it violated the equal protection clause of the 14th Amendment to the federal constitution. The Court of Appeals found no basis for violation of the equal protection clause, nor did it agree on the issue of the denial of the right to trial by jury. The Court, however, did sustain the contention that the law violated due process, by finding that the police powers were not broad enough to enable the state to require that an employer compensate an injured employee, when the injury or death occurred through no fault of the employer nor any violation of the employer's duty to the employee. Furthermore, the court said that to sustain an exercise of police power, the court "must be able to see that (the legislation) tends in some degree to prevent some offense or evil; or to preserve public health, morals, safety and welfare; (that) if it discloses no such purpose,...(it) is clearly calculated to invade the liberty and property of private citizens..." (1) In the storm of protest that surrounded the decision, a constitutional amendment permitting the legislature to enact laws protecting the health and safety of employees was drafted and adopted, which became part of Article I, Section 18 of the

New York Constitution.

> "Because of distrust of the courts, the section was drafted with a particularization better suited to legislation than to a constitution. The Legislature then enacted, and in an excess of caution, re-enacted, the forerunner of our present law. The new law was quickly challenged. With a minimal reference to the newly adopted amendment, the court reversed itself. It now found that federal constitutional due process was not infringed (relying on the very federal cases it had first rejected as not applicable) and that the reserve police power of the state was more than adequate to deal with the matter." (2)

The United States Supreme Court, in reviewing the constitutionality of the act, found no violation of due process, and said that the subject matter of the law bore so close a relation to the protection of the lives and safety of those it concerned, that it was properly within the police power of the state.

The first workmen's compensation law in Ohio was passed in May, 1911, and was elective in nature, applying to any employer who employed five or more workers. If an employer amenable to the law elected to participate, he was not liable to respond at common law for damages, injuries or death of employees. Failure to participate by employers amenable rendered them liable for damages, and denied to the employer the common law defenses of contributory negligence, voluntary assumption of risk, and fellow-servant relation. A challenge to the constitutionality of the law was made, reaching the Supreme Court in State, ex rel., v. Creamer, 85 O.S. 349 (1912). The points of argument raised embraced several issues: police power; taking private property without due process of law; due process of law - jury trial; interference with freedom of contract; impairment of existing contracts; arbitrary classification; conferring judicial powers; taxation for private purposes. The Court, emphasizing the voluntary nature of the act, upheld the constitutionality of the provision. Reference is made to the Court's decision in the 1912 Debates, by Mr. Cordes, the sponsor of the proposal, in his address to the Convention. He said:

> "Proposal No. 24 undertakes to write into the constitution of Ohio a constitutional provision making secure the workmen's compensation law passed by the last legislature, and declared constitutional by the Ohio supreme court by a vote of 4 to 2. Labor asks that this proposal be adopted, because we believe that by writing it into the constitution, it will make it possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter. It will also given an opportunity to still further improve the law to meet modern conditions of employment as they may arise." (3)

The 1912 constitutional amendment gave authority to the legislature to pass laws providing for a State Fund to be created by compulsory contribution from employers only. Under the terms of the 1911 law, employers contributed 90% and employees contributed 10%, voluntarily. Following the adoption of Article II, Section 35, the legislature passed a compulsory compensation act, and established the Industrial Commission to replace the Board of Awards charged with administering the fund under the 1911 act. Constitutionality of the amendatory law was challenged and upheld in Porter v. Hopkins, 91 Ohio St. 74 (1913). In an article entitled "the Ohio Compensation System" in the Ohio State Law Journal, vol. 19, pp. 541 (1958) James Young, former administrator of the Bureau of Workmen's Compensation, comments on the Supreme Court decision:

> "It is apparent, therefore, that the authorization for legislative enactment in

the field of workmen's compensation has a two-fold course. It flows from article II, section 35 of the Constitution and also from the inherent police power. The adoption of article II, section 35, did not, through specific grant of power, alter the fundamental source of authority. Rather, the constitutional grant is an implementation of the general and the validity of compensation legislation rests upon the authorization of the police power as well as the specific grant." (4)

What emerged from the constitutional provision was a workmen's compensation system where recovery is based upon the fact of injury, and not upon its cause, making fault an irrelevant consideration. The replacement of the common law system by the workmen's compensation system transferred the decision-making process from the courts to the legislature and administrative board appointed pursuant to law.

In 1921, a legislative act was passed consolidating state administrative functions into several departments directly responsible to the Governor. The Industrial Commission became part of the Department of Industrial Relations, with the primary function of acting as an administrative court on claims under the workmen's compensation act. The Commission was returned to its independent status in 1934, after an investigation of the Depression-related funding failure concluded that the Industrial Commission should be the sole administrative body for workmen's compensation.

In 1924, Article II, Section 35 was amended to take away the right of an employee to sue at law when injury or death resulted from failure to comply with lawful requirements for protecting health and safety. The amendment provided for the board to hear the case alleging failure to comply with such requirements, and upon finding that injury or death resulted from the employer's failure, the board shall add to the usual amount of compensation between fifteen and fifty percent of the maximum award established by law. The amended section expanded upon the powers of the board and required industry to pay a certain amount to a fund used for investigating industrial accidents.

The section, as amended in 1924, remains unchanged in our present constitution.

Article II, Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such portion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear

and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards, and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

From 1934 to 1955, the three-member industrial Commission retained all authority under the Workmen's Compensation Act.

In 1955, the Bureau of Workmen's Compensation was created by the General Assembly headed by an administrator, appointed by the Governor with the advice and consent of the Senate. The duties of the administrator are set forth in Section 4121.121 of the Ohio Revised Code.

"The administrator of the bureau of workmen's compensation shall be responsible for the discharge of all administrative duties imposed on the industrial commission in Chapter 4123. of the Revised Code,...
(A) The administrator shall do all acts and exercise all authorities and powers discretionary and otherwise, which are required of or vested in the industrial commission or in any of its employees or subordinates in Chapter 4123. of the Revised Code, except such acts and such exercise of authority and power as is required of and vested in the commission in section 4121.13 of the Revised Code..."

The powers and duties of the Industrial Commission, whose three members are appointed by the Governor with the advice and consent of the Senate, are set forth in 4121.13 R.C.

1- To investigate, ascertain, declare and prescribe hours of labor, safety devices, safeguards and reasonable means of protection for every place of employment.

2- To investigate, ascertain, and determine reasonable classification of persons, and employment.

3- To ascertain, and fix reasonable standards, and prescribe, modify and enforce such orders for the adoption of safety devices and other safeguards, including construction, maintenance and repair of places of employment.

4- To adopt rules governing the exercise of its powers, and rules to govern proceedings, investigations and hearings.

5- To "do all in its power" to promote voluntary arbitration and conciliation of disputes and avoid strikes, lockouts and similar tactics. The commission may appoint temporary boards of arbitration to held resolve disputes between employers and employees.

The powers and duties of the administrator of the Bureau of Workmen's Compensation, set forth in section 4121.121, include, in addition to duties relative to staffing and running the bureau itself:

1. preparing and submitting to the industrial commission information and recommendations for the classification of occupations or industries, premium rates and contributions, amounts to be credited to surplus fund.

"(E)...(to) prepare and submit to the commission such information as the administrator may deem pertinent or the commission may require, together with the administrator's recommendations, for the determination by the commission of classifications of occupations or industries, of premium rates and contributions, of the amount to be credited to the surplus fund, of rules and system of rating, rate revisions and merit rating and of contributions to the administrative costs of the commission, the bureau of workmen's compensation, and the regional boards of review..."

The workmen's compensation law, as of July, 1974, applies to all employers of one or more persons. Another point of note is that the money contributed by employers is divided into two funds, a public fund and a private fund, each independent of the other. The public fund receives money from the state, including state hospitals and municipal corporations, townships and school districts, as well as hospitals owned by a political subdivision other than the state. The private fund receives income from private corporations and public corporations, as well as persons and firms engaged in private industry.

Recommendations for change

The Temporary State Commission on the Constitutional Convention of New York considered the pros and cons of retaining a constitutional provision supporting workmen's compensation. The arguments reprinted below seem relevant to the work of the Ohio Constitutional Revision Commission, since the provisions of the two constitutions are similar, drafted about the same time, in the same climate of judicial decision.

"Arguments cited in favor of retention generally:
--The principle of assessing industry for the cost of industrial accidents, rather than having them fall on individual workmen, is of such vital importance to labor that its protection is of constitutional magnitude.

--The present constitutional provisions were adopted precisely because a court overturned the first legislative effort to establish the principle. The protection and perpetuation of the principle cannot be left to the vagaries of court decisions.

Arguments cited in favor of retention in its present form:
--The present workmen's compensation law operates in derogation of certain rights of constitutional dimension. For example, the right of an employee to sue his employer in negligence is abrogated, even if the injury causes death; so also is the right to trial by jury. Both of these rights are protected elsewhere in the Constitution. The present Article IX, Section 18, expressly authorizes the abrogation of these rights. Without such authorization, the workmen's compensation statute may become vulnerable to constitutional attack on the grounds mentioned.

Arguments in favor of retention in simplified form:
--There can be no question that Article IX, Section 18, is couched in language better

suited to legislation than to a Constitution. It is, therefore, unduly restrictive. The subject matter of workmen's compensation is highly complex. Granted that retention of the reference in the Constitution is desirable, the Legislature should nevertheless be free to experiment with remedies fashioned for new problems as they arise. When changing conditions require modification of treatment, change in statute law is relatively simple compared to the cumbersome mechanics of constitutional change.

Arguments against retention:
--Constitutional support of the workmen's compensation laws is unnecessary. The principles underlying such laws are now so interwoven in the fabric of modern industrial society that it is inconceivable that a modern Legislature would abolish the system, or that a present-day court would invalidate it. Since the present Convention has for one of its goals the simplification and reduction in size of the Constitution, Article I, Section 18, should be eliminated." (5)

Looking at Article II, Section 35, it appears that several details, possibly legislative in nature, are contained therein. For example, the section requires that of employers' contributions to the fund, an amount not to exceed 1% in any year, be set aside for the purpose of investigation and prevention of industrial accidents. The time may come when 1% of the fund is not sufficient to conduct such investigative and preventive studies, and perhaps the constitution should be more flexible with respect to allowing the necessary funding to be available. Another detail, which perhaps should be left to legislative discretion, is the mandate that when injury or death of an employee results from failure of the employer to comply with lawful requirements, the additional award shall be between 15% and 50% of the maximum award established by law.

The principle of workmen's compensation seems to be a vital concept, deeply ingrained in our economic system, and perhaps the detail and forcefulness of a constitutional provision that appeared necessary when the idea was new and not as popular need not be retained. By repealing the provision, as was observed by the New York Commission, there exists the possibility that judicial interpretation of workmen's compensation may restrict the system's operation by re-opening the constitutional questions that were laid to rest by adoption of a constitutional amendment clearly giving the state the required police power.

The present administrator of the Bureau of Workmen's Compensation, Anthony Stringer, noted a problem with the present constitutional provision. In his opinion, the Industrial Commission, created pursuant to the constitutional provision that "laws may be passed establishing a board which may be empowered to classify all occupations..." and the Bureau of Workmen's Compensation, created by law, share many of the same functions. The Industrial Commission, being composed of only three members, was too small to carry out all of the functions required to implement an effective workmen's compensation system-hence, the creation of the Bureau of Workmen's Compensation by the Legislature. Because of the residual power of the Industrial Commission, in several instances, it operates merely as a rubber stamp on the recommendations of the administrator. He suggested that the constitution be amended to allow the two organizations to have separate functions, with the Industrial Commission acting as the appellate body, and the Bureau responsible for all administrative duties.

FOOTNOTES

1. Ives v. South Buffalo Ry. Co., 201 N.Y. 271 (1911), cited in State of New York, Temporary State Commission on the Constitutional Convention, Housing, Labor, Natural Resources, vol. 9, 1967. p. 74.

2. op. cit., p. 75

3. Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912. p. 1346

4. Ohio State Law Journal, vol. 19, "The Ohio Compensation System" by James L. Young. p. 542

5. op. cit., Housing, Labor, Natural Resources. pp. 76-77

Public Officers: Qualifications, Oath, Salaries
Article XV, Sections 4 and 7
Article II, Section 20

This study examines three sections of the Constitution dealing with public officers: Section 4 of Article XV, which states that a person may not be elected or appointed to a public office unless he possesses the qualifications of an elector; Section 7 of Article XV, which prescribes that every public officer shall take an oath of office and an oath to support the federal and the state Constitutions; and Section 20 of Article II which, among other things, prohibits in-term changes in salary of a public officer.

Summary

Since Section 4 of Article XV makes the qualifications for public office depend on elector status, and since constitutional elector status presently consists (by construction) of being 18 years old and a resident such time as provided by law, the most important question raised by Section 4 is whether the Constitution should specify additional age and residence qualifications for all or some public officers. The Legislative-Executive Committee discussed this question in connection with qualifications to serve in the General Assembly and in the Executive Branch (notably Governor and Lt. Governor) and made no recommendations for additional qualifications.

As noted in the discussion regarding Section 7, no current problems appear.

Since the people have removed the prohibition against in-term pay increases for judges, Section 20 of Article II raises the question whether a recommendation for modification should be made for removing the prohibition for some or all other public officers. It is noted in the discussion that the people recently rejected a proposal which would have removed the prohibition for some officers. Again, the Legislative-Executive Committee studied this question in connection with legislators (section 31 of Article II) and elected Executive officials (section 19 of Article III) and did not recommend change.

Article XV, Section 14

No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.

History

Section 4 of Article XV first appeared as a constitutional requirement in 1851. This section was proposed by the Legislative Committee and was adopted by the convention without debate. The Committee on Arrangement and Phraseology moved this provision from the legislative to the elections article of the constitution.

No model for this section was noted in the convention debates nor had any similar provision appeared in either the Northwest Ordinance or the 1802 Ohio Constitution. Both of those prior organic acts contained requirements for the positions of governor and legislator only, and these requirements were phrased in specific rather than electoral status terms.

In order to determine the specific qualification required by Section 4, it is necessary to consider the constitutional provision setting forth the electoral qualifications, Article V, Section 1. The original 1851 section on electors required that a person be 21 years old, white, male, resident of the state for one year immediately preceding the election and a resident of the county, township, or ward in which he resides such time as shall be provided by law. However, the 1851 list of qualifications did not require that the person also be a taxpayer or a laborer on county roads as the first Ohio constitution had.

At the 1912 constitutional convention both Article 4 and its correlative elector section were amended. Section 4 was amended to contain a proviso that "women who are citizens may be appointed as members of or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both." This amendment was intended to allow women to participate in state government by holding certain offices which were "particularly suited to their talents," irrespective of their lack of electoral status. A further proviso which would have allowed women to hold notary positions was defeated on the convention floor.

The electoral section was amended by the 1912 convention to delete the requirement that electors be "white." This deletion was a mere matter of form due to the prior enactment of the 15th amendment to the United States Constitution which had taken effect in 1870 and which prohibited the denial of the franchise on the basis of race, color, or previous condition of servitude. A proposal to delete the word "male" from the list of requirements was approved by the convention but was defeated by the voters.

In 1953 Section Four was again amended, this time, to delete the 1912 provision concerning women which had been made obsolete by subsequent amendments to the United States Constitution and to the Ohio Constitution granting the right to vote in 1919 and 1923 respectively.

In 1957, Amended Senate Joint Resolution No. 20 (102nd General Assembly of Ohio) which would have entirely repealed Section 4 was narrowly defeated by a popular vote of 996,513 to 1,040,216.

In the same year, the voters approved an amendment to the electoral section allowing citizens of the United States over 21 years of age and citizens as required by law to vote for presidential and vice-presidential electors if they were not qualified to vote otherwise because they did not meet the residence requirements. However, these citizens

were not called "electors", and thus the amendment did not affect Section 4 or qualifications for holding office.

The state residency requirement of one year for being an elector and thus office holder was reduced to six months in 1971 via an additional amendment to Section 1 of Article V. However, the six months requirement has subsequently been held to be unconstitutional under the equal protection clause of the 14th amendment to the United States Constitution. Schwartz v. Brown, U.S.D.C. (S. D. of Ohio) Civil Action 72-113 (1972) applying Dunn v. Blumstein, 405 U.S. 330 (1972) (Dunn, supra, had held that because voting is a fundamental right, a very substantial state interest must be shown in order to restrict that right.)

The interpretation of Section 4, Art. XV, was further altered in 1971 by the passage of the twenty-sixth amendment to the United States Constitution which prohibited the denial of the franchise to those over 18 on the basis of age. Thus this change in the interpretation of Section 4 opened public offices in Ohio to all those over 18.

The proposed amendment to Section 1 of Article V of the Ohio Constitution already adopted by the Commission as part of the Elections-Suffrage Committee's report, alters the section to require only that a citizen be eighteen years old and comply with the applicable state, county, township, and ward requirements as prescribed by law in order to vote. The proposed amendment, if adopted, would assure eighteen year olds the right to hold public offices in Ohio by granting them the undisputed right to vote. Ohio has no other age requirements for public office, nor for specific public offices, other than Section 4, Art. XV. Section 3 of Art. II requires members of the General Assembly to have resided in their districts one year preceding their election. An exception is made in Article IX for a reapportionment year.

Comparative Provisions

Nine other states prohibit non-electors from holding office, while three states specifically make all electors eligible as office holders. Five additional states have similar requirements which are qualified in one respect or another, such as provisions which are inapplicable to school boards or city managers. Thus approximately one-third of the state constitutions corrolate the ability to hold office with the ability to vote.

Six additional states have a general residency requirement for office holding, while seven states including six of the states requiring residency require citizenship to hold state office.

Specific requirements of age, citizenship, and residency are also common in reference to particular state office such as governor. judge, and legislator. For example, 34 states have age requirements for being a member of the upper house of the legislature, and in 18 of such states, the age is 25, while in other states the requirements vary between 21 and 30 years of age. Thirty-one states have age requirements for the lower house and in 23 of such states the age is 21, while in the other states the requirements vary between 21 and 25 years of age. Eighteen states specifically require U.S. citizenship to be a legislator, and 13 states require between 2 and 5 years of state citizenship. Eight states have residency requirements in the district from which the legislator is elected, most commonly one year. Seven states require residency in the state varying between one and seven years.

The office of governor is even more likely to have specific qualification in the constitutions of other states. Forty-one states have an age minimum for holding the governor's office. Four states require that the governor be 25, thirty-six require that he be 30, one requires that he be 31, and one that he be 35. In addition, thirty-six states require that the governor be a U.S. citizen and twenty-one of these states specify a number

of years for which the person must have been a U. S. citizen. One state requires 2 years of citizenship; seven states, 5 years; one state, 7 years; five states, 10 years; one state, 12 years; three states, 15 years; and three states, 20 years. State citizenship is required for the post of governor in fourteen states. The years of state citizenship required varies as follows: one state requires 2 years; eight states, 5 years; two states, 6 years; two states, 7 years; and one state, 10 years. Thirty-six states require a period of residence in the state prior to election. One state requires 1 year of residence; eight states require 2 years; one state, 3 years; one state, 4 years; fourteen states, 5 years; two states, 6 years; seven states, 7 years; and one state, ten years.

Twenty states have minimum age requirements for the post of judge of the highest court in their state constitutions, and several states, including Ohio, have a maximum age of seventy. Minimum age requirements commonly set are thirty-five years, required in four states, and thirty years, required in fourteen states. Minimums of twenty-six and twenty-five are set in one state each. Other states get around age minimum for these posts by setting up a requirement that the person must have been a lawyer for a prescribed number of years, usually five or ten years. Nine states require state citizenship and fifteen states require U. S. citizenship. Eighteen states set forth some form of residency requirement for this post in the constitution. Index Digest of State Constitutions, 2nd Legislative Drafting Research Fund of Columbia University, 1959.

Statutory Provisions

Chapter 3503 of the Ohio Revised Code sets forth the further statutory qualifications necessary to be an elector in Ohio. Section one of Chapter 3503 sets forth the statutory age and residency requirements and the rules for assigning electors to precincts. Section 2 sets forth the rules for determining the existence of residence as called for in Section 1. Sections 3 and 4 respectively provide for the voting rights of certain inmates of soldier's homes, public institutions and private institutions. The residue of the chapter deals with the voter registration requirements.

Interpretation

Section 4 of Article XV does not by implication forbid the general assembly from requiring additional reasonable qualifications for office holding. The legislative article, section 1, specifically vests the legislative power in the legislature; this power can be restricted only by a direct expression of restriction and not by a mere supposed implication. State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 102 (1875). In Covington, supra, the law in question set forth additional residency and literacy requirements for policemen in cities of the first grade. the court held that these requirements were reasonable and that they were not in conflict with Section 4, Art. XV of the Constitution. Other requirements for office holding in addition to elector status which have been held to be valid include a law providing that members of a public board of city affairs be of different political parties, and a law providing for the exclusion from office of those who used corrupt practices to obtain election. State ex rel Atty. Gen. v. Ratterman, 58 Ohio St. 731 (1898), Mason v. State ex.rel. McCoy, 58 Ohio St. 30 (1898). These cases confirmed the Covington doctrine that in order to restrict legislative power the restriction must either be explicitly stated or a necessary inference rather than a mere permissible inference. Thus Section 4 Art. XV does not forbid the legislature from establishing additional requirements for offite holding.

The elector status requirement of Section 4 is applicable to all state officers elected or appointed. The chief elements of an office, which trigger the electoral requirement, are independent public duties which are a part of the state's sovereign power, vesting of these duties by virtue of the holder's election or appointment, and the lack

of control over the holder by a superior officer. State ex rel. Morgan v. Board of Assessors, 15 N.P. (N.S.) 535 (1914) (citing and following State ex rel. Atty. General v. Jennings, 57 Ohio St. 415 (1898).) In Morgan, supra, the court held that the post of deputy tax assessor was not an office due to its subordinate position to the post of tax assessor and therefore could be held by a non-elector woman. In Parkinson v. Crawford, 13 N.P. (N.S.) 73 (1912), the court defined an officer as one who exercises in an independent capacity a public function in the interest of the public. The Parkinson case held that the post of special constable was an office and thus must be held by an elector under Section 4, Art. XV.

Positions which have been held to constitute offices in the Section 4 context include a trustee of a state university, Thomas v. Ohio State University, 195 U.S. 207 (1903); a special constable, Parkinson, supra; and a notary, State ex rel. Robinson v. McKinley, 57 Ohio St. 627 (1898).

Positions which have been held not to constitute officers include the position of supervising judge of the court of common pleas, because the duties of this post were not distinct from those of a judge; the position of chief of police, because the city charter failed to vest this position with independent powers; and the positions of deputy tax assessor, deputy supervisor of elections, and deputy clerk of court, because of the lack of independent function in these positions. State ex. rel. Hogan v. Hunt, 84 Ohio St. 143 (1911); La Polla v. Davis, 40 Ohio Op. 244 (1948); Morgan, supra, State ex. rel. Vail v. Craig, 8 Ohio N.P. 148 (1900), 1954 Ohio Atty. Gen. No. 3999.

Whether or not an individual is an elector and thus eligible for office is determined by the state law governing electors, Parkinson, supra. Two questions concerning elector status in relation to Section 4 have been raised and reported. This first of the decisions held that citizenship is necessary for elector status and the second that the date for determining age eligibility is the date of the general election rather than the primary. State ex rel. Keeler v. Collister, 6 Ohio Cir Ct. (N.S.) 33 (1905), 1941 Ohio Atty. Gen. No. 4013.

Current Questions

One, is the restrictive policy of Section 4 as to all state offices a wise policy in our highly mobile contemporary society in light of the highly specialized training necessary for some jobs and the thus restricted labor pool available to fill these jobs among Ohio electors? Two, should higher qualifications in terms of age, citizenship, and residency for some state offices such as governor be placed upon candidates?

Article XV, Section 7

> Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation to support the Constitution of the United States, and of this state, and also an oath of office.

History

The concept underlying Section 7 of Art. XV that every elected and appointed officer should take an oath or affirmation to support the applicable constitutions apparently was originally derived from the federal law through the Northwest Ordinance. An oath requirement concerning the support of the Ohio and Federal constitutions and the faithful discharge of the duties of the office was included in both the 1802 and 1851 Ohio Constitutions.

The United States Constitution, Art. VI, requires that

> Senators and Representatives (of the United States) and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this constitution.

Section I of Article II prescribes the presidential oath of office which includes an oath to faithfully discharge the office as well as an oath to uphold the Constitution.

The Northwest Ordinance, the original organic act governing the Northwest territory, required officials of the territory to take an oath of fidelity and of faithful discharge of the office. Section 12 of the Ordinance reads:

> The governor, judges, legislative council, secretary, and such officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office...

The original Ohio Constitution of 1802 contained an oath requirement at Art. VII, Section 1. It read:

> Every person who shall be chosen or appointed to any office of trust or profit, under the authority of this state, shall, before the entering on the execution thereof, take an oath or affirmation to support the constitution of the United States and of this state and also an oath of office.

At the 1851 convention, the legislative committee recommended and the convention adopted without debate, a substantially identical section. The 1851 oath section deviated from the prior section only in the omission of the adjectival phrase "of trust or profit" which had formerly modified the word office. The Committee on Phraseology and Arrangement was responsible for this alteration and no debate concerning the change is recorded. This latter committee was also responsible for the placement of this requirement in the elections section rather than with the other provisions introduced by legislative committee.

Comparative Analysis

The vast majority of state constitutions require an oath to support the United States Constitution, the applicable state constitution and to faithfully perform the duties of the office. The Model State Constitution requires no oath outright;

however, its Bill of Rights prohibits the requirement of any other oath than one to support the federal and state constitutions and to faithfully execute the office.

Statutory Provisions

The general provisions governing oaths of office are found in Chapter 3 of the Ohio Revised Code. Section 3.22 reiterates the requirements of Section 4 of Art. XV, that all officers chosen or appointed under the constitution or laws of this state shall take an oath of office. This section also expressly requires that deputies and clerks of such officers also take an oath. Sections 3.20 and 3.21 provide for an affirmation in lieu of an oath and section 3.23 sets forth the elements of the oath which must be taken. Other sections of the Ohio Revised Code require specific officers to take an oath pursuant to Section 4 of Art. XV. The section numbers and the offices involved are: 311.02, County Sheriff; 315.03, County Engineer; 317.02, County Recorder; 319.02, County Auditor; 321.02, County Treasurer; 337.04, Superintendent of the County Home; 503.25, Township officers; 271.05, Supreme Court Justice; 2701.06, Judges of the Court of Appeals and the Common Pleas Court; 2965.04, Member of Parole Board; 2965.08, Secretary of the Parole Board; 4713.02, State Board of Cosmetology; 4717.04, State Board of Embalmers and Funeral Directors; 5537.02, Ohio Turnpike Commissioner; and 5593.02, State Bridge Commissioner and City and County Bridge Commissioner.

Judicial Interpretation

Whether or not a person holds an office and is thus required to take an oath as prescribed by Section 7 of Art. XV is not determined by the statutory designation applied to that position but rather by the nature of the position. State ex. rel. Atty. Gen. v. Kennon, 7 Ohio St. 546 (1851); Benckenstein et al. v. Schott, 92 Ohio St. 29 (1915); Parkinson v. Crawford, 13 N.P. (N.S.) 73 (1912).

In Kennon, supra, the question before the court concerned whether or not certain commissioners had been properly appointed under Art. II, Section 27 of the Ohio Constitution governing the appointment of state officers. The court, in response to one of counsel's allegations that the commissioners were not officers within the meaning of Art. II, Section 27 because no oath of office was prescribed in the statutes under which they were appointed, held that they were officers and that they therefore were obligated to take the oath even without a specific statutory requirement to that effect. The commissioners were officers because they were charged with " a particular duty, charge or trust conferred by public authority and for a public purpose" and that their positions were "an employment on behalf of the government, in any station or public trust, not merely transient, occasional or incidental." Kennon, at 556.

Thus the omission of the designation "officer" and a specific oath requirement from the statute creating their position was not determinative of whether or not they were officers.

In another case, Parkinson v. Crawford, 13 N.P. (N.S.) 73 (1912), the oath requirement was again discussed in connection with a determination of whether or not a certain position was an office and thus fell within the definition of an office in another provision. The office in that case was that of a process server and the constitutional provision involved was Section 4 of Art. XV which requires officers to be electors. The court noted that Section 4 and Section 7 of Art. XV both use the term officer in the same sense and then defined an officer as

> one who exercises in an independent capacity, a public function in the interest of the people by virtue of law, upon whom is devolved the performance of independent statutory duties, which to a certain extent, involves the exercise of part of the sovereignty of the state.

As noted above the designation of a position as an office or its holder as an officer does not per se create a technical office necessitating an oath within the provisions of Art. XV, Section 7. In the Benchenstein case, supra, the Ohio Supreme Court held that the reference to an "officer" taking a deposition in O.G.C. 1105 was not limited to "technical" officers, i.e., those who had taken the Section 7, Article XV oath. Section 1105, which allowed officers taking depositions to imprison persons who refused to be sworn, was preceded in the code by a section permitting out-of-state officers to take dispositions. In light of that preceding section, the court held that the Ohio oath was unnecessary. The unstated rationale underlying this decision, however, appears to be that the out-of-state deposition taker was not an officer of an Ohio court, but rather was taking the deposition by the permission of the state of Ohio but under the authority of another state.

Problems

There do not appear to be any current problems with this section. Although it may be questioned whether it is necessary, its presence does not seem to create problems.

Article II, Section 20

> The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all offices; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

History

Section 20, Article II of the Ohio Constitution was an original portion of the 1851 constitution. This section, applicable to "all offices", had no equivalent in prior organic acts.

However, the prior 1802 constitution did have provision which prohibited changes in the salaries of the judges and the governor during their terms of office, at Art. II, Section 6 and Art. III, Section 8 respectively. These prior sections may have been adapted from the United States Constitution which prohibits in-term pay increases or decreases for the executive and decreases for judges.

Section 20 was introduced at the 1851 convention by the legislative committee. The convention floor debates seem to indicate that the delegates viewed Section 20 primarily as a provision to prevent graft and pocket lining. However, though no mention of such purpose is made in the debates, historically such provisions were designed to assure the division of power between the three branches of government and such an unstated purpose for Section 20 can safely be assumed. Frederick Woodbridge, History of Separation of Powers in Ohio, 13 An. L.R. 191 (1939).

The merits and demerits of Section 20 were debated at great length on the convention floor. At one point, the section was even stricken from the committee report as being unnecessary in light of similar prohibitive provisions in the executive, judicial and legislative articles and as being poorly worded in that it civered more than one subject matter, i.e., it both granted and restricted legislative power. Later in the convention the section was reintroduced and, after members of the committee explained that it would have no effect on officers compensated on a fee basis and that it would apply only to in-term pay raises, the section was endorsed by the convention.

Comparative Analysis

Ten other states prohibit increases and/or decreases in compensation for all state officers after they are appointed or elected or during their term of office. Index Digest of State Constitutions, 1959. However, a majority of the states expressly prohibit such changes in term for executive officers, legislators and judges. The Model State Constitution prohibits in-term pay increases for legislators only. G. Braden and R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis (1969). The federal constitution as noted above prohibits any change in compensation for the president and prohibits the diminution of salary for federal judges.

The primary source of the legislature's power to fix terms and compensation for state officers is Section 1 of Article II. State ex rel. Metcalf v. Donahey, 101 Ohio St. 490 (1920). However, Section 20 of Article XV imposes a duty upon the legislature to exercise that power. Metcalf, supra; State ex rel. Howe, 25 Ohio St. 588 (1874); State ex rel. Atty. General v. Neilbling, 6 Ohio St. 40 (1856). The legislature in fixing the terms of office can not vary the terms of office set forth in the constitution. Neilbling, supra; Howe, supra. Examples of proper instances for the exercise of the legislature's Section 20 power include the fixing of the term of a clerk of court appointed to fill a vacancy and the extension of the term of the prior superintendent of the boy's state school to fill the interim until a successor was qualified. Neilbling, supra; Howe, supra.

The term "officer" in the context of Section 20 applies both to holders of offices provided for in the constitution and holders of statutorially created offices, and to appointed as well as elected offices. Metcalf, supra; State ex rel. McNamara v. Campbell, 94 Ohio St. 403 (1916). However, the fact that an office is created by the constitution does not per se make it a state office subject to the provisions of Section 20. State ex rel. Hess v. Rafferty, 19 Ohio N.P. (N.S.) 337 (1916). For example, mayors and other officers of municipal corporations or officers of school districts hold offices created for the benefit of the locality rather than the state and are not therefore subject to the provisions of Section 20. State ex rel. Terry v. Board of Education, 12 Ohio Cir. Dec. 333 (1901). But when the state seeks to exercise its sovereign power through the agencies of the county or township officers, the statute creating the office and the compensation for the office must conform to Section 20. State ex rel. Godfrey v. O'Brien, 95 Ohio St. 166 (1917).

The legislature in fixing the terms or compensation for an office may do so by a description or formula from which the time or amount may be determined as well as by specifically setting forth a term or an amount. Howe, supra, (term determined by description); Cricket v. State, 18 Ohio St. 9 (1868) (formula set forth to determine compensation). The legislature's Section 20 power to fix terms of office includes within it, the power to extend terms of office once they are set. Howe, supra. The second clause of Section 20 acts as a limitation upon the power of the general assembly to fix the compensation for an office. Metcalf, supra. This clause prohibits any change in the salary of any officer during his existing term, unless the office is abolished.

The second clause's prohibition is applicable only to officers as opposed to employees. State ex rel. Milburn v. Pethel, 153 Ohio St. 1 (1953); State ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947). The usual criteria for determining whether a position is a public office are durability of tenure, the presence of an oath, bond and emoluments, the independence of functions exercised by the appointee, and the character of the duties imposed upon him. The character of the duties, however, is the chief determinant of officer status. If the duties involve the exercise of continuing independent political or governmental functions then the position is an office and not an employee. Landis, supra. The Landis case which set forth the above criteria arose under a similar section of the Ohio Constitution which prohibited pay raises for county officers during their term. Its definition of the term "office" was applied to Section 20 via Milburn, supra, which held that members of the county board of election were officers in the Section 20 context and were thus prohibited from receiving an in-term salary increase under Section 20. Milburn, in so holding, noted that the officer's power must involve an exercise of a portion of the judicial, legislative or executive function in order for Section 20 to be applicable. Other cases defining the term "officer" in the context of Section 20 have stressed that to be an officer one must be the individual appointed or elected to office rather than a mere deputy or assistant, that the officer must aid in the permanent administration of government rather than performing some temporary or special task, and that the officer is a public servant upon whom the public has a right to call for the discharge of his duties. Theobald v. State, 10 Ohio Cir. Ct. (N.S.) 175 (1907); Walker v. Cincinnati, 21 Ohio St. 14 (1871); State ex rel. Ferris v. Bush, 12 Ohio N.P. (N.S.) 369 (1912).

The prohibition of the second clause of Section 20 is also limited to changes in salary. The words "salary" and "compensation" as used in Section 20 are not synonymous. Thompson v. Phillips, 12 Ohio St. 617 (1861); 1939 Ohio AG No. 749; 1951 Ohio AG No. 978

> It is manifest from the change of expression in the two clauses (of Section 20) that the word salary was not used in the general sense, embracing any compensation fixed for an officer, but in its limited sense of an annual or periodic payment dependent upon time, not on the amount of service rendered. Thompson, supra at 617.

Examples of compensation based upon the amount of service rendered and not constituting a salary are perdiem payments, compensation based on the amount of the tax duplicate, and fees charged by the piece of work. 1951 Ohio AG No. 978, Gobrecht v. Cincinnati, 51 Ohio St. 68 (1894); State ex rel. Taylor v. Carlisle 3 Ohio N.D. (N.S.) 544 (1905); Theobald, supra.

However, when the officer's compensation is salary, i.e. periodic payment dependent solely upon the passage of time, no change in that salary can be constitutionally made during his term. McNamara, supra, 1951 Ohio AG No. 978. An imposition of additional duties on the office holder does not make an exception to this rule. Donahey v. State ex rel. Marshall, 101 Ohio St. 473 (1920); Bordenkircher v. Lingrel, 29 Ohio N.P. (N.S.) 1932. The salary which is not subject to change is the salary in effect at the commencement of the term not withstanding the fact that a bill changing the salary has become law at the commencement of the term and is merely waiting the expiration of the referendum period to take effect. 1917 Ohio A.G. vol. 2, p. 1384. Nothing in the prohibition of Section 20 forbids the establishment of a salary for an officer during his term when no salary had previously existed nor does Section 20 forbid a voluntary relinquishment of salary by an office holder. State ex rel. Taylor v. Carlisle, 3 Ohio N.P. (N.S.) 544 (1905); Cleveland v. Phillips, 19 Ohio L. Abs. 71 (1935). The prohibition against salary changes in term refers strictly to the officer's term and does not apply to a person appointed to a partially expired statutory term where the salary of the office is increased by a statute effective during the preceding portion of the term when someone else held the office. State ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947).

Cases in which changes in salary have been held to be unconstitutional include cases involving the salaries of a common pleas judge, Zangerle v. State ex rel. Stanton, 105 Ohio St. 650 (1922); a judge of the court of appeals, Metcalf, supra; a member of the state railway commission, Donahey, supra; a county commissioner, State ex rel. DeChant v. Keslner, 133 Ohio St. 429 (1937); and a justice of the peace, 1927 Ohio A.G. p. 905.

Current Issue

Should Section 20 be retained as a portion of the Ohio Constitution? As stated above, the legislature would have the power to fix terms of office and compensation under Section 1 of Article II even absent Section 20. Further, the Ohio Constitution currently prohibits in-term compensation changes for executive officers at Art. III, Section 19 and for state legislators at Art. II, Section 30 and prohibits diminution of judges' compensation during their terms at Art. IV, Section 6 (B). In addition, Art. II, Section 29 of the Ohio Constitution states that

> No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered or the contract entered into; nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members of each branch of the general assembly.

Although there are no cases in point, it would appear that this section would be applicable to public officer's pay increases in term because these would occur after mutual obligations constituting a contract would have arisen between the public and the office. (Ferris, supra, held that Section 20 officers are public servants, and in the case of Cleveland v. Luttner 92 Ohio St. 493 (1915) (arising under Art. XV

Section 4) held that a public officer is a public servant and that because of that position, a contract exists between him and the public which takes effect at the latest when the officer takes his oath of office. The Luttner contract rationale should by analogy be applicable to Section 20 officers thus making a two-thirds vote necessary for in-term pay raises.) Thus ample protections against pocket-lining raises and raises which would impair the independence of the three branches of government appear to be present in the Ohio Constitution even without Section 20. Therefore the question arises, is Section 20 necessary?

In the consideration of this issue, it should be noted that voters failed to ratify in a recent election a constitutional amendment which would have allowed in-term pay increases for certain county officials, and others - officials occupying a position identical to that of another person whose salary is higher because his term begins and ends at a different time.

We, the undersigned, being duly elected officials of Ashtabula County, Ohio hereby petition the Legislature of the State of Ohio to submit to the electorate an amendment to the Constitution altering Article II, Section 20.

Whereas the said Article II, Section 20 in substance forbids an increase in salary for county officials during their term in office, and,

Whereas this section is discriminatory, and deprives certain elected officials the equal protection of the law,

We, therefore, earnestly petition that this section be amended to afford all officials equal protection of the law, by requiring that salary increases inure to the benefit of all elected county officials.

Public Employees

Section 10 of Article XV was added to the Ohio Constitution in 1912 and has not been changed since then. It reads as follows:

Article XV

> Section 10. Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

No other provisions of the Ohio Constitution deal exclusively with public employees. A variety of provisions relating to public employees, in addition to a merit system requirement, are found in other state constitutions, however. These include provisions relating to political activity, conflict of interests, right to bargain collectively, and pension systems. This study will discuss the merit system provisions and the constitutional issues arising under such a provision, and will briefly mention some of the other provisions not found in the Ohio Constitution.

Merit System

History. The 1912 constitutional convention adopted Section 10 of Article XV with little debate and only a few negative votes. Proponents of the provision asserted that it was a "blow to the spoils system". It was viewed as part of the progressive, reform movement that incorporated the initiative and referendum--one spokesman for the merit system in public employment stated that the Initiative and Referendum and the merit system, together, would get rid of political bosses in Ohio. A merit system was already in effect in some Ohio cities at the time of the convention. Proponents recognized, in their supporting statements, that some positions would have to be exempt, but felt that a general constitutional provision, leaving the implementation to the General Assembly, was preferable to a detailed provision attempting to spell out such matters as precisely which positions would be exempt.

The history of the movement, and the abuses that led to it, for merit systems for the employment of persons in the civil service--those in public employment not in the military service--is an interesting one, and thoroughly documented in many sources.

> The grand and familiar political themes of the early civil service movements were uncomplicated, to begin. The public official was to be protected from arbitrary replacement as different parties or factions succeeded one another; and the merit system was to be out of the reach of "spoils politics." Politics was to be kept out of public personnel administration, to put the underlying intention in its most simplistic form. There was a quid pro quo. In return, again simplistically, public personnel were to keep out of politics. The civil servant was idealized as a useful technician, in short, competent but politically neutral and intent only in his strivings to achieve the ends determined for him by political policy makers.[1]

From the time of the Pendelton Act in 1883 to the present time, there has been a constant, if sometimes slow, progression at all governmental levels toward a merit system in the selection and retention of public personnel. State and local governments have proceeded more slowly than the federal government, as a general rule,

although merit systems were operative in some states even before the federal system really took hold.

As noted above, the concept of the reformers had two parts--the employee, selected on the basis of his qualifications and not his affiliation with the party in power, was to be protected in his job, as long as he performed satisfactorily, from the whims of politics; such an employee would be politically neutral--that is, he was to perform his job without permitting his own convictions about policy or politics to interfere, and was not to use his job as a tool for the advancement of party. The first objective is easier to define and administer than the second.

Models; Other States The provisions in the current edition of the Model State Constitution for a merit system read as follows:

> Section 10.01. Merit System. The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence.

Earlier editions of the Model carried a more detailed provision, requiring a classification system, and creating a department of civil service, and requiring certification of the department (or similar municipal department in the case of a home rule city) before payment could be made to an employee. The comment in the current edition of the Model indicates that the drafters no longer considered the longer provision necessary except, perhaps, in jurisdictions where the civil service merit system tradition is not strong.

Similar model constitutional provisions have been proposed by other individuals and organizations. For example, Elmer Graper, writing in an issue of the Annals in 1935 (an issue largely devoted to a revision of the Pennsylvania Constitution) recommended the following constitutional provision:

> Appointments and promotions in the civil service of the state and of municipalities shall be made on the basis of merit and fitness, to be ascertained, so far as practicable, by competitive examination. The legislature . . . .[2]

The National Civil Service League promulgated a revised model public personnel administration law in 1970, and recommended at the same time the merit system provision of the Model State Constitution.

Slightly over one-fourth of the states have merit system civil service provisions in their Constitutions. Most are fairly simple and short, similar to the Ohio provision. The Alaska Constitution, for example, requires the legislature to "establish a system under which the merit principle will govern the employment of persons by the State." A few, such as Missouri's, limit the mandatory application of the merit principle to specified state agencies or institutions. Some states which do not have a mandatory constitutional provision have applied the merit principle only to agencies, departments or programs where it is required as a condition for receiving federal grants, and in others, such as Illinois, the merit system is a long tradition, at least in state government. There seems to be little question that a state

legislature has full legislative power to provide for a merit civil service system if it so desires, whether or not mandated or authorized by the constitution. Such a system, in general, does not abridge anyone's constitutional rights.[3]

Contrasted to those state constitutional provisions mandating the merit principle in general and leaving the implementation to the legislature are a few state constitutions which spell out, in great detail, the administration and operation of the system. Michigan is the most often quoted example of this; California's Constitution is also detailed with respect to the civil service system and even the new Louisiana Constitution has lengthy provisions dealing with both state and city civil service commissions.

The Ohio System. The General Assembly responded promptly to the 1912 constitutional mandate, and enacted a comprehensive civil service law in 1913, to take effect on January 1, 1914.(103 Ohio Laws 698) As required by the constitution, employees of the state, the counties and cities were covered. In addition, employees of city school districts were included. The civil service was divided into classified and unclassified service, with the unclassified service including the specified "exempt" persons and categories and the classified, or competitive service, including all the rest. The unclassified category included elected officials, court bailiffs, heads of principal departments, boards, and commissions appointed by the governor, secretaries to such persons, boards of elections, and others. Although city school districts were brought within the merit system, one category of exempt persons included all teachers, instructors, superintendents, presidents, and principals employed by the school districts, colleges and universities so that the school employees covered were only nonteaching employees. Separate civil service commissions were to be established in each city.

Many changes, of course, have been made in the statutes since 1913. Most recently, Senate Bill 174 of the 1973-74 session of the General Assembly, effected a complete reorganization of three state departments by combining them into one--the new Department of Administrative Services. The combined departments were the Department of Finance, the Department of Public Works, and the Department of State Personnel. The personnel function, including the administration of the merit system and the Personnel Board of Review, which replaced the former Civil Service Commission, are now part of the new Department. Chapter 143. of the Revised Code, which formerly contained the civil service provisions, is now Chapter 124. of the Revised Code.

The basic scheme, however, is much the same. The civil service has been expanded to include city health districts and general health districts as well as, as originally, the state, counties, cities and city school districts. The most recent addition is a category of "civil service townships" which authorizes, but does not require, townships with a population of more than 10,000 to establish a civil service system for fire and police employees. "State service" describes employees of the state, the counties, and general health districts. Employees of cities, city health districts, and city school districts come under the appropriate municipal civil service commission. "Classified service" embraces everyone not in the unclassified service--those required to take competitive examinations and unskilled labor, for which competitive examinations are deemed impractical. The unclassified service describes the exempt categories--elected positions, department heads, legislative employees, substantial numbers of court employees and county employees, employees of the governor's office, and others. The number and variety of unclassified employees has increased substantially since 1913.

It is not the purpose of this study to describe the operation and administration of the Ohio civil service system, but only to note possible constitutional issues.

Issues

1. General or detailed constitutional provision? Or no constitutional provision?

As is true with any constitutional provision that is unnecessary in the sense that the General Assembly has power under its general legislative power to provide by law for whatever is under consideration, Section 10 of Article XV could undoubtedly be eliminated from the Ohio Constitution without destroying the state's civil service system. With respect to cities, at least those with charters, in the absence of the constitutional requirement, there might be some question whether the state could require cities to maintain a merit system. However, merely because the provision could be removed without diminishing legislative power it is not necessary to conclude that it should be removed, since it mandates the general assembly to act in a field in which it might otherwise fail to act. If the policy conclusion is reached that a merit system in public employment is desirable, it would be difficult to justify removing the provision from the Constitution. J. Alton Burdine, writing about the necessity for constitutional revision in Texas in 1943, advocated a constitutional provision requiring the enactment of a general merit system law covering state and local administrative employees and employees of the legislative and judicial branches. He noted that the legislature has power to pass such a law, but had consistently failed to exercise its power.[4]

Arguments given in favor of the system used in Michigan, California, Louisiana, and perhaps other states, of providing in some detail a civil service system in the Constitution, are that it creates an agency independent of legislative tampering, and possibly of executive tampering as well; and that it permits limiting the exemptions by spelling them out in the Constitution, also safe from legislative or executive tampering.

The independence of the constitutional agency, however, can create problems for administrators and is not generally favored. The Committee for Economic Development, in its 1967 report entitled "Modernizing State Government" comments as follows on the personnel function:

> We believe that it is time to make a clean break with the past, and that the states should take a leading role in the installation of up-to-date personnel systems.
>
> When this function is vested in an independent civil service commission, "management often finds itself unable to determine its own manpower requirements, to rotate as part of their development, or to promote primarily on the basis of ability." Even greater frustrations result when attempts are made to maintain departmental discipline or to remove incompetent employees. Independent state civil service commissions should be replaced by central personnel agencies under directors appointed by and responsible to the governors. Administrative responsibility cannot be placed upon a governor unless he also has basic authority over personnel.

Constitutional rigidity can be worse than legislative rigidity because it is more difficult to remedy, and the 1961 Michigan Constitutional Convention added to the list of exemptions a number of positions in the governor's office: "thus giving constitutional sanction to a practice that had become customary"[5] as well as other positions. Moreover, the Michigan system permits the civil service commission to establish pay rates for the employees under its jurisdiction, and one of the issues at the convention was whether the legislature should not have some control over at least pay rates. A provision was finally added permitting the legislature, by a 2/3 vote, to reject or reduce proposed pay increases. Another problem that developed because of the constitutional independence of the Michigan Civil Service Commission surfaced when public employee unionism began its upward surge in the mid-1960's and controversy developed in Michigan not only over the whole issue of public employee labor relations and the right to strike and bargain collectively, but also over whether the legislature or the Civil Service Commission was in charge.[6]

2. What governmental units are covered?

The Ohio Constitution mandates the application of the merit principle to the employees of the state, counties and cities. The legislature has added city health districts, general health districts, and city school districts and, permissively, certain townships. The Model State Constitution and other similar model proposals would make the merit system mandatory for state and all political subdivision employees. There no longer seems to be any doubt about the General Assembly's ability to extend the requirement to units of government not mentioned in the Constitution (Karrick v. Bd. of Education of Findlay School District 174 Ohio St. 467, 1962) and the only question is whether the Constitution should mandate a merit system for additional, or all, public employees not presently covered--villages, townships, special districts of various types.

As with all matters relating to cities, Section 10 of Article XV must be read together with Sections 2, 3, and 7 of Article XVIII of the Constitution, the municipal corporation government and "home rule" provisions. The following generalizations are offered with respect to civil service and cities in Ohio:

1. A charter city which provides by charter for a civil service merit system need not follow the statutory rules. The chief of police, for example, in such a charter city need not be chosen from a civil service eligible list as provided in the statute, but could be selected as provided in the charter or by ordinance enacted pursuant to the chapter. (Lynch v. Cleveland, 164 O. S. 437, 1956).

2. A charter city which does not provide for a merit civil service system in its charter would be in the same position as a noncharter city in that respect.

3. A noncharter city must follow the state laws for civil service. It cannot vary from them. (Petit v. Wagner, 170 Ohio St. 297 (1960)

4. A noncharter city can, however, enact laws establishing pay scales and the number of employees--these are essential elements of local self-government. (State ex rel. Mullin et al.v. Mansfield, 26 Ohio St. 2d 129, 1971).

Conflict appears to exist in the statutes concerning the civil service status of employees of elected county officials. However, it seems clear that if a county should adopt a charter, it could create its own civil service system as to charter cities.

3. Who is Exempt?

The lengthy list of exempt positions and categories (the "unclassified" service) in Ohio might lead to the conclusion that the Michigan or California system--writing the exemptions in the Constitution--is better than leaving the determination to the General Assembly. Since the constitutional mandate appears to require all appointments and promotions in the specified governmental units to be made according to merit and fitness "to be ascertained, as far as practicable, by competitive examinations" the only constitutional test for exclusion is whether it is practical to devise an examination for the position. To the extent that policy-making functions and political sensitivity may be part of the position, it would be difficult to devise such a test. Department heads, for example, and the Governor's press secretary, would fall within such categories. However, the present law exempts all employees in the Governor's office, and such an exemption may be suspect. Many county employees and court employees are also exempt, whose jobs could very likely be defined with sufficient exactitude and objectivity to enable the examinations to be prepared to test for the necessary skills and knowledge.

At the same time, it should be noted that, of the total state employment (no county or other local employees) of 58,571, 52,866, or between 88 and 89% of the total, are in the classified service. Since some states cover only those employees necessary to meet the requirements of federal funding, 88% represents a substantial percentage of the total.

If the present system of permitting the General Assembly to determine which employees should be covered is not satisfactory, it is difficult to determine how the constitutional language could be changed except to include in the Constitution a specific list of positions or categories to be exempt from the merit system.

4. Merit and Fitness: Other Job Qualifications and Requirements

Without the reviewing of laws and literature on civil service in detail, it is apparent that "merit and fitness" include the knowledge and skills required for satisfactory job performance. Merit and fitness are to be measured, so far as practicable, by competitive examination.

What about other job requirements? Does the fact that the Constitution specifies only "merit and fitness" rule out other requirements? Even if part of "merit and fitness", many job requirements are today found to be unconstitutional because they discriminate against individuals or groups of persons on the basis of race, sex, religion, national origin, or color, or because they violate the Constitution for some other reason.

A recent report published by the International Personnel Management Association details some of the many legal problems besetting public employers, as well as private ones. Some job requirements, such as citizenship, enumerated have been part of public employment, and the merit systems, since the early days of public employment, when qualifications were first specified by law. Today, however, if they are found to discriminate or to violate the due process or equal protection clauses of the Constitution, they are increasingly being held unconstitutional by the courts. The following excerpt from the report summarizes some of these job requirements or qualifications:

Job requirements

Citizenship and residency. Both of these commonly accepted requirements limit open competition, restrict mobility, and discriminate by race, religion, and national origin to the degree that these people are not evenly distributed across all political jurisdictions. Expect court cases unless these requirements are dropped.

Age. Many jurisdictions require a minimum age of either 18 or 21 years for all job applicants. This may discriminate against poverty groups (largely minorities) who seek employment between the ages of 16 and 21 rather than continue their education as their more affluent (largely nonminority) counterparts do. Minimum age requirements should be lowered to age 16 unless a higher age is necessary for successful job performance.

Height and weight. These requirements are often found in firefighter and police officer jobs. Minimum heights usually range from 5'7" to 5'10", with weight proportional to height, which would discriminate against the shorter races and women unless height were a BFOQ.

Occupational credentials. Licenses, registrations, certifications, and the like may be required by state law, but a national survey by the Department of Labor (1969) found that exorbitant fees in some states put severe restrictions on mobility and the selection procedures used by the credential-granting authorities were typically unvalidated. Thus, any employer using occupational credentials as part of his/her selection process would be well advised to obtain a selection manual from the credential-granting authorities to determine whether their selection procedures were fair and valid. If no fairness or validity could be demonstrated, the employer should seek legal counsel to decide whether or not to suspend these requirements for initial employment until the selection procedures for the credentials were revised. It does not appear to be any defense to argue that the responsibility for the credential selection procedures rests with the credential-granting authority and therefore the employer is an innocent bystander.

Education and experience. These requirements, of course, must be validated as tests. Training and experience may be substituted for formal education, if there is evidence for doing so, but the practice of waiving education requirements for present employees on open exams if the employees are "otherwise qualified" is definitely suspect and should be discontinued unless there is research to support its use in specific situations. General education requirements (e.g., high school diploma or college degree) should also be avoided, as stipulated in the Griggs decision (U. S. Supreme Court, 1971c). A more acceptable approach is to use education requirements only when they could be considered to be obvious samples of job performance (e.g., an engineering degree for engineers, courses in bookkeeping for bookkeepers, etc.) rather than signs of job performance (e.g., high school graduation indicates high motivation) unless there is strong validity evidence to support such practices.

"Minimum" versus "desirable" requirements. Desirable requirements are sometimes used in hopes of avoiding the rigidities of minimum standards. Unfortunately, the results can be far worse. Potential job applicants often select themselves out when they see they do not meet the "desired" standard, which by definition is usually set at a higher level than one would need to do a minimum acceptable job. Furthermore, experience and training ratings have a way of turning desirable requirements into the minimum needed to pass, rather than the maximum possible score, and, in any event, there is always some point on the scale which is a functional minimum needed to pass even though it is not formally stated. Thus, there are always minimum requirements and the so-called desirable requirements only serve to limit applications--often to the detriment of the groups protected under law. The only answer seems to be set realistic minimum standards which can be defended by research evidence.

Character requirements

Every set of laws analyzed contained some provision for rejection of applicants or dismissal of employees on the basis of "bad Character" in the following areas: (1) subversive activities, (2) infamous conduct, and (3) personal problems. Legal problems can result when these requirements are phrased so vaguely as to preclude their consistent application to all persons or when they conflict with the 5th Amendment, the 14th Amendment, or the 1964 Civil Rights Act.

Prohibited subversive activities usually specify membership in groups advocating violent overthrow of the government. The 1964 Civil Rights Act does permit discrimination against Communists and any other group when national security is threatened, but civil service laws which reject applicants who have been "in any manner disloyal to the Government of the United States" or who refuse to testify on the grounds that it might tend to incriminate them face possible conflicts with the 5th and 14th Amendments.

The next category of civil service laws in this area rejects all applicants who:

1. are "guilty of infamous conduct"
2. have committed "conduct unbecoming of an employee"
3. have committed "scandalous or disgraceful conduct while on duty"
4. have evidenced "bad character, dissolute habits, or immoral conduct."

A related law denies sick leave or reemployment rights after leaves of absence due to "moral delinquency." The vagueness of these laws makes their consistent enforcement almost impossible. Great caution is advised whenever these laws are invoked.

Personal problems (e. g., drug dependency, poor credit rating, arrests, and convictions) may be discriminatory rejection criteria unless their

relationship to job performance can be demonstrated. Inconsistent application of these laws often occurs, for example, when some alcoholic employees are discharged while others are sent to treatment centers.

Nepotism

Prohibitions against more than one member of the same family working for the same organization, or for the same department within an organization, typically works against women, in which case it would violate the 1964 Civil Rights Act unless it were shown to be a business necessity.[7]

The conclusions reached by the author of this report are based on court cases from many jurisdictions, not necessarily Ohio, and many of the problems have not yet reached the Supreme Court for final determination. They are noted here, not to suggest that changes in Section 10 of Article XV of the Ohio Constitution are indicated, but only to point out the variety of problems that legislative bodies and executive agencies must consider in creating personnel systems today.

5. Political Activity, Conflict of Interests

An important part of the original concept of the civil service merit system was prohibition against political activity by government employees covered by the system. The "Hatch Act" represents the statement of "no political activity" for federal employees in the civil service system, and for state and local employees in programs supplied with federal funds, as a general rule. Many state civil service systems, including Ohio's, have a similar provision in their laws. At least one state, Louisiana, has written the prohibitions into its Constitution.

Prohibitions against political activity by public employees have come under scrutiny in recent years, however, and some have been held unconstitutional as unnecessarily restricting the rights of the employees under the equal protection and due process clauses of the federal Constitution. In 1966, Congress established a Commission on Political Activity of Government Personnel to investigate and study Federal laws which limit or discourage the participation of Federal or state officers and employees in political activity. The report of this Commission, further studies by federal and state officials, and court cases have resulted in re-examination and restatement of the rules and regulations governing what public employees can and cannot do in the realm of political activity. In this evolving field of law, it would be difficult and probably unnecessary to attempt to write into the Ohio Constitution any provisions relating to political activity by persons covered by the merit system.

Conflict of interest and ethics provisions for state or state and local officials and employees have also been written into some state constitutions. For example, the Hawaii Constitution requires financial statements to be filed by candidates for and holders of certain offices; it also permits the legislature to adopt a code of ethics for state and political subdivisions elected and appointed officers and employees. (Section 2 of Article 13 and Section 5 of Article XIV)

Collective Bargaining and Unions for Public Employees

The relationship between a civil service or merit system of public employment, an elected legislative body that traditionally has regulated the terms and conditions of employment of public employees, and organizations of such employees devoted to collective bargaining as the method of fixing terms and conditions of employment, is a difficult relationship to sort out. For constitutional purposes, it is not really necessary to analyze the various conflicts inherent in these systems, since they can be resolved by statute and by the process of administration.

Several state constitutions, however, do contain a positive statement granting public employees the right to organize and bargain collectively, or do something less than bargain collectively such as make grievances known through their own representatives. Section 2 of Article XII of the Hawaii Constitution recognizes the right of public employees to organize and bargain collectively, as prescribed by law. (Section 1 of this Article recognizes the right of private employees to organize and bargain collectively. The original Hawaii constitution only gave the right to public employees to present grievances through representatives of their own choosing, and the collective bargaining provision replaced the prior provision in 1968.)[8] Article I of the New Jersey Constitution, paragraph 19, recognizes the right of public employees to organize and to make grievances known through representatives of their own choosing. A new provision in the Pennsylvania Constitution (section 31 of Article III) provides for collectively bargaining for police and firemen.

These constitutional provisions follow the trend of the times, rather than the other way around, and such provisions tend to be obsolete before they are adopted. A constitutional provision attempting to define the subject matter of bargaining, and with whom the bargaining is to take place (how do you express the procedure for bargaining with the legislature?) would be extremely difficult to write and it, too, would be obsolete before it could be adopted. It seems desirable to leave these matters to statute and to the evolution of public employer-employees relations rather than attempt to write such provisions in the Constitution. Michigan, however, has written at least some elements of the bargaining process in the Constitution by assigning the Civil Service Commission the responsibility for fixing state employees' wages, giving the legislature only a veto power over the final results.[9]

Justification for writing a public employee collective bargaining provision into the Constitution might exist if a statute providing for the right of public employees to organize, have dues check-off, bargain through their chosen representatives, and similar matters, had been held unconstitutional. This has not happened, however, in Ohio. An ordinance of the City of Dayton permitting union dues check-off was originally held unconstitutional (Hagerman v. Dayton, 147 O.S. 313 (1947) but a subsequent statute passed by the General Assembly (Section 9.41 of the Revised Code) authorizing dues checkoff has cured the defect. The right of public employees to join unions has been upheld as a federal 1st mendment right.[10] There is much public employer-employee collective bargaining taking place in Ohio without the benefit of any state law, but the authority of the General Assembly to pass such laws if it so chooses is not generally questioned. The Ohio law forbidding strikes by public employees (the "Ferguson Act"), although not very effective in preventing strikes, has, nevertheless, not been held unconstitutional.

In commenting on employee organization and collective bargaining (both public and private) constitutional rights, and constitutional right-to-work provisions, the authors of "Con-Con - Issues for the Illinois Constitutional Convention"noted that:

"In practice the presence or absence of constitutional or other legal barriers to concerted action by public employees has neither deterred nor prevented such action, nor has the presence of constitutional provisions that broadly grant the right to organize and bargain collectively to all employees significantly enhanced their organizing efforts."[11] The Model State Constitution contains no collective bargaining provisions for either public or private employees nor right-to-work provisions.

Pension and Retirement Systems

Dr. Albert Sturm, in his "Trends in State Constitution-Making 1966-1972" notes that, in that period of time, constitutional changes included "sundry provisions for the establishment, investment, management, and use of pension and retirement funds for public employees in approximately a fifth of the states." p. 62 Perhaps typical of these provisions is one in Hawaii's Constitution, Section 2 of Article XIV, which provides that membership in a state employee retirement system is contractual with benefits not to be diminished or impaired. The objective of many of these provisions would appear to be protecting the employees' rights in a system if there is one. The new Louisiana Constitution requires the legislature to provide for the retirement of officials and employees of the state and political subdivisions, and school teachers, and guarantees the employees' benefits, but no constitutional provisions were found spelling out in detail the provisions of a retirement system.

The Ohio Constitution contains no provisions relating to retirement systems of public employees. In a commentary to a proposed section relating to pensions and retirement systems for public employees, The Texas Constitutional Revision Commission noted that some of the provisions in state constitutions were adopted because there was some doubt about the constitutionality of state retirement systems, but that such doubt no longer existed.

Conclusion

A recent issue of the Public Administration Review contains a symposium on "The Merit Principle Today" which points out the various problems and conflicts existing between modern principles of personnel administration, unions, equal employment opportunities, testing systems and principles, and the traditional civil service system. David T. Stanley of the Brookings Institution, the symposium editor, sums up the findings with "We have painted a messy picture, but that's the way it is."

Assuming a decision to retain a constitutional mandate to the legislature to provide a merit system, Ohio's Section 10 of Article XV appears to be as adequate as any, with possible consideration for expanding it to require a merit system for all political subdivisions.

Footnotes

1. Golembiewski and Cohen, editors, "People in Public Service", F. E. Peacock Publishers, Inc., Itasca, Illinois, 1970, p. 4.

2. 181 Annals 80-89, "The State Constitution of the Future".

3. Green v. Civil Service Commission, 90 Ohio St. 252 (1914).

4. Burdine, J. Alton, "Constitutional Revision - The Governor, The Administrative System, and Local Government," in 21 Texas 1. Review 500, 1943.

5. Sturm, Albert Lee, "Constitution-Making in Michigan, 1961-62", Institute of Public Administration, University of Michigan, 1963, pp. 199-201.

6. Sturm & Whitaker, "Implementing a New Constitution: The Michigan Experience" Institute of Public Administration, University of Michigan, 1958, p. 218-219.

7. Legal Aspects of Personnel Selection in the Public Service," International Personnel Management Association, Great Lakes Assessment Council, Special Report, December 27, 1972, pp. 54-56.

8. Meller, Norman, "With an Understanding Heart: Constitution Making in Hawaii", National Municipal League, State Constitutional Convention Studies Number Five, 1971.

9. Blair, Patricia, "State Legislative Control Over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees", Vanderbilt Law Review, January, 1973, p. 1.

10. McLaughlin v. Telindes, 398 F. 2d 287, 7th Cir., 1968.

11. pp. 54-55.

12. September/ October 1974 .

Ohio Constitutional Revision Commission
Elections and Suffrage Committee
October 17, 1974

Research Study No. 43

Employee Welfare
Article II
Section 34; Section 37

Two constitutional provisions governing employee welfare proposed by the 1912 Constitutional Convention will be examined in this memorandum. Article II, Section 34 and Section 37, as they appear below, have remained unchanged since approved by the voters in 1912.

> Section 34. Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power.
>
> Section 37. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political sub-division thereof, whether done by contract, or otherwise.

The provisions emerge from an era of American history when the forces of labor were not clearly defined, nor fully organized. Some workers were forced to accept labor conditions that were intolerable in order to survive. The government, committed to a policy of laissez-faire, was reluctant to adopt policies and laws regulating industry; likewise, some courts took the stance that legislation attempting to govern aspects of labor were in possible violation of the rights of liberty, contract, and private property. When the delegates to the 1912 Constitutional Convention began to discuss proposals regulating labor conditions, it was apparent that many feared that conditions had become so unbearable that strikes, shut-downs, and possible violence would follow if the state did not take some positive action regarding employee welfare.

I. Section 34

Early History

The standing committee on labor of the 1912 convention first considered the proposal by Delegate Farrell to enable the legislature to regulate hours of labor, minimum wage, and the comfort, health, and safety of employees. Article II, Section 34 is the original proposal, verbatim. The merits of the proposal were debated at length, with attention given, almost exclusively, to the minimum wage clause. The sponsor of the proposal stated that he formerly had not been an advocate of a statutory minimum wage, but had been compelled to change his position.

> "When one considers the relentless war that has been waged against the trade union movement in this country, and the war of extermination that is now going on, and, in some instances, meeting with success, in putting some unions out of business, and the general application of "black list", all for no other reason than the piling up of capitalistic profits without any regard for justice in the premises, when we see the attempts making to build up industries

on a foundation of wages too low to admit of sufficient rest and relaxation for even moderate health, we are driven to the knowledge that it is time that a decent humane effort should be made to remedy this un-American condition." (1)

The history of minimum wage legislation was sparse at the time. The first minimum wage law was adopted by New Zealand in 1894, providing for conciliation boards with authority to fix minimum wages. England adopted a similar law in 1910. Massachusetts was the first of the United States to pass such a law, in 1912, and minimum wage bills were presented to the legislatures of Minnesota and Wisconsin during the time of the convention.

Opponents of the proposal argued that a minimum wage was detrimental to employers and employees. They predicted that a legislature controlled by labor unions would promptly limit hours and establish a minimum wage. In addition to constituting a deprivation of liberty by regulating a man's earning powers, such restrictions, it was argued, would force the employer to pay the lazy and the industrious equal wages. They predicted that employers would not hire afflicted persons. (An interesting discussion of the effect of the minimum wage on the handicapped, unskilled, and other minority groups appears in "The Minimum Wage - Who Pays", Brozen and Friedman, The Free Society Association, 1966). The merits of applying a minimum wage to agriculture and domestic laborers were debated at length. Some felt the consequent rise in agricultural prices would negate any positive effects of the minimum wage.

The proponents of the measure noted the permissive nature of the proposal and felt the general assembly could apply a law to some groups and not others, as circumstances warranted (i.e. farmers, domestics).

Clearly, the reason for the constitutional provision was to give explicit power to the legislature to pass laws regulating labor conditions. Court decisions in some states indicated that such legislative power was in question. Prior to the 1912 constitutional convention, several cases dealt with the power of the state to regulate the hours of labor in private industry. The U.S. Supreme Court affirmed the right of the state to regulate labor in dangerous employments in Holden v. Hardy, 169 U.S. 366 (1898), by sustaining a Utah statute limiting hours of mine workers. In 1899, the Colorado Supreme Court nullified a similar statute in In re Morgan, 26 Colo. 415 (1899). Through 1915, 10 statutes regulating the hours of labor for women and children were sustained and three statutes were declared unconstitutional. (An extensive listing of the decisions appears in "Hours of Labor and Realism" by Felix Frankfurter, 29 Harvard Law Review 353.) The willingness of the courts to accept the right of the state to legislate regarding labor conditions in private employment appears related to the type of industry involved. Courts seemed in favor of statutes regulating dangerous employments and employment of women and children. But in 1905, the New York Supreme Court invalidated a 10-hour law for bakers, in Lochner v. New York, 198 U.S. 45. One justice noted that "to the common understanding the trade of baker has never been regarded as an unhealthy one". The court held the statute an arbitrary restriction of liberty not related to the public welfare, and intolerable to the 14th amendment to the U.S. Constitution. (Recent decisions have been able to make use of more scientific evidence than "the common understanding" in determining dangerous employment conditions.)

Constitutionality of Minimum Wage Legislation - Federal Court Decisions

Much of the debate about the constitutionality of minimum wage legislation revolved around whether such laws interfered with due process and the rights of contract. Originally, state courts upheld minimum wage statutes, especially for

women, until 1923, when the United States Supreme Court handed down its decision in Adkins v. Children's Hospital, 261 U.S. 525, 67 L. ed. 785, 43 S. Ct. 394 (1923). The Court invalidated an act of Congress authorizing a minimum wage for women in Washington, D.C. The act was thought to be repugnant to the provision of the Fifth Amendment prohibiting taking of liberty and private property without due process of law. Thereafter, there continued a trend of state courts invalidating minimum wage laws which ended when the Adkins decision was overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. ed. 703, 57 S.Ct. 578, 108 ALR 1330 (1937) which held that a Washington statute based upon a wage sufficient to maintain women in health was valid. The constitutional attack was based on a violation of the freedom of contract, but the Court held that the freedom of contract is a qualified and not an absolute right. The Court also mentioned several economic considerations regarding the class of women workers, such as their lack of collective bargaining powers, and the effect of their unemployment on industry. Although the Court did not appear to base its decision on these economic considerations, the fact that they were mentioned is interpreted by some to be of prime importance. A law review article "Wage and Hour Legislation in the Courts" in 5 Geo. Wash. Law Review 865, sets forth the import of these considerations.

> "The importance of the case lies not alone in its value as a precedent or principle-establishing decision but also in the step it takes toward the recognition of the use of the police power of a state to reach a definite economic goal..."(2)

> "While it (Parrish) emphasizes the importance to society of its women workers and their well-being and health, and perhaps places the decision of the case on this ground, the opinion specifically provides another ground for decision in that it recognizes that industry, the economic condition of the workers, and the effect of unemployment on the state and society at large are of sufficient concern and so intimately tied with general welfare that the state's police power may reach out to correct evils therein." (3)

The U.S. Supreme Court said, in U.S. v. Darby, 32 U.S. 100, 85 L. ed. 609, 61 S. Ct. 451 (1941)

> "Since our decision in West Coast Hotel v. Parrish, 300 U.S. 379, 81 L. ed. 703, 57 S. Ct. 578, 107 ALR 1330, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment."

Constitutionality of Section 34 - Ohio Decisions

The first minimum wage legislation was enacted in 1933 by the 90th General Assembly. General Code 154-45d to 154-45t provided minimum wage standards for women and minors. The law did not itself establish a minimum wage, but it permitted an actual minimum wage to be established by administrative action. The 1933 legislation remained the prevailing minimum wage legislation until repealed in 1973 and replaced by a new law.

The constitutionality of the minimum wage law was upheld by the Ohio Courts in Walker v. Chapman, DC Ohio, 17 F. Supp. 308 (1936). The court noted that the constitutionality of the law rested on the requirement of the law for the payment of a "fair wage" which was defined as "a wage fairly and reasonably commensurate with the value of the service or class of service rendered," whereas in the Adkins case, the decision was based on minimum wage requirements of a sum sufficient to ensure

employees "subsistence, health and morals". The court noted that if the Ohio law were indistinguishable from the law at issue in Adkins, the court would have had no choice but to declare the Ohio law unconstitutional. In fact, however, the two laws were distinguishable, and the Ohio law offered a measurable standard.

Sections 154-45d through 154-45t of the General Code were declared valid in Strain v. Southerton, 148 Ohio St. 153, 74 N.E. 2d 69, (1947). In that case, a challenge was made to the right of the General Assembly to delegate, under law, authority to an administrative agency to investigate and determine minimum wage policy, the party pleading that this delegation violated Article II, Section 26 of the Ohio Constitution: "All laws, of a general nature, shall have a uniform operation throughout the State, nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General assembly, except, as otherwise provided in this constitution." In that case, the Court said:

> "Ohio Constitution, Article II, Section 26 inhibits General Assembly from delegating its power to make a law, but that body may properly enact a law conferring authority or discretion on a designated governmental authority to carry provisions of such law into execution and granting such agency power to inquire into and determine facts under rules of its own creation which conform to standards and policy contained in law."

Current Laws

Chapter 4111. of the Ohio Revised Code, entirely rewritten by the 110th General Assembly, defines the minimum fair wage standards and related regulations. All employers and employees are governed by the minimum wage laws set forth in this chapter, except for these persons: federal employees; baby-sitters and live-in companions who are not housekeepers; outside salesmen compensated by commission or in a bona fide executive, administrative or professional capacity; agricultural employees working for an employer who during any calendar quarter of the preceding calendar year did not use more than five hundred man-hours of labor, of an agricultural employee working for a member of his immediate family; persons doing charitable service; students employed part-time by political subdivisions; member of police or fire protection agency; employees of non-profit camp or recreational area for children under eighteen.

State, county and municipal employees were formerly exempted from the minimum wage laws, (138 OAG 2979) but are included under the current statutes. Many state and local employees and public institutional employees are covered by the federal minimum wage law now, as well.

Minimum wage rates have changed over the years, and the newly revised sections fix the minimum wage in the statutes at $1.60 per hour, except that employers employing persons in counties of less than three hundred thousand population may pay employees an amount equal to $1.40 per hour until January 1, 1975. Persons who are classified as "learners", during the first 90 days of their employment, and some agricultural workers who are paid on a piece-work basis, may earn less than minimum wage according to the law. The significant change in the new law is that the minimum wage rate is fixed in the law as opposed to the former law which just granted the authority to an administrative agency to convene a board to fix wages for a particular industry under specific conditions.

Other chapters of the Revised Code regarding employment of minors (Chapter 4109); Division of Workshops and Factories (Chapter 4107); Division of Elevator

Inspection (Chapter 4105); Division of Boiler Inspection (Chapter 4104) appear, in a tangential way, to have emerged from the legislature's authority, by virtue of Article II, Section 34, as well as Article II, Section 35 (examined in another memorandum) to regulate safety and other conditions of employment by law.

Conclusion

Section 34 is a statement of the policy of the state of commitment to regulate labor conditions for the welfare of the citizens. Some constitutional revisionists argue that when a policy is deeply imbedded, there is no longer any need for constitutional support of the policy. On the other hand, revision must be approved by the voters, who might be reluctant to delete the specific references from the Constitution.

At the time the section was drafted, there was debate over two questions: whether such regulations interfered with other constitutional rights; and whether it was possible to implement minimum wage legislation so that it would be beneficial rather than harmful to both skilled and unskilled labor.

Regarding the first question, the courts have upheld the right of the state to regulate labor to sustain the welfare of its citizens. Secondly, the desirability of minimum wage legislation is still being debated today, and there are some who feel that such laws work to the detriment of a large sector of the labor class. In spite of this, however, minimum wage legislation has been operative, as have other laws regulating labor in the state, for a number of years, and the fears of the delegates in 1912 for farmers and domestic workers appear to have been resolved in the present laws. It is significant to note that the language of Section 34 is permissive - should the legislature desire to implement legislation, it has the power. Our research has not uncovered problems which appear to emanate from the constitutional language of Section 34.

II. Section 37

Early History

Proposal No. 209 (now Section 37) to regulate the hours of employment on public works, was commented upon by its author, Delegate Tetlow, as follows:

> "it is quite evident that we desire this proposition to become a constitutional provision to safeguard this right, and to circumvent the decisions rendered by the courts of this state." (4)

Mr. Tetlow refers to the case of City of Cleveland v. Clements Bros. Construction Co., 67 O.S. 197 (1902), in which the Supreme Court of Ohio declared null and void an act limiting the hours on public works. In that case, the city of Cleveland withheld money from a contractor because the contractor let his men work more than eight hours per day, in times when no emergency existed, which action was contrary to an Act of 1900 (94 Ohio Laws 357) limiting the service of all laborers, workmen and mechanics on public works for the state or a subdivision by contract or otherwise to eight hours a day. The law required contracts to contain a provision stipulating that, under penalty of law, not more than eight hours of labor may be permitted or required, The plaintiff claimed that being a mere subdivision of the state, the legislature may stipulate what contracts it may make and what provisions the contracts shall contain. The Supreme Court responded:

"The fallacy of this contention lies in the assumption that the compulsory authority of the legislature over municipal corporations is so absolute and arbitrary that it may dictate the specific terms upon which such municipality shall contract, and may prescribe what stipulations and conditions its contracts shall contain, although such contracts may, as in this case, relate only to matters of purely local improvement. This is a misapprehension of the legislative authority, for no such right or power has been delegated to, or is possessed by, the general assembly." (p. 211)

The court held the statute unconstitutional, noting that it violates and abridges the right of parties to contract; invades rights of liberty and property; and denies to contractors, subcontractors and municipalities the right to agree with employers on terms and conditions of contracts.

In an earlier case, Bramley v. Norton, 5 ONP 183 (1897), a Cleveland city ordinance prescribing a minimum wage of $1.50 per day and a maximum of eight hours on public works and improvements was declared unconstitutional, violating Section 19 of Article I of the Ohio Constitution and Section 1 of the 14th Amendment to the U.S. Constitution.

Mr. Tetlow observed that at the time of the convention, eight states had adopted constitutional and statutory provisions regulating the hours of labor on public works, and that a federal court had declared in a Kansas case, similar to the circumstances in Clements Bros. Construction Co., that the state had the right, under its police power, to regulate the hours of labor for workmen engaged on public works. In that case, Atkins v. Kansas, 191 U.S. 207 (1903), the court's reasoning appeared to finally resolve the question of the state's power in this regard, for all future questions.

"It is within the power of a state, as guardian and trustee for its people and having full control of its affairs, to prescribe the conditions upon which it will permit public work to be done on behalf of itself or its municipalities.

In the exercise of these powers it (the state) may by statute provide that eight hours shall constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities and making it unlawful for any one thereafter contracting to do any public work to require or permit any laborer to work longer than eight hours per day except under certain specified wages. And one who after the enactment of such a statute contracts for such public work is not by reason of its provisions deprived of his liberty or his property without due process of law nor denied the equal protection of the laws within the meaning of the Fourteenth Amendment even where it appears that the current rate of wages is based on private work where ten hours constitute a day's work or that the work in excess of eight hours per day is not dangerous to the health of the laborers." (p. 207)

The proposal considered by the standing committee on labor read as follows:

Proposal No. 209. Not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, on the construction, replacement, alteration, repair, maintenance and operation of all public works, buildings, plants, machinery at which laborers, workmen and mechanics are employed, carried on or aided by the state or any political subdivision thereof, whether done by contract or otherwise, except in cases of extraordinary emergency.

In the debate, the view was offered that the subject matter of Proposal No. 209 was

already covered by Proposal No. 122, which was adopted by the committee earlier, since the legislature was thereby authorized to regulate labor for both public and private industry. The proponents of the measure regulating the hours of public work feared that the proposal adopted earlier might not pass, due to the minimum wage clause, and wanted to protect themselves, by getting this more specific proposal adopted. The consensus of the convention appeared to be that if Proposal No. 122 passed, Proposal No. 209 should become null and void, if it, too, passed. A suggestion was made that the two proposals be combined, if the committee on arrangement and phraseology felt that was necessary. The language recommended by the committee on arrangement and phraseology was substantially different from what the committee on labor proposed. The committee on arrangement and phraseology proposed:

> "Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for laborers engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

The revised proposal was not debated, except that a recommendation was made to change the word "laborers" to "workmen", and that recommendation was approved. The proposal was approved by the convention, adopted by the voters, and is now Section 37.

Among the earliest cases relating to this section was Stang v. City of Cleveland, 94 Ohio St. 377 (1916). The court held that Section 37 of Article II

> "...Was not self-executing within the definition that a self-executing provision is one which supplies the rule or means by which the right given may be enforced or protected or by which a duty enjoined may be performed. But nevertheless, after the adoption of that provision in the constitution, the legislature was without power to affirmatively make lawful a working day of more than eight hours." (p. 380)

Pursuant to the requirements of Section 37 of Article II, adopted in 1912, the General Assembly in 1919 adopted General Code Section 17-1:

> "Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or direct and control the services of such workmen, to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall be construed not to include policemen and firemen."

The section was amended in 1941, adding after "firemen", "in cities and villages and policemen in villages."

In 1925, the Director of Public Service in Akron was charged with unlawfully requiring and permitting a laborer to work on the operation of a waterworks plant more than forty-eight hours during a week when no emergency existed. In State v. Peters, 112 O.S. 249, the Court found that the original and final versions of the 1912 constitutional convention with respect to Section 37 differed regarding construction and maintenance of a public utility.

The original proposal (No. 209) was deemed to be much broader in coverage, and the Court held the view that the language as adopted should not be broadened beyond the natural import of the language.

> "Section 17-1 General Code, has no application to the employment of labor by a municipality. The expression "workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise, relates to the construction of public improvements and not to their maintenance or operation." (5)

Clements v. Sherwood, 70 Ohio App. 266 (1942) held that persons employed in the operation of state institutions were not under Article II, Section 37 and General Code 17-1, which apply only to construction.

Current legislative action

Section 4115.01 of the Revised Code (formerly GC 17-1) implemented the constitutional provisions of Article II, Section 37, limiting the hours of labor on public works and later excluding policemen in villages and firemen in cities and villages from its restriction. The section was repealed in 1969 by House Bill 436. The reason for the repeal is given as follows:

> "Repeal of working hours specifications. The bill repeals section 4115.01 which provides that, except in extraordinary emergencies, eight hours constitutes a work day and forty-eight hours a work week for persons employed on any public work carried on or aided by the state or any political subdivision. The stated purpose of this change is to allow working hours more in accord with current practices in the construction industry." (6)

After the repeal of section 4115.01, no new law was passed implementing the provisions of Article II, Section 37. The Ohio Supreme Court, in Stang v. Cleveland, 94 Ohio St. 377 (1916) said that Section 37 of Article II is not self-executing and was not carried into effect until the adoption of G.C. 17-1 (R.C. 4115.01). The Court added, however, that the legislature did not have the power to make lawful a working day of more than eight hours after the adoption of Article II, Section 37. By virtue of the Stang decision and the repeal of section 4115.01, the constitutional section is inoperative at the present time. Section 37 refers to a six-day work week and was incompatible with the hours of construction workers. In addition, there is some ambiguity in the language "not to exceed eight hours shall constitute a day's work..." and as to whether that provision actually limits the work day to eight hours. The legislature, realizing the inherent difficulties in Section 37, and noting that the section would be ineffective without further statutory implementation, chose to resolve the problem by repealing the law and rendering the section inoperative.

Conclusion

There appear to be several good reasons for repealing Article II, Section 37. The proponents of the section, in 1912, clearly believed that section 37 granted no additional power than was permitted the legislature by the adoption of Article II, Section 34. Judicial interpretation has limited the application of the section to construction of public works and held that it does not apply to maintenance and operation of them, as was anticipated by the committee on labor at the convention. More recently, the repeal of the state implementing the constitutional provision reflected the attitude of legislatures and members of industry alike that the provisions of Article II, Section 37 were not desirable.

If the constitutional language were repealed, what might happen if the legislature desired at some future time to adopt legislation limiting the hours of labor on public works? It would appear that absent the specific constitutional grant of authority in Section 37, the legislature would still be recognized as having the power to regulate hours of labor on public works, particularly if Section 34 is retained. Both state and federal court decisions have upheld the right of the state to make such regulations, and have denied that these regulations intefere with the right of contract in a manner intolerable to the constitution.

FOOTNOTES

1. Ohio Constitutional Convention of 1912; Proceedings and Debates. page 1328.

2. "Wage and Hour Legislation in Courts", George Washington Law Review, Volume 5 page 865.

3. op. cit., "Wage and Hour Legislation in Courts". page 877..

4. op. cit., Debates, p. 1339.

5. State v. Peters, 112 O.S. 249 (1925).

6. Legislative Service Commission Analysis, Sub. H.B. 436 (1969).

APPENDIX

Constitutional Provisions - Other States

Hours of Labor

Arizona - No child under 16 shall be employed for more than eight hours a day. (XVIII, 2)

Louisiana - For women and girls not engaged in agriculture or domestic employment, the legislature or a commission may regulate hours. (IV, 7)

Michigan - The General Assembly may enact laws regulating the hours and conditions of employment. (IV, 49)

Colorado - Legislature to provide for period of employment not to exceed 8 hours in 24 (except in emergencies where life or property in imminent danger) for persons employed in mines, blast furnaces, smelters or other branches of industry or labor that legislature may consider dangerous. (V, 25a)

Montana - Eight hours to constitute a day's work in all employment except farming and stock raising, legislature may reduce hours constituting a day's work but denied the power to increase hours. (XVIII, 4)

Oklahoma - Except in emergencies, 8 hours constitute a day's work in underground mines. (XXIII, 4)

Wyoming - Eight hours constitute a day's work in mines. (XIX, 1)

Hours of Labor on Public Works

Arizona - Eight hours to constitute lawful day's work in employment by state or subdivision. (XVIII, 1)

California - Eight hours to constitute day's work, not more than 48 hours a week's work on all public works. Legislature to provide that stipulation be inserted on all contracts for public works. (XX, 17)

Idaho - Eight hours constitute day's work on state and municipal works. (XIII)

New Mexico - Eight hours constitute day's work on state, county, and municipal works. (XX, 19)

Minimum Wage

California - General Assembly may provide for women and minors. No provision of the constitution may be construed as a limitation on the power of the general assembly to appoint a commission to carry out the provisions of the section. (XX, 17½)

Kentucky - Mandate to general assembly to provide minimum wage for children employed in places dangerous to life, health, or injurious to morals. (Sec. 243)

Nebraska - Permits legislature to provide minimum wage for women and children. (XV, 8)

Utah - Permits legislature to regulate minimum wage for women and minors. (XVI, 8)

Ohio Constitutional Revision Commission
What's Left Committee
June 11, 1975

Article II, Section 33
Mechanics' Liens

Section 33. Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men, their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished material. No other provision of this constitution shall impair or limit this power.

Section 33 of Article II was added to the Ohio Constitution in 1912 as one of the amendments proposed by the Convention, and has not been amended.

Background of Section

A "mechanic's lien" briefly, is the right of a person who furnishes labor or materials for the construction or repair of a structure to assert his claim for payment against the structure and real estate itself. Legally, it has been defined as "a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon." (Van Stone v. Stillwell & Bierce Mfg. Co., 142 U.S. 128, 1891).

Unlike the lien of an artisan or mechanic on personal property upon which he has labored, a common law lien did not exist against real estate and structures on real estate to benefit a laborer or supplier of material. The lien is entirely dependent on the existence of a statute giving the right to a lien and setting forth the terms and conditions under which it can be obtained and the rights of the owners of the real estate to protect themselves against the lien.

Originally, statutes were enacted granting the right to a lien to laborers or suppliers who contracted directly with the owner. Since the lien depended on a contract, if a general contractor intervened between the owner and those actually supplying the labor or materials under a subcontract, the lien served only to protect the contractor against a defaulting owner. In 1894, the Ohio statute was amended to extend the benefits to subcontractors, laborers, and materials suppliers who were not privy to the contract with the owner.

In 1896, the Ohio statute was held unconstitutional by the Ohio Supreme Court. In Palmer and Crawford v. Tingle, 55 Ohio St. 423, and its companion case, Young v. The Lion Hardware Co., a general contractor had been paid in full by the owner but had failed to pay some of the suppliers of materials, who, following the procedures in the statute and within the time limits imposed by the statute, filed liens against the property. The Supreme Court held that the statute was unconstitutional as violating Section 1 of Article I of the Ohio Constitution because it interfered with the owner's right to contract freely, and the restraint upon that right imposed by the statute was not for the common benefit. The owner, according to the Court, did not have an adequate opportunity to protect himself against such liens; both of the methods of protection offered by the statute- waiting four months (the time within which liens could be filed) to pay the contractor or requiring the contractor to file a bond against such claims - could increase the owner's costs under the contract.

The Ohio statute was also tested in Federal courts, with a finding that it was not unconstitutional; however, the Federal courts, including the Supreme Court, recognized the right of the state court to construe the state Constitution (Jones v. Great Southern Fireproof Hotel Co., 86 F. 370, 193 U.S. 532, 24 S. Ct. 576, 48 L. Ed. 778 (1904).

When the 1912 Constitutional Convention convened, proposal No. 166 was introduced by Delegate Stilwell to add to the Constitution a provision which would make the statute constitutional. It is not clear from the debates whether the original proposal actually provided for the lien or merely authorized the General Assembly to do so, but the proposal as recommended by the Judiciary and Bill of Rights Committee, to which it was referred, is nearly identical to the section as finally adopted, and authorizes the General Assembly to pass laws to secure the lien. The only substantive difference is the omission of "subcontractor" from the committee language, and that word was added in the course of floor debate.

Some delegates objected to the inclusion in the Constitution of a provision for the benefit of one class of workers doing business in the state while not making similar provisions for farmers, but the proposal did not encounter serious opposition and was adopted by the convention by a vote of 103 to 6.

The General Assembly responded promptly, after adoption of the amendment by the people, by enacting a new mechanics lien law, now Chapter 1311. of the Revised Code. Although the law is quite detailed, and many cases have been litigated around its provisions, few constitutional questions have arisen. One case (Metropolitan Securities Co. v. Orlow et al., 107 Ohio St. 583, 1923) determined that Section 33 refers to a lien on real estate, although not specified, and that personal property liens are not dependent on Section 33 for validity. In another case, Voytko v. Bunting, 122 Ohio St. 552, 1930, the Court decided that the lien must attach to the property on which the labor was performed or for which materials were furnished and could not attach to other property owned by the same owner.

Problems

No problems with Section 33 have been noted in any of the materials or cases consulted. It might be questioned whether the section is necessary today as the underpinning of the mechanics lien law, but there is no assurance that the Ohio courts, in spite of the contrary federal decision, would reverse the Palmer decision if the question were presented and if the constitutional provision did not exist.

Ohio Constitutional Revision Commission
What's Left Committee
June 23, 1975

Article II, Section 41
Prison Labor

One of the provisions not yet examined by the Commission is Section 41 of Article II, having to do with the employment of prisoners in penal institutions, contracts for convict labor, disposition of prison made goods to the state or subdivisions and public institutions, and the conspicuous marking of goods as "prison made." It was adopted by the Constitutional Convention of 1912 with the combined backing of the burgeoning force of organized labor and manufacturers affected by competition with goods produced by cheap convict labor. Specifically the section provides as follows:

Article II

Section 41. Abolishing prison contract labor.
Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked "prison made." Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political subdivision thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof.

The social and economic concerns which Section 41 addressed are the subject of extensive discussion and debate on the section as proposed in the recorded Proceedings and Debates of that convention. As its unofficial title suggests the section was primarily intended to abolish the practice of letting contracts for convict labor to private industry. Statutory authority for letting such contracts had been adopted in 1863.[1] An act relating to the penitentiary permitted the warden and directors to "enter into contracts for working the convicts, upon such branches of business as in their judgment will best subserve the interests of the State and tend to promote the welfare of the prisoners." It limited any one contract to 50 convicts and five years.

As amended in 1867 the penitentiary law permitted the penitentiary's director "to let or hire the labor of the convicts upon such branches of business and for the manufacture of such articles as, in their judgment, will best . . . subserve the interests of the state . . ."[2]

The emphasis was changed by a further amendment in that year which stated: "In order to provide for hard labor by each convict according to his sentence, the directors are hereby authorized and required to let and hire the labor of the convicts upon such branches of business and for the manufacture of such articles as,

in their judgment, will best accomplish that end and subserve the interests of the state . . ."[3]

Although the contract system of employing penitentiary convicts was abolished in 1884 and prisoners were to be "employed by the State and in such way as to in the least possible manner interfere with or affect free labor,"[4] this enactment did not end the practice. An amendment adopted February 27, 1885[5] allowed direct employment by the state "whenever the legislature shall provide means or the necessary outlay" and provided further for employment of prisoners by agreement with manufacturers and others to furnish machinery and materials for the employment of the prisoners under the direction and control of the penitentiary managers "on the piece or process plan." Under this program bids were to be made for the product of such labor on the piece or process plan. This act also allowed institutional managers to arrange with the employer of prisoners under its provisions to pay for the labor of such number of laborers necessary to the conduct of the general business whenever employed in connection with larger numbers of other prisoners working by the piece or process plan.

Finally in 1906 the legislature adopted an act "to prohibit competition of prison labor with free labor and to provide for the employment of prisoners . . . for the repair and construction of public roads."[6] Section 1 of that enactment prohibited managers of both the penitentiary and reformatory from making any contract "by which the labor or time of any prisoner . . . or the product or profit of his work shall be contracted, let, farmed out, given or sold to any person, firm, association or corporation . . ."

Purposes for Section 41

Recorded debates of the 1912 Convention disclose that several interests were considered in the formulation of a constitutional proposal covering convict labor. The view espoused by organized labor and expressed by some delegates urged that prison contract labor be prohibited in order to eliminate inequitable competition with free labor, to curtail excessive profits on the part of contractors or convict labor, and to end peonage--the renting of men out to other men. Some proponents of the proposal viewed it as one to assure humane and effective correctional practices by giving prisoners work. Still others pointed out that the required use of prison labor on roads and in agriculture would make penal institutions as self-sustaining as possible.

Spokesmen for business interests pointed out that statutory controls had proven ineffective and that some manufacturers had practically been driven out of business by the competition of goods made by cheap convict labor. The requirement that goods be marked "prison made" was intended to further reduce competition between goods produced by free and convict labor. On the assumption that a ban on the sale of goods produced by convict labor from other states would be unconstitutional, the marking requirement reflected a view that goods so marked would be less desirable to prospective purchasers. Abuse and misuse of prison labor were noted as was concern about elimimating state competition in the consumer market through restriction of the outlets for prison produced goods to institutions owned or controlled by the state.

In opposition to a constitutional provision the position was advanced that Section 41 was purely statutory in character and that because of differences in opinion about what ought to be done with convict labor the matter should not be put in the Constitution. However, enactments in 1884 and in 1906 had provided for the abolition of contract prison labor, but they were viewed as having been ineffective. Some said this was so because they were limited to the contracting of labor in the penitentiary and reformatories and did not extend to workhouses and other penal institutions. Others claimed that statutes for state employment were not implemented with adequate funding and that the prohibition was simply not observed. Still others

maintained that the prohibition against competition with free labor and against peonage ought to be in the fundamental law because it defines policy and should not be easily revoked.

Objections were raised about the inconsistency of having a prohibition against work whereby the product of such work could be sold and the requirement that goods for sale be marked "prison made." The marking provision, explained its drafters, was so worded as to apply to goods manufactured outside the state and sold in Ohio, without unconstitutionally conflicting with interstate commerce. An exception was added by amendment on selling "prison made" goods made in Ohio for "those disposed of to the state or any political subdivision thereof or to any public institution owner, managed or controlled by the state or any political sub-division thereof." It was adopted on final reading so as to permit interchange of goods between state institutions and so that university bulletins printed in the reformatory for distribution generally need not bear a prison made label.

Prison Contract Labor

Several attempts have been made in recent years to amend the language that abolishes prison contract labor. Specifically that portion of Section 41 reads:

> "and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away."

Amendment has been proposed to eliminate any possible constitutional impediment to the passage of laws setting up "work release" programs. Under such programs selected inmates of penal institutions are permitted to leave such institutions unescorted during the day for purposes of employment under a kind of day parole system, returning to the institution at night. The idea was developed in Wisconsin in 1913 and implemented under the Huber law, named after its originator.

In 1967 and in 1969 joint resolutions were adopted in the Ohio House of Representatives proposing amendment of Section 41 that would have expressly permitted employment outside the penal institution of persons sentenced to a jail or workhouse for one year or less and would have given the General Assembly specific power to pass laws to that effect. House Joint Resolution No. 44 of the 107th General Assembly and House Joint Resolution No. 12 of the 108th General Assembly would have put such a change before the electorate. Both were indefinitely postponed by the Senate.

Advocates of work release have claimed that such programs (1) prevent a prisoner's family from depending on the public welfare system because of job loss; (2) cut costs of keeping a person in an institution because the prisoner pays part of them; and (3) contribute to the rehabilitation of the prisoner by easing his path back into society.

Proponents of the constitutional amendment contended that in Ohio a law establishing a work release program would be constitutional even if no amendment to

Section 41 were made. The amendment in the two joint resolutions cited was proposed, they said, to avoid any possible challenge. It was argued that the purposes of Section 41 were (1) to prohibit abuse and misuse of prison labor that resulted from the practice of letting contracts to private enterprises for working convicts, and (2) to eliminate state competition in the consumer market. Marking goods "prison made," it was assumed, made them less desirable to purchasers. Advocates claimed that Section 41 should not be permitted to hamper progress in the field of corrections.

About eight states have constitutional prohibitions against contracting out prison labor. In their annotation and analysis of a comparable provision in the Illinois Constitution George D. Braden and Rubin G. Cohn point out: "Although this sort of provision should never have gone into the Constitution and is clearly unnecessary now, it is just the sort of provision that probably cannot safely be taken out.[7]

Present Status of Work Release

In 1969 legislation was passed permitting the establishment of work release programs by the common pleas courts, in conjunction with all other courts in the county or separately where agreement cannot be reached. The authority is limited to prisoners under suspendable sentences in a county or city jail or workhouse and requires approval of the sentencing judges. Under Revised Code Section 5147.28, as enacted by that legislation, the court is prohibited from assigning a prisoner to work in an establishment where a legally constituted strike is in progress. The remuneration and hours and conditions of work of participating prisoners must be substantially equal to those prevailing for similar work in the locality.

This authority to use a system of work release programs does not extend to prisoners in the state penal institutions. In 1971 it was the position of the then Commissioner of the Division of Correction in a communication to the Commission staff that Section 41 should be revised "in order to permit 'work release or work furlough,' which has proven to be effective elsewhere in the nation." He wrote "If its version can emphasize the rehabilitative role in insuring skilled training and stable, meaningful employment rather than cheap convict labor for exploitation which the present section guards against we feel that it would be more compatible for all concerned."

In 1972, after the Commissioner's letter was sent to the Commission, another piece of legislation was passed that enacted Section 2967.26 of the Revised Code. That section allows the Adult Parole Authority to grant furloughs "to trustworthy prisoners confined in any state penal or reformatory institution for the purpose of employment . . ." and for educational and vocational programs designated by the Commissioner of the Division of Correction. The furlough requires confinement when not working or engaged in an approved program in a suitable facility designated by the authority. The state Parole Authority is authorized to enter into agreements with agencies or political subdivisions to provide for housing, supervision, and other services which may be required to prisoners on furlough. It must adopt rules and regulations for granting furloughs, supervising prisoners on furlough, and administering the furlough program. Such rules and regulations must provide that no prisoner is eligible who has served less than one-third of the period required to be served before parole eligibility.

It appears that to some extent at least the Commissioner's goal has been realized.

State work release programs are the subject of increasing comment in journals reporting developments in the field of corrections. According to a 1967 study conducted by the Florida Division of Corrections the rapid expansion of work release programs during recent years is expected to continue. A trend is noted in its report toward extending work release programs, which traditionally have applied to local, short term offenders, to state and federal prisoners. The potential of work release, according to one authority, "is an alternative for those who need closer supervision and support than possible under probation, but are not considered grave threats to the community."[8]

The Commission may wish to hear the testimony of corrections personnel to determine whether Section 41 has deterred the development of successful programs for work release or work furlough. No reported challenges to the 1969 and 1972 legislation have been found.

Disposition of Prison Made Goods

A further suggestion concerning Section 41 has to do with its restriction on the use and sale of prison made goods to the state, political subdivisions, and public institutions. The former Commissioner of the Ohio Division of Corrections proposed amending Section 41 to allow the sale of such goods to tax exempt organizations as well. He explained: "With this revision we could develop full and meaningful production in our industries, increase inmate compensation above a few pennies a day to a scale capable of creating incentive without using funds of the hard pressed general revenue resource. This could be implemented without greatly increasing the ire of either private industry or labor unions."

Since 1912 Ohio has undergone tremendous population growth, and vast industrialization, urbanization and technological developments have occurred. Section 41 was promulgated in an era when prison facilities for prisoner employment were wanting and when regulations as to wages and conditions of employment were inadequate. From a penal population of 142 in 1826 the state's average penal population had increased to approximately 9610 by 1970.

The Commission may wish to consider revision of Section 41 in the light of changed conditions and attitudes toward prison made goods. A more flexible solution may lie in statutory regulation of prisoner labor. For example, Section 5147.23 of the Revised Code provides: "The total number of prisoners and inmates employed at one time in the penitentiary, workhouses, and reformatories in the manufacture of any one kind of goods which are manufactured in this state outside such penitentiary, workhouses, and reformatories, shall not exceed ten per cent of the total number of persons in this state outside such penitentiary, workhouses, and reformatories employed in the manufacturing the same kind of goods, as shown by the last federal census or state enumeration, or by the annual or special report of the chief of the division of labor statistics. This section does not apply to industries in which not more than fifty nonconvict laborers are employed."

FOOTNOTES

1 60 Ohio Laws 29 (Mar. 24, 1863).

2 64 Ohio Laws 91 (Apr. 1, 1867).

3 64 Ohio Laws 253 (Apr. 17, 1867).

4 81 Ohio Laws 72 (Mar. 24, 1884).

5 82 Ohio Laws 60 (February 27, 1885) .

6 98 Ohio Laws 177 (Apr. 14, 1906).

7 Braden and Cohen, The Illinois Constitution, an Annotated and Comparative Analysis (prepared by the Illinois Constitution Study Commission 1969) 579 .

8 Lawrence S. Root, "State Work Release Programs: An Analysis of Operational Policies," 37 Fed. Prob. 52 (Dec., 1973).

Ohio Constitutional Revision Commission
July 21, 1975
What's Left Committee

MILITIA--Article IX

Every state constitution contains a provision dealing with the military, usually providing that the Governor is Commander-in-Chief of the military forces of the state, and many contain very extensive provisions. Article IX of the Ohio Constitution contains four sections which deal with the militia, reading as follows:

1. Who shall perform military duty

   All citizens, residents of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law. (Eff. 11-7-61, am. 11-3-53)

2. Appointment of officers

   The governor shall appoint the adjutant general, and such other officers and warrant officers, as may be provided for by law. (Eff. 11-7-61)

3. Governor to call militia

   The governor shall have the power to call forth the militia, to execute the laws of the state, to suppress insurrection, to repel invasion, and to act in the event of a disaster within the state. (Eff. 11-7-61)

4. Public Arms

   The General Assembly shall provide, by law, for the protection and safekeeping of the public arms.

Previous to 1953, the article consisted of five sections. Section 2, dealing with the officers of the militia that were to be elected, was repealed at that time. Also, until 1953, Section 1 of Article IX referred to "all white males" instead of citizens. "White" was removed by constitutional amendment in 1953, and the word "males" was changed to "citizens" in 1961, in order to recognize the role of women, such as nurses and members of the various women's auxiliaries, in the armed forces. Other changes by constitutional amendment in 1961 brought the lower age limit for military service into conformity with federal law, and increased the upper age limit so as to permit the use of retired regular army officers in the Ohio Defense Corps, as requested of the General Assembly by the Office of the Adjutant General.

Article III, Section 10, of the Ohio Constitution provides for the Governor's

powers and duties in relationship to the military, as follows:

> 10. He shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the U.S.

This section dates to 1851, as did the sections of the militia article prior to the amendments of 1953 and 1961. Article IX of the 1851 Constitution was thus much more detailed, particularly in regard to the officers of the militia that were to be elected, and by whom, and in regard to the appointment of officers by the governor. Section 1 of Article IX, originally stipulating that only white males could serve in the militia, sparked debate at the 1851 Convention on the part of those interested at that time in promoting equal rights for all races. Up until 1953, the only actual change that was proposed regarding the article on the militia was to include a clause in Section 1 providing for exemption from service because of conscientious scruples, with a payment into the school fund in lieu of service, which was proposed by the 1874 Convention, the product of which was not passed. Other debate at the 1874 and 1912 Conventions on the article concerning the militia dealt again mainly with the inclusion of the word "white" in the article, but the stipulation remained until 1953.

Extensive provisions on the military in state constitutions date to the times when states were responsible for the home defense because the national government did not assume full responsibility for defense because of the fears concerning a standing army. The provision in Section 1 of the Article, providing that all citizens are subject to enrollment in the militia would seem particularly to date to the fundamental principle in the organization of this country and the writing of state constitutions to make sure that the State would be prepared, through its militia, to defend itself against attack. The provision dates to the traditional concept of citizen service in the militia, with every man (now citizen--in earlier history, only men had the privileges and duties of citizenship) being responsible for the defense of the state. This concept was especially prominent at the time before a system of national defense was developed in the United States, and even with the development of a system of national defense, these military provisions still remain in most state constitutions. Often, the same military provisions which are found in state constitutions are even more adequately provided for in statutes of the various states.

The clause providing for the enrollment of the general citizenry into the militia (Section 1) has been used in Ohio only once. Legislative implementation preceded the use of the provision, and the General Assembly of the State of Ohio passed the 1862 Militia Act, giving the State the power to call up members of the unorganized militia in 1862, before the enrollment act of August, 1863 was passed. The 1862 Militia Act provided that state militias could be drafted, state militia being that as was defined by Section 1 of Article IX of the Constitution. This is the only known time in the history of the State of Ohio, however, that this has been used. The provision is essentially only necessary in the 20th century, in light of the development of a system of national defense and numerous state and federal laws regarding the military, in consideration of a possibility of major disaster in a state at a time when national forces could not be activated, and may be considered highly unrealistic, because an unorganized militia can not be considered to be particularly effective in such a situation anyway.

Further explaining what is meant by the constitutional provision, statutes in some states (Illinois for example) divide the militia into the Organized and Unorganized Militia. The former is the National Guard and the Naval Militia; the latter are all others within the definition (all citizens of the state in the age category as specified). When the organized militia is called into Federal service, the Governor by proclamation may call into existence the State Guard to serve until the emergency is over. The State Guard would be formed out of the Unorganized Militia and other volunteers. The State Guard is strictly a wartime expedient.

In 1951, the Wilder Commission, in its review of the Ohio Constitution, stated that an article dealing with the militia appears to be an unnecessary provision in modern times. It is felt by many that such details have no place in a modern constitution, and that these provisions could be transferred to statute if necessary. The Wilder Report in 1951 felt that only the last two sections of Article IX have any permanent value--Section 3, giving the Governor the power to call forth the militia to execute the laws of the state, to suppress insurrection and to repel invasion, and to act in the event of a disaster within the State; and Section 4, requiring the General Assembly to provide by law for the protection and safekeeping of the public arms. It was felt by the Wilder Commission that the first of these provisions belongs among the powers of the Governor in Article III (it is essentially included there already in Section 10); and the latter, among the powers of the Legislature in Article II, if indeed, it is necessary at all, because the General Assembly would have this power without the specific mention of it in the Constitution.

Robert Dishman, in his study of the militia in State Constitutions: The Shape of the Document has concluded that militia provisions such as those in the Ohio Constitution are archaic and that it would be well to drop them altogether. In light of mid-20th century needs, this concept of an all-citizen unorganized militia seems outmoded and in conflict with state and federal laws. The unreality of regarding the militia as an unorganized and undisciplined body of the citizenry seems to be obvious, especially when in fact it is the "organized" militia alone which has significance in present day state and national affairs. The states which have, in recent constitutional revisions, updated this concept, seem to have recognized the obsolete nature of such provisions.

Even with the revisions of 1953 and 1961, the Ohio provisions are more lengthy than those found in more recently written documents. The latest trend seems to be to omit lengthy articles on the militia and to deal with the subjects in shorter sections in the executive and legislative articles of state constitutions.

Alaska contains the following provision in the Constitution in the Executive Article:

> III. 19. The governor is commander-in-chief of the armed forces of the state. He may call out these forces to execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion. The governor, as provided by law, shall appoint all general and flag officers of the armed forces of the state, subject to confirmation by a majority of the members of the legislature in joint session. He shall appoint and commission all other officers.

Hawaii provides for the military in one sentence in the Executive Article of the Hawaii Constitution, as follows:

> IV. 5. He (the governor) shall be commander-in-chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion.

The Illinois Constitution has retained a shortened article on the militia.

Michigan provides two sentences dealing with the militia. The first is found in an article on general government in the Michigan Constitution, and the second is found in the Executive Article and provides for the Governor as Commander-in-Chief. The provisions read as follows:

> III. 4. The militia shall be organized, equipped, and disciplined as provided by law.
>
> V. 12. The governor shall be the commander-in-chief of the armed forces and may call them out to execute the laws, suppress insurrection, and repel invasion.

When the Michigan Constitution was revised, it was felt that statutes covered the matters dealt with in the previous constitution, and much of the existing law was thus considered obsolete--so the older provisions were revised.

Missouri deals with the subject of the military in the Executive and Legislative Articles of the Missouri Constitution as follows:

> III. 46. The General Assembly shall provide for the organization, equipment, regulations and functions of an adequate militia, and shall conform the same as nearly as practicable to the regulations for the governing of the armed forces of the United States.
>
> IV. 6. The governor shall be commander-in-chief of the militia, except when it is called into the service of the United States, and may call out the militia to execute the laws, suppress actual and prevent threatened insurrection, and repel invasion.

New Jersey deals with the militia in the Executive Article of the Constitution, as follows:

> V. 3. 1 and 2
>
> 1. Provision for organizing, inducting, training, arming, disciplining and regulating a militia shall be made by law, which shall conform to applicable standards established for the armed forces of the United States.
>
> 2. The Governor shall nominate and appoint all general and flag officers of the militia, with the advise and consent of the Senate. All other commissioned officers of the militia shall be appointed and commissioned by the Governor according to law.

New York has retained an article on the military, but it contains only one section, as follows:

> XII. 1. The defense and protection of the state and of the United States is an obligation of all persons within the state. The legislature shall provide for the discharge of this obligation and for the maintenance and regulation of an organized militia.

Article XII of the New York Constitution previously contained five other sections, and was very similar to the Ohio Constitution's provisions on the military before five sections were repealed from Article XII of the New York Constitution in 1963. The Executive Article of the New York Constitution makes the following provision concerning the Governor as Commander-in-Chief:

> IV. 3. The governor shall be commander-in-chief of the military and naval forces of the state.

Generally, the provisions of the states with newer constitutions seem to provide for the military in the executive and legislative articles. Provisions in the executive article usually provide for the governor as commander-in-chief of the state's forces, and provisions in the legislative articles usually give the general assembly the power to organize and regulate the state's forces.

Ohio Constitutional Revision Commission
What's Left Committee
August 6, 1975

REPORT
Public and Private Employees
and Officers
Articles II, XV

The What's Left Committee hereby submits its recommendations on the following present sections of Articles II and XV:

Section	Subject	Recommendation
Article II, Section 20	Terms of office to be fixed; salary	Amend
Article II, Section 34	Welfare of employees	No change
Article II, Section 35	Workmen's Compensation	No change
Article II, Section 37	Eight hour day on public work	Repeal
Article XV, Section 4	Who eligible to office	Amend
Article XV, Section 7	Oath of office	No change
Article XV, Section 10	Civil service	No change

Article II

Section 20

Present Constitution

Section 20. The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

Committee Recommendation

Section 20. The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished, except that an increase in salary applicable to an office shall apply to all persons holding the same office.

The committee recommends that Section 20 of Article II be amended as follows:

Section 20. The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished, EXCEPT THAT AN INCREASE IN SALARY APPLICABLE TO AN OFFICE SHALL APPLY TO ALL PERSONS HOLDING THE SAME OFFICE.

History and Background of Section

Article II, Section 20, proposed by the legislative committee of the 1851 Constitutional Convention, was included in the 1851 Constitution after lengthy floor debate. The section, applicable to "all officers" had no equivalent in earlier organic acts, although the 1802 Constitution prohibited in-term changes in the salaries of judges and the governor in Article II, Section 6 and Article III, Section 8, respectively. The Convention debates seem to indicate that the delegates viewed Section 20 as a provision to prevent graft and pocket lining, and, although not specifically stated in the debates, historically such provisions were designed to assure the division of power among the three branches of government.

Ten other states prohibit increases and/or decreases in compensation for all state officers during their term of office. A majority of the ten states expressly prohibit such in-term changes for executive officers, legislators and judges. The Model State Constitution prohibits in-term pay increases for

legislators only.

There have been many court cases relating to the meaning and application of Section 20. The term "officer" in the context of Section 20 applies to both holders of offices provided for in the Constitution and holders of statutorily created offices, and to appointed as well as elected offices. (State ex rel. Metcalf v. Donahey, 101 Ohio St. 490 (1920); State ex rel. McNamara v. Campbell, 94 Ohio St. 403 (1916)) However, the fact that an office is created by the Constitution does not per se make it a state office subject to the provisions of Section 20. (State ex rel. Hess v. Rafferty, 19 Ohio N.P. (N.S.) 337 (1916). For example, mayors and other officers of municipal corporations or officers of school districts hold offices created for the benefit of the locality rather than the state and are not therefore subject to the provisions of Section 20.(State ex rel. Ferry v. Board of Education, 12 Ohio Cir. Dec. 333(1901) The primary source of the legislature's power to fix terms and compensation for officers is Section 1 of Article II. (Metcalf; supra.) However, Section 20 of Article II imposes a duty upon the legislature to exercise that power. (Metcalf, supra; State ex rel. Howe, 25 Ohio St. 588 (1874); State ex rel. Atty. General v. Neibling, 6 Ohio St. 40 (1856).)

Comment

The committee, in considering whether Section 20 should be retained in the Ohio Constitution, noted that the legislature would have the power to fix terms of office and compensation under Section 1 of Article II even absent Section 20. Further, the Ohio Constitution currently prohibits in-term compensation changes for executive officers in Article III, Section 19 (governor, lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general), and for state legislators in Article II, Section 31, and prohibits diminution of judges' compensation during their terms in Article IV, Section 6(B). Also considered was the failure of the voters to ratify, recently, a constitutional amendment which would have allowed in-term pay

increases for certain county officials and senators, and for officials occupying a position identical to that of another person whose salary is higher because his term begins and ends at a different time ; for example, a PUCO commissioner.

Testimony presented to the committee on behalf of county commissioners indicated that Section 20 effectively discriminates against county commissioners, elected for staggered terms, since the newly elected officer may earn a higher salary than the commissioner remaining in office, depending on when legislation enacting salary increases is adopted. The newly elected commissioner might also have less responsibility and experience than the lower paid incumbent commissioner. The committee believes that the constitutional provision was not intended to cause this inequity, which results from the legislature granting pay increases between the time a person is elected in November and the time he takes office in January. The committee believes this discriminatory effect should be removed so that all persons holding the same office receive the same pay. The amendment proposed by the committee would permit an incumbent office holder, when there is more than one of the same office, to enjoy a salary increase granted after he takes office, which he is unable to have under present Section 20. The committee approves retention of the basic concept of no increases during term - section 19 of Article III, prohibiting change in executive salaries in-term, has been recommended for retention without change. The reason a change in Section 20 is being suggested is because of people holding the same office and getting a different salary.

With respect to the recent defeat of an amendment to Section 20 by the voters, the committee believes that electors will approve an amendment for equal pay, and greater understanding of the issue is possible with the aid of the newly created Ohio Ballot Board and the simplified ballot language.

Article II

Section 34

Present Constitution

Section 34. Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power.

Committee Recommendation

The committee recommends that no change be made in Article II, Section 34.

History and Background of Section

This section, as adopted at the 1912 Constitutional Convention, remains unchanged in our present Constitution. The proposal to permit the legislature to regulate hours of labor, minimum wage, and the comfort, health and safety of employees, was debated by the convention delegates, with attention given almost exclusively to the minimum wage clause. Citing the inhumane conditions which prevailed in industry at that time, the proponents of the measure argued for the state's moral obligation to remedy "this un-American condition". Court decisions in some states indicated that the power of the legislature to regulate labor conditions was questionable, and the reason for the constitutional provision was to give explicit power to the legislature to pass such laws.

Much of the debate about the constitutionality of minimum wage legislation revolved around whether such laws interfered with due process and the rights of contract. The trend of state courts upholding minimum wage statutes was reversed when the U.S. Supreme Court invalidated an act of Congress authorizing a minimum wage for women in Washington, D.C. The act was thought to be repugnant to the provision of the Fifth Amendment prohibiting taking of liberty and private property without due process of law. Adkins v. Children's Hospital, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (1923). Thereafter, state courts tended to invalidate minimum wage legislation until the Adkins decision was overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330 (1937). The U.S. Supreme Court

in a later case, U.S. v. Darby, 32 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1945), referred to the Parrish decision as resolving the question of whether minimum wage laws were within legislative power, and said "the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment."

The first minimum wage laws in Ohio, G.C. 154-45d to 154-45t, enacted in 1933, provided minimum wage standards for women and minors. The law did not itself establish a minimum wage, but it permitted an actual minimum wage to be established by administrative action. The original legislation was repealed in 1973 and replaced by a new law, which establishes a minimum wage and is applicable to all workers.

The constitutionality of the original Ohio law was upheld by the Courts in Walker v. Chapman, D.C. Ohio, 17 F. Supp. 308 (1936). The Court noted that the constitutionality of the law rested on the goals being measurable - a fair wage, defined as a wage fairly and reasonably commensurate with the value of the service or class of service rendered - whereas in the Adkins case, the goals were immeasurable, said the Court. The delegation of the establishment of a minimum wage to an administrative agency by the legislature was challenged and upheld in Strain v. Southerton, 148 Ohio St. 153, 74 N.E. 2d 69 (1947).

Chapter 4111. of the Ohio Revised Code, entirely rewritten by the 110th General Assembly, deals with the minimum fair wage standards and related regulations. The minimum wage is fixed in the statutes at $1.60 per hour, for intrastate employment not governed by federal law, with exceptions provided for counties below 300,000 population, some agricultural workers, and persons classified as "learners" during the first 90 days of their employment.

Committee Action

Two issues which were debated at the time the section was adopted - whether such regulations interfered with other constitutional rights and whether it was possible to implement legislation that would not prove harm-

ful to unskilled labor. Concern was expressed by some delegates that industry would be unwilling to hire and train unskilled labor if the employer was required to pay the minimum wage to unskilled workers, since it would be more profitable to hire the skilled at a minimum wage. Recently, similar concerns have been expressed that the minimum wage laws tend to exclude from the labor market the unskilled, handicapped, and youths who seek after-school employment. The desirability of the minimum wage law continues to be debated today on this point, but questions concerning labor regulations and constitutional rights appear to have been resolved by the courts.

The committee believes that in the absence of any problems arising from the language of Article II, Section 34, the section should be retained, unchanged.

Article II

Section 35

Present Constitution

Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof, in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions of this constitution.

Committee Recommendation

The committee recommends that no change be made in Article II, Section 35.

History and Background of Section

Prior to the adoption of a constitutional amendment in 1912 enabling the legislature to adopt laws relative to workmen's compensation, resolution of employee injury cases in Ohio, as in other states, took place in court. An injured employee had to prove in a law suit that the injury resulted from negligence on the part of the employer. Three common law defenses

were available to the employer: contributory negligence, voluntary assumption of risk based on an individual's right of contract, and the "fellow servant" doctrine, which rendered the employee unable to recover if the injury resulted from negligence of a fellow employee. An injured employee rarely emerged the victor from costly and time consuming litigation, owing in part to the difficulty of proving negligence on the part of the employer. If the claimant did win, an employer was usually unprepared to pay the large award without hardship to his industry. (1)

The traditional defenses were modified in Ohio between 1851 and 1910. An exception to the fellow-servant doctrine was made in Little Miami v. Stevens, 20 Ohio St. 416 (1851), whereby a supervising or directing employee was not a fellow servant. In 1904, the legislature enacted the "Williams Bill", modifying the assumption of risk doctrine. It provided that the fact that an employee knew of his employer's negligence or omission to guard and protect his machinery and place of employment could not operate as a defense for the employer. Two laws passed in 1910, the Norris and Metzger bills, further modified the employer's common law defenses by abolishing the contributory negligence defense and modifying the fellow-servant and assumed risk defenses. The notion of "comparative negligence" was substituted, applicable to certain dangerous employments in an attempt to measure whether the employer was guilty of gross negligence or the employee's negligence was only slight. These modifications did not end the necessity of the employee's resorting to court action in order to obtain compensation.

The concept of the cost of industrial accidents being a charge to industry itself rather than falling unevenly on employers was first adopted in Germany in the late 19th century. To employers it offered an available fund to pay compensation awards without jeopardizing the industry itself. To employees, it offered adequate medical and financial aid. New York was the first state to adopt a comprehensive workmen's compensation law. The statute classified eight types of industry as hazardous, for which medical benefits and com-

pensation were to be paid regardless of cause or fault, except where the injured party was guilty of serious willful misconduct. The law was challenged on three grounds in Ives v. South Buffalo Ry. Co., 201 N.Y. 271 (1911): that it violated the right to trial by jury, the due process guarantees of the federal and state constitutions, and the equal protection clause of the 14th Amendment to the federal constitution. The Court of Appeals sustained only the charge that the law was a denial of due process, finding that the police power of the state was not broad enough to enable the state to require an employer to pay compensation when he was without fault in an injury case. New York immediately drafted and adopted a constitutional provision (Article I, Section 18) enabling the legislature to enact workmen's compensation laws. Challenges to subsequent legislation reached the United State Supreme Court, which found no violation of due process and found such authority within the state's police power.

In 1911, Ohio adopted a workmen's compensation law. Employers of five or more persons could elect to participate, in which case they were not liable to respond at common law for damages, injuries, or death of employees. Failure to participate rendered employers of five or more persons liable for damages, and denied to them the common law defenses. In State ex rel v. Creamer, 85 Ohio St. 349 (1912), the Ohio Supreme Court considered a challenge to the constitutionality of the statute. The points of argument raised embraced several issues, some of which were raised in the New York case. Others included impairment of existing contracts, arbitrary classification, and taxation for private purposes. The Court, emphasizing the volutary nature of the act, upheld the constitutionality of the provision. Reference is made to the Court's decision in the 1912 Constitutional Convention Debates by the sponsor of Proposal No. 24, to include a workmen's compensation provision in the Ohio Constitution. He said:

> "Proposal No. 24 undertakes to write into the constitution of Ohio a constitutional provision making secure the workmen's compensation law passed by the last legislature, and declared constitutional by the

> Ohio supreme court by a vote of 4 to 2. Labor asks that this proposal be adopted, because we believe that by writing it into the constitution, it will make it possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter. It will also give an opportunity to still further improve the law to meet modern conditions of employment as they may arise." (2)

Following the adoption of Article II, Section 35, the legislature passed a compulsory compensation act, and established the Industrial Commission to replace the Board of Awards charged with administering the fund under the 1911 act. The constitutionality of this law was challenged and upheld in Porter v. Hopkins, 91 Ohio St. 74 (1913)

In 1924, Article II, Section 35 was amended to take away the right of an employee to sue at law when injury or death resulted from failure to comply with lawful requirements for protecting health and safety. The amendment expanded on the original section by providing for the board to hear a case alleging failure to comply with such requirements, and to add to the usual amount of compensation an award between fifteen and fifty percent of the maximum award established by law upon a finding that injury or death resulted from such failure by an employer. The amendment expanded upon the powers of the board and required an industry to pay a certain amount to a fund used to investigate industrial accidents. The section, as amended in 1924, remains unchanged in our present constitution.

In 1921, a law was passed consolidating state administrative functions into several departments directly responsible to the Governor. The Industrial Commission became part of the Department of Industrial Relations, with the primary function of acting as an administrative court of claims under the workmen's compensation act. The Commission was returned to independent status in 1934, once again the sole administrative body for workmen's compensation, and the three-member Industrial Commission retained all authority under the Workmen's Compensation Act until 1955. In that year, the Bureau of Workman's Compensation was established by law, headed by an administrator, appointed by the Governor with the advice and consent of the Senate. The powers and duties of the administrator and Bureau are set forth in Chapter

4121. of the Ohio Revised Code.

Comment

The What's Left Committee was joined in its discussion of the workmen's compensation section by several persons active in this area. Russell Herrold, a Columbus attorney representing the Ohio Manufacturers' Association, has represented employers in workmen's compensation cases, and served as chairman of the American Bar Association's workmen's compensation committee. Robin Obetz, an employers' representative and past president of the Columbus Regional Board of Review, also participated. The committee was presented with a draft amending the present constitutional language proposed by the Workmen's Compensation Committee of the Ohio Academy of Trial Lawyers.

The committee considered whether fixed numbers should remain in the section, such as additional compensation between fifteen and fifty percent, or the contribution rate for investigation of industrial accidents being set at less than one percent, or whether these figures should be removed from the constitution to give the legislature more flexibility. Another matter which was discussed was whether the section provided equal treatment for the parties involved. With respect to claimants and employees, in an appeals case, the claimant has the burden of proof even though the lower court may have found in his favor. Regarding injury and occupational disease, the statutes distinguish between occupational disease and occupational injury, and they treat the two types of disability differently. There is no right of appeal to a court for a jury trial from an adverse decision involving an occupational disease. An amendment was proposed to provide the right to trial by jury in an appeals case from any adverse decision not involving extent of disability. The committee rejected this proposal, on the basis that that the matter was statutory. The committee discussed the difference in compensation provided in the statutes for occupational disease and occupational injury. In cases involving the respiratory tract, a person has to be totally disabled

before he is entitled to compensation, but one need not be 100% injured in order to collect for occupational injury claims. The distinction may arise in the statutes from the use of both "injury" and "occupational disease" in the constitution.

Testimony heard by the committee indicated that workmen's compensation laws were cyclical in nature, periodically, as the political orientation of the legislature and executive change, the "pendulum swings" place either labor or management in a position of greater strength. There was general agreement that these trends were undesirable, but that to amend the constitution by including more statutory language in the hopes of stopping these pendulum swings would not be a wise approach. The predominant view was that Article II, Section 35 was merely an authorization to the legislature to enact workmen's compensation laws, and that if the present laws are not satisfactory, the legislature was the proper authority to revise the laws. The committee agreed that no change should be made in the present constitutional section, that the legislative process was a better method of dealing with desired changes in the area of workmen's compensation than the process of constitutional revision.

Footnotes

1- Ohio State Law Journal, vol. 19, "The Ohio Compensation System" by James L. Young. p. 542.

2- Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912. p. 1346.

Article II

Section 37

Present Constitution

> Section 37. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political sub-division thereof, whether done by contract, or otherwise.

Committee Recommendation

The committee recommends the repeal of Article II, Section 37.

History and Background of Section

When Proposal No. 209, now Section 37, was submitted to the 1912 Constitutional Convention, its author said, "it is quite evident that we desire this proposition to become a constitutional provision to safeguard this right, and to circumvent the decisions rendered by the courts of this state." (Debates, p. 1339) Delegate Tetlow referred to the case of City of Cleveland v. Clements Bros. Construction Co., 67 Ohio St. 197 (1902), in which the Supreme Court of Ohio declared null and void an act limiting the hours of work on public works. In an earlier case, Bramley v. Norton, 5 O.N.P. 183 (1897) a Cleveland city ordinance prescribing a minimum of $1.50 a day and a maximum of eight hours on public works and improvements was declared unconstitutional, violating Section 19 of Article I of the Ohio Constitution and Section 1 of the 14th Amendment to the Federal Constitution. Mr. Tetlow noted that the Supreme Court declared/regulation that of hours of labor on public works was within the state's police power, in a Kansas case, similar to the circumstances in Clements Bros. Construction Co. In that case, Atkins v. Kansas, 191 U.S. 207 (1903), the court's reasoning appeared to resolve the question of the state's power in this regard, for all future questions. The court affirmed the right of the state, as guardian and trustee for its people, to prescribe the conditions upon which public work may be done on its behalf or on behalf of its municipalities, including

adopting statutes providing for an eight hour day on public works.

Proposal No. 209 as proposed and as adopted by the convention differed substantively. The original proposal extended the 8-hour day rule to construction, maintenance and operation of public improvements. The proposal was sent to the committee on arrangement and phraseology when objections were raised on the grounds that its subject matter was already covered by Prop. 133, adopted by the committee earlier, which authorized the legislature to regulate labor for both public and private industry. The sponsors of Proposal No. 209 feared that the proposal adopted earlier might not pass because of the minimum wage clause, and wanted to protect themselves by getting this more specific proposal adopted. The consensus of the convention appeared to be that if Prop. 122 passed, Prop. 209 should become null and void if it, too, passed. The proposal was passed to the committee on arrangement and phraseology with a recommendation that the two proposals be combined. The committee reported back language that limited the application of the 8-hours day to the construction of public improvements and not to their maintenance and operation. State v. Peters, 112 Ohio St. 249 (1925), examined the difference between the convention proposal and the constitutional section and the Court held the view that the language as adopted should not be broadened beyond the natural import of the language. The revised proposal was not debated, except that a recommendation was made to change the word "laborers" to "workmen", and that recommendation was approved. The proposal was approved by the convention, adopted by the voters, and is now Section 37.

Among the earliest cases relating to the section was Stang v. City of Cleveland, 94 Ohio St. 377 (1916). In that case, the court held the constitutional provision not self executing but that the legislature could not affirmatively make lawful a workday of more than 8 hours while the constitutional provision was in force. Pursuant to the requirements of Article II, Section 37, the General Assembly in 1919 adopted General Code Section 17-1 which implemented the 8-hour day, not including police and firemen. In 1941

the section was amended, excluding firemen in cities and villages and policemen in villages from the application of the section.

Section 4115.01 of the Ohio Revised Code (formerly GC 17-1) was repealed in 1969 by House Bill 436. The reason for the repeal was given as follows: "The stated purpose of this change is to allow working hours more in accord with current practices in the construction industry." (Legislative Service Analysis, Sub H.B. 436 (1969)).

After the repeal of section 4115.01, no new law was passed implementing the provisions of Article II, Section 37. The Ohio Supreme Court said, in Stang v. Cleveland, that the section of the constitution was not self-executing and not carried into effect until the adoption of G.C. 17-1 (R.C. 4115.01). By virtue of the Stang decision and the repeal of section 4115.01, the constitutional provision is inoperative at the present time. Section 37 refers to a six-day work week and that is incompatible with the hours of construction workers, including public works. The legislature, realizing the inherent difficulties in Section 37, and noting that the section would be ineffective without further statutory implementation, chose to resolve the problem by repealing the law and rendering the section inoperative.

Committee Action

The committee recommends the repeal of Article II, Section 37. It is believed that the section contains statutory material, and the authority it contains is provided by Section 34, which is recommended for retention. In light of the lack of legislative support for the provision and the repeal of implementing legislation, the constitutional provision has no effect. The committee intends no substantive change in the employee welfare provisions of the Constitution or of the statutes by recommending repeal of this section.

Article XV

Section 4

Present Constitution

Section 4. No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.

Committee Recommendation

Section 4. No person shall be elected to any office in this state unless possessed of the qualifications of an elector as defined in Section 1 of Article V of this Constitution. No person appointed to any office in this state shall assume such office unless a resident of the state.

The committee recommends that Section 4 of Article XV be amended as follows:

Section 4. No person shall be elected ~~or appointed~~ to any office in this state unless possessed of the qualifications of an elector AS DEFINED IN SECTION 1 OF ARTICLE V OF THIS CONSTITUTION. NO PERSON APPOINTED TO ANY OFFICE IN THIS STATE SHALL ASSUME OFFICE UNLESS A RESIDENT OF THE STATE.

History and Background of Section

Section 4 of Article XV was adopted by the 1851 Constitutional Convention without debate. No model for this section was noted in the debates nor had any similar provision appeared in either the Northwest Ordinance or the 1802 Constitution, both of which contained requirements for the positions of governor and legislator only, and these requirements were phrased in specific rather than electoral status terms.

In order to determine the specific qualifications required by Section 4, it is necessary to consider the constitutional provision setting forth the electoral qualifications in Article V, Section 1. The original 1851 section required that electors be 21 years old, white, male, resident of the state for one year immediately preceding the election, and a resident of the county, township, or ward in which he resides such time as may be provided by law.

At the 1912 Constitutional Convention both Article V, Section 1, and Article XV, Section 4 were amended. Section 4 was amended to contain a proviso that "women who are citizens may be appointed as members of or

to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both." The amendment was intended to allow women to participate in state government by holding certain offices which were "particularly suited to their talents," irrespective of their lack of electoral status. A further proviso which would have allowed women to hold notary positions was defeated on the floor. Article V, Section 1 was amended by the convention to delete the requirement "white", and the voters approved this change, but rejected the deletion of the word "male" which was approved by the convention. In 1953, Section 4 was amended to delete the 1912 provision concerning women which had been made obsolete by subsequent amendments to the U.S. and Ohio constitutions granting the right to vote to women in 1919 and 1923 respectively. In 1957, Amended S.J.R. 20 (102nd General Assembly) which would have entirely repealed Section 4 was defeated by a popular vote of 996,513 to 1,040,216.

Subsequent amendments to elector status approved by the voters or resulting from court decisions have affected Section 4. The state residency requirement has been reduced (Schwartz v. Brown, U.S.D.C. Southern District of Ohio Civil Action 72-113 (1972)), and the passage of the 26th Amendment in 1971, prohibiting denial of the franchise to 18-year olds, has opened public offices in Ohio to all those over 18. A recommendation of the Elections and Suffrage Committee, already adopted by the commission, alters Section 1 of Article V to require only that a citizen be eighteen years old and comply with applicable state, county, township, and ward residency requirements prescribed by law in order to vote. The proposed amendment, if adopted, would assure eighteen year olds the right to hold public offices in Ohio by granting them the undisputed right to vote. Ohio has no other age requirements for public office, nor for specific public offices. Section 3 of Article II requires members of the General Assembly to have resided in their districts one year preceding their election, with an exception

made in Article XI for a reapportionment year.

Committee Action

Since Section 4 of Article XV makes the qualifications for public office depend on elector status, and since constitutional elector status presently consists of being 18 years old and a resident such time as provided by law, the committee considered whether additional age and residence qualifications should be recommended for all or some public officers. The research presented to the committee surveyed the comparative provisions in other state constitutions and noted that approximately one-third of the state constitutions corrolate the ability to hold office with the ability to vote, and an additional seven states have a general residency and/or citizenship requirement to hold state office. In addition, Section 4 of Article XV does not by implication forbid the General Assembly from requiring additional reasonable qualifications for office holding, by virtue of the legislature's plenary powers.

The committee questioned whether the meaning of "an appointed or elected officer" was clear. The elector status requirement of section 4 is applicable to all state officers elected or appointed. The chief elements of an office, which trigger the electoral requirement, are independent public duties which are a part of the state' sovereign power and vesting of these duties by virtue of the holder's election or appointment. The committee concluded that the meaning of "office" was determined by the nature of the office and cannot be constitutionally defined.

The committee considered whether the requirement of Section 4 for all state offices was wise policy in view of the highly mobile contemporary society and highly specialized training necessary for some jobs, and whether higher qualifications in terms of age, citizenship, and residency for some state offices, such as governor, should be placed on candidates.

With regard to the second point, the committee favored letting the voters have access to all candidates who meet the present age and residency

requirements. An 18-year old gubernatorial candidate might have a somewhat harder task convincing the public that he has the experience for the job, but the public should be permitted to make that decision. Therefore, the committee does not favor including additional qualifications for some state offices.

With respect to the first point, the committee has proposed amending Section 4 to require different requirements for appointed officers than elected officers. The committee believes that a candidate for elective office should meet the requirements of an elector, but that candidates for an appointed office should not be required to be a resident of the state for a specified period of time prior to appointment, even though that period may be only 30 or 60 days, because it may limit the field of choice of qualified people for the post. The committee agreed that an appointed officer should reside in the state while he is serving in an appointed position, and proposed language that would enable persons from out of the state to be chosen for appointed state office, provided that they become a resident of the state of Ohio prior to assuming office.

An additional change has been made in Section 4 in the interests of clarity and simplicity for those who look to the constitution for information on the meaning of an elector. The proposed revision refers the researcher to Section 1 of Article V, where the quaifications of an elector are presently set forth. This revision does not represent a substantive change.

Article XV

Section 7

Present Constitution

Section 7. Every person chosen or appointed to any office in this State, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this State, and also an oath of office.

Committee Recommendation

The Committee recommends that no change be made in Article XV, Section 7.

History and Background of Section

The concept underlying Section 7 of Article XV that every elected and appointed officer should take an oath of office to support the applicable constitutions apparently was derived from the federal law through the Northwest Ordinance, which required officials of the Northwest Territory to take an oath of fidelity and of faithful discharge of the office. Oath requirements concerning the support of the Ohio and Federal constitutions and the faithful discharge of the duties of the office were included in both the 1802 and 1851 Ohio Constitutions. The 1851 oath section deviated from the prior section only in the omission of the adjectival phrase "of trust and profit" which had formerly modified "office".

The vast majority of state constitutions require an oath to support the United State Constitution, the applicable state constitution and to faithfully perform the duties of the office. The Model State Constitution requires no oath outright, but its Bill of Rights prohibits the requirement of any oath other than one to support the federal and state constitutions and to faithfully execute the office.

The general provisions governing oaths of office are found in Chapter 3 of the Ohio Revised Code. Section 3.22 reiterates the requirements of Section 7 of Article XV, and other sections require specific officers to take oaths pursuant to Section 7.

The requirement of an oath being determined by the nature of the office rather than the statutory designation of that office was examined in State

ex rel. Atty. Gen. v. Kennon, 7 Ohio St. 546 (1851). In that case, the question before the court concerned whether or not certain commissioners had been properly appointed under Article II, Section 27 of the Ohio Constitution governing the appointment of state officers. The court held that the omission of the designation "officer" and a specific oath requirement from the statute creating their position was not determinative of whether or not they were officers.

Committee Action

Research on Section 7 of Article XV indicated no problems that had arisen from that language. Committee members favored retaining the section for that reason, and also concurred in the view that for those officers that have a public trust, the ceremony of taking an oath was desirable. The words "oath or affirmation" permit a choice to those people who do not swear or believe in a holy being.

Present Constitution

Section 10. Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

Committee Recommendation

The committee recommends that no change be made in Article XV, Section 10.

History and Background of Section

The 1912 Constitutional Convention adopted Section 10 of Article XV with little debate and only a few negative votes. It was carried by the same progressive reform movement that promoted the initiative and referendum. One spokesman for the merit system in public employment stated that the initiative and referendum and the merit system, together, would get rid of political bosses in Ohio. A merit system was already in effect in some Ohio cities at the time of the convention. Proponents recognized, in their supporting statements, that some positions would have to be exempt, but felt that a general constitutional provision, leaving the implementation to the General Assembly, was preferable to a detailed provision attempting to spell out such matters as precisely which positions would be exempt.

Progression at all levels of government toward a merit system in the selection and retention of public personnel is thoroughly documented in many sources. The concept of the reformers had two parts -- the employee, selected on the basis of his qualifications and not his affiliation with the party in power, was to be protected on his job, as long as he performed satisfactorily, from the whims of politics; such an employee would be politically neutral--that is, he was to perform his job without permitting his own convictions about policy or his politics to interfere, and was not to use his job as a tool for the advancement of party.

Section 10 of Article XV is the only provision of the Ohio Constitution to deal exclusively with public employees. The section requires that a merit system be provided for the civil service of the state. Other state constitutions contain a variety of provisions relating to public employees, in addition to the merit requirement, including provisions relating to political activity, conflict of interest, right to bargain collectively, and pension systems.

The General Assembly responded promptly to the 1912 constitutional mandate, and enacted a comprehensive civil service law in 1913, to take effect on January 1, 1914 (103 Ohio Laws 698). As required by the constitution, employees of the state, the counties and cities were covered. In addition, employees of city school districts were included. The civil service was divided into classified and unclassified service, with the unclassified service including the specified "exempt" persons and categories and the classified, or competitive, service including all the rest. The unclassified category included elected officials, court bailiffs, heads of principal departments, boards, and commissions appointed by the governor, secretaries to such persons, boards of elections, and others. Although city school districts were brought within the merit system, all persons were in the exempt category except nonteaching school employees.

Many changes have been made in the statutes since 1913. Senate Bill 174 of the 1973-74 session of the General Assembly, effected a complete reorganization of three state departments by combining them into one - the new Department of Administrative Services. The combined departments were the Department of Finance, the Department of Public Works, and the Department of State Personnel. Chapter 143. of the Revised Code, which formerly contained the civil service provisions, is now Chapter 124. of the Revised Code. The basic scheme, however, is much the same. The civil service has been expanded to include city health districts, general health districts, and civil service townships. The number and variety of unclassified employees has also

increased substantially since 1913.

Committee Action

The memorandum considered by the committee on Section 10 of Article XV examined possible constitutional issues including whether a constitutional provision was necessary, whether the provision should be general or detailed, what governmental units are covered, who is exempt, and merit and fitness requirements. The study noted that Green v. Civil Service Commission, 90 Ohio St. 252 (1914), supported the view that there is little question that the state legislature has full legislative power to provide for a merit civil service system if it so desires, whether or not mandated or authorized by the constitution. Such a system, in general, does not abridge anyone's constitutional rights. As with other constitutional provisions that give the General Assembly powers which it already possesses, Article XV, Section 10 could be eliminated from the Ohio Constitution without destroying the state's civil service system. With respect to cities, at least those with charters, in the absence of the constitutional requirement, there might be some question whether the state could require cities to maintain a merit system. However, merely because the provision could be removed without diminishing legislative power it is not necessary to conclude that it should be removed, since it mandates the General Assembly to act in a field in which it might otherwise fail to act. The committee agreed that the last sentence of the section "Laws shall be passed providing for the enforcement of this provision" was included to mandate the legislature to step in and do something.

Several committee members noted that the language of the section could be improved upon but that, in itself, was not important enough to warrant changing the section. Some persons expressed dissatisfaction with the present civil service system but all agreed that a solution should properly come from legislative action. Finally, the committee noted that no groups had come forward advocating changes in the section, and the members voted to make no change in the present section.

Ohio Constitutional Revision Commission
What's Left Committee
September 16, 1975

Article VII
Public Institutions

Article VII is comprised of three sections relating to public institutions in Ohio. The article has remained unchanged since adopted by the 1850-1851 Constitutional Convention and approved by the voters. These three sections are as follows:

1. Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly.

2. The directors of the Penitentiary shall be appointed or elected in such manner as the General Assembly may direct; and the trustees of the benevolent and other state institutions, now elected by the General Assembly, and of such other state institutions as may be hereafter created, shall be appointed by the Governor, by and with the advice and consent of the Senate; and, upon all nominations made by the Governor, the question shall be taken by yeas and nays, and entered upon the journals of the Senate.

3. The Governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified.

These provisions were approved by the Constitutional Convention of 1851 as written by the subcommittee dealing with that area. In the original Ohio Constitution of 1802, the appointing power was vested in the legislature, as part of a movement to create legislative supremacy and a weak executive in Ohio, in reaction to the oppressive experience under territorial government and the governorship of St. Clair. Article VII, Section 2, as drafted by the 1851 convention, represents a departure from the former practice of legislative appointment, by transferring some power to the governor with the advice and consent of the senate to make such appointments.

The 1873-74 Constitutional Convention dealt with this article of the Ohio Constitution in a manner similar to that with which it dealt with other provisions of the Constitution; Section 1 was lengthened by the Convention, providing for further specifics. The section was rewritten by the Convention to read:

1. Institutions for the benefit of the curable and incurable insane, blind, deaf and dumb shall be supported by the State. The punitive and reformatory institutions of the state at large shall be a Reform School for Boys, a house of discipline, and a Penitentiary. An asylum for Idiotic and Imbecilic Youth, and a home for Soldiers' and Sailors' Orphans and a Girl's Industrial Home, shall be supported so long as the General Assembly shall deem them necessary. All public institutions shall be subject to such regulations as may be prescribed by law.

The other two sections of the article, as approved by the 1874 Convention, remained the same, but the Constitution was not approved by the electorate, and the provision on public institutions thus still dated to 1851. No changes concerning Article VII were raised at the Constitutional Convention of 1912.

Comparison with Other States

According to the Index to State Constitutions prepared by Columbia University, twenty state constitutions provide for the establishment and support of institutions for the mentally handicapped and disabled, nineteen constitutions contain similar provisions for the blind, and twenty-one constitutions do so for deaf mutes.

Many of the newer state constitutions do not contain any provision regarding public institutions. The Alaska Constitution states in Article VII, Section 5,"The legislature shall provide for public welfare." The North Carolina Constitution contains somewhat lengthier language in Article XI as follows:

> Section 3. Charitable and correctional institutions and agencies as the needs of humanity and the public good may require shall be established and operated by the State under such organization and in such manner as the General Assembly may prescribe.
>
> Section 4. Beneficient provisions for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.

Comment

Three substantive issues have been raised concerning public institutions in regard to the right to treatment and rehabilitation of persons being cared for by the state in these institutions, their support and maintenance, and the obsolescence of the provision.

The litigation has almost exclusively been involved with the constitutional language regarding the establishment and support of public institutions, and the major cases will be reported below. There has been little litigation concerning sections 2 and 3 of Article VII.

Treatment

Although there have been no decisions rendered by Ohio courts concerning the right to treatment for inmates in public institutions, two recent decisions have been handed down by federal courts, having implications for Ohio's public welfare facilities. On March 21, 1971, the Alabama District Court (M.D.,N.D.) held that involuntarily committed patients "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition." (Wyatt v. Stickney, 325 F. Supp. 781 (1971)). The posture of the court is expressed further in the syllabus of a later case involving these parties as follows: "No viable distinction can be made between the mentally ill and the mentally retarded, and because the only constitutional justification for civilly committing a mental retardate is habilitation, it follows that once committed, such a person is possessed of an inviolable constitutional right to habilitation."

On June 26, 1975, the United States Supreme Court, in O'Connor v. Donaldson, 43 U.S.L.W. 4929, No 74-8, held that a Florida state hospital's involuntary custodial confinement without treatment of a mental patient who was not dangerous to himself or others violates the patient's constitutional right to liberty. The patient, Kenneth Donaldson, was held in the hospital for 15 years during which time he wrote numerous letters requesting release, which were turned down. The court said, "A state cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible

family members or friends, and since the jury found, upon ample evidence, that the petitioner did so confine respondent, it properly concluded that the petitioner violated respondent's right to liberty."

Financial Support

Another area of dispute with respect to Article VII, Section 1 has been the so-called "pay-patient" law, whereby a patient's relatives and/or estate has been called upon to provide partial support for a patient in a state institution. In a recent California case a statute imposing liability for the care and maintenance of a mentally ill person in a state institution upon certain relatives has been declared invalid as violative of the equal protection clause of the California Constitution. The Court's decision, however, did not affect the validity of a statute holding the patient's estate responsible for certain monetary responsibilities. Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 380 U.S. 194 (1964).

In Ohio, there have been cases concerning the state's pay-patient statutes. The earliest major case was in 1882, State v. Kiesewetter, 37 Ohio St. 546, challenging a statute requiring that persons admitted to institutions should pay their own clothing, travel, and incidental expenses. In case of failure to pay, such expenses were to be paid by the institution and billed to the county auditor who would pay it out of certain county funds and proceed to collect it. The case was brought by a Franklin County auditor who refused payment from county funds as provided by the statute then in force. He contended that the statute was in conflict with Article VII, Section 1. The court held that such provision of the constitution is not self-executing, and that the mode in which such institutions are to be fostered and supported is left to the discretion of the General Assembly. A similar challenge was involved in State, ex rel., v. Huwe, 105 Ohio St. 304 (1922), which challenged Sec. 1815 of the General Code, the "pay-patient" law. The statute provided that the cost should be charged against the county for institutions for feeble-minded youth. A challenge was brought on the basis of Article VII, Section 1, specifically the language "always supported by the state" and the Fourteenth Amendment equal protection clause. The defendent claimed that the constitution required the General Assembly to support the institutions by taxation and the legislature was without power to order or authorize a county tax upon citizen's property to pay expenses. The Court upheld the statute against these challenges.

The so-called "pay-patient" statutes have been upheld as constitutional against arguments that they constitute special or class legislation. In Rice v. State, 14 Ohio App. 9 (1918), a challenge was brought against General Code Secs. 1815-1815-12 requiring inmates of asylums and hospitals, if they have the means, and if not, then certain relatives, to pay support, on the grounds that it violated Article VII, Section 1 and Article II, Section 26, the latter requiring all laws to be of a general and uniform nature. The Court affirmed the state's responsibility for providing these institutions as follows: "The necessity of having places for the restraint as well as for the care of insane persons cannot be questioned. The state, for the sake of society and for the protection of the public, as well as the personal welfare and safety of such unfortunate persons, is bound to provide suitable places for their care." The Court, in addition, upheld the statutes against the alleged violation of Article II, Section 26, citing Steele, Hopkins & Meredith Co. v. Miller, 92 Ohio St. 115 (1915). "A statute is general and uniform, within the requirements of the constitution, if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because it is not made with exactness or because in practice it may result in some inequality." The Court in Rice upheld the Common Pleas Court's decision that the statute treated all persons subject to its terms equally.

The constitutional provisions for public institutions have been held to be not self-executing by the courts, and the mode in which such institutions are to be fostered and supported and the character of the institutions through which the benefit is to be conferred are left to the discretion of the General Assembly. State v. Kiesewetter, 37 Ohio St. 546 (1882); Chalfant v. State, 37 Ohio St. 60 (1881). Despite the fact that the Constitution expressly makes it the state's duty to foster and support such institutions, and expressly subjects them to General Assembly regulation, there are still constitutional limitations upon the power of the state and legislature in this regard.

In a recent Ohio case, a statute providing for the appointment of an agent to investigate the financial condition of the inmate and report to the public welfare department to determine the amount of support to be paid by relatives or from the inmate's estate was challenged as violating due process in that it provided for no hearing, defense, or appeal. The court upheld the statute against the challenge, stating that the procedures followed were within the discretionary powers of the department to secure equitable collection of financial obligations created by statute. State v. Webber, 163 Ohio St. 598, 57 Ohio Ops. 26, 128 N.E. 2d 3 (1955).

Chapter 5121 of the Ohio Revised Code, entitled "Welfare Institutions - Generally" specifies how such institutions shall be maintained and supported. The so-called "pay-patient" law is set forth in Sec. 5121.01: "All inmates of a benevolent institution, shall be maintained at the expense of the state. Their traveling and incidental expenses in conveying them to the institution shall be paid by the county of commitment. Upon admission, the inmates shall be neatly and comfortably clothed. Thereafter, the expense of necessary clothing shall be borne by the responsible relatives or guardian if they are financially able. If not furnished, the state shall bear the expense. Any required traveling expense after admission to the institution shall be borne by the state if the responsible relatives or guardian are unable to do so." Sections 5121.03 to 5121.11, inclusive, deal with liability for support of inmates, investigation of financial condition and determination of payments, and liability of estate.

Obsolescence

Chapter 5123 deals with the establishment, support, maintenance and governance of institutions for the feeble-minded and insane, and these institutions, as are welfare institutions, are under the aegis of the Department of Mental Health and Mental Retardation (formerly called the Department of Mental Hygiene and Correction in Chapter 5119 of the Revised Code). A major revision of Chapter 5123 was made by the 111th General Assembly last session in Amended Substitute Bill 336. The so-called bill of rights for the mentally retarded called for the liberal interpretation of the Code chapter to "promote the human dignity and protect the constitutional rights of mentally retarded persons in the state; to encourage the development of the ability and potential of each mentally retarded person in the state to the fullest possible extent, no matter how severe his degree of disability..." among other stated purposes.

"Feeble-minded" is defined in the Manual on Terminology and Classification in Mental Retardation, Herbert Grossman, ed., 1973 edition, as an obsolete term used to refer to a person of limited intelligence. In England the term is used more restrictively to apply to a condition of mental retardation. An insane person is included in the definition of "mentally ill individual" in Section 5122.01(A) of the Ohio Revised Code, to mean "an individual having an illness which substantially impairs the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations, and includes "lunacy," "unsoundness of mind," "insanity"..." The definition does not include retarded persons.

Article VII, Section 2 states that the directors of the penitentiary shall be appointed or elected as directed by the General Assembly, and trustees of benevolent and other state institutions shall be appointed by the governor with the advise and consent of the senate. This language is obsolete with respect to directors of the penitentiary since that office no longer exists. In only one case is there a statutory provision concerning trustees of benevolent institutions and that appears in Sec. 5909.02 of the Revised Code, which provides for a five-member board of trustees of the Ohio soldiers' and sailors' orphans home, to be appointed by the governor with the advise and consent of the senate.

Article VII, Section 3, providing for the filling of vacancies in the aforesaid public institutions, is obsolete because the types of vacancies it is talking about do not exist. In the case of trustees of benevolent and other state institutions, the constitutional provision has been superceded by Article III, Section 21, which specifies that all appointments to state office, when required by law, shall be subject to the advice and consent of the senate. That provision is implemented by R.C. Sec. 3.03, whereby the governor makes an appointment and reports to the senate for confirmation when the senate is in session, and when a vacancy occurs and the senate is not in session, the governor may make such appointment pending senate confirmation.

The Pros and Cons of Retaining Article VII

In a study of the Ohio Constitution by the Stephen H. Wilder Foundation, Article VII was commented on as follows:

> "Article VII on Public Institutions should be eliminated from the constitution completely. Section 1 requires that institutions for the benefit of the insane, blind, and deaf and dumb shall always be fostered by the state. These and many other programs now form a part of the state's permanent welfare program. The second section refers to directors of the penitentiary and trustees of institutions which before 1851 were elected by the legislature. Such offices no longer exist. The institutions are governed by quite adequate statutes. The third section relates to the filling of vacancies in such offices and is similarly obsolete. The whole article should be eliminated from the constitution. The legislature would have ample power without it to deal with welfare institutions."

The State of Ohio clearly has taken an active role with respect to providing for the welfare of disadvantaged persons in the state, and the General Assembly has gone beyond the limits of the constitutional mandate in furnishing welfare programs. The necessity of having such public institutions, without a constitutional mandate to so provide, appears to have been confirmed in Rice v. State. In support of the contentions made in the Wilder report, several arguments can be made. There is, in fact, ample statutory implementation of the state's commitment to provide a welfare program for the unfortunate, and the constitutional language as been held by the courts to be not self-executing (State v. Kiesewetter, supra), making statutory implementation obligatory. Furthermore, notwithstanding the language in Article VII, Section 1 that such institutions shall "always be fostered by the state", the Courts have upheld the state's right to require that the maintenance and support of the inmates of such institutions be paid for, in part, by the inmate's relatives or estate. There appears to be no reason why the state could not lay the entire financial burden on the inmate's relatives or estate, with or without Article VII, Section 1. Sections 2 and 3 appear to be obsolete, and could be repealed without having any substantive effect on the administration of the institutions referred to in the article.

On the other hand, some argument can be made for retaining Article VII, Section 1

although the language is somewhat obsolete and could be modernized. The 1851 Constitutional Convention believed that the state's commitment to provide for public institutions was important enough to include in our fundamental document. Society today appears to retain that sense of commitment to care for the unfortunate and disabled, and for that reason, there may be good cause to retain a basic statement of principle in the constitution, even though it grants no substantive authority to the state to provide for such care and treatment that it would not possess absent a constitutional provision to that effect.

If it were deemed desirable to retain the substance of the provision in Section 1 and to modernize the language, there are several alternatives to be considered. In the first sentence, "Institutions for the benefit of the insane, blind, and deaf and dumb...", two words, "insane", and "dumb" are obsolete, and could be replaced by terms which are more accurate and less stigmatizing. For example, "mentally ill" could be substituted for "insane" - the former term is used in our Code and has a well-defined meaning, and "mute" might be substituted for "dumb". Another alternative would be to replace the listing "insane, blind, and deaf and dumb...", which is, in fact, only a partial listing of those benefited by public institutions, with more general language, for example, "the disabled and handicapped" (the poor and orphans could also be mentioned.) A third alternative would be to follow the example of Alaska's Constitution, "The legislature shall provide for public welfare", which sets forth the state's commitment in the most general terms.

Conclusion

Article VII, Sections 2 and 3 are obsolete and should be repealed as no longer necessary. Article VII, Section 1 could be repealed with no substantive effect, but could be retained or revised to include the state's commitment to provide for the public welfare of its citizens in the constitution.

Ohio Constitutional Revision Commission
What's Left Committee
October 21, 1975

Amending the Constitution
Article XVI, Sections 2,3

Amendment, revision, or change in the Ohio Constitution is permitted by several methods, all of which are provided for in the constitution. Article XVI, Section 1 permits either branch of the General Assembly to propose amendments, and if agreed to by 3/5 of each house, the amendment is submitted to the electors for their approval. This section was studied by the Elections and Suffrage Committee and the amendments it recommended for the simplification of ballot language and procedures were approved by Ohio voters. Another method of amending the constitution is by initiative. Article II, Section 1a sets forth the procedural requirements concerning initiative petitions proposing constitutional amendments. Initiative and referendum was studied by the Elections and Suffrage Committee, which proposed amendments to simplify and modernize the procedural aspects of the so-called "direct legislation", but left the right of constitutional initiative substantially unchanged. Most of the committee's recommendations were approved by the Commission and are awaiting action by the General Assembly. The third method of altering the constitution, the constitutional convention, will be examined in this memorandum.

Article XVI, Section 2 provides for the General Assembly to call a constitutional convention. Article XVI, Section 3 requires the question of calling a constitutional convention to be submitted to the voters at a general election every twenty years. The sections read as follows:

> Section 2. Whenever two-thirds of the members elected to each branch of the general assembly, shall think it necessary to call a convention, to revise, amend, or change this constitution, they shall recommend to the electors to vote on a separate ballot without party designation of any kind at the next election for members to the general assembly, for or against a convention; and if a majority of all the electors, voting for and against the calling of a convention, shall have voted for a convention, the general assembly shall, at their next session, provide, by law, for calling the same. Candidates for members of the constitutional convention shall be nominated by nominating petitions only and shall be voted for upon one independent and separate ballot without any emblem or party designation whatever. The convention shall consist of as many members as the house of representatives, who shall be chosen as provided by law, and shall meet within three months after their election, for the purpose, aforesaid.
>
> Section 3. At the general election to be held in the year one thousand nine hundred and thirty-two and in each twentieth year thereafter, the question "Shall there be a convention to revise, alter, or amend the constitution", shall be submitted to the electors of the state; and in case a majority of the electors, voting for and against the calling of a convention, shall decide in favor of a convention, the general assembly, at its next session, shall provide, by law, for the election of delegates, and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon.

History and Background of Sections

The 1802 Constitution of Ohio provided only one method of amending the constitution, for the general assembly to recommend the calling of a constitutional convention to the people. The section read as follows:

> Article VII, Section 5. That after the year one thousand eight hundred and six, whenever two-thirds of the general assembly shall think it necessary to amend or change this constitution, they shall recommend to the electors, at the next election for members to the general assembly, to vote for or against a convention; and if it shall appear that a majority of the citizens of the state, voting for representatives, have voted for a convention, the general assembly shall, at their next session, call a convention, to consist of as many members as there be in the general assembly; to be chosen in the same manner, at the same place, and by the same electors that choose the general assembly; who shall meet within three months after said election, for the purpose of revising, amending or changing the constitution. But no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into the state.

At the 1851 Constitutional Convention, two additional methods of amending the constitution were proposed. Article XVI, Section 1, permitting legislatively initiated constitutional amendments to be submitted to the voters for their approval or rejection, and Article XVI, Section 3, requiring a mandatory referendum on the question of calling a constitutional convention, were approved by the convention. Article XVI, Section 2 as adopted by the convention contained a provision for the calling of a constitutional convention by the general assembly which was basically the same as the provision in the 1802 Constitution. Most of the convention debates concerning Article XVI centered around two issues: the inclusion of three methods of amending the constitution, and the number of convention delegates. It was suggested that the approval of Section 1 made providing for calling a constitutional convention unnecessary since amendments would be submitted directly to the people. Some delegates were opposed to Section 3, stating that a mandatory referendum was unnecessary since the legislature could already propose calling a constitutional convention under Section 2, and the people could therefore express themselves through their representatives. The size of a constitutional convention was discussed, with many delegates expressing the view that a number of delegates equal to the membership in the general assembly, as provided by the 1802 Constitution, was too large to be workable. One faction argued that the larger the number of delegates, the greater the chances for representation of everybody's point of view. The other side of the argument was that a body large enough to provide fair representation but less than 130 members (at that time the number of members in the General Assembly) would get things done more efficiently and more cheaply. The number of convention delegates was limited to members of the House of Representatives in the final draft adopted by the convention, proposed by the "Standing Committee on Future Amendments to the Constitution" as follows:

> Section 2. Whenever two-thirds of the members elected to each branch of the General Assembly shall think it necessary to call a Convention to revise, amend or change this Constitution, they shall recommend to the electors at the next election for members to the General Assembly to vote for or against a Convention; and if it shall appear, that a majority of the electors have voted for a Convention, the General Assembly shall at their next session, provide by law for calling a Convention, to consist of as many members as in the House of Representatives, to be chosen in the same manner, at the same places, and by the same electors that chose the General Assembly, who shall meet within three

months after their election, for the purpose of revising, amending or changing the Constitution.

Section 3. At the general election to be held in the year one thousand eight hundred and seventy-one, and in each twentieth year thereafter, the question, "Shall there be a convention to revise, alter or amend the Constitution?" shall be decided by the electors of the State, and in case a majority of the electors voting for Representative at such election shall decide in favor of a Convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates, and the assembling of such Convention as provided in the preceding section; but in no case shall any amendment of this Constitution, agreed upon by any Convention, assembled in pursuance of this Article, take effect or be in force until the same shall have been submitted to the electors of the State, and approved and adopted by a majority of those voting thereon.

In 1871, pursuant to Section 3 of Article XVI of the newly-adopted constitution of 1851, the question of calling a constitutional convention was put to the people and approved by a vote of 264,970 for and 104,231 against. The 1873-74 Constitutional Convention considered Proposition No. 230, containing a substitute for Article XVI. The proposal retained the methods of legislatively proposed constitutional amendments and legislatively proposed constitutional conventions but deleted the section requiring the mandatory submission of the question of calling a constitutional convention to the people at twenty-year intervals. One delegate commented that the pressure for the 1873-74 Convention was on account of defects in the judiciary system, and the legislature, knowing that the question of calling a constitutional convention was up for a vote in 1871, was influenced by that not to submit constitutional amendments to the people. Proposition No. 230 received a majority of the delegates' votes, but not a sufficient number to be adopted by the convention, and in the 1874 Constitution that was defeated by the electors, Article XVI was proposed unchanged from the 1851 version. In 1891, the question of calling a constitutional convention was defeated by the voters, 99,784 for, and 161,722 against, and the convention call was approved in the 1910 election by a vote of 693,263 for, and 67,718 against.

The delegates to the 1912 Constitutional Convention considered several substantive changes in Article XVI. It was generally agreed that the framers of the 1851 Constitution made the document too difficult to amend. What was referred to as the "greatest fundamental change" was a recommendation that the number of votes required to pass a constitutional amendment be changed from the majority of those voting in the election to a majority of those voting on the question, to carry it. Another major change was in party designation on the ballots. It had been customary from 1851 to 1891 for a political party to print a separate ballot, and if it saw fit, to print the constitutional amendment on the ballot with the party ticket, so that a voter generally voted for the constitutional amendment if the party endorsed it. Statistics were cited to show that party endorsement enhanced the changes of a constitutional amendment receiving a majority vote. It was proposed and approved that constitutional amendments be printed on separate ballots so they could be considered on their merits, and it was noted that 30 of 48 states' constitutions provided for such separate ballots. Another proposed change concerned the selection of delegates to future conventions. The Convention delegates wanted to make sure the next constitutional convention was elected as they had been, the method having proved so desirable. It was proposed that delegates to future conventions be nominated by nominating petitions only and that they "shall be voted for upon one independent and separate ballot without any emblem or party designation whatever." This change was adopted by the convention as part of Article XVI, Section 2. Debate continued on the question of the size of the delegation to a constitutional con-

vention, and although congressional or senatorial districts were discussed as a basis for the number of delegates, the numerical basis remained the membership in the House of Representatives, as in the 1851 Constitution. The sections adopted by the 1912 Constitutional Convention for Article XVI, Sections 2 and 3, appearing earlier, were approved by the voters, and have not been amended since their adoption.

Comparison with Other States

Thirty-eight states provide specifically for calling a constitutional convention in their constitutions. All except one of the remaining twelve have held at least two constitutional conventions, suggesting that their legislatures possess an inherent right to call conventions even in the absence of specific constitutional authorization(1). An explanation of that right was offered in an Ohio State Law Journal article:

> "The state constitutional convention has been described as (in the field of constitution writing) the repository of the sovereignty of the people - an all-powerful body, subject to no limitations except those imposed by the people themselves and by the Federal Constitution (Anderson v. Baker, 23 Md. 531 (1965)) ... The constitutional convention has been considered so basic that the power to have a convention has been held to exist even though the state constitution makes no mention of it. (Harvey v. Ridgeway, 450 S.W. 2d, 281 (1970); Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 229 A. 2d 388 (1967)) (2)

The constitutional provisions on the calling of a referendum are of two types: one places the decision for calling a convention entirely in the hands of the general assembly which may decide to submit the question to a popular vote when it chooses. The second type is the mandatory referendum, where the question of calling a convention is automatically submitted to the electorate at given time intervals. The latter type is examined in the law review article by Robert Martineau, cited above.

In 12 states, there is a mandatory referendum. In Maryland, this is the only method of calling a convention; in the other states, the method is in addition to legislative initiative. (3) The New York Constitution, in 1846, was the first to combine a mandatory referendum provision with the legislative authority to propose specific amendments. The rationale was that "it asserted a great principle, and that once in twenty years they might have the matters in their own hands," but "if the people were satisfied with the Constitution, they could endorse it, and the state of things would continue. Similar sentiments were expressed in the 1850-51 Ohio constitutional convention and the New York Constitution was pointed to as an example to follow." (4)

Martineau's article examines the importance of two features of the mandatory referendum provision. "The first and most important is whether the section is self-executing, i.e. once the voters speak in favor of a convention one will be held without further action by the legislature." Of the twelve states that have a mandatory referendum provision, six are self-executing and six (including Ohio) require further legislative action. The other important feature is the question of a majority vote required for calling a convention. Some states require a majority of those voting at the election, and some require a majority of those voting on the question of calling a convention. Ohio, as noted earlier, amended its provision in 1912 to require the latter. Martineau comments, "Experience has shown, however, that it is almost impossible in a general election to have a majority even vote on a constitutional issue, much less be in favor of a proposition." (5) It would appear that the Ohio Constitution has the more realistic approach on this point.

The article goes on to examine what happens in the case of a non self-executing constitutional provision when the people vote in favor of a convention and the legislature

refuses to act. Although this state of affairs might potentially be a source of problems in Ohio, no difficulties have so far arisen because the mandatory referendum is not self-executing. Since 1912, the people have not approved calling a constitutional convention.

The constitutional convention can perform several functions with respect to constitutional amendment. The convention is the chief method for full-scale revision of the fundamental law, but it can serve other purposes. For example, the convention may choose to submit separate amendments to the voters, rather than offering an entirely new constitution. In Ohio, the 1873-74 Constitutional Convention submitted a new constitution to the voters, which was defeated, and the 1912 Convention chose to submit 41 separate amendments. Thirty-three were adopted by the people and eight were rejected. The 1970 Illinois Constitutional Convention submitted a combination of an entirely new constitution and separate alternates.

Some states have used the limited constitutional convention for circumventing a more difficult amendment procedure. During World War II, Rhode Island and Virginia used such conventions to amend their constitutions to permit absentee voting by members of the armed services during World War II. This method avoids the requirement in some states of action by two successive legislatures, thus shortening the period required for action. (6) Limited constitutional conventions "are at the outset denied authority to engage in complete revision, having either been prohibited by their enabling authority (usually the legislature) from making alterations in specific provisions of the constitution or limited to making changes only in specified areas of constitutional concern. (7) The constitutional convention may also be limited by the convention itself, when it chooses to limit its proposals to amending the existing constitution. The issue of limiting a constitutional convention has raised questions, primarily concerning the right of the legislature to make certain sections of the constitution "off limits" to convention delegates. In 1944 and 1947, the New Jersey Constitutional Convention calls as approved by the voters included restrictions prohibiting legislative reapportionment, and in the former, it forbade changing the bill of rights. The limited constitutional convention is specifically prohibited in the constitutions of Alaska and Alabama, and other state constitutions are thought to ban its use by implication. For example, the constitution of New York states that the question submitted to the voters shall read "shall there be a convention to revise the constitution and amend the same?" (Article XIX, Section 2). In some of the states where limited conventions have been held, the question to be referred was not stated in the constitution (e.g. New Hampshire, Rhode Island (8)) or in the case of Virginia the constitution permits the general assembly to call a convention "to propose a general revision of, or specific amendments to this Constitution, as the General Assembly in its call may stipulate". (Article XII, Section 2). It is not known whether the Ohio constitutional provisions regarding calling a constitutional convention prohibit the limited convention or not. In some of the commentary, it is proposed that a limited convention may be called by the general assembly under Article XVI, Section 2, but not by mandatory referendum in Article XVI, Section 3. Others view the constitutional provisions as prohibiting a limited constitutional convention. A limited constitutional convention has not been proposed for Ohio, and its constitutionality has not been tested in the courts.

Conclusion

The absence of case law on the provisions of Article XVI, Sections 2 and 3 is evidence that these sections are not causing any problems and seem to be workable and well understood. While it has been held that the right to call a constitutional convention exists absent any constitutional authorization, if the sections are not raising any problems, it is probably constructive to have the alternative mentioned in the constitution.

Footnotes

1- John P. Wheeler, Jr., "Changing the Fundamental Law", appearing in Salient Issues of Constitutional Revision, National Municipal League. 1961 (p. 51).

2- 31 Ohio State Law Journal 421 (1970). Robert J. Martineau, "Referendum on Calling a Constitutional Convention". (p. 422).

3- George D. Braden and Rubin G. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis, 1969. (p. 562).

4- op. cit., Martineau, (p. 425).

5- op. cit., Martineau, (p. 426).

6- op. cit., Wheeler, (pp. 51-52).

7- Cynthia E. Browne, State Constitutional Conventions.(pp. xxxiii-xxxiv).

8- Rhode Island amended its constitution in 1973 to replace Article XIII, permitting constitutional revision by legislatively proposed amendments only, with Article XLI, Section 2, which provides for the general assembly to submit the following question to the voters "Shall there be a convention to amend or revise the constitution?" and requires the secretary of state to submit the question at the next election, if the general assembly fails to do so in any ten year period.

Ohio Constitutional Revision Commission
What's Left Committee
November 12, 1975

Miscellaneous Provisions
Article XV
Sections 1, 3

This memorandum will discuss two provisions in the Miscellaneous Article, Article XV. Section 1 states that Columbus shall be the seat of government. Section 3 requires an accounting to be made of receipts and expenditures of public moneys. These sections will be discussed separately.

Article XV, Section 1

The location of the seat of government was provided for by Article VII, Section 4, of the 1802 Ohio Constitution, which stated:

> "Chillicothe shall be the seat of government until the year one thousand eight hundred and eight. No money shall be raised until the year one thousand eight hundred and nine, by the legislature of this state, for the purpose of erecting buildings for the accommodation of the legislature."

At the 1851 Constitutional Convention, the Committee on the Legislative Department proposed the following substitute for Article VII, Section 4: "Columbus shall be the seat of government; until otherwise ordered by law." This provision was originally proposed as Section 30 of Article I, which set forth the legislative powers. The committee on drafting substituted the word "directed" for "ordered" in the section, and included it in Article XV, dealing with miscellaneous matters.

The Debates of the 1873-74 and 1912 Constitutional Conventions show no indication that changing the seat of government was considered, and the section was retained by these conventions as stated in the 1851 Constitution.

There has been very little litigation concerning Article XV, Section 1. In State v. Barhorst, 106 App. 335, 153 N.E. (2d) 514 (1959), the court held that the state board of optometry is required to maintain a central office in Columbus. Green v. Thomas, 37 App. 489 (1931) concerned A ticle XV, Section 1 and Article II, Section 26, and the court held that a statute relating to construction of a state office building and authorizing the city of Columbus to convey the site, did not violate the requirement of Article II, Section 26 that all laws be general and uniform in nature.

Conclusion

Article XV, Section 1 appears to be a satisfactory provision in its present form and should be retained, in the absence of any problems arising from it.

Article XV, Section 3

The 1802 Ohio Constitution contained no provision requiring an account to be made of receipts and expenditures of public money. The 1851 Constitutional Convention considered the following proposal, offered by the committee on the Legislative Department:

> Article I, Section 22. An accurate and detailed statement of the receipts and expenditures of the public money, and the names of the persons who shall have received the same, and the amount they have received, shall annually be published.

There was some debate on the original proposal. A motion was made to omit the requirement of reporting the names of persons involved in the transaction of public funds on the ground that this requirement would make entries in the Auditor's and Treasurer's records "voluminous". The motion was defeated. A motion to strike out "persons" and substitute "public officers" led to discussion of the rationale for the proposal. Was the provision intended to prevent "defalcation" of public officers or to report the names of all persons who receive money? The reason for making the section applicable to all persons was that one can easily tell the salary of a public officer, but other persons receive money not only by statute but by appropriations of other authorities. The original motion was withdrawn. A motion to remove the requirement for annual publication was agreed to. The language adopted by the convention remains unchanged in our present constitution, as follows:

> Article XV, Section 3. An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom, and on what account, shall, from time to time, be published, as shall be prescribed by law.

There does not appear to have been any litigation concerning this section of the constitution. The section is implemented through several Revised Code sections, including Sec. 115.06, which states:

> The auditor of state shall be the chief accounting officer of the state. He shall keep in his office full and accurate accounts of all moneys, bonds, stocks, securities, and other property paid into or deposited in the state treasury, and of all moneys, bonds, stocks, securities, and other property paid out of or transferred from the state treasury. He shall manage and direct all negotiations and correspondence concerning them.

Two sections in Chapter 117. concern the publication of receipts and expenditures of public money. Sec. 117.05 requires an accounting and reporting system to be maintained for all public offices. Sec. 117.06 provides for a financial report of each public institution or taxing district for each fiscal year to be made. The auditor publishes two reports annually, "The Ohio Annual Report" and an Annual Financial Report, which list recipients by local governmental units or other groups. The reports do not contain the individual names of persons who receive public money, for the reason that publishing certain lists of names, for example welfare recipients, runs afoul of federal laws and regulations. No one has ever challenged the lack of publication of individual names.

Conclusion

Section 3 of Article XV appears to present no difficulties, as the lack of litigation might indicate. In an era where the public has made evident its desire for accountability by public officials and its desire to know for what purposes public funds are being spent, Section 3 makes a constitutional commitment to this accountability, and should be retained.

STATE OF OHIO
ADJUTANT GENERAL'S DEPARTMENT
P.O. BOX 660
WORTHINGTON, OHIO 43085

JAMES C. CLEM
MAJOR GENERAL
THE ADJUTANT GENERAL

JAMES A. RHODES
GOVERNOR

AGOH-AG

16 January 1976

Ann M. Eriksson, Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Director Eriksson:

I wish to thank you for advising me of the hearing scheduled for 9:30 A.M., 27 January 1976, regarding possible revision of Article IX, the Militia of the Ohio Constitution.

Since I will be attending a meeting in Washington that week, I will be unable to be present. However, I will have the Assistant Adjutant General for Army, Brigadier General James M. Abraham, as well as one of our Judge Advocate Generals, LTC William Shimp, and possibly two other interested staff officers present in the event the committee cares to discuss the ramifications of any change on our organization.

In your discussion, it would appear that there is a movement to strike from the Article the authority of the Governor to call the unorganized militia in time of need, using the rationale that there are other adequate organized forces (both state and federal, to handle any emergency. I fear that advocates of this theory fail to take into account the possibility of the nuclear missile attack using multiple warheads which could effectively immobilize or engage all remaining forces in recovery or defensive operations.

The ability to call all able bodied citizens (even though untrained) in such an event is essential to reconstitution of defensive forces and local recovery operations within the state. Americans respond in time of emergency exceedingly well and natural leaders come forth and take charge, quickly changing the unorganized masses into organized effective units. Without the responsibility of service in time of a dire emergency, most citizens will resort to self-preservation, with the strong prevailing and the weak

suffering since law and order may be non-existent or ineffective.

In the event of a national emergency in which the 20,000 volunteer members of the National Guard have been called from the state and deployed either overseas or elsewhere in the United States, the 500 man Ohio Defense force is inadequate to maintain law and order. This organization would be unable to provide security for Ohioans if Cleveland, Columbus, the Dayton-Cincinnati, Toledo and the Akron-Youngstown areas sustain simultaneous nuclear attacks with fallout covering one-half of the state.

Possibly I paint a grim picture. However, my military training dictates considering every eventuality. I personally feel that the present article in the constitution has served its purpose well, and the Governor's right to call the unorganized militia to service should be preserved.

Sincerely,

JAMES C. CLEM
Major General
The Adjutant General

THE OHIO STATE UNIVERSITY

January 21, 1976

Ann M. Eriksson, Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Ms. Eriksson:

Thank you very much for your letter of January 9, 1976 regarding Article VII - Public Institutions of the Ohio Constitution. As your research memo indicated, Article VII, Section 1, has remained unchanged through many constitutional revisions and amendments since its enactment over a century ago. This provision is undoubtedly a reflection of the 19th century movement which produced large, remote, secure institutions for the mentally handicapped.

While the state constitution has remained unaltered, attitudes and policies with regard to the treatment of the mentally handicapped have changed and progressed dramatically since the mid-19th century. No development in the treatment of the mentally handicapped has been more important than the concept of "normalization". This normalization concept involves making available to mentally handicapped persons the patterns and conditions of everyday life which are as close as possible to the norms of the mainstream of society.

Translated into treatment for the mentally handicapped, normalization prescribes the deinstitutionalization of qualified residents of public institutions into small community living arrangements which provide family type environments. While state institutions are still necessary to care for the most profoundly retarded and the dangerously mentally ill, the policies of the Ohio Department of Mental Health and Mental Retardation now foster housing opportunities for many of the types of residents covered by Article VII, Section. To further advance this goal, the Developmental Disability Law Reform Project recommends amendment to the Ohio Constitution in order to modernize Article VII, Section 1 in terms of policies that prescribe treatment for citizens of the state of Ohio. The principles of community treatment and normalization need to be recognized in the fundamental document of the state.

College of Law 1659 North High Street · Columbus, Ohio 43210

Since Ohio still needs to support public institutions in some form, adoption of these principles can be done within the basic structure of Article VII, Section 1. In this regard, I am enclosing the Law Reform Project's draft of a suggested amendment to Article VII, Section 1 that integrates the above-mentioned principles into the language of the Constitution. This draft also updates the anachronistic language that is presently found in this provision of the Constitution.

Thank you again for your letter of January 9. We hope that this reply is useful in your deliberations and we will attend the January 27th meeting of the What's Left Committee.

Very truly yours,

Robert J. Hopperton

RJH/al

Enc.

Article VII, Section 1

Institutions, and residential housing opportunities in surroundings and circumstances as close to normal as possible, for the benefit of mentally ill, mentally retarded, other developmentally disabled, blind, deaf and dumb persons shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the General Assembly.

LOREN G. WINDOM
ATTORNEY AT LAW
1755 LANCASTER AVENUE
REYNOLDSBURG, OHIO 43068

27 January 1976

Ms.Ann M.Eriksson,
Director Ohio Constitutional Revision Commission,
41 South High Street,
Columbus,Ohio 43215.

Dear Ms.Eriksson,

I have been shown a copy of your letter dated 9 January 1976 addressed to Major General James Clem the Adjutant General, relative to the Constitutional provisions concerning the Militia.

In view of the fact that I was involved in the amendments of 1953 and that the 1961 amendments were my work, I would like to offer the following comment.

As you are aware Section 10 of Article III paragraph 1 was expanded in 1961 to insure that the Ohio Defense Corps could legally use personnel beyond normal military retirement age. There was another thought behind this change. Assume that there has been a massive nuclear exchange between the United States and the U.S.S.R. Both nations are prostrate. Obviously they may be out but until one nation occupies the other the war is not over. It was my idea to so broaden the militia base that those military - or even civilian - personnel who survived would have a legal and moral basis to form a defense force to carry on in the defense of our State and Nation. Stalingrad may indeed repeat itself. I feel strongly that paragraph 1 is highly desirable and should be retained.

Paragraphs 3,4 and 5 are necessary to spell out the duty and power of the Governor and the Legislature in relation both to State and also to Federal law.

Writers like Robert Dishman and others really base much of their thinking upon a WW1 and WW2 United States - super powerfully and with the ability to defend one and all. We can hope that this is true. The reality of today should convince us that to base our planning on such a hope would be foolhardy. Our State constitution and statutes should be broad enough to carry us through any emergency.

"Unorganized and undisciplined militia" served us well at Lexington and Concord and hundreds of other places. The unorganized militia may again save these United States.

Respectfully,

Loren G. Windom

Major General, AUS Retired

Ohio Constitutional Revision Commission
What's Left Committee
February 23, 1976

Public Welfare

Since the adoption of Ohio's constitutional provisions concerning public institutions as Article VII, in 1851, there has been a significant change in both attitudes and knowledge concerning the treatment of individuals who are unable to care for themselves. Some classes of persons are enumerated in Article VII, Section 1, which states that "Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly." Other groups of persons may require care by virtue of a physical or mental condition or age. The continually developing state of knowledge with respect to these classes of persons has raised some question as to whether the present constitutional provision concerning public welfare is an adequate statement of the state's commitment to the care and treatment of society's unfortunate, and whether the section might be revised, either by expansion or removal of obsolete language, to state more accurately what Ohio's obligations with respect to public welfare shall be.

An earlier memorandum prepared for the What's Left Committee on Public Institutions suggested that some of the terminology in Article VII, Section 1, is obsolete or unnecessarily stigmatizing, including the terms "insane" and "dumb", and might be replaced with more modern language, such as "mentally ill", "mentally retarded", and "mute". Other persons have commented that the term "institutions" is obsolete, since the trend in the care and treatment of mentally and physically handicapped persons is moving more toward community-based facilities and "normal" residential facilities, and away from isolated institutional-type settings. It has been noted, in addition, that Ohio's public welfare system embraces (or should embrace) a larger group than the "insane, blind, and deaf and dumb" mentioned in Article VII, Section 1, and that the constitutional provision should be broadened to include persons with other mental or physical handicaps or those handicapped due to age, whether juvenile or senior citizens.

In reviewing how other state constitutions deal with the question of public welfare, it appears that the provisions of other states generally fall into two classes: those that expand upon the number of classes designated as recipients in the public welfare system; and those that broaden the constitutional statement itself into something beyond provisions for institutional-type systems.

The following provisions fall into the first class:

Indiana - Article IX, Section 3. The county boards shall have power to provide farms, as an asylum for those persons, who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society.

Kansas - Article VII, Section 4. The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society. The state may participate financially in such aid and supervise and control the administration thereof.

Section 1. Institutions for the benefit of mentally or physically incapacitated or handicapped persons, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law.

Montana - Article XII, Section 3. (1) The state shall establish and support institutions and facilities as the public good may require, including homes which may be neces-

sary and desirable for the care of veterans.

(2) Persons committed to any such institutions shall retain all rights except those necessarily suspended as a condition of commitment. Suspended rights are restored upon termination of the state's responsibility.

North Carolina - Article XI, Section 3. Such charitable, benevolent, penal, and correctional institutions and agencies as the needs of humanity and the public good may require shall be established and operated by the State under such organization and in such manner as the General Assembly may prescribe.

Provisions falling into the second category are:

Alaska - Article VII, Section 4. The legislature shall provide for the promotion and protection of public health.

Section 5. The legislature shall provide for public welfare.

Hawaii - Article VIII, Section 1. The state shall provide for the protection and promotion of the public health.

Section 2. The state shall have power to provide for the treatment and rehabilitation as well as domiciliary care, of mentally or physically handicapped persons.

Section 3. The state shall have power to provide assistance for persons unable to maintan a standard of living compatable with decency and health.

Louisiana - Article XII. Section 1. The legislature may establish a system of economic and social welfare, unemployment compensation, and public health.

Missouri - Article V, Section 37. The health and general welfare of the people are matters of primary public concern;...

Montana - Article XII, Section 3. (3) The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants, who, by reason of age, infirmities, or misfortune may have need for the aid of society.

New York - Article XVII, Section 1. The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means, as the legislature may from time to time determine.

Section 3. The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner and by such means as the legislature may from time to time determine.

Section 4. The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by the state and local authorities and in such manner as the legislature may from time to time determine.

The Illinois Constitutinnal Convention, in 1970, considered including a section in its bill of rights relating to public health. The amended proposal No. 25 read:

> It shall be the public policy of the state to provide all persons an opportunity to secure unto themselves the blessings and adequate nourishment, housing, raiment, medical care, and necessities required for fulfillment of human life and dignity and to assist those members of society who are by reason of age, physical or mental infliction or deformity, or educational deprivation unable to fully supply these basic needs for themselves.

The authors of the proposal observed that it was hortatory in nature, and as such,

placed no specific mandates upon the legislature. The proposal received a majority vote of the convention, but was defeated, failing to receive the required number of votes for adoption by the convention.

In a study by the Temporary State Commission on the Constitutional Convention in New York, several constitutional problems relating to health, mental health, and welfare were discussed. One area, particularly relevant to our inquiry concerning public welfare, is whether the constitution should state any policy with respect to social welfare. The alternates were considered under four major headings, and the pros and cons are presented below.

1- Retain the Present Constitutional Provision

Those who favor retention of the present provision argue along these lines:

It provides basic support for legislation. Although the state might be able to provide needed social welfare services without explicit constitutional authorization, such a provision gives basic support for legislation and public concern for those in need of public assistance and gives the Legislature great flexibility in meeting needs.

It provides assurance of minimum programs. If it is mandatory, as is the present provision, there is some assurance that the state will take at least those measures which provide a minimum of aid, care and support for the needy, even though it is doubtful that there is any way of judicially enforcing the command.

It protects the state from challenge by localities. Because responsibility for the provision of aid, care and support is vested in the Legislature, the section tends to insure that local governments cannot act in a manner inconsistent with state mandates with respect to social welfare. If the localities were permitted complete freedom, the state would lose federal reimbursement of funds due to the federal requirement for a state-wide plan.

Those who argue against retention of a social welfare provision contend that:

A provision is superfluous. Because the state has power to act under its inherent police powers, which include the power to provide for the needy as part of the protection of general welfare of the people, a statement of social welfare policy is superfluous. It does not empower action or add to any powers which the state already has.

Removal would simplify the Constitution. A major goal of the Convention is to simplify the present Constitution. If a statement of policy is superfluous, it should be excised.

Most states operate welfare programs without similar provisions. Because a policy statement is technically unnecessary to enactment of social welfare legislation, most states do not contain such a statement. Because state constitutions traditionally are statements of restraints, the inclusion of such a statement tends to circumscribe the range of actions which otherwise might be taken...

2- Include entitlement to social welfare benefits as a matter of right.

Pros: It would insure that persons in need of public welfare programs would be treated according to standards of procedural due process...The inclusion of the principle of entitlement as a matter of right could guarantee that decisions respecting denial or withdrawal of eligibility could receive review based upon equitable standards reviewable by the courts.

Cons: It is unnecessary. There is no body of evidence that demonstrates that the needs are not receiving the care and assistance they require.

Statutes can prescribe mandatory standards for welfare administrators. The Federal Advisory Council on Public Welfare recently recommended that all public welfare programs receiving federal funds be administered consistent with the principle of "Public Welfare as a Right," and the Social Security Act could be amended accordingly. Similarly, the Legislature could mandate entitlement as a matter of right...

3- Develop a broader constitutional definition of persons who are entitled to public welfare.

Pros: The present provision is cast in too narrow terms. Although the term "needy" has come to include persons other than those who may lack the financial resources to care for themselves, the term might be changed to include or describe the wide range of persons who are the objects of public benefits and assistance: the aged, dependent children, the unemployed and other dependent and handicapped persons.

Cons: It is unnecessary. The state assists these people under the present terms. The change would not authorize the state to do anything not being done presently. If there is any ambiguity, the term "needy" could be defined by statute.

Specifications might result in limitations. Detailed specifications in a constitution can result in unintentionally limiting the scope of coverage through omission of a class of persons who would otherwise be covered now or in the future.

4 - Include the concept of rehabilitation in a social welfare policy statement.

Pros: It would expand the social welfare concept beyond the provision of aid, care and support to persons in need. By broadening the constitutional scope of state concern to include the rehabilitation of individuals, this proposal could place a constitutionally constructive emphasis on public welfare.

Cons: It is superfluous. The announced social welfare policy and goal of the state is not only to provide aid, assistance and care on a continuing basis to persons who are unable to care for themselves; it also is to rehabilitate as many persons as possible so that they may be returned to self-sufficiency and removed from public welfare rolls. Although the inclusion of the concept of rehabilitation would place a more positive connotation on the activities of the state, its absence does not limit the state's powers and its inclusion would not add to them. (1)

Sub. H.B. 244, adopted by the House this session, amends numerous Code sections dealing with mentally ill persons "to assure adequate treatment of mentally ill persons, to provide for the maximum use of the least restrictive treatment settings and voluntary hospitalization, to provide orderly and reliable procedures for commitment of the mentally ill consistent with due process of law, and to protect the rights of patients hospitalized pursuant to law." The passage of Sub. H.B. 244 follows the adoption of a similar bill, last session, dealing with rights of mentally retarded persons, Sub. S.B.336. One of the major changes in the house bill affects the facilities to which a respondent, when clear and convincing evidence exists that he is a mentally ill person subject to hospitalization by court order, may be referred. They include: (1) a hospital operated by the Department of Mental Health and Mental Retardation; (2) a private hospital; (3) the veterans administration or other agency of the U.S. Government; (4) a community mental health clinical facility; (5) private psychiatric or psychological care or treatment; (6) any other suitable facility or person consistent with the diagnosis, prognosis, and treatment needs of the respondent. The court is mandated to make such referral according to the guideline of the least restrictive alternate available and consistent with treatment goals. The adoption of Sub. H.B. 244 demonstrates the changing legislative attitude with respect to the care and treatment of mentally ill individuals, by including reference to community-based facilities and private care, in addition to traditional institutional and hospital treatment methods.

Mr. Joe White, of the Academy for Contemporary Problems, suggested that the underlying philosophy which should be expressed by a constitutional section dealing with public welfare, is that persons who can't care for themselves must be cared for by the state. A possible approach to devising some language to accomplish this purpose, might be to break the analysis down into the necessary elements. For example, do we want to use "mandating" or "authorizing" to describe the General Assembly's role?

1- State of New York, Temporary State Commission on the Constitutional Convention. Volume 11: Welfare, Health and Mental Health, 1967. pp. 46-48.

Should the constitution speak in terms of "institutions" or "residential care"?

In addition to some of the language in other state constitutions set forth earlier, terminology such as "handicapped by virtue of age or physical or mental condition" would include the mentally and physically disabled as well as juveniles and the aged. A term which might be substituted for "condition" would be "infirmity". The Hawaii Constitution contains a provision referring to the sort of residential and rehabilitative care which some persons have spoken in support of, in Article VIII, Section 2, "The state shall have power to provide for the treatment and rehabilitation as well as domiciliary care, of mentally or physically handicapped persons."

Some of the other state constitutions refer to the adult and juvenile criminal justice system in their provisions dealing with public welfare. We have chosen not to include those classes of persons in a consideration of a public welfare statement for Ohio's constitution, since these problems seem to us to be of a different type altogether.

It would appear that there are a number of alternatives open to the committee, depending on how broad it wishes to make the state's obligation with respect to public welfare, as specified by the Ohio Constitution.

Article II, Section 41
Prison Labor

Section 41. Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked "prison made." Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof.

Section 41 of Article II was adopted in 1912, after statutory enactments to abolish the practice of letting contracts for convict labor to private industry proved ineffective. Prison contract labor was prohibited by the constitutional provision in order to eliminate inequitable competition with free labor, to curtail excessive profits on the part of contractors of convict labor and to end peonage - the renting of men out to other men.

The What's Left Committee reviewed the constitutional provision and received testimony from persons in the field of rehabilitation and corrections to the effect that the section should be revised or repealed to effectuate the implementation of modern practices and knwoledge regarding inmates of Ohio's penal institutions. One possible source of conflict concerns "work-release" programs, where prisoners are permitted to leave penal institutions during the day for the purposes of employment under a kind of day parole system, returning to the institutions at night. Legislation has been adopted permitting the Adult Parole Authority to grant furloughs to certain prisoners for the purpose of employment. It was suggested that Article II, Section 41 might be amended to preclude a possible challenge to the constitutionality of "work-release" statutes. Another issue that was raised was that the present provision hampers the state's ability to supply meaningful employment for inmates who are incarcerated and have no immediate expectation of release. It was suggested that the constitutional provision be amended to remove the absolute prohibition against competition between prison and private labor, and that authority be given to the General Assembly to pass laws regulating such competition. This amendment would have a two-fold effect. First it would enable prisoners to be provided with meaningful employment as part of their rehabilitation process. Second, competition between prison labor and private industry as well as the federal government would be permitted, subject to regulation by the legislature. Admittedly, there are some areas where it would not be wise to place prison labor in competition with the private sector, but in other areas, for example, printing, competition would have the added benefit of reducing the state's financial obligation for the maintenance of prisoners in institutions.

The committee recommends the amendment of Article II, Section 41 as follows:
"Section 41. Laws shall be passed providing for and regulating the occupation and employment of prisoners sentenced to the several penal institutions and reformatories.

The rest of the section would be deleted, and the addition of the words "and regulating" would give the General Assembly broader discretion to regulate the employment of prisoners in Ohio's institutions.

Ohio Constitutional Revision Commission
What's Left Committee
January 20, 1976
Corrected April 26, 1976

Research Study No. 45

(Article XI)
Legislative and Congressional Districting

I. Introduction - Current Ohio Provisions

Article XI of the Ohio Constitution provides for the establishment of the boundaries of districts for the election of representatives and senators to the Ohio General Assembly. The number of representatives is fixed at 99, and the number of senators at 33; each senate district is to be composed of 3 house districts. Apportionment of the state into senate and house districts is required to take place every 10 years, following the federal decennial census, and is accomplished by a constitutionally-designated group of persons: the Governor, the Auditor of State, the Secretary of State, and two legislators of opposite parties chosen by the legislative leaders. The Constitution does not permit more than 5% over or 5% under the population ratio for each district. In addition to the population standard, the Constitution establishes other standards for the formation of house of representative districts: they must be compact and composed of contiguous territory; the boundary of each district shall be a single nonintersecting continuous line; counties may not be divided unless necessary to achieve the population standard; if a county must be divided, preference is given to maintaining the integrity of townships, municipalities, and city wards, in that order; and other standards. Exclusive original jurisdiction is conferred on the Ohio Supreme Court to hear cases arising under the Article.

Article XI is set forth in its entirety in Appendix A. It was adopted in 1967, during the "reapportionment revolution" of the 1960's, which began in 1962 with the Supreme Court decision in Baker v. Carr, 369 U.S. 186.

II. The Reapportionment Revolution

In Baker v. Carr, the U.S. Supreme Court acknowledged for the first time that federal courts have jurisdiction in cases where claims were made that state legislative apportionment violated 14th Amendment to U.S. Constitution. The significance of this case lay in the Court's ruling that the question was justiciable - because of prior rulings that the issues involved "political" questions. [1]

The requirement of "one man, one vote" subsequently became the rule beginning with a case challenging the equality of districts for election of congressmen. In Wesberry v. Sanders, 376 U.S. 533 (1964), the Court said that "the command of Article I, Section II (of the Federal Constitution), that representatives be chosen by the people of the several States means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."

In 1964, in Reynolds v. Sims, 377 U.S. 533, and 5 companion cases, the Court held that the "overriding objective must be substantial equality of population among the various districts." These cases all dealt with state legislatures. The Court didn't say how closely representation must follow population but acknowledged that mathematical exactness or precision was not workable. The Court noted that additional criteria could be taken into consideration, such as preservation of political subdivision boundaries, and compact, contiguous districts. The Reynolds Court recognized that disregard of historical or political lines invited gerrymandering -- districting along unnatural lines to achieve partisan advantage or other unfair objective.

The outcome of the cases in the 1960's was that both houses of a state legislature, congressional districts, and, ultimately, local governing bodies were ordered apportioned according to population. A number of mathematical tests were used to measure deviations from equality in applying one man, one vote rule -- one measures deviations from representative norm. Total population is divided by total number of legislators to determine ideal district. From this figure one can determine for each district the percentage deviation from the ideal district.

The responsibility for reapportioning the Federal House of Representatives is shared by Congress and the states. Following each decennial census Congress determines the number of representatives each state shall have. The actual drawing of district lines is a function of state legislatures; federal law requires each state to establish "by law a number of districts equal to the number of Representatives" to which the state is entitled (2 U.S.C.A. 2c)

Two 1969 cases saw rigid application of the one man, one vote rule to congressional apportionment. The Missouri case of Kirkpatrick v. Preisler, 394 U.S. 523 (1969) asserted that the standard in congressional reapportionment cases requires the state to make a good faith effort to achieve precise mathematical equality among districts. Said the Court: "Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.[p.531] In Wells v. Rockefeller, 394 U.S. 542 (1969) New York had constructed sub-states. Congressional districts within each sub-state were equal with respect to each other but unequal with respect to districts in other sub-states. New York attempted to justify the variances on the basis of regional interests. The Court said that "The general command,..is to equalize population in all the districts of the State and is not satisfied by equalizing population only within defined substates."(p. 546) In these two cases, the Court rejected considerations recognized as justifications in Reynolds v. Sims for variances in population equality -- i.e. regard for areas with distinct social and economic interest groups, preserving the integrity of boundaries of political subdivisions in drawing district lines, attempts to make congressional districts geographically compact, reasonable political compromise. "Kirkpatrick and Wells rejected almost every conceivable state consideration as a justification for population variances among congressional districts. Furthermore, Kirkpatrick and Wells insistence on a good faith attempt to achieve precise mathematical equality for valid congressional districts seemed to contradict the Reynolds dictum that mathematical precision was not a workable standard."[2] In Wells and Kirkpatrick, both of which called for strict population equality, the movement of one or two counties from one district to another would have preserved county lines and brought the population inequities down a couple of percentage points. However, the Court in those cases said that the preservation of county lines, observance of natural boundaries (rivers or mountain ranges) and even compactness were not valid excuses for any deviation whatsoever.

Cases in Spring term of 1973 articulated a difference in standards for state and congressional apportionment. Mahan v. Howell, 410 U.S. 315 (1973) applied the "as nearly as practicable" equal protection test of Reynolds v. Sims, not the stringent population test of Kirkpatrick and Wells. It allowed 16.4% total deviation between

most over-represented and most under-represented districts in the Virginia House of Delegates.[3] Explained by Court: 1. Generally there are more state legislative seats than congressional seats within a state; 2. It may be more feasible to preserve political subdivision boundaries and still provide adequate representation in a state legislature; 3. It may be beneficial to insure the voice of political subdivisions on matters of local concern arising in the state legislature; and 4. A state may desire to preserve political boundaries in order to deter gerrymandering. (Mahan at 321-322.) The Court in Mahan recognized "rational state policy" as justification for deviations. Flexibility of equal population standard became more recognized as a rule in state cases.

Flexibility of the equal population standard became the rule in state legislative reapportionments cases. In a case coming from Connecticut, the Court allowed a maximum population deviation of 7.83 per cent for one house where the legislature had followed a constitutional mandate not to divide any town (the basic unit of government) in a holding that acknowledged "political fairness" as a rational state interest. Gaffney v. Cummings, 412 U.S. 735 (1973) In a companion case from Texas, a 9.9 per cent total maximum deviation was held insufficient to support a prima facie case of a violation of equal protection guarantees. White v. Regester, 412 U.S. 752. However, in the latter case, the Court did indicate that a total deviation between two districts greater than 9.9% would probably not be permissible without justifications based on the implementation of a rational state policy.

The unwillingness of the Court to set a maximum deviation figure is probably explainable by population differences among the states and consequently the numbers of people who would be affected by the percentage deviation, as well as by the differences among the various state policies used to justify deviations. Several reasons have been offered for the apparently increased judicial tolerance of deviations from population equality among state legislative districts. In Gaffney the Court noted that variations in percentages of eligible voters, registered voters, and actual voters have effects in various parts of the state. Some have attributed the trend of the rulings of the 1970's to new personnel on the court.[4] In White v. Weiser 412 U.S. 783 (1973) the Court recognized that, in drawing congressional districts, the promotion of "constituency-representative relations" is a rational state policy. Finding that the deviations in the challenged redistricting were not unavoidable and that variances from equality must still be minimized, the Court said of the state's interest in drawing boundaries for congressional districts in Texas so as to minimize the number of contests between present incumbents: "We do not disparage this interest." Here the lower court had substituted for the state legislature's plan an alternative plan that was based solely upon population and that resulted in a total maximum deviation of .248%, as opposed to 4.13% under the legislature's plan. Reversing in part, the Supreme Court held that another alternative plan should have been used because it represented an attempt to adhere to districting preferences of the state legislature while eliminating population variances. Said the Court, state legislatures have "primary jurisdiction" over legislative reapportionment. The shift to absolute population equality as the standard of constitutionality for state legislature and congressional districts at the expense of other considerations has been criticized. State constitutions commonly require the preservation of county or other subdivision boundaries as well as the construction of compact, contiguous districts. The purposes of such criteria as contiguity and compactness appear to prevent political gerrymandering. A reapportionment plaintiff told a House Judiciary Subcommittee:

"Unfair representation has always come about in two ways: through the existence of numerical inequalities among district populations, and through what has traditionally been called 'gerrymandering' -- the placement of district boundary lines in such a way as to give one political party or faction or individual candidates artificial, unwarranted advantages over others. And while the numerical inequalities have now

all but disappeared, gerrymandering has, if anything, increased in importance, for with the elimination of the former evil, there has been a tendency to place greater reliance on the latter to accomplish the same political ends. And experience has proven that gerrymandering can be carried on just as effectively when numerical equality of districts is required as when it is not required. Indeed, in my opinion, the Supreme Court's over-emphasis on precise numerical equality has actually made gerrymandering easier by giving those who draw the lines an excuse for ignoring county, town, and city boundary lines."
Statement of David I. Wells to H. Jud. Subcom. No. 5, Hearings, Congressional Districting, 92nd Congress, 1st Sess. (1971) p. 76

In a 1972 publication of the American Enterprise Institute for Public Policy Research entitled Reapportionment - Law, Politics, Computers, Terry B. O'Rourke warned that insistence upon absolute population equality among districts as the sole standard of constitutionality could result in extensive gerrymandering. "By eliminating local boundaries, communities of interest, and district compactness as possible justifications for even slight population variances, the Court has unwittingly discarded almost all constraints on gerrymandering." (p. 73)

III. The Problems: Mathematical Equality and the Gerrymander

The 1970 population of Ohio was 10,652,017. The number of seats to which Ohio was entitled in Congress was reduced from 24 to 23, and the state was redistricted early in 1972. The "ideal" or mathematically correct size of a district is, therefore, 463,131 people. The population of the largest congressional district (the 14th) is 464,578, or .3% over the "ideal"; the population of the smallest congressional district (the 22nd) is 462,271, or .1% under the "ideal".

The ratio of population for a state senate district is 322,788; the largest district is 325,005 or .6% above the ratio and the smallest is 320,837 or .6% under the ratio. The ratio of population for a state representative district is 107,596. The largest district is 108,671 or .9% over the ratio and the smallest district is 106,578 or .9% under the ratio.

Under plans currently in effect, therefore, all deviations from absolute mathematical equality of congressional and legislative districts in Ohio are less than 1%.

Measuring a"gerrymander" is, of course, more difficult. Gerrymandering has been defined as a "manipulation of boundary lines among districts of equal population." [5] It can be used for partisan political, racial, social, economic, or other purposes, and the result may be to discriminate against groups of people even while achieving mathematical equality in the number of persons included in each district. The current congressional districts in Ohio have been challenged on the basis of discrimination in the Federal District Court in Cincinnati.

In an article in the May, 1971, issue of the National Civic Review, Robert G. Dixon, Jr., professor of Law at George Washington University Law Center and an acknowledged expert in the reapportionment field, notes that: "Fair representation in a pluralistic society is the goal, but there is no certain route to it." [6] Professor Dixon's comments were written as the results of the 1970 census were being made available and the new round of reapportionment was beginning. The article was written before the 1973 cases that reduced the emphasis on mathematical equality. He suggests the following "themes" to, as he states, " help put the matter in perspective": First, numbers are the natural starting point for "one man, one vote" analysis, but it should not be made a mere numbers game...In part because representation values have not been adequately discussed along with the bare equality idea,

courts have tended to say that, if a district plan can be made more equal, it must be. And of course it almost always can be made more equal in numbers, even if the price is gerrymandering and artificiality in districting....

Second, a large part of our problem is conceptual. We confuse two quite different terms: equal numbers.... and equal representation, which cannot be achieved under a district system of electing legislators because all districting discriminates by discounting the minority's votes....

Third, it follows logically that undue concern about symmetry of districts - the familiar compactness and contiguity analysis - is shadowboxing. Lack of symmetry is easy to spot, but it sidetracks intelligent discussion. The important question is where the political partisans dwell in relation to district lines and the overall (statewide) prospect they have for electing legislators roughly proportional to popular feeling.

Fourth, a goal of "equal representation" can be approximated only by abolishing districts and using a proportional representation system....

It is extremely unlikely that the United States will ever move in this direction, because we dislike some of the side costs that may go along with proportional representation, such as a multi-party system and governmental instability....

Fifth, given the realities of the American political system, the method used for reapportionment and redistricting becomes the key to achieving representational fairness. The bipartisan commission with tie breaker method of apportionment can point the direction toward fair and effective representation, and can adjust to any given rule of equal population stringency. Indeed, a bipartisan commission device can be a needed defense against the increased gerrymandering opportunities which may flow from a rigid mathematical equality rule....Clearly, the solution does not lie in the direction of so-called nonpartisan apportioning agencies, although the idea has superficial appeal. There is no such thing as a "neutral" district line or apportionment process....

Sixth, a federal constitutional amendment in the "one man, one vote" field may be in order, different from the Dirksen Amendment or the related proposals of Senators Church and Javits. The proposal here would have two provisions: first, that legislative districts would be presumed constitutional if the maximum deviation from the average district were within some low percentage figure, 5 percent or 10 percent; second, that this presumption of constitutionality could be overcome by a voter suit showing that the districts, even though having a de minimis inequality, nevertheless operated unreasonably to minimize the voting strength of racial or political elements of the voting population. This last phrase is taken directly from a Supreme Court opinion by Justice Brennan....

Seventh, although generically all districting is gerrymandering, it is possible to minimize excesses while retaining a district system. The term can be used to encompass all forms of distortion of the popular voting strength of any group. There are at least three major forms of gerrymandering.

Form one is use of multi-member districts even if all are the same size. This is a gerrymander because it inevitably submerges the voting strength of ethnic or political party minorities. There is yet no adverse ruling.

Form two is use of some single-member and some multi-member districts of varying sizes for the same legislative house. This is a gerrymander not only because it submerges minorities within the districts but also because gross inequalities in political power are created between the districts .... (Note - Ohio uses only single-member districts).

Form three is the one most persons are familiar with, and it can be called ad hoc gerrymandering. It involves the placement of lines so as to spread one party's control over as many districts as possible and give the opposition as few as possible. The first and best line of defense against this kind of gerrymandering is to block it at the outset by placing the function of reapportionment and redistricting in a bipartisan commission with tie breaker. The second line of defense is judicial review, but this may not be very effective.

No present standards, or standards likely to be articulated, can guarantee an absence of ad hoc gerrymandering in the sense of a planned disaproportionate relationship between votes cast and seats gained. The equal population standard even operates to maximize ad hoc gerrymandering opportunities by permitting all traditional alignments to be ignored in favor of arithmetic equality. Nor is the judiciary likely to offer much help here, even though courts have played a near-dominant role in reapportionment-redistricting so far. Racial gerrymandering clearly is subject to judicial review but few challenges have been successful.

If we turn to nonracial, political gerrymandering, we find that the Supreme Court has not yet clearly indicated whether it is even subject to judicial review. Lower courts are split on the issue. Even if general political gerrymandering is declared subject to judicial review, as it must be to make good on the promise of Baker v. Carr, actual interventions and effective relief may be rare....

Fifth, regarding computers and redistricting, we must distinguish between the computer as a tool, as it can be, and as a saviour, which it can never be."

IV. The Solutions

Briefly, two solutions are suggested to the problems of substantial equality in legislative and congressional districts ("one man, one vote" and gerrymandering). They are the devising of constitutional standards for the formation of districts that minimize mathematical inequality and, at the same time, require the maintenance of political subdivision boundaries to the greatest extent possible, or whatever other standards are deemed by the state to be in pursuance of a rational state policy for districting. The Ohio Constitution contains such standards for legislative districts. The second solution is to create a nonlegislative board, commission, or other agency with either primary or secondary (advisory to the legislature) responsibility for legislative districting. In 25 states, such a nonlegislative body exists, all dealing with legislative apportionment with at least one (Montana) dealing with congressional districting also. Congressional redistricting continues to be done exclusively by the legislature in all states but Montana. Of the 25 states, 13 place primary responsibility on the legislature for legislative apportionment, with the nonlegislative body serving as advisory, to submit plans to the legislature etc. In 10 states, including Ohio, legislative apportionment is completely removed from the legislature. In Montana, the legislature has the opportunity to make recommendations to the commission, but the commission's plan becomes final.

Table I, following, shows the 25 states with nonlegislative apportionment agencies. Table II shows the composition of the board or commission where the nonlegislative agency is a board or commission. Table III shows the specific provisions for breaking a deadlock where they exist (for example, where some one who is required to act fails to act, or where a commission is deadlocked).

Apportionment by Non-legislative Agency

State	Legislature Primary Apportioning Body	Primary/Secondary Apportioning Body (1)			
		Board or Commission	Court	Governor	Other
Alaska	No			X	
Arkansas	No	X			
California	Yes	X			
Colorado	No	X			
Connecticut	Yes	X			
Delaware	No			X	
Florida	Yes				Att. Gen.
Hawaii	No	X			
Illinois	Yes	X			
Iowa	Yes		X		
Louisiana	Yes		X		
Maine	Yes	advisory (2)			
Maryland	Yes			X	
Michigan	No	X			
Missouri	No	X			
New Jersey	No	X			
North Dakota	Yes	X			
Ohio	No	X			
Oklahoma	Yes	X			
Oregon	Yes				Sec. of Stat
Pennsylvania	No	X			
South Dakota	Yes	X			
Texas	Yes	X			
Vermont	No	X			
Montana	No	X			

Table I

1- Non-legislative agency has primary responsibility for apportionment where legislature does not.

2- Maine legislature is responsible for apportionment. Commission composed of legislators and public members submits plan to legislature.

5112

Table II

State	Composition of Board or Commission
Alaska	Governor has primary responsibility. Five-member advisory commission consists of non-public employees or officers, at least one from Southeastern, Southcentral, Central and Northwestern Senate Districts.
Arkansas	Governor (chairman), Secretary of State, Attorney General.
California	Lieutenant Governor (chairman), Attorney General, State Controller, Secretary of State, Superintendent of Public Instruction.
Colorado	Eleven members: speaker and minority leader of the house of representatives, majority and minority leaders of the senate, three executive members appointed by governor, four judicial members appointed by chief justice of the supreme court.
Connecticut	Governor appoints eight-member commission: president pro tempore of senate, minority leader of the house of representatives, minority leaders of both houses each designate two commission members.
Delaware	Governor (chairman), State Chairmen of the two political parties receiving the largest vote for Governor at the preceding election for Governor as advisors to the Governor.
Hawaii	Nine members: president of the senate and speaker of the house of representatives each select two members, members of each house belonging to parties different from that of the president or speaker designate one from each house and each select two members. Members select ninth member who serves as chairman.
Illinois	Eight members, no more than four from same political party. Speaker and minority leader of house of representatives each appoint one Representative and one non-legislative member. President and minority leader of senate each appoint one Senator and one non-legislative member. Chairman and Vice Chairman selected from among commission members.
Michigan	Eight electors, four selected by state organizations of each of the two political parties whose candidates received highest vote for governor at last preceding gubernatorial election; one resident from four designated regions selected by political party organizations. If a candidate for governor of a third political party received more than 25% of gubernatorial vote, commission consists of 12 members, the additional four selected by state organization of the third political party.
Missouri	Governor appoints two members from lists of nominees. Congressional district committee of each of the two parties casting the highest vote for governor at last preceding gubernatorial election nominate two members each, residing in their district. In case of failure of committees to submit names, governor appoints member of his own choice from the district and party of committee failing to make the appointment.
New Jersey	Ten members, five appointed by chairman of state committee of each of the two political parties whose candidates for governor receive largest number of votes at most recent gubernatorial election.
North Dakota	Chief justice of supreme court, attorney general, secretary of state, majority and minority leaders of house of representatives
Ohio	Governor, auditor of state, secretary of state, one person chosen by speaker of the house of representatives, the leader in the senate of the political party of which the speaker is a member, and one person chosen by legislative leaders in both houses of the major political party of which the speaker is not a member.
Oklahoma	Attorney general, secretary of state, state treasurer
Pennsylvania	Five members: minority and majority leaders of both houses, and a non-salaried state citizen selected by them.

Table II cont'd

Composition of Board or Commission (con't)

State

South Dakota - Governor, superintendent of public instruction, presiding judge of the supreme court, attorney general, secretary of state.

Texas - Lieutenant governor, speaker of the house of representatives, attorney general, comptroller of public accounts, commissioner of the general land office.

Vermont - Special master designated by chief justice of the supreme court, one freeman who is a resident of the state for five years immediately preceding the appointment, appointed by the governor from each political party which polled at least 25% of gubernatorial votes at last election, one freeman with five years residency chosen by state committee of each of those political parties. The special master is chairman and no member of the board may be a member of the legislature.

Montana - Five citizens, no public officials. Majority and minority leaders of each house each select one, and these four choose a fifth, chairman. If they fail to select a fifth, a majority of the Supreme Court selects the fifth person.

Table III

Provisions in Case of Deadlock or Failure of Non-Legislative Agency to Act

Alaska -	Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties.
Arkansas -	State supreme court, upon application of any citizen and taxpayer may compel Board to perform duties.
Connecticut -	Board of three persons, consisting of superior court judges, one selected by the speaker of the house of representatives, and one by the minority leader of the house, provided that there are members of no more than two political parties in the house of representatives. In the event that there are more than two, members of all other parties shall select a superior court judge to be a board member in lieu of such selection by the house minority leader. Two members shall select an elector in the state as the third member. The Board shall submit plan to secretary of state by Oct. 1 after its selection.
Delaware -	Any qualified voter may apply to the Superior Court to compel the Governor, by mandamus or otherwise, to perform redistricting and reapportionment duties.
Hawaii -	Upon petition of any registered voter, Supreme Court may compel appropriate persons to perform duties
Illinois -	If the commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State, one of whom shall be selected as the ninth member of the commission. Supreme Court has jurisdiction over actions concerning redistricting.
Michigan -	If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission. Any elector may petition supreme court to compel commission or secretary of state to perform reapportionment duties.
Missouri -	If either of the party committees fails to submit a list (of five persons to serve on reapportionment committee) the governor shall appoint five members of his own choice from the party of the committee so failing to act. If the committee does not file an apportionment plan, it shall stand discharged and the legislature shall be apportioned by commissioners of the state supreme court.
New Jersey -	If the 10-member commission is unable or fails to submit plan to the secretary of state, the chief justice of the supreme court shall appoint an eleventh commission member.
Texas -	The Supreme Court of Texas shall have jurisdiction to compel such commission to perform its duties by writ of mandamus or other extraordinary writs conformable to the usages of law.

In Democratic Representation: Reapportionment in Law and Politics, by Robert G. Dixon, Jr., (1968) there is a detailed analysis of non-legislative apportionment approaches among the several states that had them at that time.

In Chapter XII, entitled "Implementing 'One Man-One Vote': Some State Vignettes-I", the bi-partisan apportionment commissions of Illinois and Michigan are discussed. The failure of the Illinois Reapportionment Commission to agree on a plan in 1964, led to reapportionment by Federal Pre-Trial Conference in the senate reapportionment, and an at-large election for representatives to the lower house. Dixon offers the following comment on the Illinois system:

> The Illinois system is fundamentally deficient in concept in its three-step progression from legislative default to reapportionment commission default to at-large election as the final step authorized by the Illinois Constitution. The Illinois system, instead of putting pressure on the legislature, gives the legislature the 'out' of buckpassing to the Commission; and when the Commission achieves a not-unexpected deadlock, an at-large election is triggered. Because an at-large election itself undermines representative democracy, it should be contemplated as a direct sanction on the legislature uncomplicated by intervention of a commission or any other device for legislative buckpassing. 7

Professor Dixon contrasts the Michigan Bipartisan Apportionment Commission procedures with those of Illinois. In Michigan, the eight-member commission is charged with the decennial apportionment of both houses and, in the event of a deadlock, the state Supreme Court is authorized to order into effect an apportionment plan, selected from the plans submitted to it by the individual commission members on the basis of which plan complies most closely with the constitutional requirements. Dixon notes that the Michigan plan, in contrast to that of Illinois, creates judicial responsibility to reapportion districts and thus preserves the representative function. The "fatal" defect in the Michigan system, according to Dixon, results from the Supreme Court being the ultimate reapportioner according to the constitution, and that the political data gained by the reapportionment commission is not carried over to the deliberations of the final decision-making body.

> Indeed, the so-called bipartisan approach of Michigan actually guarantees that a partisan plan rather than bipartisan plan will eventually be adopted in the event of Commission deadlock. The state constitution authorizes the Michigan Supreme Court only to order into effect in toto one of the plans submitted by the partisan Commissioners individually. It gives the court no power to combine or adjust two or more plans to achieve a balanced and equitable result. It thus contrasts sharply and unfavorably with the pre-trial process worked out by Chief Judge Campbell in Illinois. There, after the parties had reached near-total agreement under strong judicial pressure the court - having participated throughout the process - could resolve the final disagreements in an informed fashion. 8

The Michigan Bi-partisan Apportionment Commission was attacked on the grounds that the 1963 constitutional amendment required the commission to be appointed by the political parties from four unequal population quadrants in the state, but this objection was dropped before ruled on by the court. 9

In Chapter XIII, "Some State Vignettes-II" the reapportionment approaches of Missouri and New Jersey are examined, among others. The 10-member bipartisan

commission has been in use in Missouri since 1945, and its members are appointed by the governor from lists submitted by the state central committees of the Democratic and Republican parties. Dixon comments that one problem with the Missouri system is that the Missouri Supreme Court Commissioners (three Democrats and three Republicans, appointed by the Supreme Court) provide a "backstop" in case of a deadlock in the bipartisan commissions, but the court appointed body is itself bipartisan, "and there seems to be no guarantee of achieving apportionment should this group deadlock". 10 Dixon seems to claim that the New Jersey apportionment system is the best among nonlegislative apportionment agencies.

> New Jersey's bipartisan commission approach to legislative apportionment, backstopped by appointment of a tie breaker by the Chief Justice of the state supreme court has strong claims to be a near-model bipartisan apportionment system. Functionally viewed it is more closely analogous to the pre-trial apportionment process worked out by Chief Judge Campbell for Illinois than to the bi-partisan commission procedures of either Missouri or Michigan. It is superior to the latter two bipartisan commission systems. The New Jersey bipartisan commission-plus-tie breaker process, like the Illinois pre-trial process, guarantees that reapportionment will be achieved and also guarantees that it will be achieved on as informed a basis as possible. By contrast, in the Missouri plan there is no backstop in the event of ultimate deadlock. The purported backstop in the Michigan plan mandates that the state supreme court shall pick the best of the partisan plans rather than make a final, informed, and fair adjustment. 11

A commission of nine or eleven members, all but one of whom would be appointed by legislative or other political leaders, is examined in "The Seminal Issue in State Constitutional Revision: Reapportionment Methods And Standards, by R. Dixon and G. Hatheway, Jr. (10 Wm. & Mary, 888 (1969)). In that article, the selection of the tie-breaker by a majority of the state's highest court is deemed preferable to selection by one individual, eg. the Chief Justice of the Supreme Court in New Jersey.

> Selection of the tiebreaker in this manner would minimize partisan considerations and suspicions present when the tiebreaker is appointed by the governor alone, or by the state's chief justice alone. Selection by the full bench of the state's highest court can serve to instill a popular faith in the selection process and induce a more ready acceptance of the final product. 12

In Chapter XIV of Dixon's book, three states, Ohio, Arkansas and Alaska, are discussed, as examples of"nonlegislative apportionment provisions which normally would operate to vest apportionment power in a partisan body". The Ohio Apportioning Board which was in existence at the time the book was written (1968) consisted of the governor, auditor and secretary of state, and all were Republicans. The author notes "...the existence of a partisan apportioning board as a backstop for the divided legislature prevented the achievement of a bipartisan apportionment in Ohio under court pressure or supervision." He continues by saying that it is unlikely that the method of apportionment will commend itself to other states, or even be fortuitous for Ohio. "Under this 'method', as in vesting apportionment exclusively in the legislature itself, far too much depends on the fortuitous factor of which political party controls the apportioning machinery at the critical point when apportionment must be accomplished under federal constitutional mandate." 13

The addition of two legislators to Ohio's group by constitutional amendment, one from each party, would not seem to alter these conclusions. Arkansas' apportioning board situation is compared to that of Ohio, with the difference that Arkansas is considered a one-party state whereas Ohio is a two-party state. In Alaska, the governor is charged with reapportioning the house and senate, and in 1966, a court case was brought challenging the governor's reapportionment of the senate. (Wade v. Nolan, 414 P. 2d 698) The Alaska Supreme Court upheld the governor's action, overruling a complaint that his action exceeded his authority under the state constitution. Dixon comments:

> Functionally viewed, there seems to be little distinction between accomplishing reapportionment by the device of a partisan commission in which the governor is the dominant figure, as in Ohio and Arkansas, and avesting exclusive power in the governor. None of these systems commend themselves to one concerned with maintaining the bases for effective two-party competition as well as accomplishing a periodic apportionment. 14

V. Proposals Pending in Ohio

Two resolutions have been introduced in the current General Assembly proposing modifications in Article XI of the Ohio Constitution. Both would apply the standards and the method of districting to congressional as well as to legislative districting.

S.J.R. 2, introduced by Senator Van Meter, would give constitutional status to the Ohio Elections Commission and give the Commission responsibility for legislative and congressional districting. The Commission consists of 4 persons appointed by the Secretary of State, 2 each from lists of 5 submitted by each of the two major political parties. The fifth member, the chairman, is chosen by the 4 appointees.

S.J.R. 2 does not differ from the present Ohio Constitution in the standards applied to legislative districts (not more than 5% deviation over or under the ratio and others relating to political subdivisions). The standards applied to congressional districts would be permitted a deviation of only 3% over or under the ratio.

H.J.R. 44, introduced by Representative Locker, also applies to both legislative and congressional districting and applies the same standards to both. It differs substantially from both S.J.R. 2 and the present Constitution in the composition of the "apportionment committee", however. The Committee would consist of one person chosen by the Speaker of the House and one person by the leader in the Senate of the same political party; one person each by the House and Senate leaders of the opposite political party; 2 persons chosen by 3 of the 4 initial appointees, one a resident of a county over 50,000 population and one a resident of a county under 50,000 population. The final member, the 7th, would be the person who received the third highest number of votes for Governor at the preceding gubernatorial election. Failing such a person to exist or accept, the resolution gives the final position to the person receiving the third highest number of votes for U.S. Senator, Attorney General, Secretary of State, Auditor of State, Treasurer of State, or Lt. Governor, in that order.

FOOTNOTES

1- Baker v. Carr, 369 U.S. 186 (1967). In Colegrove v. Green, 328 U.S. 549 (1946), the Court dismissed a suit which claimed that lack of approximate equality of population among Illinois congressional districts violated the 14th Amendment. "Nothing is clearer than that this controversy concerns matters that bring courts into immediate active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people." (p. 553).

2- "State Legislative Reapportionment: A New Era," by Daniel J. Tyson, 38 Albany Law Rev. 798,000 (1974).

3- Population deviation was here computed by determining the percentage by which one district contained over the average or ideal number of persons represented by one senator or representative (6.8%) and the percentage by which another contained under that average or ideal (9.6%) and adding the two percentage variations. This is what is meant by total deviation.

4- Robert F. Eimers, "Legislative Apportionment: The contents of Pandora's Box and Beyond," 1 Hastings Const. Law Quarterly 289,302 (1974).

5- Edwards, "The Gerrymander and 'One Man, One Vote,'" 46 N.Y.U. L. Rev. 879 (1971).

6- Robert G. Dixon, Jr., "One Man, One Vote - What Happens Next?", National Civic Review, May 1971, p. 259.

7- Dixon, Robert G., Jr., Democratic Representation, Reapportionment in Law and Politics, Oxford University Press, 1968. pp. 327-328.

8- Dixon, op. cit., p. 328.

9- Trial Brief of Plaintiffs, p. 75 (typescript), Marshall v. Hare, 227 F. Supp. 989, (E.D. Mich., 1964) quoted in Dixon, p. 316.

10- Dixon, op. cit., p. 339.

11- loc. cit., p. 339.

12- R. Dixon, G. Hatheway, Jr., "The Seminal Issue in State Constitutional Revision: Reapportionment Methods and Standards", 10 Wm & Mary 888 (1967), p. 907.

13- Dixon, op. cit., p. 366.

14- Dixon, op. cit., p. 370.

Appendix A

Article XI, Ohio Constitution

Section 1. The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law.

Section 2. The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such in unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

Section 3. The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five percent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

Section 4. The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five percent nor more than one hundred five percent of the ratio of representation in the senate as determined pursuant to this Article.

Section 5. Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly.

Section 6. District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed.

Section 7. (A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference to the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

Section 8. A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under section 2 of this Article.

Section 9. In those instances where the population of a county is not less than ninety percent nor more than one hundred ten percent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district, consisting of the whole county.

Section 10. The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five percent of the ratio nor more than one hundred five percent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five percent of the ratio or between one hundred five and one hundred ten percent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts.

Section 11. Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

Section 12. At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

Section 13. The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

Section 14. The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

Section 15. The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

Appendix B

Model State Constitution

BICAMERAL ALTERNATIVE: Section 4.04 Legislative Districts

(a) For the purpose of electing members of the assembly, the state shall be divided into as many districts as there shall be members of the assembly. Each district shall consist of compact and contiguous territory. All districts shall be so nearly equal in population that the district with the greatest population shall not exceed the district with the least population by more than .....per cent. In determining the population of each district, inmates of such public or private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law shall not be counted.

(b) For the purpose of electing members of the senate, the state shall be divided into as many districts as there shall be members of the senate. Each senate district shall consist of a compact and contiguous territory. All districts shall be so nearly equal in population that the district with the greatest population shall not exceed the district with the least population by more than .... per cent. In determining the population of each district, inmates of such public and private institutions as prisons or other places of correction, hospitals for the insane or other institutions housing persons who are disqualified from voting by law shall not be counted.

(c) Immediately following each decennial census, the governor shall appoint a board of ..... qualified voters to make recommendations within ninety days of their appointment concerning the redistricting of the state. The governor shall publish the recommendations of the board when received. The governor shall promulgate a redistricting plan within ninety to one hundred and twenty days after the appointment of the board, whether or not it has made its recommendations. The governor shall accompany his plan with a message explaining his reasons for any changes from the recommendations of the board. The governor's redistricting plan shall be published in the manner provided for acts of the legislature and shall have the force of law upon such pulbication. Upon the application of any qualified voter, the supreme court, in the exercise of original, exclusive and final jurisdiction, shall review the governor's redistricting plan and shall have jurisdiction to make orders to amend the plan to comply with the requirements of this constitution or, if the governor has failed to promulgate a redistricting plan within the time provided, to make one or more orders establishing such a plan.

Submitted by Mr. Robert Graetz, Ohio Council of Churches
July 9, 1976

EFFECT OF EVEN NUMBERS ON STATE LEGISLATURES
(37 States)

Even numbers in both houses:

1. Alaska: (40,20) A majority vote is needed to pass legislation. There have been minor organization problems.
2. Arizona: (60, 30) Even numbers have been less of a problem than the fact that the Assembly and Senate are controlled by opposite parties.
3. California: (80, 40) -
4. Florida: (120, 40) multi-member districts - No problem as a tie vote defeats a measure.
5. Georgia: (180, 56) -
6. Indiana: (100 from 73 dist., 50) Even numbers are not as much of a problem as the fact that the Assembly and Senate are controlled by opposite parties.
7. Iowa: (100, 50) No problems.
8. Kentucky: (100, 38) -
9. Massachusetts: (240, 40) No problem.
10. Michigan: (110, 38) Minor power squabbles but no voting problems.
11. Mississippi: (122, 52) -
12. Montana: (100, 50) No problems.
13. Nevada: (40, 20) A tie vote, which is rare, will defeat a measure.
14. New Hampshire: (400, 24) No problems.
15. New Jersey: (80, 40) -
16. New Mexico: (70, 42) -
17. New York: (150, 60) Absolute majorities are needed to pass a measure.
18. North Carolina: (120, 50) No problems.
19. Oregon: (60, 30) -
20. Rhode Island: (100, 50) -
21. South Carolina: (124, 46) Tie votes defeat a House measure, the president of the Senate breaks ties there.

22. Vermont: (150, 30) -

23. Virginia: (100, 40) No problem, parties of ten practice cross-over voting.

24. West Virginia: (100, 34) No problem.

25. Wyoming: (62, 30) A deadlock in leadership of the 1975 Senate has been resolved.

Even numbers in Senate:

1. Connecticut: (36) Tie votes may be broken by the Lt. Gov.

2. Kansas: (40) -

3. Missouri: (34) No problems.

4. Oklahoma: (48) -

5. Pennsylvania: (50) Tie votes are broken by the Lt, Gov.

Even numbers in House of Rep.:

1. Arkansas: (100) No problems. (overwhelmingly Democratic)

2. Idaho: (70) No problems. (consistently Republican)

3. Minnesota: (134) -

4. North Dakota: (102) No problems.

5. South Dakota: (70) In 1973 and 1974 the House was split 35-35. The party of the Governor organizes the House. There are occasional tie votes.

6. Texas: (150) -

7. Washington: (98) No problems. (consistently Democratic)

Ohio Department of Mental Health and Mental Retardation
James A. Rhodes, Governor
Timothy B. Moritz, M.D., Director
Clem Davis, Commissioner, Management Services

Office of Legal and Labor Services
Walter M. Lawson III, Chief

2929 Kenny Road / Room A205
Columbus, Ohio 43221

June 28, 1976

Ms. Ann Eriksson
What's Left Committee
Ohio Constitutional Revision Commission
68 Neil House
41 S. High St.
Columbus, Ohio 43215

Dear Ms. Eriksson:

Pursuant to our telephone conversation of 6/25/76, please be advised of the following two items I would request be supported and cited by the commission's record regarding its proposed amendment of Article VII, Section 1., of the Ohio Constitution:

(1) The commission's definition of the word "harm" includes more than physical harm, i.e., "behavior that creates a grave and imminent risk to substantial rights of others or himself" (O.R.C. 5122.01 B.4. effective 8/26/76).

(2) The commission's interpretation of the words "shall always be fostered and supported by the state" does not prohibit community involvement in care, treatment, or habilitation of disabled or handicapped persons, nor does it mandate the state to provide facilities for and services to <u>all</u> persons who, by reason of disability or handicap, require care, treatment, or habilitation.

If the commission's interpretation of these two items is as indicated, this department can support the proposed language.

Thank you for your cooperation.

Sincerely,

Walt Lawson

Walter M. Lawson III

WML:bm
cc: Timothy B. Moritz, M.D.
Robert Hopperton

Ohio Constitutional Revision Commission
What's Left Committee
September 1, 1976

REPORT

Article XI - Apportionment

The What's Left Committee makes the following recommendations with respect to Article XI of the Ohio Constitution, relating to legislative apportionment:

ARTICLE XI

Section	Subject	Recommendation
1	Apportionment Commission; Membership; General Assembly and Congressional districts	Amend
2	House and Senate ratios of representation	No change
3	House of Representative districts	No change
4	Senate districts	No change
5	Single member districts	No change
6	Decennial change of district boundaries	No change
7	Formation of Ohio House of Representative districts	No change
8	Counties with whole ratios	No change
9	Whole county as district	No change
10	Order in which standards are applied in creating districts	No change
11	Formation of Senate districts	No change
12	Senatorial terms when district boundaries change	No change
13	Supreme Court jurisdiction; invalidity of constitutional provision or apportionment plan	Amend
14	Temporary provisions	Repeal
15	Severability	No change

Comment

The Committee recommends two significant changes in the Constitution with

respect to the creation of legislative districts: (1) the inclusion of congressional districting in the duties of the Apportionment Commission; (2) a change in the composition of the Apportionment Commission.

Introduction

Article XI of the Ohio Constitution currently provides a method for establishing the boundaries of districts for the election of representatives and senators to the Ohio General Assembly. The number of representatives is fixed at 99, and the number of senators at 33; each senate district is to be composed of 3 house districts. All districts are single-member districts. Apportionment of the state into senate and house districts is required to take place every 10 years, following the federal decennial census, (and may take place only then) and is accomplished by a constitutionally-designated group of persons: the Governor, the Auditor of State, the Secretary of State, and two legislators of opposite parties chosen by the legislative leaders. The Constitution establishes standards for the formation of house of representative districts: population requirements; compact and composed of contiguous territory; the boundary of each district shall be a single nonintersecting continuous line; counties may not be divided unless necessary to achieve the population standard; if a county must be divided, perference is given to maintaining the integrity of townships, municipalities, and city wards, in that order; and others. Exclusive original jurisdiction is conferred on the Ohio Supreme Court to hear cases arising under the Article.

Article XI was adopted in 1967, during the "reapportionment revolution" of the 1960's, which began in 1962 with the Supreme Court decision in Baker v. Carr, 369 U.S. 186.

The Ohio Constitution, on the other hand, does not deal with the problem of creating congressional districts. Congressional districts are drawn by the

General Assembly. No law or constitutional provision, state or federal, prohibits the General Assembly from redrawing congressional districts as often as it is able to do so, although the number of representatives to which each state is entitled is determined only once every 10 years, following the census.

The Reapportionment Revolution

In Baker v. Carr, the Supreme Court acknowledged for the first time that federal courts have jurisdiction in cases where claims are made that state legislative apportionment violates the equal protection clause of the 14th Amendment to the U.S. Constitution. The significance of the case lay in the Court's ruling that the question was justiciable; prior decisions had held that the issues involved "political" questions, not appropriate for judicial solution. [1]

The requirement of "one man, one vote" subsequently became the rule beginning with a case challenging the equality of districts for election of congressmen. In Wesberry v. Sanders, 376 U.S. 1 (1964), the Court said that "the command of Art. I, Section 1 (of the Federal Constitution), that Representatives to be chosen by the people of the several States means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

Also in 1964, in Reynolds v. Sims (377 U.S. 533) and 5 companion cases, all dealing with state legislatures, the Court held that the "overriding objective must be substantial equality of population among the various districts" based on the equal protection clause of the 14th Amendment. The Court didn't say how closely representation must follow population but stated that mathematical exactness or precision was not workable. The Court noted that additional criteria could be taken into consideration, such as preservation of political subdivision boundaries, and compact, contiguous districts. The Reynolds Court recognized that disregard of historical or political lines invited gerrymandering -- districting along unnatural lines to achieve partisan advantage or other unfair

objective.

The result of these cases and subsequent ones is that both houses of a state legislature, congressional districts, and local governing bodies were ordered apportioned according to population. As the cases in the 60's and early 70's began to turn more and more on precise mathematical equality - in spite of the warning of the Reynolds court - more and more commentators observed that mathematical precision, which usually requires cutting across natural and political boundaries, may have the effect of increasing the practice of gerrymandering. More recent cases indicate that the Court will permit greater deviations from the mathematically "ideal" district in state legislative districts than it will in congressional districts, but numbers are still emphasized.

The shift to absolute population equality as the standard of constitutionality for state legislature and congressional districts at the expense of other considerations has been criticized. State constitutions commonly require the preservation of county or other subdivision boundaries as well as the construction of compact, contiguous districts. Such criteria as contiguity and compactness prevent political gerrymandering. A reapportionment plaintiff told a House Judiciary Subcommittee:

> "Unfair representation has always come about in two ways: through the existence of numerical inequalities among district populations, and through what has traditionally been called 'gerrymandering' -- the placement of district boundary lines in such a way as to give one political party or faction or individual candidates artificial, unwarranted advantages over others. And while the numerical inequalities have now all but disappeared, gerrymandering has, if anything, increased in importance, for with the elimination of the former evil, there has been a tendency to place greater reliance on the latter to accomplish the same political ends. And experience has proven that gerrymandering can be carried on just as effectively when numerical equality of districts is required as when it is not required. Indeed, in my opinion, the Supreme Court's over-emphasis on precise numerical equality has actually made gerrymandering easier by giving those who draw the lines an excuse for ignoring county, town, and city boundary lines." [2]

Gerrymandering has been defined as a "manipulation of boundary lines among

districts of equal population."[3] It can be used for partisan political, racial, social, economic, or other purposes, and the result may be to discriminate against groups of people even while achieving mathematical equality in the number of persons included in each district.

In a 1972 publication of the American Enterprise Institute for Public Policy Research entitled "Reapportionment - Law, Politics, Computers", Terry B. O'Rourke warned that insistence upon absolute population equality among districts as the sole standard of constitutionality could result in extensive gerrymandering. "By eliminating local boundaries, communities of interest, and district compactness as possible justifications for even slight population variances, the Court has unwittingly discarded almost all constraints on gerrymandering." (p. 73)

Briefly, two solutions are suggested to the problems of substantial equality in legislative and congressional districts ("one man, one vote" and gerrymandering). They are the devising of constitutional standards for the formation of districts that minimize mathematical inequality and, at the same time, requiring the maintenance of political subdivision boundaries to the greatest extent possible, or whatever other standards are deemed by the state to be in pursuance of a rational state policy for districting. The Ohio Constitution contains such standards for legislative districts. The second solution is to create a nonlegislative board, commission, or other agency with either primary or secondary (advisory to the legislature) responsibility for legislative districting. In 25 states, such a nonlegislative body exists, all dealing with legislative apportionment with at least one (Montana) dealing with congressional districting also. Congressional redistricting continues to be done exclusively by the legislature in all states but Montana. Of the 25 states, 13 place primary responsibility on the legislature for legislative apportionment, with the nonlegislative body serving as advisory, to submit plans to the legislature, etc. In 10 states, including Ohio, legislative apportionment is completely removed

from the legislature. In Montana, the legislature has the opportunity to make recommendations to the commission, but the commission's plan becomes final.

Appendix A shows the 25 states with nonlegislative apportionment agencies, some of which are advisory only or act only if the legislature fails. Appendix B shows the composition of the board or commission where the nonlegislative agency is a board or commission. Appendix C shows the specific provisions for breaking a deadlock where they exist (for example, where some one who is required to act fails to act, or where a commission is deadlocked).

The What's Left Committee, after considerable study of the methods used in Ohio and other states, and the advantages and disadvantages of each, and after lengthy discussion of the problems of drawing legislative districts with representatives of interested groups, concluded that the standards set forth in the Ohio Constitution for drawing districts need not be altered, that congressional districts should be drawn by the same commission that draws legislative districts, and only once every ten years, and that the composition of Ohio's present apportionment body should be changed.

Article XI, Section 1

The Committee recommends that section 1 of Article XI be amended as follows:

Section 1. THE APPORTIONMENT COMMISSION SHALL DIVIDE THE STATE INTO DISTRICTS FOR THE ELECTION OF MEMBERS TO THE OHIO HOUSE OF REPRESENTATIVES, THE OHIO SENATE, AND REPRESENTATIVES TO THE UNITED STATES HOUSE OF REPRESENTATIVES. MEMBERS OF THE COMMISSION SHALL BE APPOINTED IN THE YEAR ONE THOUSAND NINE HUNDRED EIGHTY-ONE AND EVERY TENTH YEAR THEREAFTER. ONE MEMBER SHALL BE APPOINTED BY EACH OF THE FOLLOWING: ~~The governor, auditor of state, secretary of state, one person chosen by~~ the speaker of the house of representatives, ~~and~~ the leader in the senate of the political party of which the speaker is a member, ~~and one person chosen by~~ the legislative ~~leaders~~ LEADER in ~~the~~ EACH ~~two houses~~ HOUSE of the major political party of which the speaker is not a member, AND THE GROUP OF REPRESENTATIVES TO THE UNITED STATES HOUSE OF REPRESENTATIVES OF EACH OF THE TWO POLITICAL PARTIES IN THIS STATE HAVING THE LARGEST NUMBER OF SUCH REPRESENTATIVES ~~shall be the persons responsible for the apportionment of this state for members of the general assembly~~.

THE SIX MEMBERS SHALL BE APPOINTED ON OR BEFORE MARCH 1 OF THE DESIGNATED YEAR, AND THEIR NAMES SHALL BE FILED WITH THE SECRETARY OF STATE. THEY SHALL MEET NOT LATER THAN APRIL 1 AT A TIME AND PLACE FIXED BY THE SECRETARY OF STATE, WHO SHALL CALL THE MEETING. THE SIX MEMBERS SHALL SELECT, BY THE AFFIRMATIVE VOTE OF FOUR MEMBERS, A SEVENTH MEMBER WHO SHALL BE CHAIRMAN. IF THEY HAVE NOT SELECTED THE SEVENTH MEMBER BY MAY 1, EACH MEMBER SHALL, ON THAT DATE, SUBMIT THE NAME OF ONE PERSON, OTHER THAN A MEMBER, TO BE THE SEVENTH MEMBER AND THE NAME OF THE SEVENTH MEMBER SHALL BE CHOSEN BY LOT BY THE SECRETARY OF STATE FROM AMONG THE NAMES SO SUBMITTED. FAILURE TO SUBMIT A NAME FOR CHAIRMAN IS DEEMED A WAIVER OF THE RIGHT TO SUBMIT A NAME. NO ELECTED OR APPOINTED PUBLIC OFFICER SHALL SERVE AS A MEMBER OF THE COMMISSION. A VACANCY IN THE COMMISSION SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT.

~~Such persons, or a majority of their number,~~ THE APPORTIONMENT COMMISSION

shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts, ~~and~~ thirty-three senate districts, AND AS MANY DISTRICTS FOR REPRESENTATIVES TO THE UNITED STATES HOUSE OF REPRESENTATIVES AS THE STATE IS ENTITLED TO. Such meeting shall convene ~~on-a-date-designated-by-the-governor~~ AT THE CALL OF THE CHAIRMAN between August 1 and October 1 in the year one thousand nine hundred ~~seventy-one~~ EIGHTY-ONE and every tenth year thereafter. The ~~governor~~ CHAIRMAN shall give ~~such persons~~ THE MEMBERS two weeks advance notice of the date, time, and place of such meeting.

MEMBERS OF THE APPORTIONMENT COMMISSION SHALL SERVE WITHOUT COMPENSATION BUT SHALL BE REIMBURSED FOR ACTUAL AND NECESSARY EXPENSES. THE GENERAL ASSEMBLY SHALL APPROPRIATE MONEY FOR THE OPERATION OF THE COMMISSION.

A DIVISION OF THE STATE INTO LEGISLATIVE AND CONGRESSIONAL DISTRICTS AGREED TO BY A MAJORITY OF THE MEMBERS OF THE COMMISSION SHALL BE FILED WITH THE SECRETARY OF STATE WHO ~~The-governor~~ shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law.

ALL MEETINGS OF THE APPORTIONMENT COMMISSION SHALL BE OPEN TO THE PUBLIC.

DISTRICTS FOR THE ELECTION OF REPRESENTATIVES TO THE UNITED STATES HOUSE OF REPRESENTATIVES SHALL BE ESTABLISHED BY THE APPORTIONMENT COMMISSION BY DIVIDING THE WHOLE POPULATION OF THE STATE BY THE NUMBER OF REPRESENTATIVES TO WHICH THE STATE IS ENTITLED, AND FOLLOWING THE PROCEDURES AND STANDARDS PRESCRIBED IN THIS ARTICLE FOR THE FORMATION OF OHIO HOUSE OF REPRESENTATIVE DISTRICTS.

Composition of the Apportionment Commission

The Apportionment Commission (the group is not named in the present constitutional provisions) presently consists of the Governor, the Auditor of State, the Secretary of State, and two persons of opposite political parties chosen by

the legislative leaders. The persons so chosen to sit with the three elected executive officials in 1971 were legislators.

Ohio is one of a very few states that had legislative districts drawn by a body other than the legislature itself prior to the reapportionment decisions in the early 1960's described in the Introduction. However, the process of apportionment was almost automatic in Ohio prior to the one man, one vote decisions, because the Ohio Constitution, as did many state Constitutions, required that there be at least one Representative from each county, regardless of population. Additional representatives were allocated on a population basis, and senators were allocated on a population basis, in such a fashion that, over a ten-year period, the large counties were roughly represented, in the Senate, according to population. In the House, because of the one representative per county provision, representation was very unequal. All senators and representatives were allocated to counties (or, in the case of the Senate, groups of counties) and were elected at large within a county entitled to more than one.

Since the decisions holding the Ohio legislature to be unconstitutionally apportioned, and the 1967 Constitutional amendment that rewrote Article XI, it has become apparent that the critical issue now is who draws the district boundaries, rather than the standards pursuant to which the boundaries are drawn.[4]

The What's Left Committee considered a number of proposals for creating the Apportionment Commission, including three resolutions introduced in the 111th General Assembly that would amend Article XI in this crucial aspect - S.J.R. 2 (Van Meter), H.J.R. 44 (Locker), and S.J.R. 41 (Pease).

The Committee concluded that the present Commission should be replaced because it places in the hands of the party that wins two out of three executive positions the entire power to control legislative apportionment. Moreover, regardless of the political affiliation of the executive officials, the Committee

concluded that executive officials should not have a part in this vital legislative decision. At the same time, the Committee also concluded that legislators themselves should be at least one step removed from the apportionment process because experiences in other states have demonstrated that it is extremely difficult, in some instances impossible, for legislators to apportion themselves.

The Committee's solution was two-fold: each of the four legislative leaders (of the two major political parties) should name one person to the Apportionment Commission. The persons named, however, could not be legislators because no elected or appointed public officer would be permitted to serve. In addition, two persons representing congressmen (of the two major political parties) would be named to the Commission, since congressional districting is to be added to the Commission's duties.

Although the six persons thus named cannot be public officials, it seemed to the Committee inevitable that they will be persons with a partisan political bias, and the Committee recognizes that apportionment and redistricting are, by their very nature, political processes. Therefore, the choice of the seventh person, who will serve as chairman, is critical. The seventh person will be the "tie-breaker". The Committee concluded that the seventh person should be chosen by the six (as is the case with the recently-created Elections Commission) and, if the six cannot agree within a specified period of time, the seventh person shall be chosen by lot - a name drawn by the Secretary of State from among six names submitted by the six members. The names submitted by the six may not include a public official nor may they include a member of the Commission.

It is the Committee's view that the uncertainty relating to the alternative of selecting the chairman and seventh member by lot constitutes a powerful incentive for the six members to reach agreement on the selection of the seventh and that the person so chosen is most likely to be fair and impartial in this highly sensitive position.

Congressional Districting

Every ten years, following the census, 435 Representatives to Congress are

allocated among the 50 states. Federal statutes direct the states "by law" to draw districts of substantially equal population and court decisions now require very close mathematical equality. There are no restrictions on redrawing the districts more often than every ten years.

Congressional districting has always been a legislative function, in Ohio as well as in all other states. The only exception located to this fact is the new Montana Constitution, which creates a 5-member Commission (no public officials) charged with both legislative and congressional districting. However, the Montana Constitution did not take effect until 1972, and the present legislative and congressional districts in Montana were apparently drawn before then, so no information is available on the operation of the new provision in Montana.

Several states appear to have citizen committees that advise on the creation of congressional districts, but no state other than Montana has made such districts official. Although some question may exist whether a state constitutional provision placing the power to draw congressional districts in the hands of a body other than the legislature is in conformity with the federal law requiring districts to be drawn "by law", the Committee concluded that there are substantial advantages to removing this process from the partisan nature of the legislative process. Among these advantages (by putting the provisions in the Constitution) is the provision that congressional districts could only be drawn once every ten years. Congressional districts would be drawn according to the same standards as are General Assembly districts. The congressional delegation of each major political party would choose one person, who could not be a public official, to be a member of the Apportionment Commission.

Procedures of the Apportionment Commission

The Committee's recommendation gives the 4 legislative leaders and the two congressional delegations until March 1, 1981 (and every 10 years thereafter) to

name the 6 members of the Apportionment Commission. The Secretary of State is designated to call a meeting of the Commission on or before April 1. The first task of the 6 is to select the 7th member, who shall be chairman. Four affirmative votes are needed, and they have until May 1 to make the choice. The Secretary of State chooses the 7th member by lot, from among names submitted by the 6, if no person is selected by May 1.

Vacancies on the Commission are filled in the same manner as original appointments are made.

The chairman is required to call a meeting of the Commission sometime between August 1 and October 1, giving each member 2 weeks notice of the meeting time and place. This provision is not changed from the present Constitution, except that presently the Governor calls the meeting. The meeting date would be chosen according to the availability of census data.

Commission members serve without compensation, but the What's Left Committee anticipates the need for staff, and therefore would require the General Assembly to appropriate money for the operation of the Commission.

When the Commission has agreed, by a majority of the members, to districting plans, it files them with the Secretary of State, who is required to publish them no later than October 5.

All meetings of the Commission must be open to the public.

Article XI, Sections 2 - 12, 15

The Committee recommends no changes in the following sections:

Section 2. The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, is such in unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

Section 3. The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five percent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

Section 4. The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five percent nor more than one hundred five percent of the ratio of representation in the senate as determined pursuant to this Article.

Section 5. Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly.

Section 6. District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed.

Section 7. (A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference to the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

Section 8. A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under section 2 of this Article.

Section 9. In those instances where the population of a county is not less than ninety percent nor more than one hundred ten percent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district, consisting of the whole county.

Section 10. The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five percent of the ratio nor more than one hundred five percent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five percent of the ratio or between one hundred five and one hundred ten percent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts.

Section 11. Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

Section 12. At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

Section 15. The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

Comment

Sections 2 through 12 of Article XI establish ratios of population for senate and house districts (divide the state population by 33 to determine the ideal senate district and by 99 to determine the ideal house district), require

single-member districts, require that each senate district consist of 3 house districts, prohibit drawing districts except once every 10 years, and provide standards for drawing districts, including a list of priorities in determining which political subdivision lines shall be cut if necessary.

The Committee recommends no changes in any of these sections. It did not believe it could improve upon the standards. After examination of the various Supreme Court decisions regarding mathematical preciseness, the Committee questions whether section 9, permitting a single-county district to be 10% over or under the ratio, might not be held unconstitutional if it were tested. However, the Committee believes it is not necessary to make that decision, and, in any event, no absolute standard of mathematical deviation has ever been announced by the Court. Rather, each case seems to be decided on its own merits, with the state having an opportunity to show a rational state policy to justify deviations. Since all the present House and Senate districts deviate from the ideal by less than 1%, section 9 has not been put to the test of constitutionality.

The Committee was interested in, and discussed at some length, the possibility of having congressional districts encompass entire senate districts (which, in turn, encompass entire house districts). Having boundaries that coincide would seem to simplify the entire question of "representation" and make it easier for voters to determine who is representing them and their community. It would also make possible better liaison between congressmen and state legislators, and between legislators at both levels of government and local officials. However, the Committee rejected the idea, largely because the number of congressmen presently allocated to Ohio - 23 - if multiplied by 2 and 4, making a house of 92 and a senate of 46 (compared to the present 99 and 33) would result in even numbers in both houses. Even numbers in both houses could present organizational problems, in the Committee's opinion. Any other multiples would make the Ohio houses too large. Another consideration in rejecting this idea is the fact that the size of both houses of the General Assembly would depend on the number of congressional seats allocated to Ohio every 10 years.

Article XI, Section 13

The Committee recommends that Section 13 be amended as follows:

Section 13. The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this Constitution relating to apportionment or any plan of apportionment made by the ~~persons-responsible-for-apportionment~~ APPORTIONMENT COMMISSION, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the ~~persons-responsible-for-apportionment~~ COMMISSION by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The ~~governor~~ CHAIRMAN OF THE APPORTIONMENT COMMISSION shall give the ~~persons-responsible-for-apportionment~~ MEMBERS OF THE COMMISSION two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

Comment

This section describes the process of challenging a plan of apportionment, and provides for a subsequent meeting of the Commission to draw a new plan if one is held unconstitutional. The only changes recommended are to provide that the chairman of the Commission call the meeting, rather than the governor, since

the governor will no longer be involved in the apportionment process, and to name the Commission.

Article XI, Section 14

The Committee recommends repeal of Section 14, which reads as follows:

Section 14. The boundaries of house of representative districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election of 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

Comment

The Committee recommends that this section be repealed. It was a temporary provision, included in the 1967 amendment to take care of questions that might be raised about a court-ordered apportionment that took place before the adoption of the constitutional provisions.

Appendix A

Apportionment by Non-legislative Agency

State	Legislature Primary Apportioning Body	Primary/Secondary Apportioning Body (1) Board or Commission	Court	Governor	Other
Alaska	No			X	
Arkansas	No	X			
California	Yes	X			
Colorado	No	X			
Connecticut	Yes	X			
Delaware	No			X	
Florida	Yes				Att.Gen.
Hawaii	No	X			
Illinois	Yes	X			
Iowa	Yes		X		
Louisiana	Yes		X		
Maine	Yes	advisory (2)			
Maryland	Yes			X	
Michigan	No	X			
Missouri	No	X			
Montana	No	X			
New Jersey	No	X			
North Dakota	Yes	X			
Ohio	No	X			
Oklahoma	Yes	X			
Oregon	Yes				Sec.State
Pennsylvania	No	X			
South Dakota	Yes	X			
Texas	Yes	X			
Vermont	No	X			

1. Non-legislative agency has primary responsibility for apportionment where legislature does not.

2. Maine legislature is responsible for apportionment. Commission composed of legislators and public members submits plan to legislature.

Appendix B

State	Composition of Board or Commission
Alaska	Governor has primary responsibility. Five-member advisory commission consists of non-public employees or officers, at least one from Southeastern, Southcentral, Central and Northwestern Senate Districts.
Arkansas	Governor (chairman), Secretary of State, Attorney General.
California	Lieutenant Governor (chairman), Attorney General, State Controller, Secretary of State, Superintendent of Public Instruction.
Colorado	Eleven members: speaker and minority leader of the house of representatives, majority and minority leaders of the senate, three executive members appointed by governor, four judicial members appointed by chief justice of the supreme court.
Connecticut	Governor appoints eight-member commission: president pro tempore of senate, minority leader of the house of representatives, minority leaders of both houses each designate two commission members.
Delaware	Governor (chairman), State Chairmen of the two political parties receiving the largest vote for Governor at the preceding election for Governor as advisors to the Governor.
Hawaii	Nine members: president of the senate and speaker of the house of representatives each select two members, members of each house belonging to parties different from that of the president or speaker designate one from each house and each select two members. Members select ninth member who serves as chairman.
Illinois	Eight members, no more than four from same political party. Speaker and minority leader of senate each appoint one Senator and one non-legislative member. Chairman and Vice Chairman selected from among commission members.
Michigan	Eight electors, four selected by state organizations of each of the two political parties whose candidates received highest vote for governor at last preceding gubernatorial election; one resident from four designated regions selected by political party organizations. If a candidate for governor of a third political party received more than 25% of gubernatorial vote, commission consists of 12 members, the additional four selected by state organization of the third political party.
Missouri	Governor appoints two members from lists of nominees. Congressional district committee of each of the two parties casting the highest vote for governor at last preceding gubernatorial election nominate two members each, residing in their district. In case of failure of committees to submit names, governor appoints member of his own choice from the district and party of committee failing to make the appointment.
Montana	Five citizens, no public officials. Majority and minority leaders of each house each select one, and these four choose a fifth, chairman. If they fail to select a fifth, a majority of the Supreme Court selects the fifth person.

Appendix B continued

New Jersey	Ten members, five appointed by chairman of state committee of each of the two political parties whose candidates for governor receive largest number of votes at most recent gubernatorial election.
North Dakota	Chief justice of supreme court, attorney general, secretary of state, majority and minority leaders of house of representatives.
Ohio	Governor, auditor of state, secretary of state, one person chosen by speaker of the house of representatives, the leader in the senate of the political party of which the speaker is a member, and one person chosen by legislative leaders in both houses of the major political party of which the speaker is not a member.
Oklahoma	Attorney general,secretary of state, state treasurer.
Pennsylvania	Five members: minority and majority leaders of both houses, and a non-salaried state citizen selected by them.
South Dakota	Governor, superintendent of public instruction, presiding judge of the supreme court, attorney general, secretary of state.
Texas	Lieutenant governor, speaker of the house of representatives, attorney general, comptroller of public accounts, commissioner of the general land office.
Vermont	Special master designated by chief justice of the supreme court, one freeman who is a resident of the state for five years immediately preceding the appointment, appointed by the governor from each political party which polled at least 25% of gubernatorial votes at last election, one freeman with five years residency chosen by state committee of each of those political parties. The special master is chairman and no member of the board may be a member of the legislature.

Appendix C

Provisions in Case of Deadlock or Failure of Non-legislative Agency to Act

Alaska	Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties.
Arkansas	State Supreme Court, upon application of any citizen and taxpayer may compel Board to perform duties.
Connecticut	Board of three persons, consisting of superior court judges, one selected by the speaker of the house of representatives, and one by the minority leader of the house, provided that there are members of no more than two political parties in the house of representatives. In the event that there are more than two, members of all other parties shall select a superior court judge to be a board member in lieu of such selection by the house minority leader. Two members shall select an elector in the state as the third member. The Board shall submit plan to secretary of state by October 1 after its selection.
Delaware	Any qualified voter may apply to the Superior Court to compel the Governor, by mandamus or otherwise, to perform redistricting and reapportionment duties.
Hawaii	Upon petition of any registered voter, Supreme Court may compel appropriate persons to perform duties.
Illinois	If the commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State, one of whom shall be selected as the ninth member of the commission. Supreme court has jurisdiction over actions concerning redistricting.
Michigan	If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission. Any elector may petition supreme court to compel commission or secretary of state to perform reapportionment duties.
Missouri	If either of the party committees fails to submit a list (of five persons to serve on reapportionment committee) the governor shall appoint five members of his own choice from the party of the committee so failing to act. If the committee does not file an apportionment plan, it shall stand discharged and the legislature shall be apportioned by commissioners of the state supreme court.
New Jersey	If the 10-member commission is unable or fails to submit plan to the secretary of state, the chief justice of the supreme court shall appoint an eleventh commission member.
Texas	The Supreme Court of Texas shall have jurisdiction to compel such commission to perform its duties by writ of mandamus or other extraordinary writs conformable to the usages of law.

FOOTNOTES

1. Baker v. Carr, 369 U.S. 186 (1962). In Colegrove v. Green, 328 U.S. 549 (1946), the Court dismissed a suit which claimed that lack of approximate equality of population among Illinois congressional districts violated the 14th Amendment. "Nothing is clearer than that this controversy concerns matters that bring courts into immediate active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people." (p. 553).

2. Statement of David I. Wells to House Judiciary Subcommittee No. 5, Hearings, Congressional Districting, 92nd Congress, 1st Sess. (1971), p. 76.

3. Edwards, "The Gerrymander and 'One Man, One Vote'", 46 N.Y.U.L. Rev. 879 (1971).

4. Following are several good articles on the subject:

   Robert F. Eimers, "Legislative Apportionment: The Contents of Pandora's Box and Beyond", 1 Hastings Const. Law Quarterly 289, 302 (1974).

   Robert G. Dixon, Jr., "One Man, One Vote - What Happens Next?", National Civic Review, May 1971, p. 259.

   Robert G. Dixon, Jr., Democratic Representation, Reapportionment in Law and Politics, Oxford University Press, 1968, pp. 327-328.

   Robert G. Dixon, Jr. and G. Hatheway, Jr., "The Seminal Issue in State Constitutional Revision: Reapportionment Methods and Standards", 10 Wm. & Mary 888 (1967), p. 907.

Ohio Constitutional Revision Commission
What's Left Committee
September 7, 1976

Report to the Commission

MISCELLANEOUS

The What's Left Committee hereby submits its recommendations on the following sections of the Ohio Constitution:

Section	Subject	Recommendation
Article II:		
Section 20	Terms of office to be fixed; salary	Amend
Section 33	Mechanics' liens	No change
Section 35	Workmen's compensation	No change
Section 41	Prison labor	Amend
Article VII:		
Section 1	Insane, blind, deaf and dumb	Amend
Section 2	Directors of penitentiary; trustees of benevolent and other state institutions; how appointed	Repeal
Section 3	Vacancies; how filled	Repeal
Article IX:		
Section 1	Who shall perform military duty	No change
Section 3	Appointment of officers	No change
Section 4	Governor to call the militia	No change
Section 5	Public arms	No change
Article III:		
Section 10	Commander-in-chief of militia	No change
Article XV:		
Section 1	Seat of government	No change
Section 3	Liquidation of receipts and expenditures	No change
Article XVI:		
Section 2	Amending the constitution	No change
Section 3	Same subject	No change

Article II
Section 20
In-term Pay Raises

Present Constitution

Section 20. The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

Committee Recommendation

Section 20. The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished, except that an increase in salary applicable to an office shall apply to all persons holding the same office.

Committee Recommendation

The What's Left Committee recommends that Section 20 of Article II be amended as follows:

> Section 20. The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished, EXCEPT THAT AN INCREASE IN SALARY APPLICABLE TO AN OFFICE SHALL APPLY TO ALL PERSONS HOLDING THE SAME OFFICE.

This recommendation is identical to the first recommendation for this section presented by the Committee. It did not secure sufficient votes the first time, and was rereferred to the Committee. A second recommendation was defeated by the Commission.

History and Background of Section

Article II, Section 20, proposed by the legislative committee of the 1851 Constitutional Convention, was included in the 1851 Constitution after lengthy floor debate. The section, applicable to "all officers" had no equivalent in earlier organic acts, although the 1802 Constitution prohibited in-term changes in the salaries of judges and the governor in Article II, Section 6 and Article III, Section 8, respectively. The convention debates seem to indicate that the delegates viewed Section 20 as a provision to prevent graft and pocket lining, and, although not specifically stated in the debates, historically such provisions were designed to assure the division of power among the three branches of government.

Ten other states prohibit increases and/or decreases in compensation for all state officers during their term of office. A majority of the ten states expressly prohibit such in-term changes for executive officers, legislators and judges. The Model State Constitution prohibits in-term pay increases for legislators only.

There have been many court cases relating to the meaning and application of Section 20. The term "officer" in the context of Section 20 applies to both holders of offices provided for in the Constitution and holders of statutorily created offices, and to appointed as well as elected offices. It does not apply to municipal and school district officers. (Cases are cited in the original Committee report.)

Comment

The Committee, in considering whether Section 20 should be retained in the Ohio Constitution, noted that the legislature would have the power to fix terms of office and compensation under Section 1 of Article II even absent Section 20. Further, the Ohio Constitution currently prohibits in-term compensation changes for executive officers in Article III, Section 19 (governor, lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general), and for state legislators in Article II, Section 31, and prohibits diminution of judges' compensation during their terms in Article IV, Section 6(B). Also considered was the failure of the voters to ratify, recently, a constitutional amendment which would have allowed in-term pay increases for certain county officials and senators, and for officials occupying a position identical to that of another person whose salary is higher because his term begins and ends at a different time; for example, a PUCO commissioner.

Testimony presented to the Committee on behalf of county commissioners indicated that Section 20 effectively discriminates against some county commissioners, elected for staggered terms, since the newly elected officer may earn a higher salary than the commissioner remaining in office, depending on when legislation enacting salary increases is adopted. The newly elected commissioner might also

have less responsibility and experience than the lower paid incumbent commissioner. The Committee believes that the constitutional provision was not intended to cause this inequity. The Committee believes this discriminatory effect should be removed so that all persons holding the same office receive the same pay. The amendment proposed by the Committee would permit an incumbent office holder, when there is more than one of the same office, to enjoy a salary increase granted after he takes office, which he is unable to have under present Section 20. The Committee approves retention of the basic concept of no increases during term - Section 19 of Article III, prohibiting change in executive salaries in-term, has been recommended for retention without change. The proposed change in Section 20 will affect only holders of an office which is multiple in nature.

The proposed amendment to Article II, Section 20, has been resubmitted to the Commission in this report after further consideration by the What's Left Committee. The recommendation was not adopted by the Commission, apparently because the section, as proposed, did not extend to certain offices, such as county auditors, who might be in office when a pay raise went into effect and not be able to obtain the benefit of it, or to senators, who serve staggered terms but are governed by another constitutional provision. The What's Left Committee proposed another recommendation, which was defeated by the Commission. It would simply have prohibited decreases in salary during term and permitted increases. One of the objections to the recommendation was that persons seeking office are aware of the salary when they run and should be satisfied with that salary during their term of office. In addition, some felt that officers might exert more pressure on legislators for salary increases if they could receive the increase during term. The Committee felt that the original recommendation accomplished the intended purpose of correcting the inequity of two people doing the same job getting paid differently, as occurs with county commissioners, for example, under the present language. The second

recommendation was designed to bring in the county auditors and still exclude the legislators from in-term raises (also governed by Article II, Section 31). But the objection to the second recommendation, that persons running for office are aware of the salary level, applies to auditors and there is no inequity for auditors, unlike the county commissioners' situation. Therefore, the Committee believes that the amendment, as originally proposed, has considerable merit, and recommends its original proposal for Article II, Section 20 for reconsideration by the Commission.

Article II
Section 33
Mechanics' Liens

Present Constitution

Section 33. Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men, their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished material. No other provision of the constitution shall impair or limit this power.

Committee Recommendation

Section 33. No change

Committee Recommendation

The What's Left Committee recommends that Article II, Section 33 of the Ohio Constitution be retained without change.

History and Background of Section

A mechanic's lien is the right of a person who furnishes labor or materials for the construction or repair of a structure to assert his claim for payment against the structure and real estate itself. Legally, it has been defined as "a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon." Van Stone v. Stillwell & Bierce Mfg. Co., 142 U.S. 128 (1891).

Although the common law permitted an artisan or mechanic to assert a lien against personal property upon which he has labored, it did not permit a lien against real estate and structures on real estate to benefit a laborer or supplier of material. A lien against real estate is entirely dependent on a statute giving the right to a lien, and setting forth the terms and conditions under which it is obtained and the owner's right of protection against the lien. Originally, statutes were enacted granting the right to a lien to laborers and suppliers contracting directly with the owner. In 1894, the Ohio statute was amended to extend the benefit to subcontractors, laborers, and materials suppliers who were not in direct

contract with the owner. In 1896, the Ohio statute was held unconstitutional by the Ohio Supreme Court in Palmer and Crawford v. Tingle, 55 Ohio St. 423, and its companion case, Young v. The Lion Hardware Co., in which a general contractor had been paid in full by the owner but had failed to pay some of the suppliers of material. The suppliers, following the procedures in the statute and within the time limits imposed by the statute, filed liens against the property. The Supreme Court held the statute violated Section 1 of Article I of the Ohio Constitution in that it interfered with the owner's right to contract freely, and the restraint upon the right imposed by the statute was not for the common benefit. The owner, according to the court, did not have an adequate opportunity to protect himself against such liens; both of the methods of protection offered by the statute - waiting four months (the time in which liens could be filed) to pay the contractor, or requiring the contractor to file a bond against such claims - could increase the owner's costs under the contract. The Ohio statute was tested in federal courts, with a finding that it was not unconstitutional; however, the federal courts recognized the right of a state court to construe the state constitution (Jones v. Great Southern Fireproof Hotel Co., 86 F. 370, 193 U.S. 532, 24 S. Ct. 576, 48 . Ed. 778 (1904)).

At the 1912 Constitutional Convention, Proposal No. 166 was introduced to add a provision which would make the mechanic's lien statute constitutional. The proposal, as recommended by the Judiciary and Bill of Rights Committee, authorized the General Assembly to pass laws to secure the lien. Some delegates objected to the inclusion in the Constitution of a provision for the benefit of one class of workers while not making similar provisions for farmers, but the proposal was adopted by the Convention by a vote of 103 to 6, and then by the people. The General Assembly promptly enacted a new mechanics lien law, now Chapter 1311, of the Revised Code. Few constitutional questions have been raised in the course of litigation around the detailed law. Metropolitan Securities Co. v. Orlow et al., 107 Ohio St. 583 (1923), determined that Section 33 refers to a lien on real estate,

although not specified, and that personal property liens are not dependent on Section 33 for validity.

Comment

The What's Left Committee felt that the absence of problems with Section 33 was evidence that the section should be retained without change.

Article II
Section 35
Workmen's Compensation

Present Constitution

Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof, in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and,if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

Committee Recommendation

The Committee recommends that no change be made in Article II, Section 35. This recommendation for no change was previously presented to the Commission, but the Commission took no action because a select legislative committee had been appointed to study workmen's compensation. That committee has completed its assignment and the results of its recommendations are contained in S.B. 545 of the 111th General Assembly. The recommendations do not include any changes in Section 35.

History and Background of Section

Prior to the adoption of a constitutional amendment in 1912 enabling the legislature to adopt laws relative to workmen's compensation, resolution of

employee injury cases in Ohio, as in other states, took place in court. An injured employee had to prove in a law suit that the injury resulted from negligence on the part of the employer. Three common law defenses were available to the employer: contributory negligence, voluntary assumption of risk based on an individual's right of contract, and the "fellow servant" doctrine, which rendered the employee unable to recover if the injury resulted from negligence of a fellow employee. An injured employee rarely emerged the victor from costly and time consuming litigation, owing in part to the difficulty of proving negligence on the part of the employer. If the claimant did win, an employer was usually unprepared to pay the large award without hardship to his industry.[1]

The traditional defenses were modified in Ohio between 1851 and 1910. An exception to the fellow-servant doctrine was made in Little Miami v. Stevens, 20 Ohio St. 416 (1851), whereby a supervising or directing employee was not a fellow servant. In 1904, the legislature enacted the "Williams Bill", modifying the assumption of risk doctrine. It provided that the fact that an employee knew of his employer's negligence or omission to guard and protect his machinery and place of employment could not operate as a defense for the employer. Two laws passed in 1910, the Norris and Metzger Bills, further modified the employer's common law defenses by abolishing the contributory negligence defense and modifying the fellow-servant and assumed risk defenses. The notion of "comparative negligence" was substituted, applicable to certain dangerous employments in an attempt to measure whether the employer was guilty of gross negligence or the employee's negligence was only slight. These modifications did not end the necessity of the employee's resorting to court action in order to obtain compensation.

The concept of the cost of industrial accidents being a charge to industry itself rather than falling unevenly on employers was first adopted in Germany in the late 19th century. To employers it offered an available fund to pay compensation awards without jeopardizing the industry itself. To employees, it offered adequate medical and financial aid. New York was the first state to adopt a

comprehensive workmen's compensation law. The statute classified eight types of industry as hazardous, for which medical benefits and compensation were to be paid regardless of cause or fault, except where the injured party was guilty of serious willful misconduct. The law was challenged on three grounds in Ives v. South Buffalo Ry. Co., 201 N.Y. 271 (1911): that it violated the right to trial by jury, the due process guarantees of the federal and state constitutions, and the equal protection clause of the 14th Amendment to the Federal Constitution. The Court of Appeals sustained only the charge that the law was a denial of due process, finding that the police power of the state was not broad enough to enable the state to require an employer to pay compensation when he was without fault in an injury case. New York immediately drafted and adopted a constitutional provision (Article I, Section 18) enabling the legislature to enact workmen's compensation laws. Challenges to subsequent legislation reached the United States Supreme Court, which found no violation of due process and found such authority within the state's police power.

In 1911, Ohio adopted a workmen's compensation law. Employers of five or more persons could elect to participate, in which case they were not liable to respond at common law for damages, injuries, or death of employees. Failure to participate rendered employers of five or more persons liable for damages, and denied to them the common law defenses. In State ex rel v. Creamer, 85 Ohio St. 349 (1912), the Ohio Supreme Court considered a challenge to the constitutionality of the statute. The points of argument raised embraced several issues, some of which were raised in the New York case. Others included impairment of existing contracts, arbitrary classification, and taxation for private purposes. The Court, emphasizing the voluntary nature of the act, upheld the constitutionality of the provision. Reference is made to the Court's decision in the 1912 Constitutional Convention Debates by the sponsor of Proposal No. 24, to include a workmen's compensation provision in the Ohio Constitution. He said:

> Proposal No. 24 undertakes to write into the constitution of Ohio a constitutional provision making secure the workmen's compensation law passed by the last legislature, and declared constitutional by

> the Ohio supreme court by a vote of 4 to 2. Labor asks that this proposal be adopted, because we believe that by writing it into the constitution, it will make it possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter. It will also give an opportunity to still further improve the law to meet modern conditions of employment, as they may arise. 2

Following the adoption of Article II, Section 35, the legislature passed a compulsory compensation act, and established the Industrial Commission to replace the Board of Awards charged with administering the fund under the 1911 act. The constitutionality of this law was challenged and upheld in Porter v. Hopkins, 91 Ohio St. 74 (1913).

In 1924, Article II, Section 35 was amended to take away the right of an employee to sue at law when injury or death resulted from failure to comply with lawful requirements for protecting health and safety. The amendment expanded on the original section by providing for the board to hear a case alleging failure to comply with such requirements, and to add to the usual amount of compensation an award between fifteen and fifty percent of the maximum award established by law upon a finding that injury or death resulted from such failure by an employer. The amendment expanded upon the powers of the board and required an industry to pay a certain amount to a fund used to investigate industrial accidents. The section, as amended in 1924, remains unchanged in our present Constitution.

In 1921, a law was passed consolidating state administrative functions into several departments directly responsible to the governor. The Industrial Commission became part of the Department of Industrial Relations, with the primary function of acting as an administrative court of claims under the workmen's compensation act. The Commission was returned to independent status in 1934, once again the sole administrative body for workmen's compensation, and the three-member Industrial Commission retained all authority under the Workmen's Compensation Act until 1955. In that year, the Bureau of Workmen's Compensation was established by law, headed by an administrator, appointed by the governor with the advice and consent of the Senate. The powers and duties of the administrator and Bureau are set forth in Chapter 4121 of the Ohio Revised Code.

Comment

The What's Left Committee was joined in its discussion of the workmen's compensation section by several persons active in this area. Russell Herrold, a Columbus attorney representing the Ohio Manufacturers Association, has represented employers in workmen's compensation cases, and served as chairman of the American Bar Association's workmen's compensation committee. Robin Obetz, an employers' representative and past president of the Columbus Regional Board of Review, also participated. The Committee was presented with a draft amending the present constitutional language proposed by the Workmen's Compensation Committee of the Ohio Academy of Trial Lawyers.

The Committee considered whether fixed numbers should remain in the section, such as additional compensation between fifteen and fifty percent, or the contribution rate for investigation of industrial accidents being set at less than one percent, or whether these figures should be removed from the Constitution to give the legislature more flexibility. Another matter which was discussed was whether the section provided equal treatment for the parties involved. With respect to claimants and employees, in an appeals case, the claimant has the burden of proof even though the lower court may have found in his favor. Regarding injury and occupational disease, the statutes distinguish between occupational disease and occupational injury, and they treat the two types of disability differently. There is no right of appeal to a court for a jury trial from an adverse decision involving an occupational disease. An amendment was proposed to provide the right to trial by jury in an appeals case from any adverse decision not involving extent of disability. The Committee rejected this proposal, on the basis that the matter was statutory. The Committee discussed the difference in compensation provided in the statutes for occupational disease and occupational injury. In cases involving the respiratory tract, a person has to be totally disabled before he is entitled to compensation, but one need not be 100% injured in order to collect for occupational injury claims. The distinction may arise in the statutes from the

use of both "injury" and "occupational disease" in the Constitution.

Testimony heard by the Committee indicated that workmen's compensation laws were cyclical in nature, periodically, as the political orientation of the legislature and executive change, the "pendulum swings" place either labor or management in a position of greater strength. There was general agreement that these trends were undesirable, but that to amend the Constitution by including more statutory language on the hopes of stopping these pendulum swings would not be a wise approach. The predominant view was that Article II, Section 35 was merely an authorization to the legislature to enact workmen's compensation laws, and that if the present laws are not satisfactory, the legislature was the proper authority to revise the laws. The Committee agreed that no change should be made in the present constitutional section, that the legislative process was a better method of dealing with desired changes in the area of workmen's compensation than the process of constitutional revision.

Footnotes

1. Ohio State Law Journal, vol. 19, "The Ohio Compensation System" by James L. Young, p. 542.

2. Proceedings and Debates of the Constitutional Convention of the State of Ohio, 1912, p. 1346.

Article II
Section 41
Prison Labor

Present Constitution

Section 41. Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked "prison made." Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof.

Committee Recommendation

Section 41. Laws shall be passed providing for and regulating the occupation and employment of prisoners sentenced to the several penal institutions and reformatories.

Committee Recommendation

The What's Left Committee recommends that Article II, Section 41, be amended as follows:

Section 41. Laws shall be passed providing for AND REGULATING the occupation and employment of prisoners sentenced to the several penal institutions and reformatories. ~~in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are~~

~~conspicuously-marked-"prison-made."--Nothing-herein-contained-shall-be construed-to-prevent-the-passage-of-laws-providing-that-convicts-may work-for,-and-that-the-products-of-their-labor-may-be-disposed-of-to, the-state-or-any-political-sub-division-thereof,-or-for-or-to-any-public-institution-owned-or-managed-and-controlled-by-the-state-or-any political-sub-division-thereof.~~

Effect of Change

The Committee recommendation with respect to Article II, Section 41 retains most of the first sentence of the section, and deletes the rest of the section. The addition of the words "and regulating" was made to give the General Assembly broader discretion to regulate the employment of prisoners in Ohio's correctional institutions. Competition between private industry and convict labor is prohibited under the present language, and the addition of the words "and regulating" would allow laws to be passed permitting such competition; with the federal government, for example, in the field of printing.

History and Background of Section

Article II, Section 41 was added to the Constitution by the 1912 Convention with the combined backing of organized labor and manufacturers affected by competition with goods produced by cheap convict labor. Statutory authority for letting contracts for convict labor to private industry had been adopted in 1853,[1] permitting penitentiary wardens and directors to enter into such contracts in the interest of the State and prison welfare, and limiting any one contract to 50 convicts and five years. The penitentiary law was twice amended in 1867, further authorizing the penitentiary directors to let and hire convict labor to business and manufacturing as "will best...subserve the interests of the state..."[2] The contract system of employing penitentiary convicts was abolished in 1884 and prisoners were to be "employed by the State and in such way as to in the least possible manner interfere with or affect free labor,"[3] but an 1885 amendment authorized limited convict labor contracts when the legislature provided the means or necessary outlay, and permitting program bids to be made for the product of labor on a piece or process plan. Finally, in 1906, the legislature adopted an act "to prohibit competition of prison labor with free labor and to provide for

the employment of prisoners...for the repair and construction of public roads."[4] Section 1 of that enactment prohibited managers of both the penitentiary and reformatory from making any contract "by which the labor or time of any prisoner... or the product or profit of his work shall be contracted, let, farmed out, given or sold to any person, firm, association or corporation...".

Some delegates to the 1912 Constitutional Convention urged that prison contract labor be prohibited in order to eliminate inequitable competition with free labor, to curtail excessive profits on the part of contractors of convict labor, and to end peonage - the renting of men to other men. Spokesmen for business interests pointed out that statutory controls had proven ineffective and that some manufacturers had practically been driven out of business by the competition of goods made by cheap convict labor. The requirement that goods be marked "prison made", deemed to render them less desirable, was intended to further reduce competition between goods produced by free and convict labor. In opposition to a constitutional provision, the position was advanced that Section 41 was purely statutory in character and that because of differences in opinion about what ought to be done with convict labor, the matter should not be put in the Constitution. The section, as adopted by the Convention and the people in 1912, remains unchanged in our present Constitution.

Comment

In testimony before the What's Left Committee, a representative from the Department of Rehabilitation and Corrections stated that the constitutional provision could be interpreted to restrict its abilities to supply meaningful employment through work-release programs, under which selected inmates of penal institutions are permitted to leave the institutions unescorted during the day for purposes of employment under a kind of day parole system, returning to the institution at night. Several attempts have been made in recent years to amend the language that abolishes prison contract labor. In 1967 and 1969 joint resolutions were adopted in the House of Representatives proposing amendment of Section 41 to

expressly permit employment outside the penal institution for persons under sentences of one year or less. Both resolutions were indefinitely postponed. Advocates of work-release have claimed that such programs (1) prevent a prisoner's family from depending on public welfare because of job loss; (2) cut costs of keeping a person in an institution because the prisoner pays part of them; and (3) contribute to the rehabilitation of the prisoner by easing his path back into society. In 1969, legislation was passed permitting the establishment of work-release programs by the common pleas court, for prisoners under suspendable sentences in a county or city jail or workhouse. Approval of the sentencing judge is required. The authority to use a system of work-release programs does not extend to prisoners in the state penal institutions. In 1972, Section 2967.26 of the Revised Code was enacted, permitting the Adult Parole Authority to grant furloughs for employment and educational and vocational programs to "trustworthy prisoners confined in any state penal or reformatory institution...". No challenges have been raised against the constitutionality of the 1969 and 1972 legislation.

Another issue raised in testimony by the Department was that the present provision constitutes an absolute prohibition against competition between prison labor and private labor. The Department spokesman states that this prohibition incapacitates the Department's ability to provide valuable work experience for those inmates who are incarcerated with no immediate expectation of release. The Department believes that, in some areas, permitting employment of prisoners and thus creating some competition, would prove valuable. In those cases, it believes, the regulation of such competition should lie with the General Assembly, through the statutes, rather than locked into a constitutional provision.

The Committee concurred in the Department's reasoning and believes that most of Section 41 is statutory in nature and should be repealed. The remaining sentence retains a constitutional commitment to regulation of employment of prisoners, but leaves the implementation of guidelines to the legislature. In addition, the proposal is not limited by the words "in the state". It was felt that this limitation is not necessary and in addition, would not hinder a movement currently being

contemplated by some penologists to create penitentiaries that would house convicts from a given geographical area, and not one particular state.

Footnotes

1. 60 Ohio Laws 29 (Mar. 24, 1863)
2. 64 Ohio Laws 91 (Apr. 1, 1867)
3. 81 Ohio Laws 72 (Mar. 24, 1884)
4. 98 Ohio Laws 177 (Apr. 14, 1906)

Article VII
Section 1
Public Institutions

Present Constitution

Section 1. Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the State; and be subject to such regulations as may be prescribed by the General Assembly.

Committee Recommendation

Section 1. Facilities for and services to persons who, by reason of disability or handicap, require care, treatment, or habilitation shall be fostered and supported by the state. Disabled or handicapped persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if civilly confined, have a right to habilitation or treatment.

Committee Recommendation

The What's Left Committee recommends that Article VII, Section 1 be amended as follows:

> Section 1. ~~Institutions for the benefit of the insane, blind, and deaf and dumb;~~ FACILITIES FOR AND SERVICES TO PERSONS WHO, BY REASON OF DISABILITY OR HANDICAP, REQUIRE CARE, TREATMENT, OR HABILITATION shall ~~always~~ be fostered and supported by the ~~State~~ STATE~~; and be subject to such regulations as may be prescribed by the General Assembly~~. DISABLED OR HANDICAPPED PERSONS SHALL NOT BE CIVILLY CONFINED UNLESS, NOR TO A GREATER EXTENT THAN, NECESSARY TO PROTECT THEMSELVES OR OTHER PERSONS FROM HARM. SUCH PERSONS, IF CIVILLY CONFINED, HAVE A RIGHT TO HABILITATION OR TREATMENT.

Effect of Change

The proposed revision of Section 1 retains the basic commitment of the state to care for those persons who, because of a physical or other disability, are unable to care for themselves. The language is modernized, removing such stigmatizing terms as "insane" and "dumb" and substitutes "disability or handicap". The idea of institutionalization, which resulted in the warehousing of disabled persons, is replaced with the idea of care, treatment, and habilitation for these persons. In addition, the language acknowledges that not all persons who are disabled and handicapped must be full-time residents of institutions. For those who need by "civilly confined", the section prohibits inappropriately excessive confinement and guarantees their right to habilitation or treatment while confined.

History and Background of Section

The first constitutional reference to public welfare institutions was proposed by the 1850-1851 Constitutional Convention. The 1873-74 Convention proposed

lengthening Section 1 to include reference to punitive and reformatory institutions, an asylum for youths, a soldiers' and sailors' orphans' home and a girls' industrial home to be supported so long as the General Assembly deemed necessary. The Constitution proposed by that convention was not approved by the electorate. The 1912 Constitutional Convention proposed no changes in Article VII, and Section 1 remains unchanged from the 1851 format.

According to the Index to State Constitutions prepared by Columbia University, 20 state constitutions provide for the establishment and support of institutions for the mentally handicapped and disabled, 19 constitutions contain similar provisions for the blind, and 21 do so for deaf mutes. Among the newer state constitutions, many do not contain a provision regarding public institutions. The Alaska Constitution states in Article VII, Section 5, "The legislature shall provide for public welfare."

One issue that has been raised concerning public institutions regards the right to treatment and rehabilitation of persons being cared for by the state in these institutions. The current dates on most of the cases cited below is some indication that legal, and perhaps social, obligations to institutionalized persons are currently in a state of evolution. Some lower federal courts have declared that persons committed through noncriminal proceedings have a constitutional right, under the Fourteenth Amendment, "to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve (their) mental condition." Wyatt v. Stickney, 325 F. Supp. 781 (1971). The U.S. District Court in Ohio held that "the state, upon committing an individual until he gains his sanity, incurs a responsibility to provide such care as is reasonably calculated to achieve that goal." Davis v. Watkins, 384 F. Supp. 1196 (1974) (N.D. Ohio, W.D.). The United States Supreme Court has not made an absolute declaration that mentally handicapped persons have a right to treatment. The Court has said that "(d)ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed,"

Jackson v. Indiana, 406 U.S. 715 (1972) and that "...a state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends," O'Conner v. Donaldson, 43 U.S.L.W. 4929, No. 74-8 (June 26, 1975). In that case, the Court refused to follow the broader holding of a right to treatment made by the 5th Circuit Court of Appeals in the case.

Under current statutory provisions of the Ohio Revised Code, Section 5122.27, as amended by Am. Sub. H.B. 244, grants a right to treatment in the "least restrictive environment" to all mentally ill patients hospitalized under Chapter 5122, and makes this a responsibility of the head of the hospital or his designee. Under Section 5122.01, "patient" means a voluntary and involuntary patient admitted either to public or private facilities, clinics or hospitals. The right to treatment in the least restrictive setting is included in Division (E) of Section 5122.15, the involuntary civil commitment provision, as a duty of the court following a commitment hearing. Section 5123.85 provides the right to habilitation to mentally retarded persons institutionalized pursuant to Chapter 5123. Under the definitions of Section 5123.68, "resident" includes voluntary and involuntary residents, and "institutions" includes public and private facilities. Section 5123.85 does not contain the least restrictive environment language mentioned in Division (E) of Section 5123.76, the involuntary commitment section, thus apparently making it applicable only to involuntarily committed patients.

Comment

The What's Left Committee heard testimony presented by a group of persons from various social welfare agencies concerned with the rights of the handicapped and aged who formed an ad hoc committee for the purpose of revising Section 1 of Article VII. The ad hoc committee prepared several drafts for the Commission's consideration. One of the initial drafts would have secured rights to persons requiring treatment and habilitation due to age, disability, handicap or behavior "in the least restrictive manner appropriate" to the individual as provided by law. This was the broadest, most inclusive alternative proposed, applicable to juveniles,

prisoners, the aged and the developmentally (physical and mentally) disabled. The proposal was rejected as unworkable for two main reasons. The "least restrictive manner appropriate..." language was unclear and ambiguous, and seemed to raise many problems in its interpretation, although it did replace the present term "institutions", since current treatment methods emphasize community-based and residential rehabilitation settings as an alternative to custodial and institutional-type care. Secondly, it was not feasible to treat juveniles, aged, prisoners, and developmentally disabled under the same language, since each class of persons had special needs. As the Committee considered the problems and alternates to the proposal, it became evident that the inclusion of some terms, such as "least restrictive alternative setting" or "manner" might raise such questions as whether the state had an obligation to construct new facilities of a type tailored to each individual, a burden the Committee was not willing to place on the state.

The final proposal is designed to accomplish several objectives. First, it states a basic commitment of the state to foster and support facilities and services to persons requiring them as a result of disability or handicap. These may include institutions, residential housing, community-based outpatient services, etc. The section limits civil confinement of disabled and handicapped persons, in accord with current statutory and state and federal judicial requirements, to the extent necessary to protect those persons or others from harm. The Committee interprets the word "harm" to include any harm, physical or otherwise, against which protection is deemed needed by the General Assembly, and anticipates that the General Assembly will define the term. In addition, the section guarantees persons civilly confined, the right to habilitation or treatment.

The Committee recommends the adoption of Article VII, Section 1, as amended, and it believes that the proposal states the basic legal and social obligations that are currently in effect while permitting flexibility in the treatment of handicapped persons as need and knowledge changes.

Article VII
Sections 2, 3
Public Institutions

Present Constitution	Committee Recommendation
Section 2. The directors of the Penitentiary shall be appointed or elected in such manner as the General Assembly may direct; and the trustees of the benevolent, and other State institutions, now elected by the General Assembly, and of such other State institutions as may be hereafter created, shall be appointed by the Governor, by and with the advice and consent of the Senate; and, upon all nominations made by the Governor, the question shall be taken by yeas and nays, and entered upon the journals of the Senate.	Section 2. Repeal
Section 3. The Governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified.	Section 3. Repeal

Committee Recommendation

The What's Left Committee recommends that Sections 2 and 3 of Article VII be repealed as obsolete and no longer necessary.

History and Background of Sections

Sections 2 and 3 of Article VII have remained unchanged since adopted by the 1850-1851 Constitutional Convention. In the original Ohio Constitution of 1802, the appointing power was vested in the legislature, as part of a movement to create legislative supremacy and a weak executive in Ohio, a reaction to the oppressive experience under territorial government and the governorship of St. Clair. Article VII, Section 2, as drafted by the 1851 Convention, represents a departure from the former practice of legislative appointment, by transferring some power to the governor with the advice and consent of the senate to make such appointments. No changes in these two sections were considered by the 1873-74 Constitutional Convention or the 1912 Convention.

There has been little litigation concerning these sections. Section 2 states that the directors of the penitentiary shall be appointed or elected as directed by

the General Assembly, and trustees of benevolent and other state institutions shall be appointed by the governor with the advice and consent of the senate. The language is obsolete with respect to the directors of the penitentiary since that office no longer exists. In only one case is there a statutory provision concerning trustees of benevolent institutions and that is Section 5909.02 of the Revised Code, which provides for a five-member board of trustees of the Ohio soldiers' and sailors' orphans' home,to be appointed by the governor with the advice and consent of the senate.

Article VII, Section 3, providing for the filling of vacancies in the offices mentioned in Section 2 is also obsolete since, as noted above, such offices have, for the most part, been abolished. A newer constitutional provision, Article III, Section 21, specifies that all appointments to state office, when required by law, shall be subject to the advice and consent of the senate. That provision is implemented by Section 3.03 of the Revised Code, whereby the governor makes an appointment and reports to the senate for confirmation when the senate is in session, and when a vacancy occurs and the senate is not in session, the governor may make such appointment pending senate confirmation.

Comment

The What's Left Committee proposes the repeal of Article VII, Sections 2 and 3 because the sections are obsolete and unnecessary.

Article IX
Article III, Section 10
Militia

Present Constitution	Committee Recommendation
Article IX	
Section 1. All citizens, residents of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law.	No change
Section 3. The governor shall appoint the adjutant general, and such other officers and warrant officers, as may be provided for by law.	No change
Section 4. The governor shall have power to call forth the militia, to execute the laws of the state, to suppress insurrection, to repel invasion, and to act in the event of a disaster within the state.	No change
Section 5. The General Assembly shall provide, by law, for the protection and safekeeping of the public arms.	No change
Article III	
Section 10. He shall be commander-in-chief of the military and naval forces of the State, except when they shall be called into the service of the United States.	No change

Committee Recommendation

The What's Left Committee recommends the retention of Article IX, Sections 1, 3, 4, and 5, and Article III, Section 10 in their present form.

History and Background of Sections

Sections 1, 2, 3, 4 and 5 of Article IX and Article III, Section 10 were added to the Ohio Constitution in 1851. Article IX was more detailed than it is presently, particularly in regard to the election of officers of the militia and their appointment by the governor. Section 1 originally stipulated that only white males could serve in the militia, and sparked debate at the 1851 Convention on the part of those

interested at that time in promoting equal rights for all races. Until 1953, the only change that was proposed regarding the militia provisions was to include a clause in Section 1 providing for exemption from service because of conscientious scruples, with a payment into the school fund in lieu of service, which was proposed by the 1874 Convention, but not adopted. Other debate at the 1874 and 1912 Constitutional Conventions concerning the militia dealt mainly with inclusion of the word "white" in the Article, but the stipulation remained until 1953, when Section 1 of Article IX was amended to remove the reference to "white" males. Section 2, dealing with the officers of the militia that were to be elected, was repealed at that time. In 1961, the word "males" in Section 1 was changed to "citizens", in order to recognize the role of women, such as nurses and other members of various women's auxiliaries in the armed forces. Other changes by constitutional amendment in 1961 brought the lower age limit for military service into conformity with federal law, and increased the upper age limit so as to permit the use of retired regular army officers in the Ohio Defense Corps, as requested by the Office of the Adjutant General.

State constitutional provisions on the militia date to times when states were responsible for home defense because the national government did not assume full responsibility for defense because of fears concerning a standing army. Ohio's provisions, requiring all citizens to be subject to enrollment in the militia, appears to stem from this principle of every citizen being responsible for the defense of the state. Even after the development of a national system of defense, most state constitutions retained their provisions on the militia. The clause providing for the enrollment of the general citizenry into the militia (Section 1) has been used in Ohio only once. In 1862, the General Assembly passed the Militia Act, providing that state militias could be drafted, state militia being that as was defined by Section 1 of Article IX of the Ohio Constitution. In the 20th century, this provision appears to only be necessary in consideration of a possibility of major disaster in a state at a time when the national guard could not be activated, or were already called into federal service.

Comment

In 1951, the Wilder Commission, in its review of the Ohio Constitution, stated that an article dealing with the militia appears to be an unnecessary provision in modern times; that such details have no place in a modern constitution, and that these provisions could be transferred to statute, if necessary. That Report stated that only the last two sections of Article IX have any permanent value - Section 3, giving the governor the power to call forth the militia to execute the laws of the state, to suppress insurrection and to repel invasion, and to act in the event of a disaster within the state; and Section 4, requiring the General Assembly to provide by law for the protection and safekeeping of the public arms.

Representatives of the Adjutant General's office appeared before the What's Left Committee to testify in favor of retaining the constitutional provisions dealing with the militia without change. They stated that the constitutional provisions concerning the militia were working well and raised no problems, and that removal of any language might indicate to the federal government and citizens alike that Ohioans did not prize their rights as stated by Article IX. The Committee members concurred with those who spoke in favor of retaining the militia article that insofar as the language does state a commitment to the defense of the state and has raised no problems, there was no compelling reason for repealing those sections. Therefore, the Committee recommends retention of Article IX, Sections 1, 3, 4, and 5, and Article III, Section 10, without change.

Article XV
Section 1
Seat of Government

Present Constitution	Committee Recommendation
Section 1. Columbus shall be the seat of government until otherwise directed by law.	No change

Committee Recommendation

The What's Left Committee recommends that Article XV, Section 1 of the Ohio Constitution be retained without change.

History and Background of Section

The location of the seat of government was provided for by Article VII, Section 4 of the 1802 Ohio Constitution, which stated that Chillicothe was to be the seat of government until 1808. The section prohibited raising money by the legislature for the purpose of erecting buildings to accomodate the legislature until 1809.

At the 1851 Constitutional Convention, Article XV, Section 1 was adopted in its present form. The Debates of the 1873-74 and 1912 Constitutional Conventions show no indication that changing the seat of government was considered, and the section was retained by these conventions as stated in the 1851 Constitution.

There has been very little litigation concerning Article XV, Section 1. In State v. Barhorst, 106 App. 335, 153 N.E. (2d) 514 (1959), the court held that the state board of optometry is required to maintain a central office in Columbus. Green v. Thomas, 37 App. 489 (1931) concerned Article XV, Section 1 and Article II, Section 26, and the court held that a statute relating to construction of a state office building and authorizing the city of Columbus to convey the site, did not violate the requirement of Article II, Section 26, that all laws be general and uniform in nature.

Comment

The What's Left Committee believes that Article XV, Section 1 appears to be a satisfactory provision in its present form and should be retained, in the absence of any problems arising from it.

Article XV
Section 3
Liquidation of Receipts and Expenditures

Present Constitution	Committee Recommendation
Section 3. An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom, and on what account, shall, from time to time, be published, as shall be prescribed by law.	No change

Committee Recommendation

The What's Left Committee recommends retaining Article XV, Section 3 of the Ohio Constitution without change.

History and Background of Section

The 1802 Ohio Constitution contained no provision requiring an account to be made of receipts and expenditures of public money. The 1851 Constitutional Convention considered a proposal requiring the annual publication of the receipts and expenditures of public money, together with the names of the persons receiving money and the amounts received. In the ensuing debate, a motion was made to omit the requirement of reporting the names of persons involved in the transaction of public funds on the grounds that this requirement would make entries in the auditor's and treasurer's records "voluminous". Another motion, changing "persons" to "public officers" was defeated. The removal of the requirement for annual publication was agreed to, and the section was adopted by the Convention and the voters in the form it appears in our Constitution today.

There does not appear to have been any litigation concerning this section of the Constitution. The section is implemented through several Revised Code sections, including Sec. 115.06 which names the auditor of state chief accounting officer for the state and requires him to keep accounts of all financial transactions through the state treasury. Two sections in Chapter 117. of the Revised Code concern the publication of receipts and expenditures of public money. Section 117.05 requires an accounting and reporting system to be maintained for all public offices. Section 117.06 provides for a financial report of each public institution or taxing

district for each fiscal year to be made. The auditor publishes two reports annually, "The Ohio Annual Report" and an Annual Financial Report, which lists recipients by local governmental units or other groups. The reports do not contain the individual names of persons who receive public money, for the reason that publishing certain lists of names, for example welfare recipients, runs afoul of federal laws and regulations. No one has ever challenged the lack of publication of individual names.

Comment

The What's Left Committee considers Section 3 of Article XV as presenting no difficulties, and that it should be retained as a constitutional statement of a commitment to accountability by public officials of public money.

Article XVI
Sections 2, 3
Amending the Constitution

Present Constitution

Section 2. Whenever two-thirds of the members elected to each branch of the general assembly, shall think it necessary to call a convention, to revise, amend, or change this constitution, they shall recommend to the electors to vote on a separate ballot without party designation of any kind at the next election for members to the general assembly, for or against a convention; and if a majority of all the electors, voting for and against the calling of a convention, shall have voted for a convention, the general assembly shall, at their next session, provide, by law, for calling the same. Candidates for members of the constitutional convention shall be nominated by nominating petitions only and shall be voted for upon one independent and separate ballot without any emblem or party designation whatever. The convention shall consist of as many members as the house of representatives, who shall be chosen as provided by law, and shall meet within three months after their election, for the purpose, aforesaid.

Committee Recommendation

Section 2. No change

Section 3. At the general election to be held in the year one thousand nine hundred and thirty-two and in each twentieth year thereafter, the question: "Shall there be a convention to revise, alter, or amend the constitution", shall be submitted to the electors of the state; and in case a majority of the electors, voting for and against the calling of a convention, shall decide in favor of a convention, the general assembly, at its next session, shall provide, by law, for the election of delegates, and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon.

Section 3. No change

Committee Recommendation

The What's Left Committee recommends the retention of Article XVI, Sections 2 and 3 of the Ohio Constitution without change.

History and Background of Sections

The 1802 Ohio Constitution provided only one method of amending the Constitution. Article VII, Section 5 provided for the General Assembly to recommend, upon two-thirds vote of its members, the calling of a constitutional convention to revise, amend, or change the Constitution. The convention would consist of as many members as the General Assembly and would meet within three months of their election. The section also stated "no alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into the state".

At the 1851 Constitutional Convention, two additional methods of amending the Constitution were proposed. Article XVI, Section 1, permitting legislatively initiated constitutional amendments to be submitted to the voters for their approval or rejection (See Commission Report #3 for discussion of this section) and Article XVI, Section 3, requiring a mandatory referendum on the question of calling a constitutional convention were approved by the Convention. Article XVI, Section 2 as adopted by the Convention contained a provision for the calling of a constitutional convention by the General Assembly which was basically the same as the provision in the 1802 Constitution. Two issues received considerable debate at the Convention : the inclusion of three methods of amending the Constitution, and the number of convention delegates. It was suggested that the approval of Section 1 made providing for calling a constitutional convention unnecessary since amendments would be submitted directly to the people. Some delegates were opposed to Section 3, stating that a mandatory referendum was unnecessary since the legislature could already propose calling a constitutional convention under Section 2, and the people could therefore express themselves through their representatives. The number of convention delegates was discussed, weighing the pros and cons of a number equal to the membership of the General Assembly (at that time 130) providing wider representation of points of view, versus the lower cost and greater efficiency of a smaller number. The number of convention delegates was limited to the number of members in the House of Representatives in the final draft approved by the Convention.

Section 3 of Article XVI required a mandatory referendum on calling a constitutional convention every twenty years. The first time the convention question was before the people, in 1871, they voted in favor of calling a constitutional convention. At the 1873-74 Convention, a proposed substitute for Article XVI retained legislatively proposed constitutional conventions and amendments but deleted the mandatory referendum question. One delegate stated that the legislature had deferred making needed changes in the judiciary article when the question of calling a constitutional convention was close at hand. The substitute proposal was not approved by the Convention and Article XVI remained unchanged until the 1912 Constitutional Convention.

Delegates to the 1912 Convention considered several substantive changes in Article XVI. It was generally agreed that the framers of the 1851 document made it too difficult to amend. What was referred to as the "greatest fundamental change" was a recommendation that the number of votes required to pass a constitutional amendment be changed from the majority of those voting in the election to a majority of those voting on the question. An amendment was approved that constitutional issues be printed on separate ballots without party endorsement so they could be considered on their merits. Another proposed change, adopted as an amendment to Article XVI, Section 2, provided that delegates to future conventions be nominated by nominating petitions only and "shall be voted for upon independent and separate ballot without any emblem or party designation whatever". Debate continued on the question of the size of the delegation to a constitutional convention, and the numerical basis remained the membership in the House of Representatives, as in the 1851 Constitution. Article XVI, Sections 2 and 3 as proposed by the Convention were adopted by the voters and have not been amended since their adoption.

Comment

The absence of case law on the provision of Article XVI, Sections 2 and 3 was viewed by the Committee as evidence that these sections are not causing any problems and seem to be workable and well-understood. The Committee approves the retention of Article XVI, Sections 2 and 3, without change.

STATE OF OHIO
ADJUTANT GENERAL'S DEPARTMENT
P.O. BOX 660
WORTHINGTON, OHIO 43085

JAMES C. CLEM
MAJOR GENERAL
THE ADJUTANT GENERAL

JAMES A. RHODES
GOVERNOR

AGOH-ARMY

22 September 1976

Ms. Ann M. Eriksson
Director
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

Dear Ms. Eriksson:

Thank you for the copy of the reports by the What's Left Committee. We are very pleased with the conclusions reached by the committee and concur completely with the findings.

It is particularly impressive to me that the committee focused on the Second Amendment and the ramifications if states begin to indicate that we protect this with less than zealous concern.

The migration of authority to the federal government continues to be alarming to me and as it occurs, the states are stripped a little bit at a time of the rights granted by the Constitution of the United States.

It is also particularly important at this time when the monies available for the defense of our country continue to diminish in terms of percentage of gross national product indicating the possibility of the states having to acquire a greater responsibility for national defense than might appear on the surface. Thus, in the interest of the preservation of our democracy, our government and the American way of life, it is important that the states continue to play a strong role in our share of that responsibility.

At this time it does not appear necessary to appear at the hearing in order to make additional comments. However, in the event a change of mind occurs and we should decide to attend, we will certainly let you know prior to the meeting.

Sincerely,

James M. Abraham

JAMES M. ABRAHAM
Brigadier General
Asst Adj Gen for Army

5215

LEAGUE OF WOMEN VOTERS OF OHIO

65 S. Fourth Street • Columbus, Ohio 43215 • 614 - 469-1505

October 1, 1976

TO: The Ohio Constitutional Revision Commission

FROM: Eileen Rehg - Director Government - League of Women Voters of Ohio
Jane Latane' - Legislative Director League of Women Voters of Ohio

The League of Women Voters of Ohio has followed closely the research and discussion of the What's Left Committee on the Apportionment Article XI. Our League position in support of apportionment based substantially on population includes support of restricting congressional districting to once every ten years, based on the decennial census. We believe that since these figures are collected only once every ten years, it follows logically that districting lines need only be drawn once at that same time.

Redrawing the lines at the whim of the legislature only serves partisan interests and can be confusing to the voter. Therefore, to this extent, the League supports the recommendation of the What's Left Committee to restrict by constitutional amendment the drawing of congressional district lines to once every ten years.

Since our members have not studied the apportioning body we cannot make any recommendations in that area. At the present time, local Leagues are examining the problems associated with apportionment and districting. We hope to develop a state position which will enable us to take action in the legislature.

We would like to repeat again our appreciation of the hard work and excellent research done by the Revision Commission. It has added greatly to our understanding of the Constitution.

LEAGUE OF WOMEN VOTERS OF OHIO

65 S. Fourth Street • Columbus, Ohio 43215 • 614 - 469-1505

OCTOBER 5, 1976

TO: OHIO CONSTITITUTIONAL REVISION COMMISSION

FROM: JANE ANDERSON - JUSTICE DIRECTOR
JOAN LAWRENCE - PRESIDENT, LEAGUE OF WOMEN VOTERS OF OHIO

THE LEAGUE OF WOMEN VOTERS OF OHIO WISHES TO ENDORSE THE RECOMMENDATION OF THE WHAT'S LEFT COMMITTEE CONCERNING REVISION OF ARTICLE II, SECTION 41 OF THE OHIO CONSTITUTION WHICH DEALS WITH PRISON LABOR. WE STRONGLY URGE THAT THIS RECOMMENDATION BE ACCEPTED BY THE FULL COMMISSION AND PASSED ON TO THE GENERAL ASSEMBLY FOR ACTION.

THE PROPOSED AMENDMENT WOULD HAVE THE BENEFICIAL EFFECT OF LEAVING THE REGULATION OF PRISON LABOR TO THE GENERAL ASSEMBLY. THE LEAGUE OF WOMEN VOTERS OF OHIO BELIEVES SUCH REGULATION TO BE BENEFICIAL FOR THE FOLLOWING REASONS:

FIRST, IT WOULD ELIMINATE ANY POSSIBILITY OF A CONSTITUTIONAL CHALLENGE TO PRESENT WORK-RELEASE AND WORK-FURLOUGH PROGRAMS, WHICH MIGHT BE RAISED UNDER THE PRESENT CONSTITUTIONAL WORDING. SUCH PROGRAMS HAVE PROVED BENEFICIAL FOR A NUMBER OF REASONS. THEY REDUCE COSTS TO THE STATE BY REDUCING WELFARE PAYMENTS AND THE COSTS OF INSTITUTIONALIZATION, SINCE THE PRISONER IS ABLE TO CONTRIBUTE TO HIS FAMILY'S SUPPORT AND THE COST OF INSTITUTIONALIZING HIM. THESE PROGRAMS ALSO SERVE TO REHABILITATE THE PRISONER BY PERMITTING A CONSTRUCTIVE REENTRY INTO SOCIETY. LAST, BUT NOT LEAST, THESE PROGRAMS PROVIDE ONE IMPORTANT SOLUTION TO THE SERIOUS CRISIS OF PRISON OVERCROWDING.

SECONDLY, THE PROPOSED AMENDMENT WOULD NO LONGER FORBID COMPETITION BETWEEN PRISON LABOR AND PRIVATE LABOR AS DOES THE PRESENT WORDING OF THE CONSTITUTION. LACK OF MEANINGFUL WORK IN PRISONS IS ONE OF THE MOST SERIOUS OBSTACLES TO RESOCIALIZATION OF OFFENDERS AND ONE OF THE MAIN CAUSES OF PRISON UNREST. SOME KIND OF REGULATED COMPETITION WOULD PROVIDE THE DEPARTMENT OF REHABILITATION AND CORRECTION WITH AN INVALUABLE REHABILITATIVE TOOL THAT IS CURRENTLY PROHIBITED. LEAVING THE REGULATION OF SUCH COMPETITION TO THE GENERAL ASSEMBLY WOULD HAVE THE ADDED ADVANTAGE OF GIVING GREATER FLEXIBILITY TO ALLOW FOR ADAPTATIONS TO MEET CHANGING CONDITIONS.

THIS RELATES TO OUR THIRD POINT IN FAVOR OF THE PROPOSED AMENDMENT. THE LEAGUE OF WOMEN VOTERS HAS LONG SUPPORTED THE CONCEPT THAT CONSTITUTIONAL LAW SHOULD DEAL WITH FUNDAMENTAL PRINCIPLES AND THAT SPECIFIC REGULATIONS SHOULD BE LEFT TO STATUTORY LAW. THE PARTICULAR PROVISIONS OF THE PRESENT ARTICLE II, SECTION 41 DEAL WITH SPECIFIC SUBJECTS THAT ARE MORE PROPERLY CONTAINED IN STATUTES.

WE HOPE THAT YOU WILL CAREFULLY CONSIDER THE MERIT OF ALL OF THESE ARGUMENTS IN FAVOR OF THE PROPOSED AMENDMENT. THANK YOU FOR YOUR ATTENTION TO THIS IMPORTANT MATTER.

October 25, 1976

TO: The Constitutional Revision Commission

FROM: Michael Kindred, Project Director, Developmental Disabilities Law Reform Project and Associate Dean, College of Law, The Ohio State University

SUBJECT: Amendments to Article VII, Section 1, Ohio Constitution

INTRODUCTION

At the October 5, 1976, meeting of the Constitutional Revision Commission, various concerns were expressed regarding the What's Left Committee's recommendations for Article VII §1. This memorandum will describe the legal underpinnings of the proposed amendments. While their adoption is unquestionably a policy decision, strong arguments can be made that the principles behind them are already implied by the federal due process clause, as interpreted by numerous court decisions.

Inaction at the state constitutional level will not ultimately shield Ohio from the enforcement of these federal rights, even if their implementation were to cause the increased administrative burdens that some fear. It is thus already past the point at which much can be accomplished by resisting the trend toward recognition of the supremacy of personal rights in the area of civil commitment. The weight of constitutional authority for these rights increases yearly; the Supreme Court has only recently begun to make its contribution in this field and there is little to indicate that the Court will reverse the progress that has been made.

The concept that public institutions are not a place to warehouse people is an idea whose time has come.

The Ohio legislature has recognized the need for correcting the abuses of the past by enacting Senate Bill 336 and House Bill 244, which go far beyond the words of the proposals before this Committee. The right to treatment or habilitation in the suggested amendments to Article VII §1, therefore, will cost the taxpayers nothing extra. It will only make concrete the bottom-line of this established constitutional right, expressing Ohio's support for the rights of its disabled citizens.

This memorandum will address the propriety of the committee proposal to amend Article VII, §1 of the Ohio Constitution in three segments. Each will discuss the merits of a particular sentence of the committee recommendation.

I.

> Facilities for and services to persons who, by reason of disability or handicap, require care, treatment, or habilitation shall be fostered and supported by the state.

This sentence makes only two changes from present constitutional language that are significant. First, the labels placed on the persons to be served by the institutions have been modernized for purposes of accuracy and non-stigmatization. This was done by Kansas in 1972, changing language very similar to the current Ohio provision (Kans. Const. Art. 7 §1 (Supp. 1975)); see also the Michigan Constitution, Art. 8 §8 (West 1967). Second, the term "institution" has been replaced by "facilities and services," to make clear that the policy of state support for the handicapped need not be physically tied to particular institutional buildings. In State ex. rel. Walton v. Edmondson, 89 Ohio St. 351, 361-62 (1913), the Ohio Supreme Court said: "We think it clear that by the use of the word 'institutions' in Section 1 of Article VII of the Constitution, it was intended to designate the places where, and the means by which, the afflictions of the persons referred to may be relieved . . . ." Thus, even the current section has been interpreted to refer to more than the maintenance of physical structures; the new proposal would only clarify the meaning.

In theory, the "foster and support" language might suggest a state obligation to provide services to the handicapped. However, no cases could be found in Ohio, or in approximately twenty jurisdictions with similar provisions, in which the clause has been so interpreted. While the current constitution mandates that the state care for its insane residents in some manner, it has been held that this provision " . . . is not self-executing, and that the mode in which such institutions are to be fostered and supported is left to the discretion of the general assembly." State ex. rel. Price v. Huwe, 105 Ohio St. 304, 307 (1922); see also State ex. rel. Goebel v. Brown, 4 Ohio L. Abs. 333 (Ct. App. 1926).

As in other states, the bulk of the Ohio litigation arising under this section has involved a constitutional challenge to the state statute requiring payment by patients or their relatives for their institutional care. The Ohio statutes have been upheld: Bureau of Support v. Kreitzer, 16 Ohio St.2d 147 (1968); State ex. rel. Price v. Huwe, supra; State v. Kiesewetter, 37 Ohio St. 546 (1882); Annotation at 20 A.L.R.3d 369, 389-91 (1968).

Since the "foster and support" language has been given such a permissive interpretation, allowing broad discretion in the legislative response, it should be seen simply as a statement of a state policy goal. As such, this recommendation of the Committee deserves support.

Nevertheless, if the Commission is concerned that this language may be interpreted to have teeth, several alternatives exist:

(1) The "shall" could be converted to "may."

(2) The words "and support" could be deleted.

(3) The sentence could be deleted.

The critical portion of the Committee's recommendations are in the second and third sentence. It is critical that concern about the first sentence not divert attention from the independent importance of the second and third sentence.

II.

> Disabled or handicapped persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm.

This second sentence, in contrast to the first, expresses a substantive constitutional right by prohibiting involuntary civil commitment except where premised upon a finding of dangerousness. Although such a provision would be new to the Ohio Constitution, it is hardly a novel idea in federal constitutional law that a finding of dangerousness is essential to justify civil confinement. The United States Supreme Court in O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) recently declared: "A finding of 'mental illness' alone cannot justify a state's locking a person up against his will and keeping him indefinitely in simple custodial confinement . . . . (T)here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."

This crucial holding merely reflects the stances taken by a variety of federal courts in the last several years. Locally, Davis v. Watkins, 384 F.Supp. 1196 (N.D.Ohio 1974) established the requirement that a person could not be confined at Lima State Hospital unless " . . . there is an extreme likelihood that if the individual is not confined he will do immediate harm to himself or others." In Lynch v. Baxley, 386 F.Supp. 378 (M.D.Ala. 1974), the court required a similar ". . . real and present threat of substantial harm." See also, Cross v. Harris, 418 F.2d 1095 (D.C.Cir. 1969) and Dixon v. Attorney General, 325 F.Supp. 966 (M.D.Pa. 1971). Bell v. Wayne County General Hospital, 384 F.Supp. 1085 (E.D.Mich. 1974) well expresses the rationale behind the 'dangerousness' standard: ". . . to validate the 'massive curtailment of liberty' which involuntary commitment occasions, the basis for confinement must lie in threatened or actual behavior stemming from the mental disorder, and of a nature which the state may legitimately control, viz., that of causing harm to self or others." The phrase "massive curtailment of liberty" was taken from Humphrey v. Cady, 405 U.S. 504 (1972), in which the Supreme Court expressed its approval of the Wisconsin "dangerousness" requirement. See also, Lessard v. Schmidt, 349 F.Supp. 1078 (D.Wis. 1972), Jackson v. Indiana, 406 U.S. 715 (1972), Baxstrom v. Herold, 383 U.S. 107 (1966), and State v. Krol, 344 A.2d 289 (N.J. 1975).

These federal cases turn on the notion of substantive due process, requiring that the state act in pursuance of a legitimate governmental purpose to justify the withdrawal of freedom. As an aspect of the state police power, that would be fulfilled only in the situation where there is a real and present danger of harm. The Ohio Constitutional Revision Commission has the option of recognizing this constitutional principle and making it an explicit part of the state constitution.

III.

> Such persons, if civilly committed, have a right to habilitation or treatment.

This proposed sentence also is a distillation of federal constitutional law. It is the other side of the substantive due process coin: if the state chooses the "benevolent" civil commitment process for a dangerous individual, it obligates itself to provide the treatment or habilitation which distinguishes civil from criminal commitment. In Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964), the court recognized this imperative. The Maryland statute providing for the confinement of defective delinquents

> would substitute psychiatric treatment for punishment in the constitutional sense and would free them from confinement, not when they have "paid their debt to society," but when they have been sufficiently cured to make it reasonably

> safe to release them. With this humanitarian and progressive approach to the problem no person who has deplored the inadequacies of conventional penological practices can complain. But . . . it can become a mere device for warehousing the obnoxious and antisocial elements, of society . . . . Deficiencies in staff, facilities and finances would undermine the efficacy of the Institution and ultimately the constitutionality of its application.

The United States Supreme Court echoed this view of the unconstitutionality of "warehousing" persons in Jackson v. Indiana, 406 U.S. 715 (1972), stating: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."

In the past ten years, the federal courts have gone well beyond the tentative questioning of Sas v. Maryland, supra, in virtually unanimous recognition of a constitutional right to treatment or habilitation for civilly committed institutional residents. In the landmark case of Wyatt v. Stickney, 325 F.Supp. 781 (M.D.Ala. 1971), the court held that mentally ill patients ". . . have a Constitutional right to receive such individualized treatment as will give each of them a reasonable opportunity to be cured or to improve his or her mental condition." In a later order (344 F.Supp. 387 (1972)), the same court extended this right to the retarded: "Because the only constitutional justification for civilly committing a mental retardate is . . . habilitation, it follows ineluctably that once committed, such a person is possessed of an inviolable constitutional right to . . . such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society." An Ohio federal court in Davis v. Watkins, 384 F.Supp. 1196 (N.D.Ohio 1974) ordered treatment for persons confined at Lima State Hospital in accordance with the standards expressed by the Wyatt decision. Numerous other courts have also found a constitutional right to treatment for the institutionalized in a variety of contexts; among them are Humphrey v. Cady, 405 U.S. 504 (1972); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974); Covington v. Harris, 419 F.2d 617 (D.C.Cir. 1969); Welsch v. Likins, 373 F.Supp. 487 (D.Minn. 1974); Stachulak v. Coughlin, 364 F.Supp. 686 (N.D.Ill. 1973); Horacek v. Exon, 357 F.Supp. 71 (D.Neb. 1973); Martarella v. Kelley, 349 F.Supp. 575 (S.D.N.Y. 1972); Nason v. Bridgewater State Hospital, 233 N.E.2d 908 (Mass. 1968).

The criminal process is available to take a person out of society for the sake of isolation alone. Pursuing a civil commitment policy for the purpose of therapy and then denying the therapy ". . . violates the very fundamentals of due process":

Wyatt v. Stickney, 325 F.Supp. at 785. Otherwise mental institutions become mere prisons.

In considering the proposed Ohio constitutional revision, it must first be realized that no right to treatment is guaranteed to all mentally disabled individuals, only to those civilly confined against their will. This narrow group will not bankrupt the state treasury in obtaining treatment or habilitation.

The question may arise as to the need for state constitutional change, since the Ohio Legislature has already enacted the right to treatment. In fact, the Legislature has gone far beyond the current constitutional proposal, regarding the promise of services to the mentally ill (Sub. H.B. 244, §5122.27 (Page's 1976 Legis. Bull #3)) and the mentally retarded (§5123.85 (Page's Supp. 1975). The What's Left Committee proposes only to provide a bottom-line guarantee to insure against potential hasty legislative alterations. While the federal courts remain open to enforce these critical rights, Ohio, of course, is an autonomous unit and may wish as a policy matter to express its support for, and constitutionally guarantee, the rights of its mentally disabled citizens on the state level.

Other states have already seen fit to include such promises in their constitutions. Missouri (Article 4 §37(a) (Vernon's Supp. 1976)) requires that "(t)he Department of Mental Health . . . shall provide treatment, care, education and training for persons suffering from mental illness or retardation . . . ." The Mississippi Constitution (Art. 4 §86 (1972)) orders the legislature " . . . to provide by law for the treatment and care of the insane . . . . ." Indiana (Art. 9 §1 (Burns 1955)) and Arkansas (Art. 19 §19 (1947)) have similar promises of treatment. It is time for Ohio to recognize the constitutional dimension of this right and to impress it upon Ohio's constitutional law.

ohio council of churches | *89 East Wilson Bridge Road, Columbus, Ohio 43085*

fabric of ecumenism... a weaving of cooperation

Carlton N. Weber, Executive Director
(614) 885-9590

TO: What's Left Committee, Ohio Constitutional Revision Commission

FROM: Robert S. Graetz, Jr.
Legislative Representative

RE: Apportionment

A new proposal has come to our attention, offered personally by David Horn, a member of Common Cause. That proposal would not attempt to change the body of persons responsible for Apportionment, but would instead provide that additional plans for Apportionment could be submitted by groups of citizens, with the Apportionment Board being required to adopt the plan which is most compact; its own or one submitted by a group of citizens.

There are two possible approaches to accomplish this. One is to spell out the mathematical formula and the details of the procedure in the Constitution. The second is to adopt language similar to what I am proposing as an addition to Article XI Section I, after the second paragraph.

> Any group of electors of the state of Ohio may, in a manner prescribed by law submit to the persons responsible for Apportionment a plan for establishing the boundaries of each of the ninety-nine House of Representatives districts and the thirty-three Senate districts. If such plan is found by mathematical computation to be more compact than the plan adopted by the persons responsible for Apportionment and is in compliance with other requirements of this Article, the plan submitted by the group of electors shall be adopted in its stead. If more than one such plan is submitted, the plan found by mathematical computation to be most compact shall be adopted.

This proposal does not deal with two other issues which must be decided upon separately. (1)The Apportionment Board could still be given the responsibility of drawing the Congressional district lines. If so, the language in my proposed amendment could also reflect that. (2)The issue of making the legislative districts divisions of Congressional districts would need much more extensive language changes. Although the Ohio Council of Churches has no position on either of the issues, I personally favor both of them.

Neither I nor any member of my staff will be able to attend your meeting on January 10. We shall, however, be in a meeting in our office, and if you wish to contact me here, please feel free to call.

Ohio Constitutional Revision Commission
February 4, 1977

Article II, Section 35
Workmen's Compensation: Private Insurance

At the December 7 Commission meeting, the staff was asked to research the question whether the language of section 35 of Article II prohibits the General Assembly from permitting private insurance companies to compete with the state fund in providing workmen's compensation coverage, and, if it does, to suggest suitable constitutional language to remove the prohibition.

Ohio is one of six states (Nevada, North Dakota, Ohio, Washington, West Virginia, and Wyoming) having a state "monopolistic" workmen's compensation system, also known as an "exclusive" state fund. In these six states, private insurance companies are not permitted to compete with the state fund in providing workmen's compensation coverage. However, three of the six states, including Ohio, do permit some employers to be self-insurers. In Ohio, self-insurers must be approved as to financial capability, must pay benefits to injured workers or the dependents of killed workers at least equal to the benefits obtainable through the state fund, and must post adequate security to assure continuation of financial capability to pay. And in Ohio, as a result of a 1951 statute, self-insurers are permitted to secure indemnity insurance to cover workmen's compensation losses of over $50,000 from any one disaster or event. Companies offering such indemnity contracts are not permitted to represent an employer in the settlement, adjudication, determination, allowance, or payment of claims. This 1951 statute permitting limited indemnity insurance was an amendment to the Code section (now section 4123.82 of the Revised Code) that otherwise prohibits insurance coverage of workmen's compensation loss or liability.

The workmen's compensation section of the Ohio Constitution, section 35 of Article II, was adopted in 1912 and the history, background, and reasons for adding it to the Constitution have been detailed in a prior memorandum. The statute passed after the 1912 amendment permitted employers to be self-insurers in spite of the language of the section to the effect that "laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state...." and the Ohio Supreme Court upheld the constitutionality of the statute permitting self-insurers in 1917 in the case of State ex rel. Turner v. U.S.F. & G., 96 Ohio St. 250. Since employees were entitled to the same benefits whether paid by the state fund or paid directly by the employer, the court could find no constitutional infirmity on the basis of equal protection, and further declared that the language of section 35 providing for a state fund from which compensation was to be paid was permissive, not mandatory. Turner v. U.S.F. & G. was an effort by the Attorney General to oust insurance companies from writing insurance to indemnify employers who had been permitted to become self-insurers from losses suffered as a result of workmen's compensation payments. The decision upheld the constitutionality of the self-insurance provision and, at least by implication, approved the indemnity insurance contracts. Indemnity insurance was then permitted by statute providing it covered the same payments for expenses and compensation provided by law, and was not permitted to indemnify the employer for any other civil liability.

In 1917, shortly before the decision in the U.S.F. & G. case, the General Assembly amended the statute permitting limited insurance coverage and declared all such contracts of insurance or indemnity void. It prohibited the licensing, in Ohio, of an insurance company to transact such insurance. Subsequently, a self-insuring employer who had entered into an indemnity contract, admittedly valid when entered into, was required to cancel his insurance and contended that such a requirement was unconstitutional. The Supreme Court, in Thornton v. Duffy, 99 Ohio St. 120 (1918) upheld the statute and the rules making all insurance contracts void, and upheld the requirement that existing contracts be cancelled. Judge Donahue, who wrote the

decision, stated that the statute permitting indemnity insurance was valid when enacted, but just as valid was the statute prohibiting the insurance. He then went on to declare that the constitution contemplates "one insurance fund, to be administered by the state out of which fund compensation shall be paid to workmen and their dependents for death, injuries, or occupational diseases occasioned in the course of employment."

"If insurance is desired," continues the decision, "the state will furnish it.... for it would not only be arbitrary, unfair, and without purpose to permit some employers of labor to enter into contracts of insurance .... and compel all other employers to contribute to the state insurance fund, but it would also hinder and perhaps utterly demoralize the method and defeat the object and purpose of the creation of such a fund."

This language of Judge Donahue went beyond the necessity of the decision, which only required the Court to find that the General Assembly had the power to permit or prohibit insurance, as it saw fit. Moreover, taken literally, the language could cast doubt on the self-insurance feature of the Ohio workmen's compensation law, which was apparently not the intention of Judge Donahue, and on the 1951 amendment permitting indemnity insurance for self-insurers of losses, over $50,000 for one disaster or event.

It is not possible to reach a firm conclusion about the constitutionality of a statute permitting private insurance companies to compete with the state fund in providing workmen's compensation coverage, since that question has not been decided by the Ohio Supreme Court. The language in Thornton v. Duffy is negative, but that might or might not be the conclusion reached if the matter were squarely before the Court.

The attached draft is suggested as offering the broadest options to the General Assembly in terms of providing for workmen's compensation coverage by the state fund, by insurance, or directly by the employer.

Article II, Section 35

Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, AND LAWS MAY BE PASSED PERMITTING THE PAYMENT OF COMPENSATION AS REQUIRED BY LAW EITHER DIRECTLY BY THE EMPLOYER OR THROUGH THE STATE FUND OR OTHER SYSTEM OF INSURANCE, SUBJECT TO SUCH TERMS AND CONDITIONS AS THE LAW PROVIDES. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just,

not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

Ohio Constitutional Revision Commission
What's Left Committee
February 7, 1977

Apportionment
Article XI, Section 1

At the December 7 Commission meeting, Mr. John McElroy presented a new apportionment proposal to the Commission, and, after discussion of both the What's Left Committee recommendation and Mr. McElroy's proposal, the matter was rereferred to the committee for further consideration.

The committee has met twice, and has given careful consideration to Mr. McElroy's suggestions and to the comments of Commission members at the December 7 meeting. The committee recommends a revised proposal for Section 1 of Article XI, and also submits Mr. McElroy's proposal as an alternate, believing that the committee version is to be preferred but that Mr. McElroy's proposal has much merit and would be an improvement over the present provisions.

The recommended committee proposal, attachement No. 1, differs from the original as follows:

1. Congressional redistricting by the Apportionment Commission is optional with the General Assembly rather than constitutionally mandated. The Apportionment Commission would consist of five rather than seven persons (eliminating the two persons appointed by representatives to Congress) and, if the General Assembly chooses to place the responsibility of congressional redistricting with the Apportionment Commission, the law could provide for the addition of two persons, not of the same party, chosen by representatives to Congress, to the Apportionment Commission.

2. The proposal specifies that the Apportionment Commission appoint its own staff, and that the General Assembly provide adequate funds to operate the Commission, including staff. This is intended to assure that the Commission staff will be independent and responsible to the Commission.

3. The proposal modifies the timetable for adoption of a new apportionment plan somewhat in order to require publication of a tentative proposal at least four weeks prior to the adoption of a final plan, in order to offer an opportunity for any person or group to comment, criticize, or offer modifications of the plan. The committee borrowed this idea from Mr. McElroy's proposal, which seemed to receive favorable comment at the Commission meeting and which the committee believes to be an excellent idea. The Commission meetings would be required to be public meetings, and all the records and documents of the Commission would be open to public inspection, both during the time the Commission is completing its task and for at least 180 days in the office of the Secretary of State after the final plan is adopted. It is the committee's intention to make the whole apportionment process as open as possible.

The main features of Mr. McElroy's proposal, attachement No. 2, were discussed at the last Commission meeting. They are:

1. Retention of the present Apportionment Commission, consisting of the Governor, Auditor, Secretary of State, and two persons (of opposite political parties) chosen by the legislative leaders.

2. The appointment of staff with political affiliation, in the same number and proportion as the members of the Commission. The Commission majority would name the staff director and two assistants of its own political party and two staff assistants of the opposite political party. The General Assembly would provide by

law for "such qualifications and prior recommendations or approvals" as would be required of the staff, and for an oath of office, compensation of staff, and office and facilities as required. The proposal details the method in which the staff is required to report the plan it develops to the apportioning persons, and the amendment of such plan by the apportioning persons.

3. The plan is required to be published and otherwise exposed to public review and comment for at least four weeks, at the end of which time the apportioning persons meet and consider all criticisms, suggestions for amendment, staff analyses of the criticisms and proposed amendments, and the constitutional requirements, and adopt, after amendment - if it chooses, by a majority of the total number, the plan.

4. As in the revised committee proposal, congressional redistricting could be assigned to the apportioning persons by the General Assembly.

Attachment No. 1

Article XI, Section 1

Section 1. THE APPORTIONMENT COMMISSION SHALL DIVIDE THE STATE INTO DISTRICTS FOR THE ELECTION OF MEMBERS TO THE OHIO HOUSE OF REPRESENTATIVES AND SENATE IN ACCORDANCE WITH THE REQUIREMENTS OF THIS CONSTITUTION AND OF THE CONSTITUTION OF THE UNITED STATES. MEMBERS OF THE COMMISSION SHALL BE APPOINTED IN THE YEAR ONE THOUSAND NINE HUNDRED EIGHTY-ONE AND EVERY TENTH YEAR THEREAFTER. ONE MEMBER SHALL BE APPOINTED BY EACH OF THE FOLLOWING: ~~The governor, auditor of state, secretary of state, one person chosen by~~ the speaker of the house of representatives, ~~and~~ the leader in the senate of the political party of which the speaker is a member, and ~~one person chosen by~~ the legislative ~~leaders~~ LEADER in ~~the~~ EACH ~~two houses~~ HOUSE of the major political party of which the speaker is not a member ~~shall be the persons responsible for the apportionment of this state for members of the general assembly~~.

THE FOUR MEMBERS SHALL BE APPOINTED ON OR BEFORE MARCH 1 OF THE DESIGNATED YEAR, AND THEIR NAMES SHALL BE FILED WITH THE SECRETARY OF STATE. THEY SHALL MEET NOT LATER THAN APRIL 1 AT A TIME AND PLACE FIXED BY THE SECRETARY OF STATE, WHO SHALL CALL THE MEETING. THE FOUR MEMBERS SHALL SELECT, BY THE AFFIRMATIVE VOTE OF AT LEAST THREE MEMBERS, A FIFTH MEMBER WHO SHALL BE CHAIRMAN. IF THEY HAVE NOT SELECTED THE FIFTH MEMBER BY MAY 1, EACH MEMBER SHALL, ON THAT DATE, SUBMIT TO THE SECRETARY OF STATE THE NAME OF ONE PERSON, OTHER THAN A MEMBER, TO BE THE FIFTH MEMBER AND THE NAME OF THE FIFTH MEMBER SHALL BE CHOSEN BY LOT BY THE SECRETARY OF STATE FROM AMONG THE NAMES SO SUBMITTED. FAILURE TO SUBMIT A NAME IS DEEMED A WAIVER OF THE RIGHT TO SUBMIT A NAME. NO ELECTED OR APPOINTED PUBLIC OFFICER SHALL SERVE AS A MEMBER OF THE COMMISSION. A VACANCY IN THE COMMISSION SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT. THE CHAIRMAN SHALL CONVENE THE COMMISSION AS OFTEN AS NECESSARY PRIOR TO AUGUST 1 FOR THE PURPOSE OF ORGANIZING, SELECTING STAFF, SECURING OFFICES AND EQUIPMENT, AND SIMILAR MATTERS.

~~Such persons, or a majority of their number,~~ THE APPORTIONMENT COMMISSION shall meet and establish in the manner prescribed in this Article the boundaries for each

of ninety-nine house of representative districts and thirty-three senate districts. ~~Such~~ THE FIRST SUCH meeting shall convene ~~on a date designated by the governor~~ AT THE CALL OF THE CHAIRMAN between August 1 and ~~October 1~~ AUGUST 10 in the year one thousand nine hundred ~~seventy-one~~ EIGHTY-ONE and every tenth year thereafter. The ~~governor~~ CHAIRMAN shall give ~~such persons~~ THE MEMBERS two weeks advance notice of the date, time, and place of such meeting. THE COMMISSION SHALL MEET AS OFTEN AS NECESSARY IN ORDER TO COMPLETE AND PUBLISH A TENTATIVE APPORTIONMENT PLAN NO LATER THAN SEPTEMBER 15. NO SOONER THAN FOUR WEEKS AFTER PUBLICATION OF THE TENTATIVE PLAN, THE COMMISSION SHALL MEET FOR THE PURPOSE OF ADOPTING A FINAL PLAN, AND SHALL CONSIDER THE COMMENTS, CRITICISMS, AND ALTERNATE PROPOSALS SUBMITTED BY ANY PERSON OR GROUP TO THE TENTATIVE PLAN. THE COMMISSION SHALL ADOPT A FINAL PLAN NO LATER THAN OCTOBER 20. THE CONCURRENCE OF AT LEAST A MAJORITY OF THE MEMBERS OF THE COMMISSION IS NECESSARY FOR THE ADOPTION OF BOTH THE TENTATIVE AND THE FINAL PLANS.

THE FINAL PLAN SHALL BE FILED WITH THE SECRETARY OF STATE WHO ~~The governor~~ shall cause the apportionment to be published no later than October ~~5~~ 25 of the year in which it is made, in such manner as provided by law.

MEMBERS OF THE APPORTIONMENT COMMISSION SHALL SERVE WITHOUT COMPENSATION BUT SHALL BE REIMBURSED FOR ACTUAL AND NECESSARY EXPENSES. THE GENERAL ASSEMBLY SHALL APPROPRIATE MONEY FOR THE OPERATION OF THE COMMISSION, INCLUDING STAFF.

ALL MEETINGS OF THE APPORTIONMENT COMMISSION SHALL BE OPEN TO THE PUBLIC. ALL COMMUNICATIONS, SUGGESTIONS, CRITICISMS, PLANS, ALTERNATE PROPOSALS, AND OTHER DOCUMENTS RELATING TO THE PREPARATION AND ADOPTION OF THE TENTATIVE AND FINAL PLANS SHALL BE OPEN TO PUBLIC INSPECTION AND SHALL BE RETAINED BY THE COMMISSION DURING ITS EXISTENCE AND BY THE SECRETARY OF STATE FOR AT LEAST ONE HUNDRED EIGHTY DAYS AFTER COMPLETION OF THE COMMISSION'S WORK.

THE APPORTIONMENT COMMISSION SHALL BE RESPONSIBLE FOR DIVIDING THE STATE INTO DISTRICTS FOR THE ELECTION OF REPRESENTATIVES TO THE UNITED STATES CONGRESS WHEN SO PROVIDED BY LAW. SUCH LAW MAY PROVIDE FOR TWO MEMBERS TO BE ADDED TO THE COMMISSION, WHO SHALL BE APPOINTED BY REPRESENTATIVES TO CONGRESS AND SHALL NOT BE MEMBERS OF THE SAME POLITICAL PARTY.

1. The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

The first meeting of such apportioning persons in the year one thousand nine hundred eighty-one, and in every tenth year thereafter, shall convene in Columbus on a date between August 1 and August 15 designated by the governor. The governor shall give each apportioning person two weeks advance notice of the date, time and place of such meeting.

By a vote of a majority of their number, such apportioning persons at their first meeting shall appoint a staff director who shall be a member of the political party having the largest number of members among the apportioning persons, and shall likewise appoint two staff assistants who are members of the same political party as the staff director and two who are members of the major political party of which the staff director is not a member. The staff director and the staff assistants shall have such qualifications and prior recommendations or approvals, take such oath of office, and shall be compensated and reimbursed for expenses in such amounts, and provided with such working space, facilities and equipment as shall be provided by law.

The staff, with the assistance and under the supervision of the staff director, shall formulate an apportionment plan conforming to the requirements of this Article XI,

and requirements of the Constitution of the United States. Such plan shall be reported by the staff director to the apportioning persons at a public meeting convened by the governor for the purpose of receiving it and attended by the full staff. The governor shall give one week advance notice to each of the apportioning persons of the date, time, and place in Columbus of such meeting.

When such second meeting of the apportioning persons convenes, and a majority of the apportioning persons is found to be present, the governor shall call upon the staff director, with participation of the staff, to report and explain the apportionment plan developed by the staff and to respond to questions from the apportioning persons about its content, prep aration, supporting data, and alternatives considered during its development. The apportioning persons, by a majority of their number, may amend the staff-developed plan. The meeting may recess from day to day. When satisfied with the staff-developed apportionment plan, as amended by the apportioning persons, the apportioning persons, by a majority of their number, shall vote to adopt it as their proposed apportionment of the state into house of representatives and senate districts. Such proposed apportionment shall thereupon be published and otherwise exposed to public review and comment for such period, not less than four weeks, and in such manner as shall be provided by law.

At least one week before the end of the period so provided for public review and comment, the governor shall give notice to each of the apportioning persons of the date, time and place in Columbus where they shall reconvene to consider further their proposed apportionment of the state into house of representatives and senate districts. Upon the reconvening of such third meeting of the apportioning persons,

with at least a majority of their number present, they shall further consider their proposed apportionment, criticisms thereof, suggestions for amendment proposed to them, staff analyses of such criticisms and proposed amendments, and the requirements of this Article XI and requirements of the Constitution of the United States. Such meeting may recess from time to time as deemed desirable by the governor to permit completed development of an apportionment plan likely to receive approval by at least a majority of the apportioning persons. Upon motion by one of their number, duly seconded, the apportioning persons by a majority of their number, and by a recorded yea and nay vote, shall publicly establish an apportionment of the state into ninety-nine house of representatives districts and thirty-three senate districts.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is made, in such manner as provided by law.

[CONGRESSIONAL DISTRICTING OPTION]

The apportioning persons described in Section 1 of this Article XI shall be the persons responsible for apportionment of this state for representatives to the Congress of the United States when so provided by law.

Ohio Constitutional Revision Commission
What's Left Committee
February 7, 1977

Article II, Section 4
Eligibility of Legislators to Public Office

Present Constitution

Section 4. No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

No member of the general assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.

Committee Recommendation

Section 4. No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

Committee Recommendation

The What's Left Committee recommends the repeal of the second paragraph of Article II, Section 4, as follows:

Section 4. No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

~~No member of the general assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.~~

History and Background of Section

Article II, Section 4 as adopted by Ohio voters on May 8, 1973, was considered by the Commission's Legislative-Executive Committee, which recommended the amendment of the first paragraph of the section, and the transfer of the second paragraph, which was formerly Article II, Section 19, to Section 4, with some minor wording changes but no substantive modification.

In its report to the General Assembly, the Legislative-Executive Committee commented on Section 19 as follows:

> "The Commission did not consider abandoning the one year rule in Section 19, prohibiting appointment to office for one year after term. It noted that the Citizens Conference on State Legislatures in its general recommendations for the States has favored the prohibition against a legislator's accepting appointment to other state office during the term for which elected and within a period of time after termination of his service. [1]
>
> The Commission has substituted the term 'public office' for 'civil office' in the portion of the section that derives from Section 19 because, military office having been excluded, definitions of the two terms have been interchangeable.
>
> The provision from Section 19 have been rewritten to make style changes consistent with other parts of the Constitution by the elimination of the 'shall' construction where it is not used in a mandatory sense. The phraseology has been revised to make it consistent with the first paragraph of the section, and thus the expression that refers to 'no senator or representative' has been changed to read, 'no member of the General Assembly.' The ambiguous and archaic term, 'emoluments' has been replaced by the term 'compensation' ... In recommending the substitution of 'compensation' for 'emoluments', the Commission intends no change in the meaning of the restriction. The term 'compensation' was selected as one that covers remuneration in salary or other form." [2]

Section 4 prohibits the appointment of a legislator to an office either created or the compensation of which has increased during his term, for the duration of his legislative term and one year thereafter. A form of this prohibition has existed in Ohio's fundamental law since the beginning of statehood. The Ohio Constitution of 1802 stated, in Article I, Section 20:

> "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state, which shall have been created, or the emoluments of which shall have been increased, during such time."

At the same time this section was introduced in the Constitution, the power of the legislature was very extensive, and the executive branch was weak. The governor had no executive veto. The legislature chose the secretary of state, treasurer of state and the auditor, triennially, and chose the chief military officers. Judges of the supreme court and common pleas courts were elected by joint vote of both houses for seven year terms. The governor had no power to make appointments except as such power was expressly granted by the legislature. Article VI, Section 4 of the 1802 Constitution enabled the general assembly to provide by law for the appointment of all civil officers not otherwise covered by the Constitution. In addition, the two

senators to the United States Senate were chosen by the General Assembly (Article I, Section 3, U.S. Constitution) and only the representatives to Congress were chosen by the electors. The prohibition of Section 20 of Article I was the only obstacle to members of the General Assembly appointing themselves to the most important state offices.

The prohibition of Article I, Section 20 was the subject of considerable debate at the 1851 Constitutional Convention. As originally proposed to the Committee on the Legislative Department, the section extended the prohibition on assuming civil office to elected and appointed offices for the legislator's term and one year thereafter. The proposal contained the additional clause "nor shall any such Senator or Representative during his term of office be appointed or elected by the General Assembly to any other office whatever." Delegate Green raised an objection to the clause on the basis that it conflicted with the U. S. Constitution - Article I, Section 3, which mandates the general assembly to choose senators and spells out restrictions on U.S. Senators (e.g. age, residency, citizenship), and Section 4, which authorizes states to pass laws determining the time and place for holding congressional elections, but reserves the right to Congress to make or alter such regulations, except as to the place of choosing Senators. Mr. Green objected that Section 19 proposed an additional restriction on congressmen and was therefore unconstitutional. The Convention agreed to delete the clause. There was extensive discussion on an amendment limiting the prohibition on assuming civil office to appointments to office, removing the words "elected or". Arguments were advanced by Delegate Vance to the effect that if the voters elected a person to the legislature with specific instructions to create an office, and later asked that representative to assume that office, the constitutional provision as proposed would thwart the will of the electors. What the sentiments of the delegates appears to indicate is that they did not fear legislators assuming a newly-created office with possibly a higher salary when the voters had the chance to voice their approval, as much as their assuming such benefits as a result

of appointment - the latter lending itself to log-rolling. The amendment was agreed to. Section 19, as approved by the Convention read as follows:

> No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected.

Among the other constitutional changes that emerged from the 1851 Convention, the executive branch was strengthened, and the power of the legislature to make appointments was diminished. The secretary of state, treasurer and auditor were elected by popular vote, as were supreme court judges and court of appeals judges. The attorney general and lieutenant governor were added to the executive branch. The adoption of Article II, Section 27 took away the power of the General Assembly to appoint "except as prescribed in this constitution, and in the election of United States senators; and in these cases the vote shall be taken 'viva voce'." (The General Assembly continued to select senators until 1913, when the Seventeenth Amendment to the U.S. Constitution provided for their election by popular vote.) These major changes in the 1851 Constitution severly curtailed the power of the General Assembly to pass laws creating other offices and to appoint persons to those offices.

Section 19 of Article II remained unchanged in the constitutions proposed by the 1873-74 and 1912 Constitutional Conventions. The earlier convention did not consider amending the section and Proposition 250, to amend the section in the 1912 Convention, was not reported out of committee and the substance of the amendment is not known. Non-substantive language changes were approved by the voters in 1973, as noted earlier, when the language of Section 19 was combined with Article II, Section 4.

Comment

The What's Left Committee recommends the repeal of the second paragraph of Article II, Section 4. The present language prohibits members of the general assembly from being appointed to public office when the compensation of that office has been increased during the legislator's term, although such increases, in recent years,

have been designed to meet the costs of inflation rather than substantially increase the income of the person holding the office. An example was cited of former senator Harry Jump who was appointed Director of Insurance. While he was a member of the Senate, the pay for the Director of Insurance was increased, as it was for other cabinet officers, and Mr. Jump was barred from assuming the director's position as a result of Section 19, and served as Deputy Director for a year before becoming Director. The Committee believes that the original intent of the constitutional language was to prevent the general assembly from creating offices and appointing themselves to them, or granting themselves or political allies higher salaries by assuming those offices. Nowhere in the history of former Section 19 does it appear to be the intent of lawmakers to prevent a person from assuming a public office with a higher salary, when the salary of the office has increased as a result of inflation or other economic factors, as opposed to political manipulation.

The Committee believes that the dangers of the general assembly using their power to create offices and higher salaries as a log-rolling technique have been severely restricted since the provision was first made part of the Constitution, by the increased number of public offices which are elective and by subsequent limitations on the power of the general assembly to make appointments. The Committee believes that the section now operates to prevent qualified persons from assuming positions of responsibility merely because the salary of the office has increased during his term due to inflationary factors. The Committee felt that the danger of legislative abuse is no longer acute, since it is unlikely that a legislator wanting to create an office to be appointed to it could get it through the public hearing process of both houses of the legislature to get that accomplished.

The What's Left Committee proposes the repeal of the second paragraph of Article II, Section 4, since circumstances have changed since its adoption resulting in an undesirable prohibition against legislators assuming public office, and it's belief that it is against the public interest today to have this situation continued.

Footnotes

1. Burns, John, The Sometime Governments, Bantam Books, Inc. p. 166.

2. Ohio Constitutional Revision Commission, Part I, Recommendations for Amendments to the Ohio Constitution - General Assembly, 1971. p. 22

Grand Jury and Civil Trial Jury Committee

Chairman, Representative Alan Norris

First Meeting, January 23, 1976

Last Meeting, September 24, 1976

Minutes and Research begin on page 5245

Ohio Constitutional Revision Commission
Committee to Study Grand and Civil Petit Juries
January 23, 1976

SUMMARY

The Committee to Study Grand Juries and Civil Petit Juries met on January 23 at 9:00 a.m. in House Room 10 of the State House in Columbus. Committee members present were the chairman Rep. Alan Norris, Senator Paul Gillmor, Rep. Marcus Roberto, Mr. Craig Aalyson. Staff members present were Julius Nemeth, Brenda Buchbinder and the Director, Mrs. Ann Eriksson.

Rep. Norris - For the record, this is the committee to study the grand jury and civil petit jury systems here in Ohio. It is a special committee of the Ohio Constitutional Revision Commission. It has been convened by the Commission and charged with studying those sections of the Bill of Rights to the Ohio Constitution pertaining to the grand and petit juries. This committee is an offshoot, to some extent, from the Bill of Rights Committee of the Ohio Constitutional Revision Commission and it has been determined by that committee that these two particular areas required some particular attention because there is some controversy at least in the literature, and a thorough inquiry would take more time than was alloted to the Bill of Rights Committee. So that's why we're here today. This committee will hold two public hearings, one on grand juries, which is the hearing today, and another hearing to follow shortly on petit juries. And then this committee will be charged with recommending to the full Commission whether or not changes should be made in the Bill of Rights of the Ohio Constitution in these two areas. Witnesses today are here by either invitation of the committee or by their own request. Their testimony will be perpetuated, so that the members of the Commission who aren't here will have that testimony available to them before the final decision is made. As I call the witnesses, I would like them either to sit at the table and talk to us from the chair or from the lecturn, whichever is more comfortable. Our proceedings here will be informal. Normally, we would ask that you make any prepared remarks that you have first and then that you permit questions from members of the committee at the conclusion of your prepared remarks. Do any members of the committee have any opening remarks before we begin? The first witness to appear this morning is the Honorable Frederick T. Williams, the administrative judge of the Franklin County Common Pleas Court.

Judge Williams - I have appeared before committees before and usually in all other cases have had an axe to grind. This morning I would simply say that I have no axe to grind whatsoever. I just simply am here more for your convenience than to make any presentation to the group. What I say primarily will be my own opinion, not necessarily those of other members of the court, or not even the majority or the minority of the court. I have been administrative judge since that particular position came into being several years ago, and since the adoption of the present Criminal Rules, it is and has been my duty to appoint the chairman of the grand jury or the foreman of the grand jury as well as charge each of the grand juries and sort of be a listening post whenever any problems arise, most of the problems being when they want to be excused after they have served for some time. In all of my experience with the grand juries particularly, this is the first time that at the conclusion of the grand jury, I've gotten a two page letter from the foreman of the grand jury and the deputy foreman and I thought I would share it with you because it very much points out some of the problems in the grand jury and at the same time will indicate that, at least in Franklin County, the grand jury is a functioning

and very viable body. It says, "Dear Sir: This is in the nature of my personal obligations and feelings of our activity in the grand jury this past season. I would first like to thank you for the opportunity to serve. It was one of the most rewarding experiences I have ever had. As I mentioned to Bob Hill, I think it should qualify me or anyone else who serves for at least five hours of a no-credit course in criminal activity in Franklin County." (I should say that he is a retired professor from Ohio State.) "I think we did a good job. Eight of the twelve jurors who started in October, 1975 were still active as of December 31, 1975. During that period of time, we had the opportunity to visit the county jail, the Columbus State Institute and the Columbus Police Department and an additional opportunity for those of us who were interested to ride along in a cruiser to observe first hand the job done by the cruiser personnel." I would add paranthetically here that one of the lady grand jurors took that opportunity, and on the first arrest, who was a female, they asked her to pat the suspect down. She did shake out a Saturday Night Special. "Since I have always been a law and order person, I was very pleased at the dedication and preparation of those officers who presented their case to the grand jury. I was not at all pleased when we were informed that some of the defendants in the cases we were hearing had been indicted previously and were now out on the streets on bail, probation, or case dismissed because of the paternal or "friend of man" concept of law as interpreted by several of the judges. The assistant prosecutors for the most part did well. I was impressed with the work of Curt Griffith, one of our regulars. He always seemed to have taken care of his homework before he presented his cases. His interrogation of the witnesses was to the point and when all of the evidence had been presented, his summation to the members of the grand jury left little doubt as to the charge to be considered. I do not wish to write a book about my tenure as foreman of the Franklin County grand jury but I think I could. I'd like to state that my confidence and respect for the enforcement agencies, the Columbus Police Department and the Franklin County Sheriff's office as they go about their daily tasks of trying to track the criminal element in our city, has been strengthened. Now, if something could be done in the courts to put the criminal on trial and not the victim and to keep the repeaters off the streets, it would seem that more of the criminal problems would be taken care of. Just a couple of suggestions. One, have a member from the prosecutor's staff spend the first morning when the grand jury is in session, clarifying the different kinds of felonies and penalties. No cases, just a lecture, because to communicate it is necessary to know the language. Two, set up the trip to the Columbus Police Department early in the term because most of the cases heard by the grand jury and brought before it are presented by representatives of this department. Three, require everyone called for grand jury, except those excused for medical reasons, to serve a minimum of three weeks. The knowledge and understanding gained from this experience should be a must for every citizen. Thanks again for the opportunity to serve." I present that to you because I suspect there will be no witness to appear before this committee who has ever been on a grand jury. I'll start out by saying that, and certainly you will have no witness before this committee who has served as a foreman of a grand jury. He sets out the problems and, I think, fully understands the purpose of the grand jury, that is, that it is an inquisitorial body and it is the accusatory body. For whatever reason, sometime in the dim history of the past, the grand jury, at least in this state, was brought somewhat under the arm of the court and at the same time under the arm of the prosecutor. The court, at least in this county, has always taken the position that the grand jury is an independent body, and the sole function for the judge who

purportedly is in charge of the grand jury is to give them the statutory oath together with the requirements of the charge which of course have come through the long lapse of centuries. I would say that the grand jury in Franklin County -- now, again, I cannot speak for other counties -- has always done exactly what it was expected to do under the Constitution and has done what it was expected to under our statutes. There are and have been a great number of very learned and distinguished lawyers and jurists who at this time are, I think, very violently opposed to the use of the grand jury system. Those on one side, let's say on the right, feel that the cost is something that should be taken into consideration, that it actually doesn't do anything other than sign the indictment and that it serves little or no function whatsoever. There are those, let's say on the left side, who feel that the grand jury should be continued, and that it should become almost an open institution, very similar to the eventual trial of the facts and certainly as broad and open as the preliminary hearing. I don't know where I put myself. I suppose, someplace in between. I think if we continue the grand jury system, it should continue very much as it is in effect at the present time. I do not feel that the grand jury was ever intended to be a public playground for the benefit of the criminal. At the same time I do not think it should be so utterly secret, so that under certain circumstances and controls by a judge or some magistrate in authority we can relax the rules, so that certain things can be elicited from the grand jury by way of some of the testimony. I think under the present Criminal Rules we have that particular power, although I am very surprised that only in one case since the Criminal Rules have gone into effect has a request been made of me to release information, and that was by the prosecutor in order to prosecute somebody for perjury before the grand jury. So apparently that is not being used too often. It is a good tool both for the prosecution and for the defense. If something is said exculpatory before the grand jury, that is of course a good tool for the defense. If a recalcitrant witness testifies one way before the grand jury and a different way before the trial jury, then that's something that we ought to have the authority and ability to pull out and present to the trial jury. Our new grand jury, of course is no longer composed of the fifteen members as it was for many years. This, of course, being to cut down somewhat on the cost. The term of the grand jury is a minimum of four months up to a maximum of nine months, and it can be extended that far by request of the prosecuting attorney and by order of the administrative judge. Only once since we have been under this particular system have I extended the grand jury, and that was in a situation in which there were some important people under investigation and the investigation was about half-way through at the end of the four months. I extended it and it wrapped its business up in about three weeks and resulted in 41 indictments, 38 of whom I understand have been convicted, so there is not exactly a witch-chasing operation by a grand jury. Now at this point, I know there may be some questions, and if there are, I would be very happy to try to answer them. As I say, I'm neither for nor against. I think we have an operating system right now. It has its drawbacks by way of cost, it has its drawbacks by way of procedure, but at the same time there must be some type of organization or group or whatever you wish to call it who, as we go back in English history, stands between the crown and the people.

Rep. Norris - Thank you, Judge. Questions of the witness?

Mr. Aalyson - Judge Williams, do you have any comments as to the relative effectiveness or desirability of the grand jury as opposed to the preliminary hearing?

Judge Williams - I would say -- and I am speaking from experience, and this is a personal observation and personal feeling -- I did serve for some time on the municipal court which conducts the preliminary hearings and most of the time they were just simply fishing expeditions and many times were used strictly for delay. So I can't say that I would favor one system over the other. I feel that if we go strictly to the information system, we would be clogging the magistrate's courts almost beyond any hope. The grand jury system obviously takes a great deal of the burden off the magistrates' courts.

Mr. Aalyson - Was it the defendant ordinarily who would be seeking to accomplish delay in the preliminary hearing?

Judge Williams - Yes. No prosecutor is enamored of a preliminary hearing.

Mr. Aalyson - Do you feel that there really is a present need for the historical grand jury function of standing between the crown and the people?

Judge Williams - Yes, I do.

Mr. Aalyson - Do you think that the grand jury serves anything other than being a "rubber stamp" to the prosecutor?

Judge Williams - I cannot answer that. I've never been in the grand jury. And as I say, I read you this letter because you probably never will have a witness who has been a grand juror. I would say that I strongly suspect -- and if you brought in 25 grand jurors they would probably all say approximately the same thing -- that if the prosecuting attorney in the case says that he has enough evidence to get a conviction and that the defendant looks like the right person, and he presents some of that evidence to the grand jury, they're going to true bill it. Likewise, I would suspect that if the prosecutor, after presenting evidence to the grand jury, stands up and says "I don't think we can ever get a conviction on this", they're going to no bill it. But at the same time, in those inbetween cases, I suspect the grand jury itself makes that ultimate decision.

Rep. Norris - Judge, in your experience, just to go off a little bit on that question, have you ever had conversation with grand jurors that recommended against the prosecution's recommendations? Have they gone against the recommendation of the prosecutor to your knowledge?

Judge Williams - It has always been my absolute rule never to interrogate a juror, either grand or petit, as to why he did what she did. I think that is their function, and I keep my nose out of it.

Rep. Norris - The reason I asked that question is that there is a middle ground for the prosecutor who could, of course, take no position. I would guess that that is an area where the grand jury does make the ultimate decision. You hear the facts on both sides and you make up your mind, but I was curious as to whether or not you had any personal knowledge of instances where the prosecutor recommended an indictment and the grand jury rebuffed it.

Judge Williams - I think when Judge Tague testifies this afternoon, he indicated to me that he had at least one situation in his county where the grand jury is the

greatest tool that he had ever seen because apparently there was some situation where the county had chosen up sides and the grand jury had to make the ultimate decision. He will probably explain that to you a little bit more in detail. That's all I know. That's the only thing he indicated to me.

Rep. Norris - Again, going a little bit further with some of the previous questions, can you point in your own opinion and experience to a contribution that you think the grand jury makes? Does it have an essential contribution to make today?

Judge Williams - Well, why don't we call a spade a spade and back up to the situation of the phantom employees two years ago. There was or is a Republican prosecutor in Franklin County. Had we moved strictly according to an information system or according to an affidavit system, the scream would have been "Politics!", from beginning to end, and I think the arguments before the jury and before the court might very well have been politics from beginning to end. Apparently, the cases were submitted to the grand jury, there were indictments, there were no bills, and nearly all of those who were indicted were convicted either by a jury or by the court or by guilty pleas. Most of them had guilty pleas. I would say in a situation like that there would have been few convictions just because of the extreme politics. There still was a scream of politics but rather obviously the grand jury indictments and in all of the results -- there was a lot more fire than there was smoke. And I think there the grand jury had to take the burden upon its own shoulders and weigh the evidence before it and then come up with what it thought were the right answers. And it looks like it did come up with the right answers in almost every case.

Mr. Aalyson - Do you have any comments, Judge Williams, on the historical need for the grand jury that is interpositioned between the crown and the people? Is that argument still valid?

Judge Williams - I don't think that argument is truly valid. As I say, that is a historical argument. It goes back, I think, to 1166 when there were the 12 knights who made the accusation and there was a trial by ordeal, and if you passed the ordeal the only punishment was banishment. So you were going to be punished regardless, whether you won or lost, but you lost a hand and a foot and then were banished if you lost the ordeal, and were simply banished if you won. And, of course, 500 years later the grand jury became sort of the buffer between the crown and the people, and they pointed obviously with historic pride to that, and the people felt so strongly about it at the time of the Revolution that the Bill of Rights in our own Constitution includes it. I think perhaps today, because of many of our modern detection methods, it may have outlived its true usefulness. At the same time, it is not truly useless. I'm not going to say that I want it abolished. I'm not going to say that I want it kept. I've tried to take a sort of middle position on this and just give you the facts as I know them.

Rep. Norris - Any further questions? Thank you, Judge Williams. We appreciate your taking your time to be with the committee. I should note for the record that we do have testimony given earlier by Judge Fred Shoemaker of the Franklin County Common Pleas Court, and that is already in our files, so we have two representatives from your court. Judge Shoemaker, as you may recall, was critical of the grand jury system. The chair will call Donald M. McIntyre, Associate Executive Director of the American Bar Foundation in Chicago. Welcome to the committee.

Mr. McIntyre - Mr. Chairman and members of the committee, the American Bar Foundation has embarked on a study of the grand jury systems in this country. It's a national study and at this point we have done a serious and thorough survey of the laws in the various states concerning the use and operation of grand juries. And we plan to do an empirical study of their actual operation. We are very mindful that there is an inevitable gap between the theory expressed in the law and what happens in practice. I have my presentation here which is in writing which I shall provide for you, which is based primarily on statutory and case law survey in this country. I have taken the liberty of offering some interpretation and some opinions on the grand jury situation. (Mr. McIntyre's presentation is attached.)

Rep. Norris - Questions of the witness? You're so thorough, I don't know what in the world we can shoot at you, Don. Thank you, very much. I find that was very helpful testimony. The next witness is Judy Avner, who is staff associate of the Coalition to End Grand Jury Abuse, from Washington, D.C.

Ms. Avner - By way of introduction, I would just like to say that the Coalition, up to this point, has based most of its efforts on reform of the federal grand jury system. This testimony represents our first step toward beginning to look at state grand jury systems. For that reason, a good part of our comments refers to abuses of the federal system.

Senator Gillmor - Ms. Avner, it would be helpful to me if you could give me a little bit of background about the group.

Ms. Avner - Sure. The Coalition was started in 1973 and consists of 18 groups that are listed on page 3 and continued on page 4 of the copy of the testimony. It is basically made up of civil liberties, religious, and legal groups and labor unions. The purpose of it is to effect change in the federal grand jury system through legislative reform. There are currently four comprehensive grand jury reform bills in the Congress. Hearings should start being held in February. There is also one right to counsel bill which is sponsored by Congressman Badillo. Basically what we have been doing, besides the legislative work, is that we print booklets on people's rights before grand juries, explaining the grand jury process, and writing articles on grand jury procedures and related matters -- speaking to people. We find that the whole area of grand juries is one that there is very little known about and a lot of education that needs to be done in terms of basics as what the grand jury is. In law school, we spent one day out of the three years I was there, one three hour session in criminal law on grand juries. Basically, it is a public education organization. (Ms. Avner's presentation is attached.)

Rep. Norris - Thank you. Questions of the witness?

Mr. Aalyson - Ms. Avner, would you please tell me how it comes about that you suggested abolishing reiterative contempt?

Ms. Avner - A witness is subpeonaed before the grand jury and refuses to answer questions. Assume that the witness is held in contempt and is sent to prison. In the federal system it is until the witness decides to talk or until the maximum of of the grand jury term, which is 18 months in the federal system. If at the end of that time the witness still hasn't talked, there is nothing preventing that witness from being resubpoenaed before a new grand jury, being asked the very same question,

again being held in contempt for refusal, and being sent back to jail. Right now there is no limit as to how long it can go on. That's the kind of situation we want to prevent when it is clear that the witness isn't going to answer any questions. For all intents and purposes, the continued resubpoenaing of the same witness, being asked the same questions, is done for harrassment purposes -- to put people in jail, people who can't be gotten for certain kinds of substantive criminal offenses. Now, there is no requirement that the government show any new evidence or new reason why the person should be resubpoenaed. It's just the same investigation and the same questions. Recently, federally, there were two women who were in jail in New Haven. They've been recently released from there, but there is one who is still in jail in Lexington, Kentucky, for the same kind of situation, where they were subpeonaed, held in contempt, imprisoned, the term of the grand jury expired, they were resubpoenaed, asked the same exact questions, held in contempt again, imprisoned for another nine months until the prosecutor, I guess in December, decided that they weren't going to answer the questions, and that there was no coercive purpose in keeping them there. On the federal level, the maximum term has been suggested to be six months.

Rep. Norris - Other questions? If not, thank you very much for your testimony. The Chair will call the Honorable Lee C. Falke, Prosecutor, Montgomery County, Ohio. Lee, I don't recall whether you are representing yourself, or the Ohio Association of Prosecuting Attorneys, but it would probably be best to tell us.

Mr. Falke - Thank you, Mr. Chairman. I am representing myself. I did notify the Ohio Prosecuting Attorneys' Association that I was going to be here, but it's difficult for them, I suppose, to have input into what I'm going to say, so I can't state that I have their full-hearted support behind my remarks as I have not cleared them with them at all. I think it might be in order to give you a little background as to how I handle the grand jury in my county. I think it's probably a pretty average way in many respects. I think it probably represents the way the grand juries are handled in most of the large counties. By that I would say the largest 22 counties. Probably the smallest 66 counties handle their grand juries a lot differently. I think also probably Cuyahoga County, because of the number of cases, handles its grand jury differently than most of the rest of the larger counties. But just to give you a little brief background on the way we handle it, we do have a grand jury every day. I have one of my older assistants who has been in the office twenty-plus years assigned to handle the grand jury. He presents all of the cases to the grand jury. We try to schedule the grand jury hearings on the same day as the preliminary hearing. With the time restraints we have on us now we can no longer have a week for the preliminary hearing and then a week before the case is scheduled for the grand jury and then a week before the grand jury reports. So we in Montgomery County try to schedule the grand jury hearing on the same day as the preliminary hearing. It saves us time in our overall time schedule but it also saves witnesses time which we think is important.

Mr. Aalyson - May I interrupt for a moment? Lee, I had gathered the idea that a preliminary hearing and a grand jury hearing were almost mutually exclusive. You seem to be saying something else.

Mr. Falke - No. Under Ohio Law, we have to give every case to the grand jury unless the defendant waives the grand jury. We do not go through the trouble of getting an information.

Mr. Aalyson - Well, what about the preliminary hearing? Do you have a preliminary hearing in the same case on the day of the grand jury?

Mr. Falke - Yes, practically every defense attorney now is asking for a preliminary hearing .

Mr. Aalyson - Then they are entitled to both?

Mr. Falke - Yes, indeed.

Mr. Aalyson - Alright, thank you.

Mr. Falke - It's the defendant's prerogative as to whether or not he wants a preliminary hearing. But every case, unless he waives the grand jury, has to go to the grand jury. There are times when we will take a case directly to the grand jury and bypass the preliminary hearing, but that is something that is the exception rather than the rule. I can get into that a little later as to when we do that. Those with preliminary hearings late in the afternoon, we can't schedule the grand jury hearing the same day, so we schedule cases the next morning, hoping to save the witnesses some time and also to speed up our process. And then instead of waiting a week before the grand jury reports, we report twice a week so that we hopefully have the person indicted within 10 to 14 days from the time of his arrest. We schedule witnesses for the grand jury about every 10 minutes. We give each witness about 10 minutes, in other words, except in a complicated case or what experience teaches us is going to be a slow-moving case through the grand jury. Most homicide cases are slow-moving. Most rape cases are slow-moving. So that in those cases we usually schedule about 30 minutes a witness. I have prepared a summary of our grand jury over the past several years. This is a record we keep normally in our own office. I thought it might be of interest to you. It shows the number of cases our grand jury has heard, the number of witnesses we've called, the number of cases ignored, cases per day, the total number of witnesses and the last column shows the percentage of persons indicted. The idea that we tell grand jurors what to do -- I think is shown there vividly that we certainly don't tell them what to do in every case. Another thing that is different in Montgomery County perhaps from some counties or a lot of counties is that we review all cases before they are filed by the police department. We have what we call a screening process that all cases go through so that when a case is filed we hope that we've got a case that will not only stand up to probable cause for preliminary hearing but will also be a case that will ultimately be worth our while to take all the way through the system and hopefully that we will win at the end of the line. So we try to weed out the bad cases by preliminary screening, so the cases that the grand jury ignores -- for example, in May 1973, they indicted 88% of the cases which means they ignored the other 12% and that is I think the highest figure there; in September 1973 they indicted 95.9 %, which means they ignored 4.1% of the cases -- are 12% to 4% of the cases over and above the ones that we tell police departments "You just don't have enough, we can't accept a case like that." And of course that's over and above the cases that many times are knocked out in the preliminary hearing, too. Although, frankly, if we have a preliminary hearing in a case and we have not been able to present all of our witnesses, for one reason or another, and we have more evidence, we will take it many times directly to the grand jury, and indict in that type of case, even though it has been dismissed in the preliminary hearing. So, I think this particular schedule shows one reason why it is important to keep the grand jury, and that is that the grand jury does do a real service for some defendants. In these cases here, if you or I were one of the 12% of the defendants who had

their cases ignored I think we would feel very strongly about the grand jury. There are a couple of other areas where the grand jury renders an important service to the community, and one of them is in emotional impact cases where the community is very wrapped up about a case. They think that a crime has been comitted and maybe we cannot prove it so. If the police department has to say that they refuse to make that filing, or if I have to tell the witness or the community that we are not going to file charges in that particular case, perhaps what we are telling the community may cause a lack of confidence in either the police department or in my office. We have taken cases like that to the grand jury, and I think when the grand jury also says "We ignore this case", it is rendering an important community service as far as having confidence in the system is concerned. Let me give you an example of that community service type situation. We had a police officer, a police chief in a small town, who had a warrant for the arrest of one suspect. He had information to believe that two suspects were in a particular motel. They were black suspects. He is a white police officer. The motel was in a black area. He took a couple of local police officers with him in the middle of the night, at two or three in the morning, went to the motel, and knocked on the door. The hallway where the room was was a very narrow hallway and very dimly lit. He heard scuffling inside and he thought he heard someone say, "It must be police, shoot 'em". They did acknowledge that they were police officers and the police chief shot very quickly. He shot twice through the door and killed one of the persons on the inside who happened to be crouched down behind the door. He shot about waist high, and two shots went into the man's chest, and killed that person. That was not the person they had a warrant for and the other defendant in the room, whom they did have the warrant for, escaped through a window over a roof and out through the back of the motel. They did not find a gun in the room and they did not have a warrant for that particular person, and the black community thought that this police chief should be charged with murder. We, in reviewing the case, felt that the police chief was in very sincere belief that he was in imminent danger of great bodily harm and that there was reason for him to shoot in self defense under those circumstances, because if they had started shooting from the other side, he was standing right there in front of the door, too. We felt that it was not, at any rate, the type of case that we could give a murder charge for. The case was sent to the grand jury and reviewed by the grand jury and it did not indict the police chief. I think that was a case where it was very important to have some other group in the community review the charges, in this case, a grand jury. In other cases where a police officer shoots people -- just the other night we had a suspect that had just tried to pass a bad check with one of the building and loans there, and the man drew a gun and the police officer shot him. That case will be taken to the grand jury so the grand jury can review it, so we don't have the police department or we don't have my office necessarily making the decision. Some difficult types of crimes -- gray area cases -- which I think it is important to take to the grand jury are homicides. Many times, there is a very fine line between an aggravated murder situation and a voluntary manslaughter situation and we like to have the grand jury review that. We like to get the layman's reaction to the type of charge that should be placed against a particular individual, so we think that's an important type of situation for the grand jury to hear. Another type of case we think it's proven it's important for the grand jury to hear is occasions when the defendant himself wants to be heard. He wants to go to the grand jury and tell his side of it, and we think that's an important type of case for the grand jury to hear. There are some other situations

where we run into problems and we would like to ask maybe that the laws be changed. You'll notice, we've had some special grand juries. We may have too many cases or we may have a particular type of investigation that is going to take a lot of a grand jury's time and so we have need for perhaps two grand juries going at the same time. I think there is some common law basis for it, but there is no statutory basis for it, and we would like to have that particular point cleared up. Section 2939.12 authorizes us to subpoena witnesses. It does not say anything about subpoenaing records and documents and frankly we would like to have that clarified. There is an attorney general's opinion that says we can and we do do that, but we would like to have that clarified under Ohio law. I agree with the former speaker, there are some things that we could do for grand jurors to help them be able to serve. One of the things the grand jurors ask me about, for example, is that they wish they had a place to park their cars. I think those little things are important for citizens to be able to serve. Some people feel that they can't pay their lunch and their car fare and everything else out of the grand jury fee. The time period for subpoenas -- I don't see any problem with that. Giving witnesses some lead time before they are subpoenaed before the grand jury -- the only problem with that is that then we've got a squeeze on us both ways, because we have to hurry our cases through now in order to get the cases indicted in time so we can go through all of the preliminary stages so that we can dispose of them in 90 days. The more time we take at the beginning, the less time we have at the end of our time periods. There are three points I would like to suggest where I think we perhaps need some major changes in the grand jury procedure in Ohio. One of them is that I think it would be helpful to allow prosecutors in adjoining counties to request a multiple-county grand jury. There may be situations where you have drug traffic going across two counties. There may be a situation where you've got a particular criminal committing activity in your county and maybe living in another county; it might be helpful on occasions in the type of situation which you might classify as organized crime, where you might want to have multiple-county prosecutors involved and perhaps multiple-police agencies. I think it would be an aid to investigating that type of crime. I think it would be better to give the county prosecutors authority to do this than to give it, for example, to the Attorney General. I think the closer we keep the law enforcement to the people in the community the better off we are. The prosecutors in Ohio have been very emphatic about keeping the state-wide grand jury out of existence, and things like that. Another area where the grand jury can be of service is in its ability to inspect county jails. This is something which is, in a way, done in a routine manner in Montgomery County now. We have a nice new modern jail, and so forth, but for a long time, before we had our new jail, they were the only voice that was regularly telling the people in the community that there was something wrong with the jail : "This, this, and this is wrong with the jail and it should be corrected." It may be that in addition to jails, the grand jury could be asked to look at mental health facilities in the county, the correctional facilities in the county, and if you don't have some other agency that you think could better do the job, maybe nursing homes. They could take a look at nursing homes, and I have to admit that the grand jury might not be too great on some of the technical requirements, but I think that they could address themselves to the needs of the community as to whether or not the people are being kept in a humanitarian manner. I would also recommend a change in the grand jury procedure, and that is in regard to a question perhaps earlier indicated. I really think that it is superfluous for the grand jury to hear most of the cases that appear and to have a preliminary hearing at the same time. If we have a preliminary

hearing, the defendant, at any rate, should not have a right also to have his case heard by the grand jury. I think that many times the prosecutor would like to waive the right to have the case heard by the grand jury in order to save time and so forth. So I would like to propose a constitutional amendment to allow grand juries to be waived in most of those cases, or putting it in a different way, I'd like to see the grand jury retained but I'd like to see the prosecutor and the defense counsel or the defendant himself have the right to request that the case go to the grand jury. In other words, let it be so that either side could request that the case go to the grand jury, but if it does go to the grand jury then waive the right to a preliminary hearing automatically, because I see no real purpose being served by both of these procedures taking place. The preliminary hearing is where the judge determines whether there is probable cause that the man committed the crime, and the grand jury proceeding is basically the same thing. I don't think that we need two probable cause determinations. I'm on a task force that has been studying various standards pertaining to the criminal justice system and one of the standards we've been studying relates to the grand jury system. (Copy attached). The task force was appointed by the President of the National District Attorneys Association. It is a task force for large county prosecutors. It did not attempt to meet all of the situations that come up in the smaller counties, but it did attempt to meet the situations that come up in the larger counties. I think that some of the suggestions we came up with there are very interesting and they think they are in line with some of the things that have been said here this morning by myself and also by the previous speaker. It does, for example, recommend the continuation of the grand jury. It recommends that they have both indictment and investigatory powers. It provides the prosecutor with the option to present a case to the grand jury. I'd like to submit that we should also add to that that the defendant shall have the right to have his case heard by the grand jury, too. And the standard does recommend, under 2b there on the first page, that if the charges are reversed by a grand jury cause hearing be eliminated. And there is the requirement for a preliminary hearing under Ohio law. It does provide for hearsay evidence, but it sets up several safeguards. I think it isn't neccssary for us to continue the right to present hearsay evidence because, frankly, we can't always get our witnesses there and we need to have some statement of a witness or perhaps a laboratory report or something of that nature to present to the grand jury, rather than the lab technician or coroner and so forth. One of the criticisms is that we would want to present evidence to the grand jury that we know won't be used at trial. This simply is not true. There is no point in us presenting evidence to the grand jury we won't use at trial because we can't win the case if we have a case built on evidence that is not admissible. Frankly, we do not want to be saddled with a lot of cases that we can't win later on. It takes our time, and it makes our conviction record look bad, which we don't like to see. Also, we do have concern that the defendant is treated fairly, and I try hard to see that we do not charge people that we can't ultimately convict if at all possible. One of the problems with the grand jury and the other proceedings is that many times a case is not fully investigated by the time we have a preliminary hearing or by the time we review the charge initially or even by the time the grand jury hears the case. This is one of the problems that we run into with the speed-up of the process. We just can't speed it up and get all of these things done too, sometimes. And so many times we still have not found some of the witnesses or we do not have all of the evidence back by the time the grand jury hears

the case. This is a problem for us to some extent. At any rate, we do need to present hearsay evidence to the grand jury. There is a point here, on page 2, that the prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt. I think this is important, too. We try to do that in Montgomery County, and in fact this is one of the things that needs to be changed under the present law. The grand jury has the right to determine whether or not they will hear the defendant. And amazingly enough, sometimes grand juries do not want to hear the defendant. We always encourage the grand jury to hear the defendant, but in our county at any rate, we have an independent grand jury and they do make up their own mind about that, and sometimes they do not hear the defendant. I can never figure out why they don't want to hear the defendant's side of the case. It seems to me that the more they learn about both sides of the case, the better off they are and the better off we are. If there is something that, frankly, is very helpful to the defense, we want to consider it in our evaluation of whether or not we have got a good enough case because, as I say, we don't like to have cases that we think we can win when they go to the grand jury and then later find out we can't win them. Why bother with them? So I encourage the grand jury to hear the defendant himself, and whenever I know of any witnesses that I think are defense witnesses, we try to have these witnesses testify before the grand jury. When it gets down to the investigatory function (on page 3 of the standard) you may want to consider having the grand jury handle political type charges, misfeasance and malfeasance of office,and some of the things pertaining to that. They do that in many states. I don't particularly want to get into that business. We have enough problems in the prosecutor's office to get into that sort of thing, except that I can see that it would be of merit if a citizen would come in and file an affidavit against any one of us and then require an open hearing as to what he thinks we have done as far as misfeasance or malfeasance of office is concerned. The hearing itself might damage us a great deal and the fact that he filed charges might damage us a great deal. But if these things could be heard in some sort of preliminary way to determine whether there is any merit to the claim, I think it might be helpful. Some states have this. I think this particular section is adopted according to the procedures they use in the State of Washington, and if you want to consider this sort of thing, or if you want to consider setting up this sort of procedure for some other types of investigations that the grand jury might do, for example investigations of mental health institutions or something of that nature, this procedure, I think, has a lot of protections built into it as it is outlined in this particular standard. I would like to say one thing further. Our grand juries are not allowed to make reports to the press or to the media. In other words, we pretty much follow the law that was handed down in the Kent State case. We followed it before Kent State. Our grand juries have not been allowed to give reports that this or that or the other thing is going on that is not proper in the community. They are only allowed to report whether they indict or do not indict. They are not allowed to more or less editorialize on anything that is happening in the community. I think that is proper law under Ohio law and that of couse is the law that was followed in the Kent State case.

Mr. Norris - Lee, you alluded earlier to this relationship between the grand jury and the preliminary hearing. Perhaps you might walk us through that procedure so that we understand exactly the relationship between those two.

Mr. Falke - The charges are filed, and in Montgomery County we review the charges. Sometimes a citizen will absolutely demand that charges be filed, and we feel that we do not have any statutory authority to keep him from filing an affidavit. Then, an

affidavit is filed. A warrant is issued, the person is arrested and he's brought before the court as soon as possible, and that is what we call a preliminary arraignment. He's brought before the judge, the judge sets his bond and then the defendant determines whether or not he wants a preliminary hearing. It's the defendant's right under Ohio law to determine whether or not he wants a preliminary hearing. Most defense attorneys in this day and age are worried about not representing their clients adequately, so they're all asking for preliminary hearings, so we're having preliminary hearings in practically all of our cases. A preliminary hearing has to be set within five working days after the person is arrested. Of course, that gives us up to seven days usually, because there is a weekend in between. We really have a difficult time many times getting our list of witnesses, getting them subpoenaed, getting them to the preliminary hearing on time, because if the police have a man in jail and they have to issue papers on the witnesses and the papers are issued, they may not even have contact with all of the witnesses yet. They may not know all of their addresses. They get their information as quickly as they can, but if they get it to us maybe a day or two late, that's maybe two days gone out of the five or seven day period. We've got then maybe a day to prepare the thing, to prepare our subpoenas and get them filed, and it takes another day to get them served, so we've got four days gone out of our five or seven days. Time really is critical at that stage. The preliminary hearing is held. We frankly put on as few witnesses as we can in order to establish probable cause. We frankly do not like to present our witnesses if we don't have to. It's part of the old idea I guess of not giving the defendant any more than you have to. It also saves time. We just don't have time to present all of our witnesses. The courts usually set a half hour for the preliminary hearing. So I have two people in our particular county who handle preliminary hearings all of the time. In a large community the city prosecutor handles the preliminary hearings. We handle them ourselves so that we have control of the evidence in a case all the way through. And we present as few witnesses as we can to establish probable cause. We find that, generally speaking, the judges will bind a person over to the grand jury if we have any witness with any evidence at all.

Rep. Norris - In a given case then, under your procedure, with probable cause found by the judge and bind-over to the grand jury, you would have a grand jury proceeding on that same case that same day?

Mr. Falke - Yes. We tell the witnesses to go right over from here to across the street, and it's fine when the preliminary hearing is downtown or in the municipal courts, but sometimes it's in one of our outlying courts and we have to allow an hour or two of lag time in between so that the witnesses can get downtown. But we feel that it is better for them to take off work only one day than it is two days.

Rep. Norris - Assuming the judge in a preliminary hearing does not find probable cause, at that point you can still take it to the grand jury.

Mr. Falke - We can, and if we have presented all of our evidence at the preliminary hearing we just drop the case at that point, and we do not go to the grand jury. But if for some reason the witness didn't get there or for some reason we have some other problems, let's say the witness wasn't prepared and the judge wouldn't allow the testimony, we will then take it directly to the grand jury.

Rep. Norris - Do you use the preliminary hearing very often as your first confrontation with defense counsel in order to at that point come to some resolution of the case?

Mr. Falke - We do not because we don't have time. I think in the smaller counties they probably do, but in our county we've got preliminary hearings set up every half hour. I have two attorneys handling preliminary hearings but they are not in the same courtroom, because we've got preliminary hearings someplace else in the county. So they're just scrambling just to get the job done.

Rep. Norris - So with your proceedings, the preliminary hearing really doesn't serve a useful purpose in so far as a plea bargaining tool?

Mr. Falke - It does not for us at all. It could if we had more time. Another problem with preliminary hearings is that we are going so fast anymore that we really don't know what the cases are like at preliminary hearings. We absolutely have no time to look at them well enough. And I don't think most of the defense attorneys are prepared well enough either to know what they are going to do at that time.

Rep. Norris - Well, I am amazed that you are in a position to go right to the grand jury as soon as you are.

Mr. Falke - It really is a scramble, but we do it.

Rep. Norris - The recommendation that we heard earlier that grand jury witnesses be given the right to assistance of counsel in the grand jury -- what is your reaction to that?

Mr. Falke - It doesn't bother me particularly. I would like to have it be their counsel rather than have it be defendant's counsel, if there is a difference. I think attorneys get themselves in a conflict of interest if they are representing two people who are involved in the same case. But it doesn't really bother me. When it comes right down to it, we really have nothing to hide about what is going on in the grand jury. If the person in indicted, that information, I suppose, is going to come out sooner or later. If the person is not indicted, then I think there is some reason to want to protect that information and keep the witnesses or keep the public from knowing what was said about someone that did not result in an indictment. But if the person is indicted, it doesn't bother me. If the attorney is only in there for his particular client, I guess he is going to know what that client is saying anyway, so that doesn't really bother me.

Rep. Norris - Shouldn't counsel for the witnesses be permitted to cross-examine at that stage?

Mr. Falke - That doesn't bother me either.

Rep. Norris - You don't think that would result in too much of a problem?

Mr. Falke - Are you talking about cross-examining all of the witnesses or cross-examine his own witnesses?

Rep. Norris - All of the witnesses.

Mr. Falke - I think that would become a time problem and also make the proceedings too complicated. I don't think that should be allowed, myself. But to see that we ask the proper questions of that witness, his client, and get all of the information that he wants out from that client, I don't see any problem with that.

Rep. Norris - If we were to abolish one or the other, the preliminary hearing or the grand jury, and assuming for the minute that we were to eliminate the right to the preliminary hearing and require every case to go to the grand jury, one of the complaints, of course, would be that counsel for the defense was not permitted and counsel for the defense is not able to cross-examine the prosecution witnesses. I'm wondering whether or not, if in that trade-off it wouldn't make sense. If you didn't have to worry about the preliminary hearing as well as the grand jury, would it then make sense to have one hearing that serves the function of those two -- that serves the defense's purposes as well as the prosecution's?

Mr. Falke - I don't think that we would have time to do that. We would certainly have to have more than one grand jury even in Montgomery County, and we don't have nearly the problem they've got in Cuyahoga County. I don't think that would be possible. If you are going to do that, I would think the only thing that would be possible would be to give the defendant a transcript of the proceedings.

Mr. Aalyson - You've indicated that if you are not able to present all of your evidence at the preliminary hearing, that would be one basis for wanting to have a grand jury hearing. Yet you do this on the same day, and I assume assign the same amounts of time almost to each of these cases. How do you manage to cure the defect in the earlier hearing in the second?

Mr. Falke - We do one of two things. That requires us to either reschedule the entire case or to have the witnesses at the preliminary hearing testify at the grand jury and if there is some witness who does not show up, have him come in at a later time and squeeze him in someplace.

Mr. Aalyson - Assuming the defense standpoint, for a moment, do you feel that both of these types of hearings are necessary?

Mr. Falke - I don't think so, and it's not necessary for the prosecutor, either. The question was asked, what if we do away with the preliminary hearings? I really don't think we should do that. I think we should have one or the other in each case.

Mr. Aalyson - But not both?

Mr. Falke - Not both.

Mr. Aalyson - I thought you suggested earlier that either the defendant or the prosecutor in the absence of a good result, as to him, in the preliminary hearing, ought to be able to go to the grand jury.

Mr. Falke - No, my suggestion is that either one should be able to request the grand jury, but if the cases goes to the grand jury, then not to have a preliminary hearing.

Mr. Aalyson - But if you have a preliminary hearing, do you feel that there should be a right, if you are dissatisfied with the results, to go to the grand jury?

Mr. Falke - Or refile. In other words, if we haven't been able to present all of our evidence, I think we have to have some ability to have the case reconsidered either by that judge or to take it directly to the grand jury. Because we have times when our witnesses don't show up and with the time period that we're trying to work in, it does happen. Not 50% of the time, but it happens frequently.

Mr. Aalyson - What do you do if you can't get a witness to the grand jury hearing at the time you set aside for the case?

Mr. Falke - Well, we have him come in some other time as long as it's the same grand jury, and we may or may not schedule the rest of the witnesses again at the same time.

Rep. Norris - Let me interrupt here to pursue a point that you've made. When we are talking about one or the other, and somebody's options, obviously, if you are allowed the options while the defendant isn't, then it still remains pretty much in your control. You can opt for the grand jury any time you want to avoid the preliminary hearing. What would you think of the defendant -- since both of these institutions are for his protection -- having the option of one or the other -- either the grand jury or the preliminary hearing -- assuming that you have some ability for reconsideration of the situation you talked about, where you didn't get all of your witnesses there? For example, if the defendant opts for the preliminary hearing, and you don't make it that first time but you are allowed a second crack in a preliminary hearing, as opposed to going on to the grand jury as your second crack, as you do now, how would that work?

Mr. Falke - I think we can divide the grand jury function into two functions: one is the indictment function and one is the investigative function.

Rep. Norris - I'm thinking only of the indictment function.

Mr. Falke - On the indictment function, for the average run of the cases it doesn't bother me. There are some cases where it would bother me, and that would be, for example, a rape case where we don't want to expose a girl to all sorts of court room hearings and so forth. We usually try to take those directly to the grand jury. Also, some of our questionable cases, like a policeman shooting somebody, we like to present directly to the grand jury.

Rep. Norris - In those cases what you are going to end up with is both, won't you, because the defense counsel is going to want the preliminary hearing, and you are going to want the grand jury?

Mr. Falke - It's my recommendation, and I think it's in the standard too, that if either one elects the grand jury, the preliminary hearing not be held.

Rep. Norris - I see. That creates some problem of openness which we have already discussed.

Mr. Falke - And the openness, I think, could be solved different ways. It could be solved by allowing the witness to step outside and talk to his attorney if he's got any questions. Or it could be handled by giving the defendant a copy of the transcript. Or it could be handled by letting the defense attorney, if he's got good cause -- I think it should be limited in that situation -- take depositions of those witnesses later on, too.

Rep. Norris - I'm sorry, I just don't.

Mr. Aalyson - I think I have the same problem. We seem to be saying that this duality is not desirable because there is a time problem. Could there be something worked out where the defendant could elect as to which procedure he wanted to adopt and be bound by it? Would that create an impossible restriction upon the prosecutor? Suppose the defendant elected the preliminary hearing and you couldn't produce your evidence and he's off and you can't get to the grand jury?

Mr. Falke - That would be an impossible situation for us, I think, with the time requirements that we have.

Rep. Norris - Again, too, he's got his problem with the rape case situation and the political case situation.

Mr. Aalyson - Well, then, could we not have the defendant entitled to request a private preliminary hearing?

Mr. Falke - The defendant wouldn't want to do that, to protect our witnesses.

Mr. Aalyson - Well, but in the rape case, most of the time, oh, I see....

Mr. Falke - It's the complaining witness.

Rep. Norris -In the political case situation, too, that he cites....

Mr. Falke - I guess really I'd like to see both proceedings kept but the preliminary hearing used most of the time unless someone elects to go to the grand jury. That's the way I'd like to see it.

Mr. Aalyson - But are you saying that if the defendant elects the preliminary hearing and loses, you are going to restrict his right to go to the grand jury, but if he wins, you want the right to go to the grand jury?

Mr. Falke - No, my idea on requesting the grand jury would be that if you do that before the preliminary hearing, not have a preliminary hearing.

Mr. Aalyson - Even though you may want it.

Mr. Falke - Even though you may want it. You know, the Supreme Court of the United States has said the preliminary hearing is not necessary. In the Gerstein case, the Court said that there has to be a probable cause determination, and as long as there is one, you do not have to have a preliminary hearing or a grand jury hearing. And we do have a probable cause determination technically now, too.

Mr. Aalyson - That begs the question. If we put it into the Constitution, then there does have to be one, at least in Ohio, whether the Supreme Court says that there has to be one or not.

Mr. Falke - That's true.

Mr. Aalyson - I'm somewhat bothered by the fact that if you give the defendant the alternative of requesting a preliminary hearing, he is proscribed from getting a

grand jury hearing, and yet the prosecutor is not.

Mr. Falke - That's the way it is now. If we elect to take a case directly to the grand jury, the defendant is not entitled to a preliminary hearing. I think some states propose a preliminary hearing after the indictment. They have a preliminary hearing on an indictment if there is not a preliminary hearing before it.

Rep. Roberto - Both the preliminary hearing and the grand jury proceedings are controlled by rule, aren't they?

Mr. Falke - There are very few rules pertaining to the grand jury. It's mostly statutory.

Rep. Norris - Further questions? If not, thank you very much, Lee.

The Committee recessed for lunch. The first speaker of the afternoon session was Mr. Thomas Swisher, Director of Research for the Ohio State Bar Foundation.

Mr. Swisher - Mr. Chairman and members of the committee, I might say first that I am not here on behalf of the Ohio State Bar Foundation. I'm here on my own behalf because I have a personal interest in this particular provision. And I might also say that Mr. Falke and I did not communicate before this, yet what I'm going to say is really an elaboration of one of his main points. And it very simply is this: The grand jury is a screening device. The preliminary hearing is a screening device. And while I firmly believe that we need a screening device in the criminal process, I do not think we need two of them. I'm here to urge that this committee adopt a provision that will provide that an accused can have a preliminary hearing or he can have an indictment by a grand jury, but he can not have both. And I have for that purpose prepared some suggested language, which I might add does not entirely solve the problem that Mr. Falke alluded to that there are times when he himself would prefer to go to the grand jury. This I do not think makes provison for that, but it does at least provide some of the basic things. I don't want to go to any detail on where the grand jury came from or what its original purposes were, but suffice it to say that in this country, it was designed to provide a cushion between the prosecutorial authorities, which are the government, on the one hand, and the accused on the other. And probably the most notorious case, one that I'm sure all of you are familiar with, and the one that perhaps had as much as anything to do with the fact that we now have a right to indictment by a grand jury in the Constitution, was the John Peter Zenger case, in which there was an incompetent, corrupt, and venal royal governor in New York. He was criticized by a fairly large faction of the educated public in New York, and they did this rather privately through John Peter Zenger, who probably on his own account wasn't bright enought to do it. He didn't spell very well. He was prosecuted, not by indictment, but on an information of the governor himself, or one of his chief officers. The grand jury device was designed to prevent persons being made to stand trial for their life, their liberty or their property on specious or spiteful or flimsy accusations. And I think it is that function which absolutely must be preserved. I have another reason for preserving that function in the grand jury itself, and that is that there is a very definite advantage in having a body of citizens, as opposed to public officials, who in private, essentially, discuss the evidenee and decide whether they are going to prosecute or whether they are not going to prosecute. This has several advantages, not the least of which is the fact that the people who do the accusing are not subject in that case, as much as

they would be otherwise, to recriminations for having considered evidence in the wrong way, or not having considered all of the evidence, and so on. I do not want to suggest for a minute that there are not abuses in the grand jury system. There are, and we've heard a great deal of testimony on curing those abuses, and I do not want to suggest that my position is in any way in opposition. I think that the cure for these abuses might very well be within the framework of what I'm suggesting here today. I recall Mr. Falke mentioning, in the State of Washington, the provision dealing with the prosecutor's duty to present exculpatory evidence to the grand jury. That is also law in California. I might add that there is quite a recent case on it. It's Johnson v. Superior Court which appears in 44 Law Week 2171, and states that in view of the state statute which says that the prosecutor has the duty, if he fails in that duty you are going to have to dismiss the case. Now, I always understood that in Ohio, while that was not stated in the statutes, the duties of the prosecutor were stated in the statutes in such a way that his duty could not be said to be to indict and convict, but to do justice -- which meant to free the innocent as well as convict the guilty. I'd like to review for just a moment the procedure we now have in Ohio and then suggest how I think we could change that procedure to the advantage of everyone. In the first place, we have a federal Constitution which in the Fifth Amendment says that no person shall be held in answer for a capital or otherwise 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. Now there is a question in my mind as to whether that specific provision in the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. I haven't counted up recently how many of the Bill of Rights provisions have been made directly applicable to the states, but I'm not sure that that is one of them. At any rate, it doesn't make any difference, because Ohio's Constitution now has a provision quite similar. It says, except in cases of impeachment, (and that is something that is not in the federal Constitution) cases arising in the army or 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 made to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. Now, I'd like to mention one other thing that we have on the books, and this happens to be in Section 2939.08 of the Revised Code, which very succintly states what the grand jury is in Ohio, and it says that the grand jury shall retire at the judge's charge and "proceed to inquire of and present all offences committed within the county." That tells us something about the powers of the grand jury in Ohio. There are no such things in Ohio and indictable and nonindictable offenses. The grand jury is perfectly capable and authorized to present an indictment for overtime parking if they were so disposed. I can't imagine the prosecutor bringing an indictment on that. As a practical matter, cases presented generally are felonies. But we do have misdemeanors that are presented on indictment, more often when the grand jury performs an investigatory function. We have one other provision in Ohio that I would like to bring to your attention and that is Section 2941.021, which says that any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney, if the defendant, after he has been advised by the court of the nature of the charge against him, and of his rights under the Constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing in open court, etc., waives prosecution by indictment. What that means is this - prosecution by indictment is required in all felony cases in Ohio unless the defendant waives indictment

in writing after having been fully informed of his rights. He must affirmatively waive that right. If he doesn't waive it, he gets indictment. He can't even waive that right in a capital case or one punishable by life imprisonment. There, he gets an indictment. There is one other provision I would like to bring to your attention. I won't go into detail, but simply state that Chapter 2937 of the Revised Code deals with preliminary hearings. In essence it says that in all felony cases where the grand jury has not yet acted, the accused is entitled to a preliminary hearing. I'd like to review some of the criminal procedures to put these in perspective for you. There are three ways to begin a criminal case in Ohio. Number one is if the grand jury meets, they retire to the privacy of their chambers, and as the statute says "inquire of and present all offenses committed within the county." And when they do that, that begins a criminal case. Nothing else has happened. The man has not been arrested yet. There has been no complaint filed by a citizen. The grand jury itself has come out with the accusation right off the bat. That is what we now call secret indictment. The second way in which a case might be started is if any citizen -- it could include a police officer, it could include a private citizen -- goes to the courts, usually to the deputy clerk in a police station, and files a complaint that someone has committed an offense. When that complaint is filed, a warrant or summons is issued and the man is arrested. The third way to begin a case, in very limited cases, all felonies and certain misdemeanors, is when the person is found commiting the offense or there is probably cause to believe that he has committed it and there is no time to get the warrant, and you arrest without the warrant and then take him down to the station and get the warrant. It's kind of a reverse procedure, but again there is a summons issued on him. In felony cases, as soon as the person has been arrested, in all those cases where the grand jury hasn't acted -- and that would mean arrest without a warrant or arrest with a warrant on the filing of a complaint -- the accused is entitled to go before a magistrate, in a court of record -- it could be a municipal court or a county court -- and go through the preliminary hearing. The preliminary hearing is designed to find out two things: number one, whether there is probable cause to believe that an offense was committed; number two, if an offense has been committed, whether it was committed by the man accused here. If the answer to both is yes, and the offense committed was a felony, the man is bound over to the grand jury for its inquiry. The answer might be, yes, there was an offense committed, but it was a misdemeanor, and yes, the misdemeanor was committed by this accused. In that case, the magistrate retains that case for trial in his own court. Now, if he is bound over to the grand jury, what does the grand jury do? Well, the grand jury inquires into two questions: they ask, is there probable cause to believe that an offense has been committed, and if so, is there probable cause to believe that this accused committed it? In other words, they are inquiring into exactly the same thing as does the preliminary hearing. I would suggest to this committee that there is no rational reason, at least not today, for having two such probable cause hearings. I very much believe that there ought to be some form of probable cause hearing somewhere along the line for the ancient reason to screen out accusations that are brought on flimsy evidence or are brought spitefully or speciously. Those should be screened out. We shouldn't trouble our courts with those. I would suggest that the grand jury, since it is a body of citizens which meets essentially in private, has a legitimate function. So if I am suggesting from that case that there ought to be one or the other but not both, I am suggesting that we retain both but we make a provision for saying you get one or the other but not both. That

brings me to the suggested language I have here. "Except in cases of impeachment, and cases arising in the militia when in actual service in time of war or public danger, no person shall be held to answer for a crime for which the penalty provided is death or imprisonment for more than one year, unless on preliminary hearing by a court of record and information of the prosecuting attorney, or, upon demand of the accused, unless on presentment or indictment of a grand jury in lieu of preliminary hearing and information of the prosecuting attorney." First and foremost, what I believe that this would do is to provide that you get the preliminary hearing or you get the indictment, but you do not get both. These are alternatives. The second thing that it does, is say that the preferred method is going to be the preliminary hearing, and if you do not affirmatively ask for indictment by a grand jury, you are going to get the preliminary hearing. In essence, this would say that if you don't ask for it, you waive it.

Judge Tague - Why can't we do it now?

Mr. Swisher - I think it can be, Judge, under the present constitutional provision. I think the reason we have not turned it around, however, is because there is a certain amount of inertia in attempting to do away with a procedure that has now become so encrusted in use and time. I don't think you could do it, short of saying in the Constitution that this is the way to do it.

Judge Tague - I realize I'm from a small county. The minute our county court binds over to the common pleas court, and the man has not made bond, he is called in with his assigned counsel by the county court and told: "Our grand jury is not scheduled to meet for another month. You can waive this and proceed now by way of information." And we get people to trial early by sticking that one additional little very easy provision in between the county court and the grand jury's action. Now whether this can be adopted to counties such as Montgomery, or Cuyahoga, I don't know. In our county it works beautifully.

Mr. Swisher - It would work beautifully I think in Perry County, Judge, because, let's face it, everybody knows everybody else in Perry County. My experience has been in the larger counties, however, including one medium sized county, that you won't get a defense attorney waiving anything as long as he knows that he's entitled to it and he can hope that the prosecutor steps in a hole. That's essentially it. Now what I suggest here is that the state will say preliminary hearing is going to be the method, except on demand of the accused, and then he gets the grand jury. But if he gets the grand jury, he doesn't get the preliminary hearing. It works two ways. I have not put in here, frankly because I hadn't thought of it, a provision which would govern, if the prosecutor in the cases Mr. Falke mentioned, would prefer to go to the grand jury.

Rep. Norris - Wouldn't that be taken care of in this language, if in the sixth line after the word "accused" you insert "or prosecution"? That would give either of them the option, and one would be bound by the option of the other. I think the language works out real well.

Mr. Swisher - Yes, you could do that.

Mr. Aalyson - Mr. Chairman, the thing that bothers me about that is, you are giving the prosecution the right to deprive the defendant of a preliminary hearing if that is the way he would prefer to have it.

Mr. Swisher - That's the way it works now, essentially. I'm not suggesting that that's right.

Rep. Norris - The only reason for my inquiry was not making a judgment on the merits of it, but whether or not that language would accomplish what Mr. Falke wanted, and I think it does.

Mr. Swisher - As the language stands, it does not do what you suggest. The choice is strictly the accused's in this case. It does require an affirmative demand on his part to get a grand jury if that's what he wants. But there is nothing all that difficult about doing that.

Mr. Aalyson - Of course, the language could be reworked to provide that the choice would be up to the defendant, but that in certain instances the prosecution, without depriving the defendant of his right to a preliminary hearing, could nevertheless have an indictment.

Mr. Swisher - That's possible. You could do that. And that might be the best compromise. If the prosecutor wants an indictment and the accused wants a preliminary hearing, alright, do both, in that one single instance.

Mr. Falke - Can I raise one point here? That's o.k. if the defendant is charged prior to the time his case goes to the grand jury, but you've not answered the situation of the investigative type of grand jury.

Mr. Swisher - I would not touch that. In other words, I would not do away with the investigative function of the grand jury at all, nor do I think this does that. This only speaks to the right of the accused.

Mr. Falke - Because in that case, if the grand jury goes ahead and indicts before the preliminary hearing comes about, the person entitled to the preliminary hearing would not....

Mr. Swisher - I think it could be provided by law, and now it is not. I don't think this particular section would say that the General Assembly is disabled from providing for that sort of thing. I'm not sure that I would want to go into that kind of detail in the constitutional provision. Leave the options open, in other words to the General Assembly, within the limits that are very carefully set in the Constitution. I might add that there are a few other things done in the language that I am suggesting that I just couldn't resist toying with. Number one, we don't have an army or navy in Ohio. We do have a militia and I'm sure it will surprise all of the able-bodied men here, and perhaps the women too, to find that we are all members of the militia. That scares me a little bit. It seems to me fairly obvious that the Constitutional Convention back in 1851 just took that language without really thinking about it from the federal Constitution, where it does make a difference. At any rate, I took away the reference to the army and navy and left in the one on the militia. You notice, also, that in the present provision, who is entitled to the grand jury is stated in the negative. It says "except in cases..." and then proceeds to talk about misdemeanors, and I suppose by implication everybody else gets indictment by the grand jury. I have stated it in the reverse, in the positive way -- these are the people who get indictment by the grand jury. In essence, it is the present definition of felony in the Criminal Code. Now, I might suggest that

what Mr. Falke told you this morning, I would support, and state that what he had reported as his personal experience is what I have found through observation and through research on this subject. The grand jury takes a lot of time. It takes more time than a preliminary hearing. It is also quite expensive. Of course we have to pay for the courts. I don't want to suggest that we don't pay for the courts. But when you have grand jurors, you have to pay the grand jurors. And it is a more time consuming procedure on the whole than the preliminary hearing is. And that's the reason I have given preference to the preliminary hearing in this particular case. I might add that Mr. Falke is to be commended for the way he handles the grand jury in Montgomery County, but I might suggest that that is a very unusual thing. There aren't many counties which do that. For one thing, the county prosecutor really very seldom goes down to the county of municipal court to handle the preliminary hearing. It's usually the municipal prosecutor who does that. The Miami county prosecutor has recently said that he is going to do what Mr. Falke is now doing. His associates are handling the preliminary hearings and they are handling the indictments, and I think although there might be some administrative problem, basically it is proper that the same prosecutor follow a case through from beginning to end. It is much more efficient from the law enforcement standpoint, and also from the standpoint of using the court's time. Consequently, I would be inclined to keep the grand jury because it serves a basic and very important function, but to make sure that the grand jury is not overused, as I believe it is used now. It's used too much and it costs too much. I don't know whether this provision I am suggesting would cause any particular problems to defense counsel, especially in view of the discovery procedure that we now have, and especially since he gets his choice. He can take preliminary hearing or he can take indictment by a grand jury.

Mr. Aalyson - What discovery devices are available in a criminal case? Are they, for instance, comparable to discovery devices available in a civil case?

Mr. Swisher - They are a little more limited than in a civil case. A civil case is pretty wide open. There are some limitations which I think are probably dictated by the nature of the proceeding and the rights of the accused in part. It used to be that there weren't any, and in fact, when I first started to practice, you had to go to all sorts of devious methods as a defense attorney, trying to find out what the prosecution's case was going to be. When the new Rules of Criminal Procedure were adopted, the Supreme Court put the right of discovery into those rules and made it mandatory. Now, it operates this way: the prosecutor hasn't got any right to look into the defense's file. He can't ask the defense who his witnesses are. The only way he is going to find out is when they are subpoened. He can't ask "What's your evidence? What's your defense?" He might ask but he might not get an answer, either. However, the defense doesn't get an answer either, if it asks, "Who are your witnesses, prosecution? Whom are you going to call? What's going to be your main line?" And if it asks that, the prosecutor doesn't have to tell it anything, unless the defendant makes a demand for discovery under the Rules, at which point the prosecutor pretty much has to open up his file, pretty much has to show the man that these are the witnesses, this is essentially what's going to be said, this is the police evidence, these are the statements made before, and so on. The truth of the matter is that in a lot of cases, the prosecutors have been doing that for years anyhow. They didn't have much to lose. They indicted those they felt that they could get a conviction on, and it was a question of presenting the evidence. They felt they had the case and for the most part did. There is a reciprocal right under

discovery. When the defense says, "Prosecutor, I want to look in your file," then the prosecutor acquires the reciprocal right to look in the defense's file. The private work product of the office is not subject to discovery, but basically you're telling what your side of the case is going to be. That's pretty much the way it works now.

Mr. Aalyson - Does the defense have the right to depose, for example, the complaining witness or the key witness of the prosecution?

Mr. Swisher - My recollection is that the right of deposition is much more limited. I'm not sure there is a defense right of deposition. There is a prosecution right.

Mr. Falke - Only for good cause.

Mr. Swisher - Yes, then, you do have a right of deposition. It's much more limited, because the prosecution, for example, cannot depose the defendant, obviously, because otherwise he would violate his Fifth Amendment rights.

Mr. Norris - Further questions of Mr. Swisher? Judge Tague?

Judge Tague - Thomas, what happens to the potential defendant witnesses? Let's take the Hoffa case for example. Suppose I'm under subpoena for three suspects to be called to testify before a federal grand jury. Now just assuming that I'm there without counsel. True, they have all the advice in the world. But for whatever the reason be, I implicate myself. What rights do I have?

Mr. Swisher - I haven't addressed myself to that. I might say I think that problem and other problems which were touched upon this morning, this language does not address itself to. And it was not my intention to ignore them or to say that the committee ought to ignore them. It was only my intention to provide suggested language to solve a particular problem that I had in mind, which was the question of superimposing one probable cause hearing on top of another. I have no problem with agreeing that anybody who testifies in front of a grand jury ought to have his rights fully protected. I had thought frankly that we had done that in Ohio, particularly for the witness who would refuse to testify because he might incriminate himself and then was granted immunity. I had thought that we had clamped into the law of transactional immunity, and I find now that the court in Cuyahoga county said no, it was use immunity. I think anyone who testifies before a grand jury should be able to say that without his lawyer he doesn't know what he should say, and that he wants his advice. I think there ought to be some provision for making the prosecutor or somebody bring out exculpatory evidence. If the man's got a perfect self-defense argument, what is the point of going to trial? It begins to look spiteful at that point, you see. I would like to see a provision such as California and Washington have which puts the duty on the prosecutor, if he know of exculpatory evidence, to present it. If the man's got defense counsel, or if he's got evidence he wants to present, tell the prosecutor. Or bring it in himself. We do very much that same thing in a preliminary hearing now. Theoretically, we don't have to, but we allow cross examination. If we are going to have a screening device, let's make it a good screening device.

Mr. Norris - Thank you, Tom. The chair will now call the Honorable Robert G. Tague, Judge of the Perry County Common Pleas Court.

Judge Tague - Mr. Chairman and members of the committee, in the years that I have practiced law I've been a prosecutor in a small county for eight years, so I'm familiar with the makeup and the function of a grand jury from the standpoint of the prosecutor's office. I have been a common pleas judge for somewhat over 13 years, and of course I'm familiar with that area. And I've done some defense work as well. I must confess that my thoughts in this area are pretty ambivolent. I read with a great deal of care the extremely competent and exhaustive brief that your staff prepared and did a little independent research and in that independent research I ran across the California case decided in September that Mr. Swisher referred to. And in the concurring opinion there is an exhaustive history of the grand jury and a cogent criticism of the way it operates in California. As a matter of fact, that particular judge in that case suggested that there should be a post-indictment preliminary hearing to secure a case such as was presented before the Supreme Court there. That case was a case where a man charged with the sale of some narcotic was accused and brought before the magistrate on preliminary hearing. The magistrate found no probable cause in large measure because of the defendant's own testimony. Thereafter the prosecutor simply took the case into the grand jury. And there, without that exculpatory evidence, the grand jury did in fact indict. The defendant thereupon filed a writ of prohibition asking the Supreme Court to stop further prosecution under the indictment.And in a unanimous opinion, the court granted the writ, without prejudice, however, to the prosecutor starting all over again and going through the preliminary hearing or going to the grand jury.

Mr. Norris - Was that based on California statute that required the prosecutor to present exculpatory evidence?

Judge Tague - The concurring judge went on to say that he had to defend that constitutional right to present exculpatory evidence. Now, I have read with interest,--and I have a tremendous amount of respect for Mr. Swisher--but what he presents here is not exactly revolutionary. It's a little novel. He predicates it on the accusatory function of the grand jury as opposed to the preliminary hearing. In my view, and this is in a little county with 28,000 people, the grand jury performs a very vital function. I know it's been overworked but with regard to which, in my view, too much emphasis can't be made. You cannot appreciate--thrill is too strong a word but interest is definitely a good word to describe the people who actually serve on those grand juries. They honestly and sincerely feel that they have performed a real civic function. I cannot overemphasize this. Add to this the fact that in medium and small counties, the prosecutor is invariably a young man. This grand jury definitely adds tremendous credence to his prosecutorial function. Quite frankly, I think the system that we have is the converse of this presented by Mr. Swisher and it words more beautifully. That is, the case is bound over to the grand jury by the county judge, at which point each defendant is entitled to waive the grand jury. He's present at a hearing, and he's given the opportunity to waive the grand jury and proceed by way of information. This works beautifully in our county and I know it can in medium sized counties. Add to this the fact that the present wording of our Constitution, Article I, Section 10 agrees almost word for word with Amendment V of the U. S. Constitution. It therefore follows that any decisions arrived at on the federal level are invaluable guidelines to our trial courts as well as the rest of our system. I recognize the anomaly Mr. Swisher has that exists in the double screening system, and of coure the effect of Coleman v. Alabama. In my honest judgment, and I have given this considerable thought since Mr. Nemeth first called me, I've finally concluded that the solution reached by Illinois, retaining the language that we presently have in Article I, Section 10,

to which is added the legislative power to abolish or to limit, is preferable. And without really having digested everything that Mr. Swisher said in his suggestion, I believe that for the purposes of this committee the course that Illinois took is quite probably the preferable course. It's pointless for me to rehash what I know Judge Williams and all the rest of them have gone over with you. If you have any questions, I'll do my best to answer them.

Mr. Norris - Thank you, Judge Tague. Judge, I want to make sure I understand your testimony. Tom was addressing himself essentially, as I understand it, to eliminating the duplication, saying that yes, we need a screen, but let's have only one screen.

Judge Tague - I say the preliminary hearing is very little, if any screen.

Mr. Norris - O.K. You're saying that the problem with Tom's proposal is that it prefers the preliminary hearing. Instead of more preliminary hearings and fewer grand juries, you would rather see more grand juries and fewer prelimimary hearings. Is that correct?

Judge Tague -Yes. May I say why?

Mr. Norris - Yes.

Judge Tague - I think that he will agree with me as far as the preliminary hearing is concerned--I can't quote statistics, but I'm confident that in 75% of the accusations where the preliminary hearing is waived, it's waived for many good reasons, which include, in my view, one fact: The fact that once a complaining witness really gets on a story and it's taken down in the course of the preliminary hearing, it's difficult for him to back off of that story . The defendant is entitled to it. And more often than not, in the usual breaking and entering--what have you case--that victim and complaining witness has mellowed by the time that case is really ready for trial, provided that he is not stuck with the story that he has given to the preliminary hearing magistrate. And when he mellows, of course, there is the plea bargaining situation that immediately enters the picture, providing the witness has not stuck with the story. Then, of course, as we all know, whether Lee does it or not, most of the evidence before that preliminary hearing is at best surface evidence. Much of it is hearsay regardless of what our rules say, because there is nothing final about it. It's not an appealable order. For the most part, this explains why in 75% of the cases there is a waiver of the preliminary hearing. I feel that if you stick this opportunity to go by way of information between the preliminary hearing and the grand jury, it cures your delay problem. Of course, whether it could occur in Lee's situation or not, or John T.'s situation, I don't know.

Mr. Norris - Assuming that we want only one screen, should the defendant have the option to choose his screen, should he be able to choose whether or not he gets the preliminary hearing or whether he gets the grand jury, or should we just simply abolish preliminary hearings altogether and retain only the grand jury with perhaps some modification to those procedures.

Judge Tague - You've got to retain the preliminary hearing. Where else is an attorney going to be appointed for him for the first time? Where does he first see an attorney?

Mr. Norris - Well, we could provide some alternative time where he could have counsel appointed. Maybe that could happen at arraignment. Should we retain both, but give the defendant the alternative of which one he gets, or should we abolish the preliminary hearing altogether?

Judge Tague-- I must obviously go along with Tom Swisher and give the accused the opportunity to choose which of the two.

Mr. Norris - Rather than abolish the preliminary hearing?

Judge Tague - Right.

Mr. Norris - Let me just press you a little further on this for my information. I'm not sure why you chose that option and I want to understand that. Let's assume that we were to abolish preliminary hearings and retain only grand juries, but afford the defendant essentially the same opportunities in the grand jury that he has in the preliminary hearing. Would that change your mind?

Judge Tague - It would be expensive, and obviously would prolong the grand jury proceedings. On balance, of course, I would retain the preliminary hearing.

Mr. Norris - Further questions of the witness? If not, thanks very much, Judge. Please feel free to stay. We welcome your input. The chair will call Jack Patricoff, a member of the Ohio Bar and Chairman of the Criminal Justice Committee of the Ohio State Bar Association.

Mr. Patricoff - Mr. Norris, since I've been here since 9:00 this morning and I've heard all of the previous people on the program, and in my opinion they were outstanding, I have to throw away the script that I have prepared. I'm not here as the Chairman of the Criminal Justice Committee of the Ohio State Bar. I was invited because of that position, but I don't represent their views. This has not been submitted to the members of the Criminal Justice Committee and therefore, I'm just appearing here on my own behalf. I've done criminal defense work in Montgomery County for the past 43 years and have never done any work in the prosecutorial state. Lee Falke,who sits here, and I have been at odds in the court room for the past 12 years, but away from the court room we have a very good social relationship. I might say that the lawyers of the Dayton Bar have the greatest respect for Lee Falke in the conduct of his office. After having heard all of the comments by people who have done a lot of preparation, I thought I would speak more or less off the cuff and present the views as I see them based upon the practice of law as a criminal defense lawyer. Experience does have some application in the legal profession. It also may have some application in passing new laws and also with reference to revision of the Ohio Constitution. I might quote the words of Justice Oliver Wendell Holmes when he said:"Experience is the life of the legal profession and not logic." So I'll base my remarks on the experience that I've had in the legal profession as a defense lawyer, though some of them might not appear to be logical. I believe that both systems should be preserved, with reference to a preliminary system and also indictment by a grand jury. However, the grand jury does need some updating and I will submit to this honorable committee thoughts that I have had along these lines. I agree wholeheartedly with Tom Swisher's remarks that there should by one or the other. If a person has a preliminary hearing and he's bound over, it's a duplication in the grand jury. We present the same witnesses, the same thing comes out when there is an indictment. However, I'll mention this and it has been brought out,

that a defendant who appears before the grand jury should be allowed to have his lawyer there for protection. Not for purposes of cross-examination. If you are going to allow a defense lawyer to appear before a grand jury, and cross-examine, your entire system is going to become cumbersome and it's going to drag the thing out. In a large county like Montgomery, Lucas, Cuyahoga, Hamilton, or Franklin county, there will be no end as to when these grand jury hearings are. I believe the grand jury investigations should be confined to suggestions that were made, such as in capital cases, or as Tom Swisher mentioned, except in cases of impeachment, in cases arising in the militia, or in the case that Lee Falke mentioned, like a woman in a rape case, or where they want to have a secret indictment without the original filing of a complaint such as he mentioned in the experience with the chief of police where they had to clear the air. The grand jury heard it and then made its recommendation. In these types of situations, the grand jury is necessary. If I had my choice, as a criminal defense lawyer, I would naturally ask for a preliminary hearing. It serves a criminal defense lawyer. It's also helpful to an accused to know what the witnesses have said. It's recorded, and a witness who attempts to accuse a defendant cannot change his testimony later. The same procedure is not available to a defense lawyer as to what goes on in the grand jury. However, I make this strong recommendation, and Lee Falke said he as a prosecutor would have no objection, assuming a man goes to the grand jury the law should be that the defense counsel should be able to have a copy of the proceedings of the grand jury. That's been decided upon in the U.S. Supreme Court, and as much as I have tried in Montgomery County to get a copy of the grand jury proceedings, I've been unable to. In the case of Dennis v. U.S., the Supreme Court case decided in 1966, in reversing, this is part of what they said: "On certiori, the supreme court reversed and remanded the case for a new trial. It was unanimously held that the failure of the trial court to permit the defendants to examine the witnesses' grand jury testimony constituted reversible error." Now that's the language of the U.S. Supreme Court. Although the judges in Ohio will not necessarily follow that court, I would submit to this group that it could be provided for in some form of legislation that an accused who does not have a preliminary hearing, and does not appear at the grand jury, has a right to get the transcribed testimony of every witness. That also supplements the theory of Brady v. Maryland, in which the U.S. Supreme Court said that any evidence which is helpful to the defendant which is in possession of the prosecution must be turned over, and that the defendant has a constitutional right to that. These types of suggestions can be incorporated in the laws of Ohio. They have the backing of the U.S. Supreme Court, and the support of the U.S. Constitution, the 6th Amendment and the 14th Amendment. Also, in the case of Richard v. State which is an old case, it's apparently recognized as the rule that a defendant may be permitted to inspect the grand jury testimony of the prosecution witness for the purpose of cross-examination, after the conclusion of the direct testimony of the witness. In other words, in this case the reviewing court said when the prosecution witness gets through upon direct examination, defense counsel has a right to demand that same witness' testimony at the grand jury perceived as being in conflict. As a matter of fact, that's the prevailing rationale in the United States Supreme Court of Dennis and also in Brady v. Maryland, although in Brady v. Maryland it did not touch upon the grand jury, it says: "The prosecution has the benefit of every witness to testify at the grand jury." There is no reason today why that same evidence or the transcript of testimony should not be available to defense counsel. In this respect, I'm speaking as a defense lawyer because that's been my work for 43 years. Lee Falke's office has opposed defense counsel from getting that. But

I believe that it should be a part of the law that defense counsel has the right to get a trasncript of the testimony of the witnesses that appear before the grand jury. Since it's an arm of the prosecutor, it's a one-sided approach, and that way an accused would have the same benefits he would have if he were to have the testimony of the preliminary hearing. But I think from a practical standpoint, it's a waste of time to have both. Coleman v. Alabama -- I can't see how that fits in the picture. The only thing Coleman v. Alabama says is that a man is entitled to an attorney at a preliminary hearing. That is language of the U.S. Supreme Court. Let's say that language exists in Ohio, and it does if our courts follow it. But that language in Coleman v. Alabama does not say that the defense is entitled to a preliminary hearing. Therefore, from my experience, I would say it should be one or the other. There have been some practical suggestions made, and I appreciate the opportunity to be here. I might mention that some of the things I've heard here I've taken notes on. The reason I came early is that I am going to submit them, with the permission of this committee, to the Criminal Justice Committee of the Ohio State Bar. If anybody has any questions, I'll certainly be happy to answer them.

Rep. Norris - Thank you. Does anybody have any questions of the witness?

Mr. Aalyson - Mr. Patricoff, do you feel that under the present system of criminal justice in Ohio, the discovery methods which are available to the defendant would suffice to permit abolition of the preliminary hearing?

Mr. Patricoff - From my experience as a criminal defense lawyer, I say absolutely yes. This is the Bible -- The Rules of Ohio Criminal Procedure, especially Rule 16. I have used it often in submitting a demand. Of course, under Rule 16 there must be a demand made first and if there is no compliance with the demand, you file a motion and it is left up to the court. In my opinion, as a criminal defense lawyer, I would say, based on Rule 16 of the Ohio Rules of Criminal Procedure, it is adequate protection. I have had no problem in getting the information that I felt was necessary. And frankly, it may be in our county only, I would say that Lee Falke has his men highly cooperative. I don't mean to tell tales, but you set up an appointment and one person in particular, he says, "Jack, there's my file. You can take it home if you want to". That's how liberal they are. And we have no trouble getting everything that they have. Now, of course, with respect to the private work which they do on their own, we're not entitled to that.

Mr. Aalyson - But you don't feel that under the present rules you would be protected if there were just a grand jury method of indictment without your having the ability to get the transcript of proceedings?

Mr. Patricoff - The transcript of the proceedings is helpful in this respect: We don't know what a witness has testified to. They may have that and they may not in their files. If the witness on trial is giving a different version of what happened from what he testified at the grand jury, then that's grounds for impeachment. In other words it might be a criminal defense tactic, but if I can destroy or discredit a prosecution witness, I'm going to do it. Not only I, but any criminal defense lawyer. I don't know how you gentlemen accept this interpretation, but our function and purpose and probably the prosecution's also, is to destroy, if possible, and if not, to discredit a witness. That's the great value. And also, it gives a defendant this protection: When a witness gives a different story at the trial than he did at the grand jury, he might be committing perjury. I feel that the defendant should have the benefit of that.

Rep. Norris - Jack, let me pursue this a little further. Now, as I understand your testimony, you said you agreed with Tom Swisher's proposal, which is essentially that the defendant is entitled to one screening process, either the preliminary hearing or the grand jury. And it is at the defendant's option, so he chooses either the preliminary hearing or the grand jury. Let me pose this to you: If we modify the grand jury procedure in line with your suggestions so that defense counsel would be permitted in the grand jury -- he would not be permitted to cross-examine witnesses, but he would be permitted in there with his client and then would be entitled to a copy of the transcript -- would that procedure plus what we have now in Rule 16 be enough in your mind to justify abolition of the preliminary hearing?

Mr. Patricoff - In my experience, I would say yes.

Rep. Norris - I'm trying to explore all the possibilities of ways of eliminating the duplication.

Mr. Patricoff - That's exactly the purpose. I might add that, of course, criminal defense lawyers love the preliminary hearing. I'm trying to be objective about this, not only as a criminal defense lawyer.

Rep. Norris - I understand. Of course, if we were to eliminate the preliminary hearing, we would have to open up the grand jury somewhat.

Mr. Patricoff - Of course, you have got another thing. How are you going to get the case rolling to begin with? It either has to be by an affidavit or an information. If you go by information, then the defendant waives grand jury indictment.

Rep. Norris - And you still have the problem of the secret indictment. I'm not sure how we would get around that.

Mr. Patricoff - That's another problem. Exceptional situations occur, with secret indictments.

Rep. Norris - We'd have to do something different there, and we may end up doing something differently even than what we do now. Further questions of the witness? If not, thank you very much Jack. I appreciate your testimony. Please regard yourself as a participant. The chair will call the Honorable John T. Corrigan, who is Prosecuting Attorney in Cuyahoga County. Welcome, John.

Mr. Corrigan - Mr. Chairman and members of the committee, I am pleased to have the opportunity of appearing here this afternoon before you and giving you the benefit of my views as relates to any constitutional revision relevant to grand juries. At the outset, I suppose it is a fair statement for me to say, since I've been the Prosecuting Attorney for the past 20 years in Cuyahoga County, that probably I've had more experience with the practical effects and application of works of the grand jury than anybody else in the State of Ohio. Presently we are processing over 6,000 felony cases a year. In order to do this, it is necessary that we have two grand juries in session, each of them meeting 2 days a week, and we are presenting to those two grand juries somewhere in the vicinity of 125 to 130 cases a week in order to meet the demands of 6,000 felonies. Thinking in terms of not only constitutional revision but legislation as well, we can't look only at Cuyahoga County. We have to be mindful that the problems of Vinton County are quite a bit different than those of Cuyahoga County. The fact of the matter is, and particularly because

of the time limitations that are put on trials, our policy up there now is this, that we are in direct contact with the police officers. We get their statements, and as soon as we get their statements, we submit the case to the grand jury, regardless of whether or not the preliminary has, in fact, been had. And if we were not to do this, we would find ourselves in a situation such as we did sometime back, where preliminary hearings were about 3 months in arrears. They were primarily in arrears because of the fact that defendants did not have counsel and municipal judges were not hearing them until they had counsel or the Legal Aid Society or somebody provided counsel for them. And as you can appreciate, in too many of those instances those people that were in that package of arrears were involved perhaps a second or a third time in some other crime. So we saw the need to get these matters into the grand jury as quickly as possible, and we continued that process so that, today, by and large, any felony that is committed is submitted to the grand jury within 10 days of the time of the commission of the crime. We found, too, that if we did not do that, in regard to the preliminary hearings the defense counsel oftimes would move for a continuance, and we would have cases continued in the municipal court, and continued from one week to another, and so on; and you can better believe that on occasion when witnesses would not appear, then defense counsel would be looking for a preliminary hearing, otherwise not. So, we found gimmickry creeping into the preliminary hearings and matters being dismissed there -- in any event, witnesses becoming tired and not appearing. Our system in part overcame that particular situation. I would not favor the abolition of the preliminary hearing for the reason that after an individual is arrested there has to be some vehicle to get that individual before a court and to set bond. I think the preliminary hearing, if for no other, should be preserved for that reason. I don't think, assuming the preliminary hearings continue and I wish that they would exactly as we have them, that in any way preliminary hearing determinations should be final. I see some people advocating that if in fact there is a preliminary hearing, this be with finality. The fact of the matter is, that in the manner and way in which they are conducted -- because the time limit is such that it is almost immediately after the crime; because witnesses are not readily available; because a judge is not then determining a question of guilt or innocence but rather whether or not the individual should be charged -- there are too many cases, in my opinion, that are rather perfunctorily being dismissed. And notwithstanding these dismissals, we do effect indictments by the grand jury and we do effect convictions. I think we have to keep in mind when we look at the grand jury and the whole preliminary process that we are not dealing with the question of trying an individual. Rather, we are dealing with the question of charging an individual. And too often I find that those of us who are on the current scene lose sight of the fact that some of the things that we have in the law are time-tested and time-proven and too often we reform, or we change under the guise of reform, and perhaps we burn down the barn to chase out a few rats. I find in my experience that the present system that we have is more than adequate to protect the right of the defendant. It's more than adequate to protect the rights of society, which has a right to have the people indicted that should be indicted and to have people dismissed who should not be indicted. The fact is that percentage-wise, in the cases that we present to the grand jury over the years, four or five percent result in no bills, 95% result in true bills. If there is something I'm unhappy about, I'm unhappy with the fact that the number of the grand jury has been reduced from fifteen to nine. I think that there is another attribute to the grand jury, and that is the citizen participation in government. Lord knows, too many of the citizens today feel that those of us that are in public office are not serving the public interest, and here is a vehicle wherein we can get fifteen to twenty people involved and involved in a very serious and important part of our democracy, that of determining whether or not an individual should be charged. I feel that these people come away from this experience better equipped to be good citizens, better equipped to impart to their fellow citizens matters relating to the

courts, to the prosecutor's office, to the police departments, and other matters that are offshoot information that they pick up in the course of the proceedings that are conducted before the grand jury. So it would be my position predicated on the remarks that I've made, and the experience that I have, that we do not make preliminary hearings a constitutional provision in any sense of the word, and that we do not in fact change the constitutional provision as it relates to the grand jury. I will be pleased to answer any questions that you may have of me.

Rep. Norris - Thank you, Mr. Corrigan. Questions of the witness?

Rep. Roberto - Mr. Corrigan, it has been suggested that defense counsel be permitted at the grand jury proceedings. What would your reaction be to that?

Mr. Corrigan - I'm opposed to that for the reason that you open the door to defense counsel and then you are beginning to make it an adversary proceeding. What then is the next step thereafter? I might add that if in fact that would be, it should be by legislation and not by any constitutional amendment. But I would be opposed to that for the reason that someone would have to show me that there is something now intrinsically or actually wrong with the procedure that is employed in the grand jury. And though we have, from time to time, people indicating that this insulation is necessary to the defendant to make sure that something doesn't go on in that grand jury that shouldn't go on, we have to ask ourselves this question: When we look at the case at the end of the tunnel when it comes out, what is happening with the decisions that the grand jury is making? Do they show that they were wrong or do they show that they were right? And my experience in our county is this -- that the great majority of cases wind up in guilty pleas or trials, and the only deviation from the indictment returned by the grand jury is deviation that comes about by virtue of the fact that we don't have witnesses, or by the time when we can evaluate it we find, for example, that we can't make out a particular element. Let me give you an example. Suppose that a young lady, a victim of a crime, were to indicate that a man held her up on Euclid Avenue -- put a gun to her head and stole her money, and there are no problems with the case whatever. However, when we get down to trial, somebody thinks to ask this young lady, "How did you know that he had a gun?" "Well, he said that 'I'll blow your brains out'." "Did you see a gun?" "No, I didn't see a gun". When the man is apprehended, let's assume, not too long thereafter, there was no gun on his person. Now, we have to make a decision. Are we going to try to make that case predicated on her testimony, "I'll blow your brains out" -- make an aggravated robbery -- or are we going to be mindful of the fact that we have a jury of twelve people, that we have to prove that element beyond a reasonable doubt, and take a plea for a robbery? We'll take a plea to a robbery. And that would change what the grand jury initially indicted for. But I think those are changes that are understandable. Those are changes that are going to occur. I do not see anywhere demonstrated that what grand juries are doing they are doing wrong, which necessitates defense counsel being present in the grand jury.

Rep. Roberto - How about just permitting defense counsel for the purpose of just advising his client, not participating?

Mr. Corrigan - I would have no quarrel with that.

Rep. Norris - Mr. Corrigan, let me follow up on one other question, along that same line. You say you have no objection to having defense counsel present to advise his client, as long as he doesn't become an active participant.

Mr. Corrigan - We don't have, just maybe one case out of 3,000, that we ever have the defendant in. So it's such a negligible thing in any event.

Rep. Norris - How about counsel representing a witness?

Mr. Corrigan - I think you would have to look at the individual case, and I would like to see provision if that were to be permitted that there be some judicial determination as to whether or not he could be there, for the simple reason that he could be acting in a conflict of interest situation where he's representing a defendant and a witness, and so on. But otherwise, I would have no quarrel with that.

Rep. Norris - How about the suggestion made earlier that defense counsel be entitled to a copy of the transcript?

Mr. Corrigan - Here again, we are confronted with a practical problem, it seems to me. We could not furnish enough court reporters to record and transcribe the transcript to make it available. The cost would be a prohibitive thing. And again, in my opinion, it would not be productive of anything substantial by way of affording the defendant any additional rights.

Rep. Norris - So even assuming that we can lick the cost problem, you would not favor that?

Mr. Corrigan - Generally, I would not favor it, no -- if I may elaborate a little further on that. In the trial of the matter, let us assume that the grand jury transcript was available to defense counsel. Let us assume, too, for the sake of this given case that a deposition was permitted for some reason or another. Let us assume, too, that there were statements made by some of the witnesses to police officers and those statements were made available. Now, in the course of the trial and cross-examination, if that defense counsel cross-examines a witness on a statement that he made to the police, on a statement that was made in a deposition, on a statement that was made before the grand jury -- the fact of the matter is that witnesses don't act like mechanical beings. They are human and they don't always cross every 't' and dot every 'i' and we get confusion into the case. I think it is additional gimmickry in the trial of a lawsuit.

Rep. Norris - There has been a lot of testimony today dealing with the problem of the duplication that's inherent in the preliminary hearing and the grand jury. For example, situation where you have a preliminary hearing and then bind over to the grand jury, where what you are really doing is duplicating testimony. There has been concern with that and there have been some suggestions for eliminating the duplication. One of these suggestions is that we get only one of them. We need a screen so we need to retain either the grand jury or the preliminary hearing, and a way to make sure that they are retained,but there should be only one that the defendant gets to choose. He can choose either the preliminary hearing, in which event he get no grand jury, or he can choose the grand jury, in which event he gets no preliminary hearing. What are your thoughts on that?

Mr. Corrigan - I think that I have indicated that I would oppose the preliminary hearing as being a matter of right and I certainly would oppose further the concept that he would get either one.

Rep. Norris - You think that the defendant should have both?

Mr. Corrigan - Yes, I do.

Rep. Norris - Why is that, sir?

Mr. Corrigan - Because we're thinking in terms of Cuyahoga County, we're thinking in terms of Vinton County, and we're thinking in terms of the physical facilities. Let us assume, going back, that he has a preliminary hearing as a matter of right. Now you're putting all of the eggs in one basket, as it were, with one judge who in a cursory sort of fashion alone has to make some pretty tremendous decisions. Presumably, he could decide that this man should be charged with aggravated murder, for example. Or he could decide, predicated on the evidence that he has, that the man should be dismissed. These are pretty serious decisions to vest the authority with one man. And that's what you would be doing in a mandatory preliminary hearing, whereas he is entitled to this as a matter of right without a grand jury. And I would think, in a democracy, and with keeping in mind, too, the awesome responsibility that you are fixing on one man, that it is better to share that responsibility with a group of people such as 9 or 15 that would make up the grand jury.

Rep. Norris - How about eliminating the preliminary hearing and having only the grand jury but expand it so that the defendant has some of the prerogatives that he now has with the preliminary hearing?

Mr. Corrigan - He has those by virtue of Rule 16. He has access to statements and physical evidence, and again, I would not go for an expansion beyond that simply because it has not been demonstrated to me that there is something bad or wrong in the grand jury or defendants are being denied their rights.

Rep. Norris - I guess what I'm searching for, in my own mind, is why you think we need the screening twice.

Mr. Corrigan - I don't think you need the screening twice, and the fact is that we have tried to eliminate the screening twice. I do feel, however, that we need a vehicle, and the preliminary hearing provides it, so that this man can quickly get before some judge for the purpose of setting bail.

Rep. Norris - Let's assume we do it some other way. Let's assume we set up some procedure where he gets his bail set. Why do we need the screening twice?

Mr. Corrigan - I suppose I am willing to go with what we have and I'm not desirous of being disruptive, and in some other community they might want it. In our situation, I would just as soon say,"Eliminate the preliminary hearing." Really, the way it's done up there it is an exercise in nothing, both from the standpoint of the defendant and the prosecution.

Rep. Norris - Does your office handle preliminary hearings?

Mr. Corrigan - Only in the City of Cleveland. Not in the suburban municipal courts.

Rep. Norris - The suburban prosecutors handle the cases out in the suburbs?

Mr. Corrigan - Yes.

Mr. Patricoff - If a case is pending for preliminary hearing, does your grand jury indict while a case is waiting for a preliminary hearing?

Mr. Corrigan - Yes, sir.

Mr. Patricoff - In the event there is a preliminary hearing and the magistrate

dismisses the affidavit, have you on occasion, or do you then take it directly to the grand jury?

Mr. Corrigan - Yes, sir.

Mr. Falke - I'd just like to make a comment here, if I may. I think it's necessary to keep in mind, and I don't think it's been mentioned yet, that there is, at least I feel in our county that we should have a right to present a case to the grand jury in the event that the case is dismissed at the preliminary hearing and in the event that we have not presented all our evidence at the preliminary hearing. I don't think it should be a final hearing, although I wouldn't mind it being a final hearing if we don't have any additional evidence.

Rep. Norris - Let me follow up on that. Let's go back to the situation of Tom Swisher's where the defendant takes his shot. Now in your situation, the defendant chooses a preliminary hearing and you lose at that level because you've not presented all of your evidence. Would you be just as well satisfied if you get a rehearing at the preliminary hearing, or are you telling me you need then to go to the grand jury?

Mr. Falke - I think I would rather take it to the grand jury, at that point. One thing we can do at the grand jury that we can't do at a preliminary hearing is, if a particular witness doesn't show up a particular day, we can bring that witness back the next day or the next week if the same grand jury is in session. Judges do not have that latitude and will give us hardly any breaks in that regard, so if we don't have everything right on the head, right there at the preliminary hearing, the case is dismissed.

Rep. Norris - If the grand jury thinks you're short, you've got no problem. You just continue it another day and bring in somebody else, is that it?

Mr. Falke - Yes.

Mr. Corrigan - May I call to the committee's attention a Missouri case? I'm sorry I don't have the citation, but it is a rape case. The hearing judge dismissed it predicated upon the fact that he did not believe the testimony of the prosecution. Apparently in Missouri they do have some sort of a right of appeal. This matter was appealed, and the Missouri Supreme Court held that the preliminary hearing judge does not weigh the evidence, and that if there is some evidence to warrant a bindover then it is his responsibility. And he could not believe the prosecutrix testimony only if in fact it was totally unbelieveable and impossible. So that throws into the preliminary hearing another picture, as it were, with respect to whether this man has the authority, at least under the Missouri law.

Rep. Norris - Thank you, Mr. Corrigan. We appreciate your testimony. And John, we'll invite you to consider yourself a participant. The Chair will call at this time Professor Charles Thompson of the Ohio State University College of Law.

Professor Thompson - I suppose one of the benefits or disadvantages of being last on the list is that you have already talked about everything that I could mention. When I was asked to come here, I really hadn't spent a lot of time thinking about what kind of recommendations, if any, I would make to a body such as yours with respect to the grand jury process. To a great extent I think that my own views are colored by my experience. I'm a member of the Indiana bar. I'm not a member of the Ohio bar. I've practiced law in Indiana for 5 years -- essentially criminal -- and I was reporter for a criminal law study committee in that state for 3 years.

The Constitution of Indiana, which was drafted in 1851, provides that the General Assembly may modify or abolish the grand jury system. And that's been the constitutional provision since that time. In 1905, in the criminal code that was enacted in that year, the statute provided that any offense may be prosecuted by information, except murder or treason. While there was a statutory grand jury process, that process was essentially discretionary with the prosecutor. He could choose to charge by grand jury indictment or by information. In 1973, that statute was amended, and now provides that any offence in Indiana may be prosecuted by information. My experience in Indiana, and I practiced in Indianapolis for that 5 year period,is that the prosecutors used the grand jury process in roughly three categories of cases. Until 1973, they were required to use it in murder cases, which they did. They used the process in cases which had some political ramifications to it. They also used it frequently in sex offenses. And I suppose there is a miscellaneous category. But the primary practice in Marion County, at least, was to use it in those three kinds of cases. The system worked very well. During the five year period I represented very few people that had actually been indicted by the grand jury. For the most part, run-of-the-mill type felony cases were all prosecuted by information followed by a preliminary hearing and bindover, not actually bindover, but transfer from the municipal court to the criminal court if probable cause were found. When we were studying the criminal laws of the state, no one was taking the position on our committee that the grand jury process should be extended to other kinds of cases. It seems to me that there are really two things that the grand jury really does. One is that it is an investigatory tool, and perhaps an investigatory tool that our society needs in certain kinds of cases. It seems to me that a grand jury can serve a very good function in investigating governmental corruption, in visiting and viewing and investigating conditions of public institutions, jails, orphans' homes, homes for the elderly, that sort of thing, and organized crime. Sometimes, one really needs to have the kind of investigatory instrument that the grand jury provides to the prosecutor. And the second function is to review whether there is probable cause or reasonable grounds, whatever the local standard is,to prosecute a person for a crime. I think I would recommend if I were working with a group such as yours that the grand jury be removed from the indictment process, and that all crimes be prosecuted by information. I do not think, though, that the grand jury should be totally abolished. I think the grand jury should remain as a public body of citizens to investigate allegations of governmental corruption, and to investigate and review conditions at public institutions, jails and homes for the elderly, poor, and that sort of thing. I think that I would recommend, however, that the grand jury not be involved in investigation of organized crime or other kinds of criminal activities that grand juries currently look into. I think that I would prefer to see an independent commission appointed for that. It could be a statutory procedure for the executive or the legislature to appoint a commission to perform the function that the grand jury now performs and perhaps also to have the same powers that the grand jury now has to investigate organized crime. I know that Illinois has, for example, a statute that creates a crime investigatory commission. I'm not sure that I would personally prefer to see it institutionalized as a governmental agency, but it seems to me that blue-ribbon panels and independent commissions with subpoena power and full investigatory powers might be an answer to that real need that I think the grand jury has been serving over the past years. There are several reasons why I think that the grand jury should be removed from the indictment process. I think that the grand jury probably does not fulfill its original function, which was to serve as a buffer between the potential defendant, the citizen, and the government. I'm sure that you all know now that the grand juries are not really very well equipped legally to fully serve that purpose. That they are so dependant -- and that's not to say that there aren't exceptions -- upon prosecutors for legal advice

and direction. The prosecutor's office generally drafts the indictment and gives a good deal of leadership and guidance to the grant jury in determining what offense should be charged. I think that it would be just as well to let the prosecutor file an information and then subsequently to conduct a preliminary hearing and proceed in that fashion instead of what we presently have. I think the preliminary hearing is more fair in terms of the defense. In many jurisdictions, and I don't know that much about local practice in Ohio, essentially hearsay is the only evidence the grand jury hears and often it's testimony only of investigating police officers. And the defendant does not have the right to present any evidence to the grand jury, or to appear even, although I suspect many grand juries would welcome the opportunity to hear testimony from the persons under investigation. But the preliminary hearing provides the defense with the opportunity of presenting evidence if there is any evidence to be presented at that point in time, and also provides the obvious discovery benefits that correspond with the adversary-type hearing. I think one of the problems with the grand jury process now is that, for the most part, the procedure is insulated from any subsequent judicial review. I think there is a real substantial argument to be made that the grand jury process violates the Fourth Amendment. In a recent case, Gerstein v. Pugh, the U. S. Supreme Court held essentially that when there is a prosecution by information, the defendant cannot be held for a substantial period of time in custody without some sort of probable cause determination being made. The case came from Florida, and in Florida the first event which occured after the information was filed and the defendant was arrested was arraignment, which was often several months later, and as a result the defendant was being held in custody for long periods of time without any kind of probable cause determination being made. The court in Gerstein said that that's a violation of the Fourth Amendment. In Gerstein, in footnote 19, I believe the Court said it would not, at that point, extend the same rule to the grand jury process; that based upon Costello, Monn and Blue, the three prior Supreme Court decisions, an indictment by a grand jury was conclusive as to the issue of probable cause. That's subjective, and maybe indicative of what the Supreme Court would do if the question were raised. We all know that there are many instances in which the evidence presented to the grand juries in the United States does not satisfy the requirements of probable cause. The requirements of probable cause, as you know, do not always exclude the use of hearsay evidence. And in Spinelli and Aguilar the Supreme Court held that certain kinds of hearsay evidence could constitute probable cause. In most jurisdictions,if probable cause evidence in fact is not presented to the grand jury, the defendant has no remedy in terms of dismissal of the indictment or release from detention for that reason.

If the grand jury is retained, I would suggest the following procedure. I think witnesses should be permitted to have counsel present in the grand jury hearing during the time the witness is testifying. The grand jury secrecy rule does not apply to witnesses. The witness, after testifying, is permitted to leave the grand jury room and discuss his or her testimony with attorneys and anyone else. And the procedure has developed in many jurisdictions. I don't know about Ohio because it's informal, not sanctioned by statute, the witnesses often leave the room to go out into the hallway to confer with counsel and so forth. Because of the very real potential for a Fifth Amendment violation when the witness is on the stand uncounseled and under pressure of the moment to respond to questions it seems to me that it's just as well to have counsel present in the grand jury room rather than keep him waiting out in the hallway. There was a proposal in New York a few years ago which provided a procedure for a defendant who was incarcerated or had been taken into custody, perhaps released on bail, but a defendant who was in that status and was being investigated by a grand jury could make a formal request as to the grand jury to present exculpatory evidence. It was not mandatory, as I recall, that the grand jury actually hear the evidence, but it could if it decided that it would be helpful.

But there was a formal process by which the potential defendant communicated with the grand jury requesting the right to present evidence. I would think that some consideration should be given to such a procedure here if the grand jury is retained. But at the very least, the defendant, if not given the right to present evidence, should have the right to request the opportunity to do so.

Two weeks ago I had an inquiry from a Common Pleas Judge in Ohio with respect to a problem that had occured in a case in his court in which the defendant was making a motion to dismiss the indictment because of a violation of Rule 16, and I believe, Rule 44. Under Rule 16, there is a provision that at trial, after the prosecutor's or state's witnesses have testified, the defendant has the right to access to grand jury minutes or transcripts in the event that they contain conflicting or impeaching material. Under Rule 44, the rule provides that all proceedings before courts shall be transcribed. In this particular case the grand jury testimony was not recorded. At the trial the defense moved to discover to inspect grand jury transcripts for purposes of impeachment and there was none available because there was none made. Then the defense was moving for dismissal on that basis. Clearly there is a conflict in the law if the law does not require that grand jury testimony be recorded. Rule 16 becomes a fairly useless remedy to defense in terms of impeachment. And admittedly there is some question whether rule 44 on its face applies to grand jury proceedings. At least the spirit and purpose of Rule 16 is defeated if the evidence is not transcribed. So I would think that there should be a requirement, express requirement, that grand jury testimony be transcribed to preserve the effectiveness of Rule 16. By transcribing the evidence it seems to be that Rule 16 could be expanded, and in the absence of some countervailing purpose, that the defense should be provided access to the grand jury evidence prior to trial. In my own experience in Indiana, for example, they had a similar rule, similar to Rule 16, that after the state witness has testified, you have access to grand jury transcripts. I was involved in a trial with the stat's witnesses testifying. We moved for a discovery of the transcript and the transcript had 10,000 pages. And so we spent three days. The jury trial was adjourned for 3 days while we went through the grand jury transcript. It seems to me that that is awkward: it could be provided to the defense in advance of the trial, at least those portions of it containing the testimony of witnesses that the state's going to call. I also think that the grand jury indictment should be dismissed prior to trial, if the transcript of the grand jury reveals that there is not sufficient evidence to establish probable cause. Which would be the same test required of preliminary hearings. In most jurisdictions, as I understand it in Ohio, defense is essentially precluded from challenging sufficiency of evidence underlying grand jury indictment. The grand jury indictment is conclusive and not subject to attack. I might add that I have with me today Professor Stuart Israel of Ohio State University Law School who practices in the state of Michigan. In Michigan, there is a similar provision as in Indiana, and most prosecutions there are by information as well. It seems to me that the grand jury process in the run of the mill average kind of felony that is not particularly complex serves no real purpose either for the state or for the defendant.

Rep. Norris - Thank you, Professor. Questions of Professor Thompson? Just a couple I have. In Indiana, the procedure that you outlined, do they have a full preliminary hearing procedure in Indiana? Is it an adversary procedure?

Professor Thompson - For the most part they do. The statutes are confusing. It's the old 1905 code and essentially what they do, in Marion County at least, depends somewhat on where the case originates.

Rep. Norris - Is it a probable cause kind of hearing?

Professor Thompson - If the person is arrested without a warrant then there is a full probable cause adversary hearing in the municipal court. If the municipal court judge determines that probable cause is present then the person is transferred to the criminal court. In the event that a warrant was issued directly by the criminal court, an arrest warrant where a defendant is arrested pursuant to the warrant rather than without a warrant, then there will be no preliminary hearing.

Rep. Norris - No probable cause determination?

Professor Thompson - There is a probable cause determination but no preliminary hearing in the adversary sense. Before the warrant issues there has been a probable cause determination.

Rep. Norris - And how is that done?

Professor Thompson - The criminal court in Marion County has four judges who have explicit criminal jurisdiction. We have a commissioner, I believe he's called, who is a judicial officer, who reviews probable cause upon application by the prosecutor or the police.

Rep. Norris - Do the prosecutor or the police use testimony?

Professor Thompson - Yes, it's sworn testimony and it's often done by affidavit. It's also done by oral testimony. The benefit of doing it that way is that it's subject to review subsequently. A record is made and when the defendant is arrested the defense lawyer has access to the records, to the affidavit and record of oral testimony before the magistrate.

Rep. Norris - We've been talking here today with a number of witnesses about abolishing one or the other of these two screening processes that we have in Ohio, the preliminary hearing and the grand jury. As I understand what you're saying, you would prefer that of the two, the grand jury be abolished and that we use the preliminary hearing as the screening process.

Professor Thompson - That's right. My own personal view is that the grand jury is not an adequate screening process, for a number of reasons. One is that it is not subject to review at a later time, which insulates it from any attack.

Rep. Norris - Is the preliminary hearing in Ohio subject to later review?

Professor Thompson - I guess what I'm saying is that under Gerstein and under standard Fourth Amendment concepts a person cannot be detained. That doesn't mean the person can't be charged with a crime. He can't be detained. A person cannot be seized and held in custody in the absence of probable cause.

Rep. Norris - Can you appeal from that in any hearing or finding of that nature?

Professor Thompson - No, I don't think you can in any case. The remedy, of course, from the Fourth Amendment is pretty much limited to exclusionary rules. But Gerstein said that while Florida was not required to dismiss charges, they were required to discharge the person from custody until a probable cause determination was made.

Rep. Norris - Let me pose this question. Let's assume that we were to change the grand jury procedure to allow the witnesses and the defendant to be represented before the grand jury by counsel, not in a participatory function, not to cross-examine witnesses, but to advise him. Let's further assume that the defendant has the right to the grand jury transcript. Would those changes, plus what is now available under our discovery Rule 16, would that, in your opinion, be a viable alternative to the preliminary hearing? If we did that, would that satisfy you if we then abolish the preliminary hearing? Would that be just as good?

Professor Thompson - It would certainly be better than the existing grand jury process, I would say. I think I would prefer the preliminary hearing, personally. I think that there is a service performed by cross-examination and the probable cause determination. The problem with the grand jury is that in some cases theoretically you may not know who the potential defendant is going to be and so you can't have every witness's lawyer there for the entire process, cross-examining everyone. That's why I think that perhaps it's better to defer that probable cause determination until a later time, after a charge is filed and then you know who the defendant is and the defendant can have counsel present and cross-examine.

Rep. Norris - Further questions of the witness? Mr. Roberto?

Rep. Roberto - Professor Thompson, people who suggest retention of the grand jury suggest that this is really one of the few institutions that we have that interposes the citizens between governmental officials and the citizens themselves, and of course the preliminary hearing process would involve the judge, the prosecutors, government officials and so on. Their argument is that the grand jury should be retained because here you have the citizen input. It's kind of a buffer between the government and the people. How do you respond to that kind of an argument to retain the grand jury?

Professor Thompson - I think it's a good argument if it were, in fact, true. I guess my problem is that I'm not sure it is. If the grand jury really was a process which involved citizen input to a substantial degree, then I would say that that would perhaps be a benefit. On the other hand, as many critics have said, the grand jury is essentially a rubber stamp for the prosecutor and is essentially subject to the prosecutor's desires and then I think the argument loses some of its force. It seems to me also that interposing a citizen group between the state and the defense or accused is only of real value in limited cases. I don't think it serves a real purpose in most felony cases. That is why it seems to me that an independent commission of lay people could serve that purpose in a situation where you are investigating something that is very complex and which requires a lot of testimony. Most felony cases require just a few seconds of testimony by a police officer and that's it for the purpose of being indicted. At least that's my impression from my experience. And in that kind of a situation a grand jury even though it is a body of lay people really serves no purpose.

Rep. Norris - Thank you. Professor, in your practice in Indiana, were you involved in representing defendants?

Professor Thompson - Yes, I was a defense lawyer. I never worked for the prosecutor. The Committee that I worked for was composed of judges, prosecutors, defense lawyers, and legislators.

Rep. Norris - Further questions of the witness? If not, thank you Professor Thompson for taking the time.

Professor Thompson - Thank you.

Rep. Norris - Professor Israel, do you have something you want to add?

Professor Israel - I didn't prepare anything. I would like to add that the Michigan Supreme Court, in a case called Duncan, I'm not prepared with the citation, held that even a defendant indicted by a grand jury, which is very rare, at least in Michigan, is entitled to a preliminary examiniation.

Rep. Norris - For probable cause.

Professor Israel - Well, it's an extensive preliminary hearing. The prosecutor is obligated to prove probable cause that the defendant was involved in the crime and that the crime was committed, not probable cause that it was committed, but that it was committed.

Rep. Norris - Thank you. Anything else? If not, then thank you very much, particularly to the witnesses, we appreciate your coming. For the members of the committee, my intention at this point is not to call any further testimony unless members of the committee wish further testimony. We are going to ask a prosecutor from a small county to make his suggestions and we'll correspond with him to do that. I felt that the testimony we had was exceptional. I want to wait til the transcript is finished and distributed before we do anything more. If any of you feel any differently, or think there is something we ought to do.... I personally want a chance to digest it. I feel we had some pretty good testimony. We will then be in touch with you, as that's ready we can distribute it.

The meeting was adjourned.

THE GRAND JURY: A PROPOSAL FOR ITS EFFECTIVE USE

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Currently the constitutions in twenty-one states, including Ohio, plus the federal Constitution, provide that persons cannot be charged with ordinary serious crimes except by indictment by a grand jury.[1/] Seven states[2/] provide for the prosecution of felonies by use of the information (except for capital crimes), a formal, written charge prepared by the prosecuting attorney. The remaining states[3/] are "optional" in that the prosecution may elect either to refer a felony case to the grand jury or proceed by information.

Details as how the jury is to be selected, the specific scope and limitation of its powers and the procedures to be used by it have been left to the legislatures and courts. The first and most fundamental question to be addressed by a constitutional revision commission is whether the indictment is the most effective, efficient and prudent way to charge serious crimes. The answer is not a simple yes or no. Too many values, customs and desirable goals are at stake to abolish the grand jury; too many abuses of its power are evident, and too much waste and inefficiency attend its operation, to justify a continuation of its unqualified use.

At first blush, one is tempted to opt for one horn of the dilemna or another. But this need not be the solution nor should it be. The purpose of this report is to outline the arguments for and against full use of the grand jury, to indicate some of the experiences in the states and federal system to support those arguments, and finally to suggest the means by which the grand jury can serve our system of criminal justice without sacrificing either the interest of efficiency or fair play.

Constitutional vs. Statutory Coverage

No constitutional provision for the grand jury is made at all in some states, like Michigan. Appellate courts in that state have decided that charging felonies by indictment or information is a matter for the legislature to decide. [4] In the absence of constitutional guidance, legislatures are therefore relatively free to establish charging processes. In Michigan by statute, an accused may be proceeded against either by information or indictment. [5] Additionally, the legislature has established the so-called "one man" grand jury, which permits a judge, upon probable cause, to inquire into a crime situation [6] - that is, the court has the same subpoena power as a full grand jury. In a few states this power has been granted to prosecutors. [7]

At the other extreme are states with clear constitutional outlines concerning the use or non-use of grand juries. In California, for example, the Constitution specifies that an information may be used, after a judicial preliminary examination, and also an indictment, with or without such examination. [8] That is the typical provision allowing for the optional use of grand juries but it should be noted that the preliminary is required if the information is used.

A fourth possibility is illustrated by an Illinois Constitutional provision. It states that "... no person shall be held to answer for a criminal offense unless by indictment of a grand jury ...(but) the general assembly by law may abolish the grand jury or further limit its use." [9] In 1975 the Illinois legislature did indeed limit the use of the grand jury by providing that all prosecutions of felonies shall be by information or indictment and that if a felony prosecution is by information a preliminary hearing must be held with a finding of probable cause. [10]

New York represents another interesting approach. Their Constitution, like Ohio's, simply requires an indictment in order to charge a person with a felony. The legislature in New York has been more active than most states in prescribing

rules and rights and guidelines for the grand jury. For example, provision is made for the court to dismiss an indictment based on insufficiency of the evidence presented to the grand jury,[11] or it may dismiss the indictment "in the furtherance of justice."[12]

These provisions are fairly unique, and significant, in the sense that courts do have the explicit power to review the grand jury minutes and to adjudge the sufficiency of evidence presented to them in order to establish "reasonable cause"[13] to believe a crime has been committed by the suspect.

It is difficult to categorize individuals into those who favor or disfavor use of the grand jury. Libertarians by and large, however, are the grand jury's most severe critics. But those who cling to the notion that the grand jury can, if utilized properly, stand as a bulwark against unwarranted or frivolous prosecutions and thus an intrusion into privacy and liberty, are not inclined to advocate abolition. Individuals favoring strong law enforcement are inclined to favor the grand jury because of its investigatory power. But, as I have indicated, several states do not utilize the grand jury (instead allow the prosecutor to proceed by use of the information) and in these states law enforcement officials express considerable content with their system.

Arguments for and against the Grand Jury

Never before in the history of our country has the grand jury come under such attack as it has since, and as a result of, the Nixon-Mitchell control of the Department of Justice. It has been asserted with considerable evidentiary support that federal grand jury powers were carried to unhealthy extremes in order to suppress if not convict individuals singled out because of their political beliefs. Since these assertions have appeared in numerous places and do not seem to be typical of state grand juries, my remarks will be largely limited to the operation of state systems. The arguments for and against the use of grand juries are as follows:

1. Grand Juries Are Nothing More Than Prosecutorial Tools

It probably is a myth that the grand jury has any real effectiveness at all in curbing the prosecutorial abuse of charging a crime without justification. The combination of heavy case loads with the relatively short life of a typical grand jury simply does not allow them to exercise independent judgment about charging a crime. "No Bills" or decisions not to indict, are largely returned at the suggestion of the prosecutor and often are a means of eradicating superfluous charges against a defendant once he has been indicted on a primary offense. Moreover, the decision to charge a crime is a complex business. Understanding the necessary quantity and quality of evidence to constitute such things as probable cause (much less proof beyond a reasonable doubt), even after instruction on the definition of that term, requires considerable classroom and empirical instruction, more than can possibly be imparted to grand jurors at the time of their charge or under the short period in which they receive evidence. In a word, the "rubber stamp" criticism of grand juries is pretty well documented by a number of studies and, more importantly, by the admissions of prosecutors experienced in working with grand juries.

2. The Investigatory Role of the Grand Juries Resembles an "Inquisition" without Adequate Safeguards for Constitutional Rights.

The power of the grand jury to issue subpoenas requiring testimony and the production of physical evidence, combined with the power of the prosecutor to grant immunity, violates the fundamental purposes of the Fourth and Fifth Amendments or at least the spirit of these amendments.

More specifically, the grand jury in practice is a law enforcement tool in that the prosecutor directs it to exert its investigatory power toward individual suspects and possible crime situations.

Despite recognition in the law that the grand jury is an institution judicial in nature, and as such functions primarily as a part of the judicial branch, its role as an executive or law enforcement agency is dominant. The U. S. Department of Justice in the recent past used federal grand juries to intrude into the private lives of

people in the following more specific ways:

a. Issuance of "forthwith subpoenas," whereunder individuals under suspicion are required to appear before the grant jury on a moment's notice;

b. Issuance of presentments wherein individuals are not indicted but are subject to severe criticism bordering on indictment leaving no adequate form for explanation or exoneration.

c. Leakage of information to the press about the identity of persons under investigation so that their reputations will be scarred.

d. Requiring suspects under subpoena to "stand-by" for long periods of time - sometimes days - in the hallways of the court house waiting to be called to testify; and

e. Requiring witnesses under subpoena to travel long distances from their home to areas far from the jurisdiction of the alleged crime.

3. The Grand Jury is Inefficient in that it is a Needless Duplication of Prior Screening of Routine Felony Cases.

Viewed in the context of the processes by which felony cases are developed and perfected by the police, the prosecutor and the courts, the grand jury represents just one more point of decision which duplicates judgments by criminal law experts and adds to the time necessary to mature a case for final disposition. The defendant's right to a speedy trial is of particular significance in this regard since the necessity for the production of evidence at the prosecutor's office for an initial charging decision, at the preliminary hearing for a judicial determination to "bind over" the case to the grand jury, together with the presentation to the grand jury itself, often places an undue time constraint on the prosecutor's office and courts in order to bring the case to trial within the statutory limit.

Those who favor the grand jury as an important criminal justice institution advance their own several arguments as follows:

1. Citizen Participation in the Charging Decision

Whereas the average citizen, on the petit jury, does decide guilt or innocence,

the decision of the grand jury to charge is of at least equal importance. The great bulk of persons charged with a crime enter guilty pleas, often through plea negotiations, and hence the grand jury offers a greater opportunity for citizens to make known their viewpoints about law enforcement. If the fundamental concepts of our democratic form of government are likely to be realized in the criminal justice system, citizens should have a right to participate in the critical charging decision.

While there is considerable evidence that the prosecutor is in fact in control of the grand jury, that practice need not be perpetuated. Remedial measures can be taken, such as legislation creating more grand juries with a longer life span, better indoctrination, and greater recognition by the courts of the importance of the jury's independence. In short, there is something inherently wrong with the notion that a group of average citizens cannot function as anything other than pawns in the hands of the prosecutor.

2. From the Prosecutor's Standpoint it is sometimes Desirable to Share the Charging Decision

In certain identifiable situations it is difficult for the prosecutor, on his own, to make the charging decision. In a literal sense the prosecutor is an elected public official - a politician - and as such any number of community pressures converge on him to condition and indeed control his discretion to charge and prosecute crime. Prosecutors are often "damned if they do or damned if they don't" in their investigation and prosecution of government officials, union leaders and prominent businessmen. Further, there are certain areas of law enforcement in which a large segment of the public has a great deal of tolerance. Gambling and prostitution are examples. The spectrum of enforcement can range all the way from strict to lax. In either case the prosecutor, as a politician, runs the risk of alienating a large number of voters. Hence he should have the opportunity

to share his charging decision with the citizenry both to protect himself and to have an accurate gauge of community expectations about enforcement of criminal laws.

3. There is Nothing Wrong With a Grand Jury Serving as a Law Enforcement Tool

Law enforcement needs help. Many if not most crimes are surreptitiously committed. Conspiracy to commit crime, in particular, is difficult to ferret out by police undercover operations. Without the grand jury's subpoena power and the prosecutor's power to grant immunity, many of these crimes would go undetected and unpunished. Whatever one might say about grand jury abuse under the Nixon administration, a number of serious criminal law violaters were called before the bar of justice in that administration.

RELATIONSHIP OF THE GRAND JURY TO OTHER CRIMINAL JUSTICE AGENCIES

An effective way to understand the most efficient use of the grand jury is to view that institution in the context of the entire criminal justice system. One should examine the relationship of the grand jury to the actors and institutions surrounding it. It should be borne in mind in this connection that grand juries have three functions: to indict, to investigate, and to report generally on their view of a crime situation. These functions are sometimes intermixed, depending on the court's charge to the jury and the prosecutor's use of it.

The Police

The police have a significant influence on grand jury decisions in that they, in the first instance, are responsible for the quantity and quality of evidence produced. The typical "indicting" grand jury, which most are, must of necessity rely on the police as their investigatory arm.

The Prosecuting Attorney

I have yet to meet a prosecutor who will not concede that the grand jury is under his control. By "control" I mean, first, that once the police decide to press charges the matter is referred to the prosecutor for review; in only those cases in

which the prosecutor feels charging is appropriate will referral be made to the grand jury. His discretion not to prosecute, even after an indictment by a grand jury, is well settled in the law. Prosecutorial decisions on whether to charge - that is, to file a formal complaint in the courts - or to refer the matter directly to the grand jury, make him the dominant decision maker once the case leaves police hands.

Secondly, the presentation of cases to the grand jury is managed by the prosecutor. He examines the witnesses, offers and describes physical evidence, and expresses opinions and judgments about chances of success or failure if the case goes to trial. Since the prosecutor is an expert on such matters, and grand jurors are not, his influence on the grand jury is, to put it mildly, a significant factor in their deliberations.

Even for special, investigatory grand juries, the prosecutor exercises significant control. His advice concerning who should be subpoenaed, and his decision to grant immunity to witnesses, clearly puts him in the driver's seat.

The Courts

The courts interact with the grand jury in two significant ways. One is the role of courts of limited jurisdiction to preside over preliminary hearings. These hearings precede any reference to the grand jury and the judicial decisions made duplicate the charging decision to be made by the grand jury. If enough evidence is produced at the preliminary hearing to warrant further prosecution the case is "bound over" to the grand jury for further, identical action.

To the defense, the preliminary hearing is a highly desirable procedure. For it is at that hearing that the defendant is present and may offer evidence to dissuade the court that probable cause exists or that prosecution is otherwise unjustified. The accused faces his accuser in open court and the opportunity is given for the cross examination of state's witnesses, thus providing a valuable discovery tool for the defense. The transcript of the testimony given at the preliminary

hearing is often a valuable basis on which to cross examine the same state's witnesses if the case goes to trial.

The preliminary hearing in some jurisdictions is also a major disposition point for felony cases. A study of preliminary hearings in Chicago in the late 1960's, for example, revealed that approximately 80% of all such cases are disposed of at that point.[14] Some are dismissed outright, others are reduced to misdemeanors so that the judge can take a plea, while others are disposed of by preconviction probation, a "diversion" procedure whereunder the case is continued for six months to a year and ultimately dismissed if the defendant behaves himself. It should be noted, however, that in this system there was little or no preliminary screening either by the police or the prosecutor's office.

Doubtless because the defendant is given the foregoing advantages at the preliminary hearing, the practice of many if not most jurisdictions, including the federal, is for the prosecutor to bypass the preliminary hearing by taking the case directly to the grand jury. There the prosecutor can examine the witnesses in secret. If a transcript is made of the testimony it is available to the defense for examination at the time of trial, which is obviously helpful, but not as advantageous as a transcript of a preliminary hearing. States in which the grand jury is optional require a preliminary hearing when the prosecutor opts for the information process.[15] It should be noted too that some states allow counsel in the grand jury room,[16] a relatively recent trend, but these are states which do not require indictment in the first place. The emerging compromise among states allowing counsel in the grand jury rooms seems to recognize that if the prosecutor desires the extraordinary power of the grand jury he must accept responsibility of protecting the witness - accused. So long as the indictment is mandatory it is unlikely that the right to counsel will be extended although the right to counsel would in all likelihood mollify the prosecutor's incentive to manipulate the timing of the indictment to avoid the preliminary hearing.

Thus the preliminary hearing and the grand jury, while serving the common

objective of charging crime, are at odds with regard to opportunities for discovery (i.e. an open hearing compared to secrecy), and a final disposition point for felony cases (i.e. a large number of dismissals and charge reductions compared to a high percentage of indictments and a few no-bills). In fairness to prosecuting authorities, however, it must be recognized that when the preliminary hearing is not used, considerable screening takes place in the prosecutor's office, meaning that the grand jury receives no more than three quarters to one half of the felony cases referred to the prosecutor's office. It must be recognized too that once there has been both prosecutorial and preliminary hearing screening the grand jury is not likely to receive anything but the most serious cases for which prosecution is warranted.

The second relationship between courts and grand juries is the power of the court of general jurisdiction to call or convene grand juries, to charge them with their responsibilities and the scope of their authority, to dismiss them, and to review the correctness of their decision to indict. Relatively little attention has been given to this "supervisory" function of the courts despite the fact that there is theoretical recognition that the grand jury is a part of the judicial process. In the real world, as already indicated, the grand jury is more of a function of the executive branch of the government - the prosecutor's office. In addition to the reasons already given, I have heard numerous complaints by defense counsel that judges, by and large, are loathe to interfere with the operation of the grand jury once it is convened. Several opportunities arise for this operation to be challenged in court, such as the grand jury's failure to function within the limits of its charge, violations of secrecy and the absence of a lawful basis for issuing subpoenas. This "presumption of regularity" complained about doubtless stems from the law and tradition in this country whereunder courts do not intrude into the discretionary power of the prosecutor. The United States Supreme Court

has held, for example, that even after an indictment has been rendered the prosecutor can, within his discretionary power, refuse to return it to the court for prosecution. 17/

There is also a strong tendency for courts not to review the sufficiency of evidence that was put to the grand jury by the prosecutor once an indictment is returned. 18/ In consequence the prosecutor, because of his influence on the grand jury, can determine the level of proof required before a defendant will be indicted.

CONCLUSION

It seems to me four basic conclusions can be drawn about the operation of grand juries:

1. For routine felony cases - perhaps as high as ninety percent of a typical felony caseload - the grand jury's decision to indict is a useless duplication of the prosecutor's decision to charge and the decision of the judge at the preliminary hearing to "bind over" such routine cases to the grand jury. Witnesses must make an "extra" appearance; too much valuable time is consumed in scheduling and presenting evidence. At a minimum the prosecutor should have the opinion of using the information, provided the case is given a preliminary hearing and it is bound over for trial.

2. For two reasons the grand jury should be preserved for limited use. One is that it has proved to be an asset to law enforcement because of its subpoena power. The other is that the prosecutor should have available to him a group of citizens to whom he can turn in difficult charging situations. In every jurisdiction, therefore, a grand jury should be available, either regularly sitting in high crime, metropolitan areas or subject to immediate call in less populated areas.

3. Abuses of the grand jury process in recent years raise the question of how such abuses can be best controlled and prevented. There is some evidence in some jurisdictions that judges are too reluctant to intrude into the operations of grand

juries (both in surveying or reviewing sufficiency of indictments and justification for issuance of subpoenas) or otherwise take a position of "presumption of regularity". Hence, recognition should be given to the concept that the grand jury is primarily responsible to the judiciary and the judiciary is responsible for the grand jury's operation.

4. Guidelines under which grand juries should proceed, including full consideration of the rights of persons under investigation, should be spelled out with much clarity by legislatures and such policy making bodies as the American Bar Association with its Standards for Criminal Justice Administration.

It would be unwise, I think, for any Constitutional Revision Commission to undertake anything other than the making of provisions for the use of both the information and the indictment leaving to the legislatures and courts the task of adopting details of the jury's powers and limitations.

For example, the Ohio Legislature could require a preliminary hearing in all felony cases regardless of whether the indictment or information is used, such as the requirement in Michigan and which is also recommended by the American Law Institute.[19/] Judicial review if not supervision of the indictment process could and should be recognized, as in Pennsylvania where the judge in each county jurisdiction may decide whether indictments or informations are to be used.[20/]

If it is decided that the indictment should be optional as an official charging document, and within the prosecutor's discretion, then what is likely to transpire, in practice?

The answer probably lies in the California experience where indictment is optional. Good crime statistics are recorded in that state and a number of studies have been done there describing rather precisely when and why the grand jury is used or not.

To begin with, fewer than 5% of felony filings in California are by indictment; in Los Angeles the grand jury is used for about 1% of felony cases filed.[21/] In

general, five reasons can be given for the grand jury use: 1) technical difficulties with the statute of limitations; 2) the defendant's absence from the state; 3) a desire to avoid the preliminary hearing; 4) public interest in the case, and 5) a need for the grand jury's investigatory powers.

A survey of district attorneys in seven counties 22/ revealed, in more specific terms, the following reasons why California prosecutors opt for referring cases to the grand jury:

1. Crimes - usually narcotics violations - involving the use of police undercover agents where secrecy is important.

2. Sex offenses where the victims are of tender years and their examination at the preliminary hearing is avoided.

3. Where the preliminary hearing would be unreasonably protracted, such as the establishment of complex factual situations, or where there is a large number of defendants, attorneys and witnesses.

4. Where it is thought that the jurors and public generally would have a special interest in the case.

5. Where the facts are clear, easy to prove and the defendant is in custody.

6. Where the statute of limitations or speedy trial limit is about to expire.

7. When the preliminary hearing has been postponed or delayed, an unreasonable length of time.

8. When the case is dismissed at the preliminary hearing for legal (not factual) reasons and the law should be further reviewed.

9. When witnesses are not easily available and a firm date for their testimony can be set.

10. In organized crime cases, where safety of a witness is of concern.

11. When the defendants are public officials.

12. When undue fanfare or publicity should be avoided.

13. When several suspects are involved and secrecy, so as to insure effective

continued investigation, is desirable.

14. Where there are multiple defendants but some are not in custody or where their whereabouts is unknown, thus precluding a preliminary hearing.

15. Capital crimes and other particularly heinous offences.

In my judgment the foregoing reasons are sensible and, based on the California experience, provide useful guidelines for adjuding when the grand jury can be put to productive use. It should be noted that the liberal California discovery rules preclude too many complaints that by-passing the preliminary hearing works an undue hardship on the defense.

Finally, may I point out that the enterprise of enforcing the law and protecting rights is extraordinarily complex. The grand jury, like all criminal justice institutions, has that responsibility. Perhaps the most important thing it has going for it is direct citizen participation at the early, critical stage of charging crime.

FOOTNOTES

1. ALA. CONST. AMEND. 37; ALASKA CONST. art. 1 § 8: HA CONST. art. 1§8; ILL STAT ANN., CH 38, § 111-2 (as amended, 1975); KY CONST. §12; MD CONST. art. 21; ME CONST. art 1 §7; MASS ANN. LAWS ch. 277 §§ 1-14 (1972); MISS CONST. art. III §27; N.H. CONST. Part I art. 15; N.H. CONST. art 1 §8; N.Y. CONST. art I §6; N.C. CONST. art 1 §22; OHIO CONST. art I §10; ORE CONST. art. VII §5; S.C. CONST. art. I § 11; TENN. CONST. art. I §14; TEX CONST. art I §10; VA. CODE ANN. §19.1-147 (1973 Supp.); W.VA. CODE ANN. §62-2-1 (1966). Georgia's common law rule that all felonies be prosecuted by indictment is reflected in the statute prohibiting prosecution after two "no-bills" by the grand jury, GA CODE ANN. §27-702(1972).

2. CONN CONST art 1 § 8; FLA CONST art. I § 15; IND STAT ANN 9-801 (1972 Supp.); LA CONST art I § 9; MINN R. CRIM PRO. RULE 17.01 (1975); R.I. STAT ANN 12-12-1.1 (1975 Supp.); VT STAT ANN. tit. 13 § 3601-5606 (1973 Supp.). Under The Penn CONST art. 10 § 7 (1975 Supp.) each local court may elect to abolish the grand jury indictment requirement.

3. ARIZ RULE CRIM PRO, RULE 78; ARK STAT ANN. § 43-806; CAL CONST art. I § 8; COLO. CONST art II§23; IDAHO CODE ANN. §2-508; IOWA CODE ANN. 770.1-(1973); KAN STAT ANN§ 22-2902; MICH STAT ANN § § 28-947 (1973 Supp.); MO CONST art. I §17; MONT REV CODE ANN. 95-1801 (1973); NEB REV. STAT § 29-1400; NEV CONST. art. I § 8; N. MEX CONST art. II §14; N.D.CENT CODE ANN. §29.09-2 (1975 Supp.); OKLA CONST. art. II § 17; S.D. COMPILED LAWS ANN. §§ 23-29-2-16; UTAH CONST art. I §13; WASH REV CODE ANN §10.28.010-.220 (1972); WISC STAT ANN § 255.10 (1973); WY STAT ANN §7-92)1972

4. People v. Simon, 36 N.W.2d 734, 224 MICH 450 (1949)

5. MICH. COMP.L. ANN. § 767.7

6. MICH. COMP.L. ANN. § 767.1

7. ARK STAT ANN 43-801 (1964); DEL CODE ANN tit. 29 §2502 (1953); FLA Stat. Ann. 905.185; IOWA CODE ANN § 769.19 (1972 Supp.). States that allow prosecutor to subpoena when he is preparing for a grand jury, but allow prosecution by information have, in effect, an independent prosecutorial subpoena power because the attorney can subpoena witnesses for the grand jury, record their testimony, and request the case to be no-billed. He can then file an information charging the same offence. CAL PENAL CODE §v 939.2 (West: 1970); MO ANN STAT § 540.160 (1953); NEB REV STAT § 29-1409 (1965).

8. CAL CONST. art I § 8

9. ILL CONST, art I § 7

10. ILL STAT ANN ch 38, §111-2

11. N.Y. CRIM. PROCEDURE LAW § 210.20(b)

12. Ibid, § 210.40

13. Ibid, § 190.75

14. McIntyre, "A Study of the Judicial Dominance of the Charging Process" 59 J. CRIM L.C&P.S. 403 (1968)

15. Michigan has required a preliminary hearing in every case, unless the case was initiated by a grand jury. People v. Duncan 201 N.W.2d 629 (1972). This was a rule by judicial fiat on an equal-protection theory that has been rejected by most other courts; see People v. Uhlemann 511 P.2d 608 (1973:Cal.) and State v. Bojorquez 535 P.2d 6 (Ariz: 1975). Some states, however, require a preliminary if the suspect is in custody before the grand jury has considered the case, Stone v. Hope 488 P.2d 616,618 (Okla.Crim.App. 1971), Commonwealth v. Soloff 175 Pa Super. 423 107 A.2d179 (1954) (see also PA. R. Crim.Pro. 203(c)); VA CODE ANN § 19.1-1631 (1961) VA CT R. 3A:5(b)(1).

16. ARIZ R CR. PRO 12.6 (limited to target witness), GA CODE ANN § 89-7908 (limited to public officers); KAN STAT ANN §§ 22-3309(1974); MICH STAT ANN § 28.943 (1972); MINN R CR PRO 18 (1975); UTAH CODE ANN § 77-17-3 (1973 Supp.); REV CODE WASH ANN §10.27.120 (1975 Supp.); Ill R.S. STAT ANN. Ch 38,§ 111-2 (Oct. 1975). Illinois may typify the trend of extending the right of counsel into the grand jury room in exchange for dropping the indictment requirement.

17. U.S. v. COX, 342 F 2d. 167 (1965)

18. Most states will only quash an indictment if the the defendant comes forward with the burden of showing that no legal or competent evidence was presented to the grand jury. CAL PEN CODE § 939.6; COLO CODE ANN 16-5-205; Idaho (dicta:State v. Bullis 472 P.2d 315); IOWA CODE ANN 771.16; NEV REV STAT 172.155(2); N.D. CENT CODE ANN 29-10.1-26. Some more extensive review is allowed by MINN RULES 18.06 (subdiv. 2) (1975); Other jurisdictions specifically prohibit going "behind an indictment valid on its face."

19. People v. Duncan 201 N.W.2d 629 (1972); ALI, A Model Code of Pre-Arraignment Procedure Sect. 331.1 (1975)

20. PENN. Const. Art X, § 7 (1975 Supp.) See Commonwealth v. McCloskey 277 A 2d 764 (PA:1971) Cert den. 404 U.S. 1000 (1971) where the Pennsylvania Supreme Court explicity recognizes its supervisory authority over the use or non use of grand juries.

21. Felony Filings on Defendants in California Supreme Courts, 1966-1970, Table U-3

22. Comment, "The California Grand Jury-Two Current Programs" 52 Cal L. Rev. 116-118.

TESTIMONY

BEFORE

THE OHIO CONSTITUTIONAL REVISION COMMISSION

COMMITTEE TO STUDY

THE GRAND JURY AND CIVIL PETIT JURY

BY THE

COALITION TO END GRAND JURY ABUSE

JANUARY 23, 1976

THE STATEHOUSE, COLUMBUS

TESTIMONY, January 23, 1976: COALITION TO END GRAND JURY ABUSE

We are here today, in a sense, because 185 years ago the people of the United States decided to incorporate the grand jury into the federal Bill of Rights and because 10 years later Ohioans included the grand jury in this state's Bill of Rights.

Most people probably don't realize that it was the Bill of Rights that first made the grand jury the law of the land. We normally don't associate the right to a grand jury indictment with celebrated liberties like freedom of speech, but America's first generation did. In 1791 and 1801 citizens saw the grand jury as an integral guarantor of American freedom, a shield for otherwise defenseless individuals against overzealous or malicious government prosecutors. No person, these first citizens reasoned, should be put through the ordeal of a jury trial unless an independent group of his/her fellow citizens--the grand jury--determined that there was enough evidence to warrant further prosecution.

Besides shielding individual citizens from improper governmental designs, the grand jury also protected the citizenry

as a whole by making sure that offenses by government officials against the community were investigated and prosecuted. Eighteenth century American citizens, fresh from their bout with English tyranny, were not about to trust the government to investigate its own wrong-doing.

Both these roles combined to make the grand jury "a shield for the innocent and a sword against corruption in high places." How often down through the years courts have invoked these words or similar rhetoric to justify the grand jury's powers! But how seldom have these noble words borne any resemblance to the reality of the grand jury's actual role in our criminal justice system!

Today we have a situation where less than half the states of the union are impressed enough with the grand jury's importance to require an indictment before trial. We have a situation where 18 national bar, civil liberties, religious and labor groups have become so outraged by the perversion of the grand jury's original intent that they have formed an organization,

the Coalition to End Grand Jury Abuse, to work for grand jury reform.* We have a situation where an American jurist can accurately assert that "(t)he prosecutor can violate or burn the Bill of Rights seven days out of seven and bring the fruits of unconstitutional activity to the grand jury. No court in the country has the power to look behind what the grand jury considers or why it acts as it does."[1]

What went wrong with the grand jury? Is the grand jury situation beyond repair? What improvements can Ohio make? These are the questions we would like to discuss with you this morning.

<u>The grand jury: bulwark of liberty to rubber stamp</u>

A key word in any description of the grand jury that the Framers of the Bill of Rights thought so highly of is <u>independent</u>. The grand jury was to stand <u>between</u> the people and

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*These groups are: American Civil Liberties Union, National Lawyers Guild, National Conference of Black Lawyers, Emergency Civil Liberties Committee, Unitarian Universalist Association, National Student Association, United Methodist Board of Church and Society, Dept. of Law, Justice and Community Relations, United Methodist Board of Global Ministries (Women's, National Div.),

--continued on next page

government, buffer the citizenry from its officials. Indeed, independence was a prerequisite for effective grand jury functioning. Could a grand jury controlled by the government be expected to fairly evaluate the government's case against an accused? Could a grand jury dominated by the government thoroughly ferret out government corruption?

Grand jury independence was, moreover, the reason why grand juries were and have been given such wide latitude to operate. The founders of the republic did not bother to attach statutory limits to the grand jury's subpoena power or restrict the evidence a grand jury could hear because they saw the grand jury as an agent of the community, not an arm of the prosecution. There was no need to protect the people from the people.

Before too many years passed, however, the logic behind

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* (continued from previous page) Church of the Brethren, American Friends Service Committee, Women's International League for Peace and Freedom, Jesuit Social Ministries Conference, Southern Christian Leadership Conference, National Bar Association, National Legal Aid and Defenders Association, American Trial Lawyers Association's Criminal Section and Amalgamated Meatcutters and Butcher Workmen of North America.

this rationale began to unravel. The broad and vague powers of the grand jury proved too inviting for the government to resist, and various officials moved to bend the grand jury to their own improper purposes. One of the first prominent Americans to speak out against this abuse of grand juries was none other than Thomas Jefferson. His political opponents on the federal bench had guided grand jury harassment against Jefferson's supporters, and Jefferson protested that "(t)he charges of the federal judges have for a considerable time been inviting the grand juries to become inquisitors on the freedom of speech, or writing and of principle of their fellow-citizens."[2] Unfortunately, Jefferson's concern was short-lived. When Jefferson became president a few years later, he targeted grand juries against his own enemies.

While the early grand jury proceeding of the time was hardly so abused, an unfortunate trend had been established, and gradually grand jurors played less and less of an independent role. The democratic notions that had spurred the grand jury's

constitutional birth came to exist only in the overblown prose of court decisions, and observors began to note with increasing frequency that grand juries did nothing more than routinely rubber stamp prosecutorial decisions. Today the situation has deteriorated to the point where it is commonly acknowledged that a grand jury will do whatever a prosecutor wants it to do. If the prosecutor wants an indictment, there will be one, and if a prosecutor wants a grand jury to get the government off the hook in a sensitive situation by not indicting, the grand jury will do that, too.

As we enter our Bicentennial year, we do it without the grand jury shield America's founders envisioned.

The grand jury: a formidable weapon

If the grand jury had only lapsed into an anachronistic panel that affords an accused little protection from the government, that would be reason enough to subject the institution to intense scrutiny. But there is another reason. The grand jury, which was intended to protect the innocent

from the government, has evolved into a frightening instrument the government can manipulate against the innocent. Over the past decade, the judicial misinterpretation of traditional grand jury powers and the legislative addition of new ones have handed law enforcement agencies the ability to maneuver as if the Bill of Rights did not exist.

"I suggest," Watergate Special Prosecutor Charles Ruff has said, "that virtually the only restraints imposed on the prosecutor's use of the grand jury are those which he imposes on himself as a matter of personal or professional morality or which are imposed on him as a matter of policy by his superiors."[3]

Ruff hardly exaggerates. Ponder, if you will, the entirely legal prerogatives currently enjoyed by prosecutors before federal and Ohio grand juries. A prosecutor may subpoena anyone fron anywhere at any time with whatever notice deemed fit. A prosecutor does not have to inform a witness why he/she has been subpoenaed. No grand jury witness is

allowed to have an attorney present inside the grand jury chamber during questioning, and that questioning can touch on anything the prosecutor chooses: the witness' private conversations, political activities, personal relationships, even the attorney-client privilege. The prosecutor can badger a witness, and since a complete transcript of a grand jury proceeding need not always be kept, never worry about a court censuring this conduct. If a witness claims his/her Fifth Amendment right against self-incrimination, a prosecutor can immunize the witness with limited "use" immunity which requires the witness to testify on pain of jail. Even if a witness does testify, however, he/she still faces the prospect of going behind bars. Under use immunity, a prosecutor can indict a witness on the subject of his/her testimony if evidence against the witness is found independently of the testimony.

Taken as a whole, the modern grand jury offers prosecutors a package of powers that make a mockery of due process and invite abuse. If we give prosecutors, for instance, the

unlimited power to subpoena witnesses and their records in the name of the grand jury, should we be surprised when prosecutors stage disruptive fishing expeditions into the activities of their political opponents? If we allow prosecutors to ask any questions they please, should we be surprised when prosecutors use the grand jury to intimidate those with unorthodox or unpopular opinions? If we allow prosecutors to force immunity onto witnesses, should we be surprised when prosecutors trap people into jail by asking questions that they know the immunized witness cannot, in conscience, answer?

These are some of the abuses of the grand jury process evident over recent years, abuses that led Sen. Edward Kennedy in 1973 to attack "the kangaroo grand jury" which he described as "a dangerous modern form of Star Chamber secret inquisition that is trampling the rights of American citizens from coast to coast."[4] The abuses Sen. Kennedy decried (see appendix for detailed case histories) occurred in the federal

system, and, naturally, we are not saying that similar horrors accompany every Ohio grand jury proceeding. Most grand jury deliberations are, on the contrary, perfunctory and emotionless affairs in which the prosecutor briefly presents the government's case and the grand jury just as briefly disposes of it. We are saying, however, that in those instances where a buffer between the government and the individual is most needed--situations where a prosecutor is "out to get" someone or some group for personal, political or ideological reasons--the grand jury can be manipulated by the prosecution to facilitate the "getting."

The losers when the grand jury is so abused are, of course, the victims of these tactics, but also, in a very fundamental sense, the entire community. Let us speculate, for example, that a district attorney from Party X announces an indictment of a Party Y mayor after a lengthy investigation replete with press leaks and widely publicized subpoenas. The angry mayor charges that the D.A. is out to ruin him by pressing a flimsy

case. The mayor might be right. By withholding exculpatory evidence, compelling incriminating testimony and mixing in unverifiable hearsay, a prosecutor can build a grand jury indictment out of a very weak case. Then again, the mayor's reaction may be a self-serving attempt to divert attention from his culpability. The problem is that the current grand jury system leaves the public no way to determine who's right. As long as prosecutors dominate grand juries, suspicions will always remain that a controversial indictment represents more the malice of the prosecutor than the disinterested appraisal of neutral grand jurors.

Stripping prosecutors of their complete control of grand jury powers, in and of itself, will not magically transform the grand jury into a shield for the innocent. We remain convinced, though, that by democratizing grand juror selection and introducing procedural and evidentiary safeguards, which we will discuss below, the grand jury can perhaps regain its respected position as a fair arbiter of whether the government

has produced enough evidence to bring an accused to trial.

Or perhaps that is hoping too much? Perhaps the historical, libertarian notion of the grand jury is unworkable? Perhaps the grand jury must be constitutionally modified or abolished to fit existing criminal justice realities? What are Ohio's options? Let us take a closer look:

Should we abolish the grand jury?

No institution ought to be retained merely out of a sense of historic sentimentality. We readily admit that, as matters now stand, the accusatory procedure most states have adopted--the information and preliminary hearing--may offer an accused greater protection than a grand jury. For this reason, some conscientious commentators have recommended abolishing the grand jury. We feel, however, that several considerations must be taken into account before taking such an irreversible step.

To begin with, eliminating the grand jury means rejecting the valid democratic principle that led our nation's founders

to constitutionalize the grand jury in the first place. Simply stated, that principle holds that there is an important place for citizens in our society's accusatory process.

When the grand jury was first written into the federal and Ohio constitutions, the United States was still a nation of communities where people could be expected to know their neighbors. While we no longer have such a society, our need for citizen input into the criminal justice system is just as strong. The growth of our nation has increased the distance between people and the government and fostered distrust and suspicion. We are in the midst of a national crisis of confidence in our political processes. Polls show that citizen trust of government is at its lowest ebb.

A grand jury functioning fairly and independently can help bridge this chasm of cynicism and apathy. Here, already institutionalized into our legal system, is a "people's panel." Our task is to restore the grand jury to its original function, not cast it aside. As stated in a 1975 report to the

American Bar Association's Section on Individual Rights and Responsibilities: "While a lay body such as the grand jury is in need of competent legal advice, we see nothing to persuade us that the grand jury cannot serve important legal and civic functions as an independent citizen's body."[5]

On the state level, most prosecutors are elected officials. As such, they are subject to political pressures. Whether or not to bring charges against a particular person or to strictly enforce or virtually ignore a controversial law are decisions that a prosecutor must make all the time, decisions that are subject to political considerations. Prosecutorial discretion in law enforcement is broad, and indeed, it should be. But prosecutorial discretion cannot go unchecked. The grand jury can afford the protection an accused and the community need.

And surely at a time when we are more conscious of government misconduct than at any juncture in our history, we should think twice before we abolish the grand jury, the

people's historic sword against government corruption. As a body empowered to investigate government corruption, the grand jury is an irreplaceable watchdog. Grand jurors have lives and careers unrelated to their service on the grand jury and thus are not limited by political aspirations in vigorously pursuing probes into official malfeasance.

A vibrant grand jury system can make sure that those entrusted with the public safety don't abuse that trust. Our democratic rule of law works best when there are mechanisms to enforce accountability. The grand jury is such a mechanism.

Should the preliminary hearing replace the grand jury?

Compared to grand jury proceedings, the rules that govern preliminary hearings seem enlightened indeed. Since the courts have ruled that the preliminary hearing represents a "critical stage," defendants have basic rights in the preliminary hearing that are missing in the grand jury chamber. A preliminary hearing is public. An accused is entitled to

counsel and the opportunity to present exculpatory evidence before the presiding judge.

Yet there is a price paid by states that have replaced the grand jury with the preliminary hearing, and that price is citizen participation. We have earlier noted the healthy role citizen input can play in the law enforcement process. We need here only to emphasize that once we remove grand jurors from this process and substitute the decision of one judge, society loses these benefits. Lay grand jurors are likely to be more attuned to community standards than a judge, more able to place a prosecutor's charges in a realistic context, and, in any case, a decision that puts an accused's liberty in jeopardy is too important to place on one person's shoulders.

The argument that a preliminary hearing offers an accused rights denied him/her in the grand jury chamber is, at present, totally accurate, but certainly no reason why the grand jury must be replaced. Basic constitutional rights can be extended to the grand jury chamber, and we will shortly

detail some possibilities you may want to consider. These reforms can be accomplished through statutory enactments; constitutional change is not necessary.

Do we need the "indicting grand jury"?

While 40 years ago many grand jury critics argued for complete abolition of the institution, some modern critics are recommending a halfway measure, that is, abolishing or limiting the grand jury as an indicting instrument. On the federal level, one current proposed Constitutional amendment, for instance, calls for the abolition of the grand jury's indicting function, but the retention of the grand jury as an investigative panel. Another amendment proposed by the Department of Justice suggests leaving the requirement for a grand jury indictment at the prosecutor's discretion.

On the state level, Pennsylvania has already separated out the investigatory from the indicting grand jury.* The

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*Pennsylvania also allows its counties to abolish their grand jury systems, a course many have already taken.

investigatory grand jury accumulates the evidence against an accused which it then presents to a different grand jury, which decides whether or not to indict.

On one level the Pennsylvania distinction between investigatory and indicting grand juries runs true to the precepts that underlie the American grand jury's original purposes. Pennsylvania apparently understands that it is blatantly unfair to expect the same unit that prepares a case against an accused to dispassionately judge the sufficiency of that case. This is exactly why the grand jury was written into the Bill of Rights. The Framers did not want an accused brought to trial simply on the government's assertion that it had enough evidence to warrant further prosecution.

The grand jury was the Framers' go-between, the first stage in the judicial system's determination of guilt, and, as such, part of that system's compulsory process authority. It could subpoena witnesses and evidence and have those who failed to comply held in contempt. This coercive power was and

is indispensable to the grand jury. After all, how can grand jurors determine the worth of a government witness' testimony if they cannot demand the witness' presence? How can the grand jury fairly weigh the government's case if it cannot investigate ambiguities in the proposed indictment? Clearly, the grand jury's indicting role presupposes an investigatory responsibility.

But if investigation is integral to indicting, then how can Pennsylvania separate the two? Only, it seems, by ignoring the justification for the grand jury's investigatory powers. These powers exist to help the grand jury evaluate the case against an accused, not to help build that case. By creating a separate grand jury with a mandate to investigate and no responsibility to indict, Pennsylvania blurs the original reasoning behind the grand jury's right to compulsory process. It confuses the investigation that must be undertaken to discover the perpertrators of crime, an executive branch task that belongs to police agencies and prosecutors, with

the investigation necessary to determine whether there is probable cause that a particular individual committed a crime, a judicial function that belongs to the grand jury.

This distinction is more than legalistic hair-splitting. Suppose we were to suggest that a police officer should have the power to detain anyone he/she chooses without having to explain why to the person or a judge, that the officer should be able to take that person to a secret room where the person, who would not be allowed to have an attorney present, could be grilled on any subject, that the police officer should not have to keep a record of what happens in that secret room, that the officer should be able to force the person to answer questions and send that unfortunate to jail--indefinitely--if he/she insists on silence, If we were to suggest all this, basic decency would demand a shout of "No!" Yet these are exactly the dangers we invite when we separate out an ill-defined investigatory grand jury.

We have strict judicial guidelines that restrict arbitrary

police behavior. Any person, for instance, has the right to remain silent and have an attorney present during police questioning. But by manipulating the grand jury process, law enforcement officials can sidestep these safeguards. A witness who refuses to answer police questions without his/her counsel present can be subpoenaed before a grand jury and forced to answer the same questions.

There is one exception to our discussion of the grand jury's investigative limitations, and that is the grand jury's duty to investigate government wrong-doing. Here the grand jury has a legitimate "police work" function to perform. It has to be allowed to find the official culprits because the government, as we noted earlier, cannot be expected to investigate itself.

But this is an exception that, so to speak, proves the rule. The grand jury was enshrined in the Constitution to protect the people from the government. It does this by both shielding individuals accused of crime and the community at

large from improper governmental behavior.

Simply abolishing the indicting function and separating out an investigatory grand jury would advance neither of these purposes.

We do not, however, wish to imply that the requirement for a grand jury indictment must be at all times inviolate. There may be situations where an accused may want to waive the indictment requirement. A person arrested and bound over by a magistrate on high bail, for example, may want to go to trial as quickly as possible instead of waiting behind bars for a highly probable grand jury indictment. But the decision to waive the grand jury is, of course, a choice for an accused, not the government to make. Grand juries would provide little protection indeed if the very prosecutors they were supposed to oversee could ignore them at whim.

RECOMMENDATIONS

In summary, then, the Coalition strongly suggests that the grand jury be retained in the Ohio Constitution. However, we urge that the grand jury system be reformed to combat present abuses. We therefore suggest that the Constitutional Revision Commission take a comprehensive approach to grand jury reform and recommend that the legislature take action on the following proposals:

1. We recommend that every grand jury witness be given the right to assistance of counsel inside the grand jury room. This has been proposed for the federal system by five reform bills currently before the House of Representatives (H.R.s 10947, 6207, 1277, 2986, and 6006). Several states, including Arizona (ARIZ. RULES CRIM. PRO. 12.6), Michigan STATS. ANN. §28:943 (1972)), Washington (REV. CODE ANN. §10.27.120 (1975 Supp.)), and most recently Illinois, have provided for counsel in certain circumstances.

2. An Ohio grand jury can currently subpoena before it the target of an investigation without informing that person of his/her

Fifth Amendment rights (Burke v. State, 135 N.E. 644 (Ohio Sup. Ct. 1922). In accordance with the American Bar Association Standards for the Prosecutorial Function (Approved Draft, 1971) (hereinafter ABA Standards), we recommend that any person subpoenaed be informed that he/she is a target, if that is the case, and advised of his/her rights. The crime under investigation should also appear on the face of the subpoena. All witnesses should have, in addition, seven days notice between the service of a subpoena and its return date. Similar proposals for the federal grand jury system are now pending before Congress.

3. Ohio case law holds that although unusual, it is not irregular for a grand jury to take evidence in a case after an indictment has been handed up. State v. Hoover, 17 O.N.P. N.S. 65 (Ohio Ct. of Common Pleas 1913), aff'd. 109 N.E. 626 (Ohio 1914) (Ohio). Gathering facts for trial is properly within the purview of law enforcement agencies, and not the grand jury. A long line of federal cases, beginning with an Ohio District Court case, In re National

Window Glass Workers et al., 287 F. 219 (N.D. Ohio 1922), have held that it is improper to use a grand jury for the sole or dominant purpose of preparing an already pending indictment and that it is also a misuse to use the grand jury as a substitute for discovery. See, Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972); United States v. Doe, 455 F.2d 1270, 1273 (1st Cir. 1972); United States v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972); United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964); United States v. Park, 150 F.Supp. 262, 264 (D.Del. 1957). We urge the enactment of legislation prohibiting any such use of the grand jury.

4. The decision whether or not to transcribe a grand jury proceeding is now entirely the prosecutor's (R.C. §2939.11). As has been proposed for the federal grand jury system, such a transcript should be mandatory. A.B.A. Standard 3.5(c) states: "The prosecutor's communications and presentations to the grand jury should be on the record." A complete record of grand jury

proceedings might discourage a prosecutor from taking undue advantage of his/her role as an ex parte representative of the state, especially, as we further recommend, if witnesses are permitted to examine and copy their own testimony. Several states including Montana (REV. CODES §95-1406 (1947 ed.)) and North Dakota (CENTURY CODE §29-10.1-38 (Replacement Volume 5A)) currently have such provisions.

5. On a related issue, we recommend that upon indictment, a defendant be given a copy of the grand jury transcript relating to his/her indictment. This would help equalize the defendant's rights under a grand jury indictment with those now available in a preliminary hearing. Kentucky, in its Rules of Criminal Procedure (5.16 (2)) and California, by statute (PENAL LAW §938), currently provide for such a procedure.

6. Ohio has a "use" immunity statute. Thus, although neither the witness' testimony itself nor any evidence gained directly therefrom can be used against that witness, he/she may still be prosecuted

for that very same transaction. The witness has no part in the immunity decision, and if he/she still refuses to answer, he/she can be found in contempt and imprisoned. To permit a person's Fifth Amendment right against self-incrimination to be neutralized without his/her consent is tantamount to voiding the heart of the Bill of Rights. While the availability of immunity may, in fact, be a valuable law enforcement tool, the compulsory limited immunity now in existence provides an easy method of putting citizens who have not been convicted of <u>any</u> crime in prison for the remainder of the grand jury term. We strongly urge that Ohio adopt consensual transactional immunity. We believe that a person who decides, for whatever reason, to seek immunity in exchange for his/her testimony should have that option. In the interest of safeguarding constitutional rights, however, that immunity should be complete. The American Bar Association, at its 1975 Annual Meeting, took a position in favor of replacing the federal "use" immunity statute with transactional immunity. Transactional immunity is also a part of three of

federal grand jury reform bills (H.R.s 2986, 6006, 1277).

7. The power to compel a person to appear before the grand jury is a great one indeed. It is also one easily abused. Because the penalties for refusing to obey a subpoena are so stringent, we recommend that guidelines be established to check the issuance of subpoenas. For example, before a subpoena is issued, we recommend that a majority of the grand jurors must agree that the witness' potential testimony is relevant to their inquiry. Ohio law (R.C. §2939.12) now permits a prosecuting attorney or judge of the Court or Common Pleas to require a person's appearance before the grand jury without having to first get approval from the grand jury.

8. The grand jury is not bound by the rules of evidence. (See, O.JUR., Grand Juries, §42). Consequently, any and all evidence is admissible. Further, there is no requirement that an indictment be based on legally sufficient evidence. The A.B.A. Standards suggest, as a general principle, that "the use of

secondary evidence before a grand jury should be avoided unless there are cogent reasons justifying the presentation of a matter on the basis of such evidence." Standard 3.6(a) reflects that principle: "A prosecutor should present to the grand jury only evidence which he(sic) believes would be admissible at trial...." We feel that an indictment should be based on legally sufficient evidence, a requirement found in two of the current congressional proposals (H.R.s 2986 and 6006). Subjecting a person to a felony trial is a traumatic and disruptive experience. Resting an indictment on inadmissible evidence or evidence of dubious reliability paves the way for unnecessary harassment and embarassment, consequences the grand jury is intended to prevent.

9. As suggested by the A,B.A. Standards and recently by the California Supreme Court (Johnson v. Superior Court of San Joaquin County, S.F. 23168, Super. Ct. No. 25332 (9/19/75), the prosecution should be required to present any exculpatory evidence in his/her possession to the grand jury. The commentary to A.B.A. Standard

3.6(b) states, "The obligation to present evidence which tends to negate the guilt of the accused flows from the basic duty of the prosecutor to seek a just result." Montana, for example, does not require the grand jury to hear evidence for the defendant, but the grand jury "shall" order exculpatory evidence to be produced if it aware of such evidence.(REV. CODES §95-1408(b)). In Oregon, the statute says that the grand jury "should" order exculpatory evidence to be produced, but it is not bound to. (REV. STATS. §132.320(2)).

10. We recommend a ban on reiterative contempt. In other words, no witness should be jailed more than once for refusing to answer the same questions. This principle has also been supported by the American Bar Association and incorporated into Congressional reform proposals.

11. The method of both grand jury and petit jury selection is an area that requires intensive study. Currently, the method utilized cannot systematically exclude a cognizable group of qualified citizens. United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969),

cert. den. 397 U.S. 1021. Across the country, both on the federal and state levels, juries are being challenged as not being representative. Minority groups, poor, women, to name a few, rarely serve-- voter registrations are often the base of the jury pool, and many people do not register to vote; sometimes telephone directories are used, but not everyone has a telephone; compensation is too low, so people of low or moderate incomes cannot afford the time away from their jobs; small children must be cared for. We suggest that an in depth statistical study of the Ohio grand jury system be undertaken to assure that all segments of the community are represented in adequate numbers in the pool.

In addition, to broaden the base of people who can afford to take the time away from their jobs to serve on grand juries, we suggest that the amount of compensation (now $10/day maximum) be increased to partially allievate the financial burden of citizen participation in our system. We further suggest that some measure of job security be provided so that a juror is not put in the position

of jeopardizing his/her employment by the extended leave necessary to serve. We also encourage the formulation of child care programs to enable parents with small children who cannot afford babysitters to serve.

12. The charge of the court to the grand jury (R.C. §2939.07) should be expanded to include informing the grand jurors of their rights and duties as, for example, the right to question witnesses and to call their own witnesses, the grand jury's power to inquire into instances of alleged governmental corruption, its role in the immunity offer and the decision to subpoena a person.

13. The Court of Common Pleas is authorized to summon a special grand jury whenever the governor or general assembly directs the attorney general to conduct any investigation or prosecution. (R.C. §2939). This grand jury may be discharged and another called, all totally outside of the regular grand jury process. We feel that independent grand juries and special prosecutors are critical in

the investigation of certain corrupt practices, but we recommend that this Ohio statute be altered to provide that where the governor has evidence of criminal activity, he/she should have the attorney general present the evidence to a regular grand jury. In the event of a special grand jury impanelled to investigate specific allegations of corruption, this grand jury should not be dischargeable at the whim of the government.

CONCLUSION

In his concurring opinion in the recent landmark California Supreme Court case (Johnson v. Superior Court of San Joaquin County, supra at , 9), Justice Stanley Mosk reflected:

> Unfortunately, to date courts have been loathe to shine the revealing light of due process analysis into the secret recesses of the grand jury room. Because of this reticence, the state is permitted to subject an individual to the trauma of a felony trial without even cursory consideration of his (sic) side of the story. This, I submit, is a patent violation of the Due Process clauses of the federal and state Constitutions rivaled only by its equally blatant violation of equal protection of the law.

In this our bicentennial year, we are pleased to note that Ohio is seriously studying the grand jury system in all its ramifications

Let us end the wrong that Justice Mosk and many others have identified and make the grand jury worthy of its position in the federal and Ohio Bills of Rights.

NOTES

1 Baltimore Judge Charles E. Moylan, Jr., quoted in "How to Get Your Man," Newsweek, December 1, 1975.

2 Quoted from "The Grand Jury: Shield or Sword," 1972 unpublished paper by Prof. Leon Friedman presented before the Committee for Public Justice Grand Jury Conference, 1972, p. 26.

3 Remarks made at the Judicial Conference of the District of Columbia Circuit, July 2, 1975.

4 Quoted from the testimony of Sen. Edward M. Kennedy before the House Judiciary Subcommittee No. 1, March 13, 1973.

5 Report to the House of Delegates from the Section on Individual Rights and Responsibilities, prepared spring, 1975.

APPENDIX

I. Congressional Record reprint of "Kangaroo Grand Juries" by Frank J. Donner and Richard I. Lavine, from The Nation, Nov. 19, 1973 issue.

II. "Where Did the Grand Jury Go?" by Charles E. Goodell, from Harper's, May, 1973 issue.

III. "The Scholar Invokes His 'Privilege'" by Eda M. Gordon, from Trial, Jan./Feb., 1973 issue.

IV. "The Grand Jury and Post-Watergate America" by Fred J. Solowey, from Trial, Nov./Dec., 1974 issue.

V. "Use Immunity" by Judy Avner and Kathy Johnson, from Trial, Jan., 1976 issue.

VI. Congressional Record reprint, "The Federal Grand Jury," remarks by Charles Ruff. (July 14, 1975)

VII. Grand Jury Legislation Introduced in 94th Congress as of May 9, 1975.

VIII. Congressional Record reprint, "Conyers Introduces Grand Jury Reform Act of 1975." (February 6, 1975)

IX. Congressional Record reprint, "The Right to Counsel in Grand Juries." (not attached)

* Note: Because of the limitations of space, the above material is not published.

GRAND JURY SUMMARY - MONTGOMERY COUNTY

Term	Days of Hearings	Persons Indicted	Persons Ignored	Total Cases Heard	Cases Per Day	Total Witnesses	Percent of Persons Indicted
Jan. 1973 (1st Half)	37-1/2	307	25	271	7.2	787	92.44
Jan. 1973 (2nd Half)	38-1/2	290	15	268	7.8	851	95.0
May 1973 (1st Half)	36	204	26	230	6.4	638	88.0
May 1973 (2nd Half)	39	256	21	237	6.0	717	92.41
Sept. 1973 (1st Half)	37	286	23	265	7.2	758	92.2
Sept. 1973 (2nd Half)	34	237	10	216	6.4	660	95.9
Jan. 1974 (1st Half)	39-1/2	364	21	329	9.2	979	94.5
Jan. 1974 (2nd Half)	40	366	27	337	8.425	942	93.13
May 1974 (1st Half)	37	232	26	226	6.1	741	90.0
May 1974 (2nd Half)	42	319	32	319	7.6	893	90.0
Sept. 1974 (1st Half)	42-1/2	301	23	300	7.2	916	92.90
Sept. 1974 (2nd Half)	35	284	18	267	7.6	750	94.0
Sept. 1974 (Special Jury)	11	92	8	81	7.4	208	92.0
Jan. 1975 (1st Half)	39-1/2	303	35	286	7.1	841	90.0
Jan. 1975 (2nd Half)	37-1/2	380	23	358	10.1	1055	94.3
May 1975 (1st Half)	42	270	15	270	6.4	796	94.6
May 1975 (Special Jury)	10-1/2	86	7	83	8.0	210	92.4
May 1975 (2nd Half)	41	184	15	182	4.44	563	92.46
Sept. 1975 (1st Half)	41	322	22	302	7.36	768	93.6

NATIONAL PROSECUTING ATTORNEYS ASSOCIATION

TASK FORCE C

STANDARDS ON THE GRAND JURY - FINAL DRAFT

1. Continuation of the Grand Jury

There should be in each jurisdiction a grand jury possessing both indictment and investigatory powers.

2. Charging Function of the Grand Jury

a) The prosecutor should have the option whether to present the case to the grand jury as long as there is provision for a probable cause determination if defendant is incarcerated. In any case, the option of utilizing the grand jury should be available to the prosecutor.

b) Where charges are reviewed by a grand jury, the requirement for a probable cause hearing should be eliminated.

c)

1) a. Hearsay evidence should be utilized only when:

--the direct testimony of the primary source is unavailable or demonstrably inconvenient to obtain;

--utilization of the primary source would not have made a difference to the grand jury's determination;

--the primary source is expected to be available for testimony at trial.

b. Where hearsay evidence that would not be admissible at trial is presented to the grand jury in accordance with (c), its character should be clearly identified.

c. These new guidelines to prosecutors should not be considered to confer on defendant on expanded right of review over the quality and sufficiency of evidence considered by the grand jury.

ii. The prosecutor should disclose to the grand jury an evidence which he knows will tend to negate guilt.

iii. A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law.

3. Investigatory Functions

a) The precise scope of grand jury investigatory functions should be determined by each state.

b) The prosecutor must present evidence to the grand jury. If, however, the grand jury believes that there is a conflict of interest, it should seek the advice of the court as to the proper action to be taken. Witnesses before grand jury investigating panels should be allowed the assistance of counsel, unless and until immunity is granted. Counsel should not accompany the witness into the grand jury room during the testimony, but should only be available for consultation outside the grand jury room.

c) State law should provide that upon petition from two or more prosecutors, a grand jury be impaneled to investigate matters of a specific nature, and to bring

charges based upon that investigation based on activities within all of the counties joining the petition.

d) Where grand jury reporting is provided for the reporting function should be governed by the following procedures:

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 of removal or disciplinary action; or

(b) Stating that after investigation or 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 recommendation 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 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) and)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,

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 such report may not be subject to subpoena or public inspection during the pendancy 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.

4. Prosecutor's Relations with the Grand Jury

a) Where the prosecutor is authorized to act as legal advisor to the grand jury he may appropriately explain the law and express his opinion on the legal significance of the evidence but he should give due defference to its status as an independent legal body. If the grand jury believes that a conflict of interest exists, it must consult the court for advice or appropriate action.

b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

Ohio Constitutional Revision Commission
Committee to Study the Grand Jury and the Civil Petit Jury
June 25, 1976

Summary

The Committee to Study the Grand Jury and the Civil Petit Jury met on June 25, at 9:30 a.m. in the State House in Columbus. Committee members present were: Representative Alan Norris, Chairman, Mr. Craig Aalyson, Mrs. Katie Sowle, Representative Marcus Roberto, Mr. Bruce Mansfield. Senator Paul Gillmor was represented by Robert Leutz. Ann Eriksson, Director, and Julius Nemeth attended from the staff.

Speakers included Professor Alice Padawer-Singer, Senior Research Associate of Columbia University's Bureau of Applied Social Research and the Director of the Bureau's Jury Project; the Honorable Alba Whiteside, Jr., Judge of the Tenth District Court of Appeals; Professor Howard Fink of the Ohio State University Law School; the Honorable Lloyd Moore, Prosecuting Attorney of Lawrence County; and Marcus Gleisser, a Cleveland attorney and newspaper editor.

Mr. Norris: For the benefit of three of our witnesses this morning, I might just summarize briefly why we're here, what the charge of the Committee is, and some of the general directions that we're thinking of right now. Our purpose in being formed was to study two areas. First, the grand jury, and we have had hearings on that and developed a lot of material that we will be working on. The second area of our charge is the civil petit jury. We are not to spend any time studying the criminal petit jury -- in the area of criminal law, the grand jury only. There are several areas in the civil petit jury that interested the Committee on the Bill of Rights. One of the questions that came up for consideration in the Bill of Rights was the question of additur and remittitur, both in its present form and whether or not it ought to be constitutionally allowed as an appellate remedy. Just as we have an appellate remedy from a decision by a jury on the facts -- where you have a very heavy burden, of course -- before the court of appeals, why not that same heavy burden for additur or remittitur, were some of the questions that were raised. Insofar as civil juries themselves are concerned, then there is the question of their effectiveness and the advisability of retaining them in the 20th century, the feeling being that we at least need to inquire into that situation. Under our Constitution, our Supreme Court has already reduced the size of civil juries to eight, so the size, although a consideration, certainly has not been one of our primary problems because we've already addressed that. Another area would be if we retain the civil juries, in what way should they be retained, if at all. A couple of ideas that have been raised by members of the Committee were whether or not we ought to, by Constitution, give to the General Assembly the right to limit the kinds of cases in which a person would be entitled to a trial by jury -- a civil jury. Or should the Constitution itself limit the kinds? Or should we simply be entitled to a trial by jury in all civil cases? Another closely related question, of course, would be the monetary limit. Should we by the Constitution put in a monetary limit under which we are not entitled to a trial by jury, or should we leave that determination to the General Assembly by Constitution? Those were just some of the areas that were raised by the Bill of Rights Committee, and we are an off-shoot charged by that Committee with inquiring into areas where it didn't have time to inquire. That's the reason we're working on the grand jury and the civil jury.

Dr. Singer, at this point we would like to hear from you, and I would like you to know how happy we are that you could come on such short notice. We are certainly appreciative of that. Since we have the tape recorder on, I'd ask you to tell us for the record just some of the background to yourself and the project that you are currently working on.

Dr. Singer: I am presently working at Columbia University. I am the Director of Jury Studies at the University and I have been there since 1968 as Director of Jury Studies. I have conducted studies on the impact of pre-trial publicity, on the effects of voir dire, on decision making in 12 versus 6 member juries, and unanimous versus non-unanimous decisions. The last and the present research in which I am still analyzing data is 12 versus 6 member juries and unanimous versus non-unanimous decisions. This research has been funded by the National Science Foundation, through its Division of Research Applied to National Needs. It has been deemed to be a national need to determine what the impact of reducing the size of the jury and of changing from unanimous to non-unanimous decisions is. That impact was assumed to be non-existent by the Supreme Court in a variety of decisions. In such decisions as Williams v. Florida, Apodaca v. Oregon, Johnson v. Louisiana, the Supreme Court came out with allowing state courts to go, as I'm sure everyone knows here, to a less than 12 member jury and to non-unanimous decisions if a state desired to make such changes. And some of the assumptions made by the majority view of the Supreme Court were that there would be similar representation of the community in 12 and 6 member juries; that deliberations would be just as robust and careful in both types of juries; and that there would be attention to minority views. Also, one concern of the Supreme Court seemed to be that one perhaps would avoid hung juries if one went from 12 member unanimous to 12 member non-unanimous juries. The minority view of the Supreme Court dissented, of course, and raised the question of the value of a hung jury and the one voice which might have represented reasonable doubt, and raised the point that deliberations in a smaller jury might not be as robust as in a large jury and that, actually, the function of the jury was robust deliberations and not a "tea-party". I'm paraphrasing, I'm sure. The Supreme Court minority did not mention "tea-party", but these are my own words. In order to study this problem, I looked at previous studies which had all involved either field studies in which, unfortunately, the effects of cases tried in front of 12 and 6 were confounded, so that if you compared, for instance, 12 and 6 member juries in terms of time taken for deliberation, you had at the same time the effects of complex cases tried in front of 12 and simpler cases tried in front of 6. So that this type of comparison was not valid and not valuable. Other studies have been done using another method, which is the non-traditional type of legal research which is springing up at this time and which is taking on more and more importance. It is an inter-disciplinary research involving lawyers and social scientists. The experimental research, unfortunately, on 6 and 12 was done using students acting as mock-jurors, and again, students acting as mock-jurors cannot represent the jurors at large. So the National Science Foundation and I thought that we perhaps ought to conduct a very realistic study in the courts. It would be an experimental study, but the mock-jurors would be jurors called to jury duty in the court, there would be voir dire as in a real case, they would all watch the same trial and render a verdict. We would have a group of juries which would be 6-member unanimous juries, a group of juries which would be 12-member unanimous juries, another group that would be 12 member non-unanimous juries, and a group of 6 member non-unanimous juries, and compare their functioning, their verdicts, the time taken for deliberations, and so on.

There has been a desire to achieve greater speed, greater efficiency, and greater savings in time and money, and I think these desires have come down to the smaller juries and the non-unanimous decision juries. However, the functioning of these juries is what is important to lawyers and to the public at large. I'll go through some of the results. We looked at verdicts. Verdicts are important, certainly, to lawyers and to plaintiffs and defendants. But they really only reveal a very small part of what goes on, so we've looked at deliberations, we've looked at hung juries, we've looked at the majority opinions of jurors before they come to deliberations. In terms of verdicts we found (and again, this depends very much on the type of case which you show the jurors; the case we showed was a trial in which the evidence was not very strong evidence against the defendant) that in that case you have more

"not guilty" verdicts in 6 member juries than in 12 member juries. If you have a case in which the defendant appears to be more guilty because he arouses stereotypes -- let's say he is described as a "drifter" -- then you would expect on the basis of statistics -- and I'm sure we could prove it if we ran another study -- you would expect more "guilty" verdicts in 6 member juries. On the basis of statistics, and we have shown it really on an empirical basis, too, you don't have the same pattern of verdicts in 6 that you obtain in 12. In terms of hung juries, we have had as many hung juries in 12 unanimous juries as in 12 non-unanimous. We also had a similar number of hung juries in 6 member unanimous juries. So that you really don't avoid hung juries. There is no need to change from 12 unanimous to 12 non-unanimous to avoid hung juries. You don't avoid them. In terms of opinions, the opinions of jurors before they come to the deliberating room are very important. If jurors already have an opinion as to the guilt of the defendant, this will very much decide the way in which deliberations will be conducted, because juries, in general, conduct some form of balloting at the beginning of the deliberations. What we finally got is that in 24% of all 6 member juries, five or six members already come to the deliberating room with their opinions made up as to the guilt or the innocence of the defendant one way or the other. But that is almost as if you are playing a game of chance, because 24% of the time, deliberations are almost not necessary. They are certainly curtailed. We looked at a time table for deliberations of 6 member juries in which there was an overwhelming majority of opinion before deliberations, and the remaining 6 member juries, and we found that indeed there was a statistically significant difference in deliberation time. When you have an overwhelming majority, there is very little need to deliberate. Again, we looked at reversals. By reversals I mean, does the early minority at the beginning of deliberations reverse the majority -- does it happen? It has been previously reported that in general the majority almost always wins out. Well, this should be restated with a certain amount of caution, because first, you have many juries that start out 6 to 6 or 3 to 3, and then you have a certain number of juries which start out as a 9 to 3 or 8 to 4. So what happens is that when you compare the reversals of the majority by the minority, you find again that there are more reversals in 12 member juries than in 6 member juries. Now, this points to a much greater influence by the group and by the jury in 12 member juries than in 6. Whether that is valuable or not, is, again, a subject to be discussed, but the 12 member juries are different from the 6 member juries.

I am now just going to give you a few more data and perhaps you will have then some questions. If you aggregate, and look at all 6 member juries and all 12 member juries in terms of ethnic background, in terms of religious composition, and so on, you find that they are alike. However, we've done another kind of analysis, a jury-by-jury analysis. We have looked at each jury within the 6 member group and within each 12 member jury, and what we have found is that there is a much smaller likelihood of a member of any minority being on a 6 member jury. There are also fewer 6 member juries in which you have members of certain political philosophies. In other words, the 12 member jury is much more heterogeneous in composition, and represents the community at large in terms of political affiliation, in terms of ethnic background, in terms of education. For instance, in a 6 member jury, there are only 22% of the juries which have jurors who have had less than seven years of schooling, whereas in 12 member juries there are 43%. Now, we went to the other extreme, to those that have college degrees. In 6 member juries, you only have 48% in which there are some jurors with a college degree. In 12 member juries the figure of 74% compares with the figure of 48% in 6. And there are differences all the way through. So that definitely, I think we can conclude that the 6 member juries are different. When you also look at some of the corrolations between voting for "guilty" and voting for "not guilty", and that depending on the cases these corrolations change. But, for instance, in our study we have found that jurors who have had greater experience as jurors previously are more likely to vote for "guilty". If you then find that you have fewer such jurors in 6 member juries, if you have some of these members in 6 member juries but not in all 6 member juries, whereas these members appear in every

12 member jury, then what you end up with in a smaller jury is an unstable jury. What we have demonstrated is that you may have an excellent 6 member jury and you may have a very bad 6 member jury. The 12 member jury may contain all kinds of people and therefore will present a greater element of stability if you compare every 12 member jury with every other 12 member jury. Whereas 6 member juries are very much unpredictable. And this seems to confirm some of the opinions of Judge Baum, for instance, and Judge Kaufman about the 6 member jury. We have found a new difference between unanimous and non-unanimous juries in terms of avoiding hung juries. No differences in terms of saving time for deliberation. Then again, I really don't see what is accomplished by going to a non-unanimous decision type of jury. I am also looking now at content analysis of jury deliberation. We have taped jury deliberations with the jury's knowledge and consent, and we are just about analyzing this data, and I believe that we're finding a greater percentage of inaccuracies about facts and law are corrected in 12 than in 6 member juries.

Professor Fink: Is there any significant time-saving or cost-saving difference between the 12 and 6 member jury?

Dr. Singer: The only saving is in money but not in time.

Professor Fink: Why in money?

Dr. Singer: In money because of the fact of the numbers. You pay six instead of 12 persons. That's about it, and it's really a very small amount of money in comparison with the total cost of the judicial system. I interviewed Judge Goldberg in this research, and I interviewed Judge Meyer who is a Nassau County Judge. Judge Goldberg mentioned, and this is just a quip, that he had done an analysis of the cost of the federal judicial system and found that, indeed, the whole cost of the federal judicial system was less, and I quote "less than two squadrons of B-1 bombers". And he said, when you can compare the cost within this framework, the cost of the jury system is very minimal. In his opinion, one should not tamper with it.

Mr. Mansfield: Did you find any evidence where you had a dominant character who was foreman?

Dr. Singer: We are looking into that. There are some juries which have dominant characters. I'm just about analyzing this data to see where it appears more often, and so on. This study is a very extensive study and we are going back and forth between questionnaires. Jurors are answering extensive questionnaires and also we are listening to their taped deliberations, and they are very time-consuming.

Mr. Aalyson: Do the studies that you have done relate to criminal juries?

Dr. Singer: They relate to criminal juries. They can easily be, I think, applied to civil juries.

Mr. Aalyson: You mean the same thinking would carry over?

Dr. Singer: Yes. The same representation within, and so on.

Professor Fink: So the net of it is that there isn't much to be said for going from a 12 person to a 6 person jury?

Dr. Singer: No. Every time you reduce the size of the jury you are really changing it.

Mr. Aalyson: Have you done any precise studies on whether you feel that 12 member as opposed to 6 member juries are more conservative or more liberal in their outlook? If you can define those terms, of course.

Dr. Singer: Yes, what you find in a 12 member jury is a cross-representation of outlooks so that they battle things out, whereas in a 6 member jury you are very often likely to find either a 6 member jury made up of all conservatives or a 6 member jury made up of all liberals, and therefore you have this kind of instability from jury to jury, which is worrisome.

Mr. Aalyson: Did I understand you to say that in the 12 member juries there was a greater disposition to reach a "guilty" verdict?

Dr. Singer: In the 6 member jury. It is the kind of jury which would be more susceptible to the appearance of the guilt or non-guilt of the defendant, and if the defendant tends not to be guilty, the 6 member jury would be more likely to render "not guilty" verdicts. If the defendant appears to be guilty, well then, easily enough there arises some prejudice. Then the 6 member jury would more likely end up with a guilty verdict.

Professor Fink: So that is to say that the 12 member jury tends to be more rational in debate and considering all of the issues.

Dr. Singer: Yes.

Mr. Norris: Do you intend to inquire into the size of civil jury verdicts?

Dr. Singer: Yes, I'm going to try now to do the same analysis in the courts, and do field work now to really look at the end product or the results of civil trials, and relate them to the original opinions of the jurors.

Mr. Norris: It seems to me what you are likely to find if the same thing holds true is that over the long run there may not be any difference between 12 and 6 member juries insofar as the liberality with the size of the verdict. But as contrasting one 6 member jury to another 6 member jury, you might get a very high verdict here, but then another might be a very conservative 6 person jury and so you get a very low verdict. Maybe if you look at 100 twelves and 100 sixes, they might even out, I don't know.

Dr. Singer: What happens is if you aggregate them, they even out. But if you don't...

Mr. Norris: You get the highs and lows more in the sixes.

Dr. Singer: Yes, you have an unpredictable kind of jury.

Professor Fink: Which would tend to give you more new trials on the basis of excessive or inadequate verdicts with the 6 person jury, if that is true.

Mr. Norris: It could tend to show that we need additur and remittitur more with the reduced sizes of juries. Further questions of Dr. Singer?

Mrs. Eriksson: Could I make an inquiry? In making your comparison of the juries with respect to the heterogeneous nature of the jury as representative of the community, which is what is often alleged, did you make comparisons of these figures with the community as a whole, or are you simply stating these as the chances of finding certain characteristics in the jury? What I'm saying is, do you find in the community that there is more likelihood to meet persons with upwards of seven years of education or with college degrees as compared with the juries themselves?

Dr. Singer: I have not looked at the composition within the community because actually jurors called to jury duty do not necessarily represent the community at large. I believe there are jurors who represent the jury community, you could say, if they

were chosen randomly from the jury room, and there is voir dire by lawyers in the usual way. So what we find as a matter of numbers is that this could have been predicted as such, and there, statistics had no impact, unless you really demonstrate that in every jury there are less extreme categories in every 6 member jury than appear in the 12 member jury. So that you have fewer less-educated people in 6 member juries by pure chance, and by pure chance also have more people with college educations in 6 member juries.

Mr. Norris: Further questions of Dr. Singer?

Mr. Nemeth: Dr. Singer, have you done any studies or do you have an opinion as to the participation of individual jurors -- the likelihood of the participation of individual jurors as it relates to jury size? That is, are they more likely to participate if the jury is smaller or larger?

Dr. Singer: The impression that one gets when one listens to a 6 member jury and compares it with a 12 member jury is that, in general -- and that again is in general because there are some 6 member juries which are excellent and which deliberate very strongly -- there is an atmosphere of politeness and gentility in a 6 member jury which you do not have in a 12 member jury. Twelve member juries thrash things out and they really battle it and discuss the evidence. The 6 member jury -- they become friends, and they don't want to hurt one another's feelings and what they do is say, "Well, if you see it that way, I can understand it but could you look at it in this other manner?". And they lose themselves in politeness. They lose the subject. And the 12 member juries seldom do that. There is a certain anonimity in a 12 member jury that really allows you to really come out.

Professor Fink: And as it gets to the smaller group, there is more intimidation. When you are before a larger body you are simply not influenced by one person or two people as directly as in a six person group.

Mr. Norris: Dr. Singer, do you as a result of your studies have any suggestions to make to us? I don't know if you know exactly where our Constitution is on civil juries.

Dr. Singer: Yes.

Mr. Norris: But we don't have trouble in reducing the size of the jury so long as we have three-fourths. With one exception, in appropriation cases, where you've got to have 12 jurors. And pursuant to that, our Supreme Court has said by rule that civil juries are going to eight members. I have drawn some tentative conclusions from what you have said but I wonder if you have any suggestions to make at this time?

Dr. Singer: Really my preference is, and actually the preferences of jurors is, for the larger jury and for the non-unanimous jury, among jurors who have served.

Mrs. Eriksson: You said for a non-unanimous verdict.

Dr. Singer: No, I mean for a unanimous jury. We find that the majority of jurors prefer a 12 member, unanimous jury. Even those who serve in 6 member juries. Of those who serve in 6 member juries, 77% prefer a 12 member jury. Of those who serve in 12 member juries, 87% prefer a 12 member jury. Because we felt that the experience of having served on a 6 member jury would make them more favorable to the 6, we looked at this data.

Mr. Mansfield: Do you think these figures result from the fact that the responsibility is more diluted in the 12?

Dr. Singer: I don't know that it is necessarily a response to more diluted. When we interviewed jurors, they believed that in any case, if you are a defendant, your rights as that defendant are better defended and better taken care of in a 12 member jury because there is that greater number to persuade towards guilt or acquittal. Whereas in a 6 member jury, they were very much aware that there is a chance factor -- the kind of chance factor that I mentioned before. We also looked at the alignment, the early majority in the 12 member jury, and at no time did we have a 12 member jury arriving in the deliberating room with 12 similar opinions, or with 11 similar opinions. It never happened. Only 4% of the time did we have a 12 member jury arrive with ten similar opinions. So again you have a different set of rules operating.

Mrs. Eriksson: Have you done any work or are you contemplating any work addressed to the question of no jury in civil cases at all? Comparing a trial before a judge and a trial before a jury?

Dr. Singer: I have not done any work in this area. I have done some thinking about it. I believe that it would be important to allow the parties to decide whether they want a trial by a jury as opposed to a trial by a judge. Then perhaps in some very difficult cases, where one needs expertise, the parties could decide on judges or on expert arbitration. I think that really should be left to the parties.

Mr. Norris: Further questions of Dr. Singer? If not, we thank you again and we invite you to stay as long as you like. Our format, because of the size of this committee, like a 6 member jury, perhaps, has been rather informal, and as a result we invite not only committee members to question witnesses but other witnesses to question the witnesses. So if you feel that you would like to address questions to other witnesses, please do so.

Dr. Singer: Thank you.

Mr. Norris: The second witness this morning is the Honorable Alba Whiteside, who is a judge of our Tenth District Court of Appeals. Judge, I'm aware of an opinion of yours touching on the subject of remittitur. I don't know whether that's what you are intending to limit your discussion to or not, but please understand that you don't have to.

Judge Whiteside: Thank you. I wanted to say that I will not be able to stay when I finish because I do have another commitment a little later on in the morning, so when I do leave it is not because I'm not interested but because I have to be elsewhere later. I'm not here as an expert with a lot of knowledge on why jurors do what they do, and what is best. The studies that I have made are my own personal observations through the years and a little bit of knowledge of the law and the problems that have arisen. I really intend to touch on all of your points shortly. First, as to the question of should there be juries in civil cases. I am a strong advocate of the jury system. I think personally from my observations, both as a lawyer and as a judge, it is the best system that has ever been developed. It is much superior, in general, to judges trying the cases. As a matter of fact, I think one of the dangers in our society today is too much power for judges rather than too little, although we do not have that problem particularly in Ohio. In our elective system, especially, judges have too long tenure. They become somewhat king-minded. I think there is more of a problem of tyranny in the judiciary than there is coming from the legislative or executive. So I think that too much power concentrated in the judge is not good. On the other hand, I think that the system we have at present, where there are instances where cases are submitted to the judges, many of them, by the parties, is also desirable if the parties want to do so. But there are some disadvantages to that system too. When a case is tried by a jury, the jury goes

back in deliberation and makes a decision. If you try a case to a judge, almost invariably, the first thing is the lawyers submit briefs and then talk about a law and then file more briefs, and then there are some oral arguments later, and then several months later you get a decision from the judge. You don't have the quickness or the certainty of the deliberation while everything is fresh in your mind. Judges usually don't operate that way. Now, if the parties agree to that, that's fine. I know from my work as a trial judge, I tried many instances to make a decision quickly because I thought that it was just as desirable for me to do it as it was for the jury to do it. But I also found that it was very difficult to do because of the fact that you did have other work to do. When you are trying a case to the jury, you prepare the laws and your charges go along. When you are trying a case for the facts, what you tend to do is concentrate on the facts and then you have to worry about the law later, because you don't keep the law as firmly fixed in your mind. And I found myself doing this. I had to go back and do research, which I could otherwise do during the trial, before I would make a decision, because I didn't have the law firmly in my mind. Either all of the parties hadn't brought it to me or we didn't have the charges there. You have to think a little bit about it. So it is putting two functions on the judge at the same time. It actually doubles his burden, and makes it more difficult for him. And I think dividing the responsibility up is a very good system. There is nothing wrong with such a system and I see no reason to change it. As to ideal jury size or desirability and effect of a special majority requirement, I think this is largely a matter of viewpoint. What are you looking for? First, the special majority requirement which we do have in Ohio. As a lawyer, I felt it was the greatest thing in the world when I finally got a 9 to 3 verdict in my favor. I was glad when the deliberation ceased. However, when I had a 9 to 3 verdict against me, I wished we had a unanimous verdict requirement, so you could have more opportunity to change the result. So that depends on your viewpoint. I have had both experiences and yes, I liked it very much when I won the case, and didn't like it so well when I lost. I felt kind of bad that those other three didn't have more opportunity to convince the other nine. At least lower the verdict if nothing else, in the defendant's case, or up the verdict if it is the plaintiff's case. So I think it depends on your viewpoint. I think the special majority requirement we have in Ohio does work very well. It does have its drawbacks. Despite statistics to the contrary, I think it definitely has to shorten deliberations or else limit hung juries, one or the other, because of the number of other than unanimous verdicts I have observed. In those cases, obviously, either the jury is going to vote unanimous or be hung, or they are going to take more time in deliberations to reach a verdict. Maybe in the average case this does not happen. It has been my experience that a substantial number of cases (I don't have statistics) do result in a split verdict in our system. On the other hand, the non-unanimity requirement eliminates another problem which I have observed. It doesn't happen frequently but it happens on occasion, which is one of the posits of the hung jury, and that is an unreasonable juror. A juror whom someone didn't catch on voir dire, who is opinionated, and who is not going to discuss the case with the other members of the panel and who is going to hold off their position no matter why, and won't listen to reason or anything else. That does happen occasionally and we either have the hung jury or we have the non-unanimous system which takes care of that, which I think is very good in civil litigation. Actually, I think our special majority requirement in Ohio is a very good compromise between all of the various viewpoints. I think it works very well. I personally have no problem with it and I see no problem with it. Ideal jury size. Personally I prefer the 12 member jury. I feel more comfortable with it. It has all kinds of advantages. I know the Supreme Court has put in the 8 member jury, and I can't say that I've observed any observable difference between verdicts of an 8 and a 12 member jury, because unless you made a study like Dr. Singer did on the same case, you can't really make a true comparison. It may be because of tradition, in part, but I don't think it's solely that. My

own observation from dealing with people and on committees is that you tend to get more viewpoints expressed and more reaction from a larger group, as long as it is not too large, than you do from a smaller group. It is more difficult for one person to dominate 11 others than it is for one person to dominate five others. It may be on a 12 member jury that you have two or three who are doing the domination, but at least you don't have the one. I know that jurors do get into heated debates, both from my experience as a lawyer and from the jurors and as a judge. Many times in the court you hear some pretty loud sounds coming out of the jury room. You don't know what they are saying, but you know that the din is probably high. In many, many cases they finally come out with no bloodhsed, they are still friends usually, and they go on their way. As I have expressed on many occasions, I am a great believer in the jury system because I think, really, it is a matter of faith in people. Our jury system is founded upon the premise that citizens or ordinary people are capable of deciding controversies among other people, and trying the guilt or innocence of the people accused of a crime. They have this ability, and that is putting great faith in the average person. It's a question of looking for the cross-section of the average person. I happen to be one of those persons who has that faith. I don't think judges are strictly imbued with some special power which gives them a great advantage over the average person as far as judgment is concerned as what facts are or not. We have training, we have experience, we have law, and our very training and experience at times may well bias us in directions that the average person may not have. It may limit us, rather than broaden us, in our scope. This very experience we do have, because we have probably heard this same case before so many times, may tend us to go in the same direction in every case even though there may be some reasons to be different in this case. If you hear the same story for the 15th, 20th, 50th time, you may say "Oh, that same story again". But you may not look as much at the credibility. Maybe this is the time when it is true, the one time out of a hundred when it actually happened that way. You don't know. The jurors, I think, would have a better perspective, although on the other hand, the jurors haven't heard this good story before and they may be taken in by it, whereas a judge knows that he has heard it many, many times.

The Supreme Court saw fit to put 8 member juries and it can go back to 12 when it sees fit under the present law. Although I prefer the 12, I cannot say that there is any great harm in the 8 member jury in civil cases. It is working adequately over-all. Studies have been made I know of which indicate that it is causing great injustice. I have noticed possibly some degree of greater instances of higher verdicts, but I don't know if that is a trend of the times or whether it is the result of 8 member juries. I have noticed locally more higher verdicts than we used to have. Whether that is a result of 8 member juries or a result of the times I could not say. But there have been, I think, from my observation, not statistics, more higher verdicts in the local courts since we have had the 8 member jury than there were previously. It doesn't mean that the average verdict has changed. But there have been some high verdicts. Who knows why? I don't. I don't profess to, but there has been that factor. It may be the cases.

The one possibility I do see is the elimination of the jury on the basis of some monetary limitation as to the amount of a claim which is entitled to be tried to jurors. I believe that the federal constitutional limit is $20. It was a very realistic limitation at that time. The amount of money today that would be $20 then I do not know, but I can see, as then, a reason for some kind of monetary limitation. In some of your smaller cases, there probably should not be a jury. In small claims courts you do not have and for obvious reasons should not have one.

But unless there is some compelling reason to put in a provision for a monetary limitation or authorize one, I am always reluctant to put these kinds of things in the Constitution itself because as time goes by they don't get changed, and while $100 may be reasonable at one time, today that might be $2,000 or $3,000 to have the same effect, and we don't tend to change our constitutional provisions that quickly. Therefore, I think if we go to that it should be an authorization rather than a specific amount in the Constitution itself. There is some basis for an authorization of some amount, some dollar amount limitation. On the other hand, if you say "authorize", they may authorize a million dollars and therefore you limit the jury system entirely. So you have the other side of it.

I have not found the jury resolving cases to be a great problem. Maybe it is in some places. I have not heard of it anywhere being a great problem in Ohio. Additur and remittitur is a very interesting area. Again, I don't think there is, unless we want to change something, any great need for any change. The courts presently utilize remittitur on many occasions. Some lawyers say they are usurping the function of the jury. The courts have been held that remittitur is a proper function. We have granted remittitur on occasion in our courts.

Mr. Norris asked Judge Whiteside to explain how remittitur works in practice.

Judge Whiteside: There are several kinds of remittitur. Of course remittitur-additur can be used when you are saying "Here is a clear error, mathematically certain." If it is a jury case, we could make a judgment differently. If the court finds a judgment for somebody it has to be some amount because purely mathematically the jury made a mistake in addition. If the defendant owes three notes and each of them is $1,000 and the jury reaches a $2,000 verdict, it is obvious that if they made a finding that he owes on all three notes, then it is $3,000. That is additur in that sense of jury determination.

Mr. Norris: What can you do on the court of appeals at that point? Can you render a verdict for $3,000?

Judge Whiteside: We have done it. We have changed or modified the judgment on occasion, yes. The only time we have done it on additur is where it is a plain matter of mathematics: if the plaintiff is entitled to the judgment he is entitled to this much money, and the jury has found he is entitled to judgment. The parties have never objected and therefore we haven't had any problems. And that presently requires the approval of one of the parties. And the party receiving never objects. So that the party paying has to.

Mr. Norris: Do you think that would hold if you corrected that verdict and you entered a judgment of $3,000 and there was an appeal? Would that hold up?

Judge Whiteside: I see no reason why it would not, where it is a case of just a matter of clear error. I don't think you would have to grant a new trial. The error is correctable without being prejudicial, and why go through another trial on all the issues?

Mr. Norris: Tell me some of the other areas.

Judge Whiteside: Additur is not being used other than in that instance that I know of any place in Ohio. Courts in Ohio are very reluctant to use additur. There is very little authority and the instances where it has been used are very, very seldom. I recall an instance where it was used in our court, in the court of appeals, where

there was an appropriations case and the verdict happened to come out lower than the evidence. The court ordered an additur to the minimum evidence. The state accepted it and that was it. No appeal was taken.

Mr. Norris: Same theory?

Judge Whiteside: Same theory. Well, the theory was that the minimum amount of money they could have found was this amount. Therefore, the owners had at least that amount. They couldn't be entitled to less because that was the lowest evidence.

Mr. Norris: Weren't you really saying that the verdict there was against the manifest weight of the evidence?

Judge Whiteside: Yes, but you can't do it strictly on the manifest weight because you can't change it on strictly manifest weight. You're saying there is an error in the amount of recovery.

Mr. Norris: But you enter a judgment.

Judge Whiteside: We enter a judgment subject to the agreement of the party making the payment.

Mr. Norris: So if he had not agreed....

Judge Whiteside: ....there would be a new trial.

Mr. Norris: How about in your first example?

Judge Whiteside: Again, the person making the additional payment has to make an agreement of some sort.

Mr. Norris: Even in the clear error of increasing from two to three thousand dollars?

Judge Whiteside: I think we have done it in a couple of instances. We have given them an opportunity to correct. And in the case I mentioned, the appropriation case, there was an opportunity given to agree and it was agreed to readily rather than having a new trial and taking the chance of having a higher verdict. I don't recall whether that was appealed or not to the Supreme Court. But if it was, they did not take it in.

Mr. Norris: What I'm trying to get at is, do you view additur, if used by your court, as still a consentual remedy?

Judge Whiteside: Essentially, it is a consentual remedy. Remittitur is a consentual remedy.

Mr. Norris: The same way with additur.

Judge Whiteside: The same way with additur, unless, now, there are exceptions to that. Again, we have on occasion said that as a matter of law the judgment has to be a certain amount under the facts and we have entered judgment for different amounts. And of course, in a judge trial, we have the right under Rule 12 to render the right judgment. We've got that, up or down, if a trial is to the judge rather than the jury.

Mr. Norris: What rule is that?

Judge Whiteside: Rule 12(C), is it, the appellate rule? In a trial to the judge, we have an appellate rule implementing the constitutional provision on jurisdiction. I assume that's what it is doing, at least. We have the jurisdiction in cases tried to a judge without a jury, where we find that the only error is manifest weight of the evidence, to enter the judgment that should have been entered.

Mr. Norris: Should you have that right, when the jury verdict is against the manifest weight of the evidence, which is what you are telling me Rule 12(C) gives you?

Judge Whiteside: We could change the Constitution. The difference is that in the one instance, you are not entitled to the right to a trial by jury, and in the other instance, you are denied the right to trial by jury. To me, that is an interference with the jury system, when we are substituting a judgment for the jury trial, and the question is should we.

Mr. Norris: Should you be able to substitute your judgment for the jury as to the amount of the verdict if it is clearly against the manifest weight of the evidence?

Judge Whiteside: I have personal mixed feelings. I feel very strongly about the right to a jury trial. On the other hand, I don't like the non-consentual aspect of it. As to the appellant who takes the appeal and therefore asks the court to do something, I think he has then consented, by appealing, to the court doing whatever the court has the right to do or the rules provide for. The appellee has not agreed to it, and cannot waive his right to a jury trial. If he had it would be a little different possibly. I still feel that a person has the right to a jury trial. I think we ought to leave that. I trust the judgment of jurors. I'm more reluctant in that area to say that it is a salutory system. You had a considered opinion of 9 out of 12 people as opposed to....

Mr. Norris: But if it's wrong...

Judge Whiteside: Well, we think it's wrong, and we have certain things we can do. We can grant remittitur if the parties agree with it. We can give the parties a choice and we do, at least the party of the appellee.

Mr. Norris: Remittitur or a new trial.

Judge Whiteside: "You either pay this amount or accept this amount or have a new trial." This, to me, is an adequate system and it works most of the time.

Mr. Norris: I'm pushing it and I know that, and I understand the distinction. Why is that not just as good as in the trial left to the judge? Why do you make a distinction? The verdict is wrong. It is against the manifest weight of the evidence. Why should you be able to order remittitur in one and not in the other?

Judge Whiteside: In one instance, they have waived the right to trial by jury to start with. In fact, three judges rather than one judge are making the decision as to the amount.

Mr. Norris: But the verdict is still wrong.

Judge Whiteside: The verdict is still wrong and we can correct it if the party who now has lost the advantage of that verdict wants to waive his right to jury trial. We do not want to do it in a technically improper manner. Judges do it from time to time just to see if the parties will accept it. When we see a verdict that is so

grossly inadequate that there is no way we can say a remittitur cures it, but yet the plaintiff has got a $50,000 verdict and $1,000 is all we believe he is entitled to it really is not proper for remittitur. We can say that if he agrees to it he can have the $1,000 rather than having a new trial. If we have this temptation to do this in addition, and it has been done on occasion, as a matter of practicality it is working a settlement for the parties as opposed to really deciding the case. And this is, I think, the danger, more so in the case of jury trials than in the case of judge trials. On appeal, it is actually three persons, looking at the evidence, even though they have not had the opportunity of viewing the witnesses, and it is a little different situation, I feel, substituting that for the jury trial.

My general feeling on remittitur and additur is that we do have the full power of both on a manifest weight basis where a judge trial is involved. We can do anything. Why, we can change the results. We can render a judgment in the other direction, and we have done that on occasion, where a judge trial is involved. And I guess really what I am saying, in part, is if you took the entire gamut of our authority and applied it to juries, we could even reverse the jury verdict on the weight of the evidence and make a verdict for the defendant a verdict for the plaintiff. I'm not sure that would be right, but we can do that when the judge finds. On a manifest weight basis, we can render a judgment for the other party completely. It is something which is not done frequently, but again, it is something which is a power. Wherever we find a verdict which is against the manifest weight there is a power.

We have an additional power. I don't know whether it is constitutional. I tend to think maybe it is, but it may be statutory. We have held at least, in the whole area of manifest weight, as to amounts, we can send a case back for a new trial. We have held that the whole case has to go back. The new jury decides the amount of damages. And they have to go back for the whole case, a whole new trial. However, it seems to me that there is no reason, why should you have to try all of these points? Maybe this could be corrected by legislation rather than constitutional provision and maybe it should be, but this is something to think about. Because there would be some time taken when the case is sent back for a new trial. And then you have to go back on all the issues....

Mr. Norris: Do you think that's a constitutional prohibition?

Judge Whiteside: No.

Mr. Norris: What has the Supreme Court said?

Judge Whiteside: They didn't say it was constitutional. They said it was not authorized. Whether it relates to the Constitution or the statutes, and the statute they were talking about, they said that jurisdiction is fixed by the Legislature. It may be legislative but it was not clear to me. Although an older case comes almost from a constitutional....

Professor Fink: Do you recall the name of that case?

Judge Whiteside: No. But Mast v. Doctor's Hospital, which went through our court, incidentally, did not use remittitur because the verdict was so excessive we found no way of justifiably saying that we would grant any kind of remittitur. In the situation where you are talking about, a situation where maybe we decide the case, had we done so promptly, we could have done so in that case, and rendered a verdict for about 1/10th of what the jury verdict was.

Mrs. Eriksson: I don't understand the theory on which, Judge Whiteside, if you decide that it is against the manifest weight of the evidence and therefore would grant remittitur, you seem to feel that if it is a great amount of money -- using this Doctor's Hospital case, and your $50,000 vs. $1,000 -- you said that you think that this is an improper use of remittitur.

Judge Whiteside: It is improper because obviously you are no longer correcting a mistake in the sense of a jury, although we have done it if the parties accepted. But the jury is so far off that you have to say either "passion or prejudice" or the jury didn't know what they were doing. You can't say this is really a situation where the jury made a small mistake that should be corrected by remittitur. The jury is either influenced by passion or prejudice which was found in that case, or it is just plain confused and doesn't know what its function is -- it's run wild.

Mrs. Eriksson: And in that case you say there should be a new trial?

Judge Whiteside: Yes, because our remittitur is tried on cases in present law where the jury was not influenced by passion or prejudice or was not unduly confused. It knew what it was doing, but somehow it made a mistake and therefore we have to correct it because they made a serious error in judgment in the amount. But if a jury goes wild, you don't correct it.

Mrs. Eriksson: In the case of your first example, where it was a pure mathematical error, where it could not have resulted in that amount of money if, in fact, the verdict was such and such, where you say the appellate court has corrected that verdict, why couldn't the trial court have done the same thing?

Judge Whiteside: It could have. Sometimes they don't recognize it.

Mrs. Eriksson: They just don't see that that's what they can do.

Judge Whiteside: Yes, they can, and sometimes they do, but sometimes they just don't quite understand. I don't know what it is. As a matter of fact we had one mathematical error by the trial judge in his decision, where he first deducted out and did not include in his version a $14,000 item and then, in rendering his verdict, he deducted it out again. So he deducted it twice. And they made a new trial for him and he didn't understand it. We corrected it. But the trial was held twice and it is a matter of mathematics.

Professor Fink: I wouldn't call that remittitur, though. I would call that a corrected verdict.

Judge Whiteside: You could call it a corrected verdict, it is still the same. It is still a remittitur. You've changed it. It can't be a complete directed verdict because the issue of liability had to be determined by the jury. So it is not a true directed verdict, where you are determining all of the issues. You are determining just one issue on that basis here. It is a judgment on a matter of law. It's a matter of law that damage must be this amount or nothing and therefore you enter a judgment.

Mr. Norris: Judge, to follow up on Ann's question, do I understand you correctly, or do I understand the present law correctly, that after a jury has rendered a verdict in a situation where there is an error, and there ought to be remittitur or additur, at that point, the trial judge on the question of granting a new trial, has the same authority for additur or remittitur by agreement of the parties as you would have on appeal? Is that right?

Judge Whiteside: That's right.

Mr. Norris: Because the only thing you can do if they don't consent is to order a new trial.

Judge Whiteside: Right. Well, on one side of the consent is the person who either is paying more or receiving less. He is going to have to consent. The theory being that the person who is getting more has no reason to complain. And the person who is paying less has no reason to complain. He's better off than he was before. The error that was affecting him has been cured -- cured by making the correction rather than having a new trial.

Mr. Norris: In additur or remittitur, the court of appeals has no more or less authority than does the trial judge?

Judge Whiteside: That's right. Our authority is exactly the same as the trial judge.

Mr. Aalyson: Is my impression correct or incorrect that the court tends generally to use remittitur much more often than they do additur?

Judge Whiteside: The courts are not too comfortable with additur. They are not sure of their authority to do so, and many courts use it only when they can get both parties to agree. I only know of three or four instances in Ohio where it has been used.

Mr. Aalyson: Do you feel that is the reason that they are uncomfortable with their authority to do so?

Judge Whiteside: Yes, they are not sure of their authority in additur.

Mr. Aalyson: Why does that question exist?

Judge Whiteside: Because the Supreme Court of Ohio has never spoken on the issue of additur but has spoken many times on the issue of remittitur.

Mr. Aalyson: Isn't that sort of the chicken and egg sort of thing -- if you haven't used additur they haven't had the opportunity to.

Judge Whiteside: I only know of four or five instances in Ohio where it has been used throughout the history of the state.

Mr. Aalyson: Do you feel that an injustice occurs in the sense that an additur should be permitted?

Judge Whiteside: Undoubtedly, it does, and I think additur as an area which can well be clarified. Remittitur is well established. Additur is not well established because courts in general are not sure, and some really have no power.

Mr. Aalyson: From where does the power for remittitur derive?

Judge Whiteside: The power of remittitur has been in Ohio for many, many years in historical precedents.

Mr. Aalyson: It's case law?

Judge Whiteside: Yes, as a means of curing error.

Mr. Aalyson: But of course there can be error that would require additur.

Judge Whiteside: I agree, but the courts are more reluctant. Here is the rationale of some judges: you had your jury trial and the jury says you owe $10,000. Now we say to the other side, "All you get is $8,000". The person who is complaining is only getting $8,000. If he agrees to take less, what's wrong with that? The other side has had a jury trial and he is paying less than the jury told him to pay. That is the rationale of remittitur. As to additur, however, the judges say "Well, if you deserve more, the jury hasn't said how much more". And one side hasn't been told how much more and they impose it upon him saying, "Okay, you only get $1,000 more". The jury hasn't set that amount in any sense. The theory then is that both parties must agree to additur because in both directions it interferes with the function of the jury.

Mr. Aalyson: On the other hand, you can send it back for a new trial if you think an additur should be granted and you don't do it. Why?

Judge Whiteside: Well, we only do it infrequently. Instead of granting an additur, it goes back for a new trial. We don't affirm the judgment, no.

Mr. Mansfield: Judge Whiteside, to get a little philosophical, do you see any conflict in your basic philosophy? You are a strong advocate of the jury system in civil cases, and yet -- and I assume you would be the trial judge too, here -- you have no reluctance in tampering with the jury's verdict either by granting a new trial, by granting a judgment n.o.v., by ordering remittitur or additur when the parties agree. In other words, do you find anything inconsistent in those two positions?

Judge Whiteside: No.

Mr. Mansfield: May I follow up and ask you this: my one-time friend Thurman Arnold used to say that the jury system by and large was a psychological tool, so that judges could treat the jury as the devil of the case. If the parties and the lawyers were unhappy, "well, that's what the jury says, don't blame me" -- that kind of thing. And he was a strong advocate of the jury system. Because he felt that even if it was simply a psychological tool, it was a very important one for the whole structure of the judicial system.

Judge Whiteside: I think it is a psychological tool, although I don't know that that's all it is, because many times in the very difficult cases, as a trial judge, it is very nice to have the jury to make that decision rather than yourself. You feel very lonely sitting there by yourself, talking to yourself, making that decision alone. It's better to have eleven other people to talk with.

Mr. Mansfield: On the other hand, in the field of equity jurisdiction, judges do this.

Judge Whiteside: I will elaborate a little on my answer to your question of whether I find any inconsistency. I am a great believer that jurors are very dedicated people, in general, although there are exceptions. They really try hard and they work hard. My observation is that juries don't make very many mistakes. And there are mistakes made, either by the judge or the lawyers in what they tell the jurors. Explaining a law to the jurors is maybe an area which needs more exploration than the jury system itself. Our system of court instruction, using language which technically is correct -- I'm not sure how much it adds to the jury's understanding. They can ask questions and we can explain.

Mr. Mansfield: Along that line, would you be an advocate of giving the lawyers the same opportunities in civil cases that they have in criminal cases to ask the judge to put his charge down in writing?

Judge Whiteside: I have often wondered, both as to evidence and as to law, how we

can expect twelve people who come off the street -- or eight, or six -- not knowing the law, to listen to the charge we have, to retain and remember those things that have taken us some time to prepare and write, years of education, and how we expect them to become instant experts by explanations. Primarily because of that, I guess, I have long felt that maybe written charges may be very desirable for the jury. But, on the other hand, how can they possibly retain and understand all that we give them? They do a remarkable job, really, of asking questions and coming back, and thinking of things that you didn't tell them. It's amazing how many things they ask you about something that wasn't thought about or mentioned. Sometimes they ask the question later on after their service is done. I talk to jurors to find out their impression of cases, and I am surprised at some of the things that they have thought about which we did not. I think when the jury goes wrong, it is more often the lawyers and the judge, and therefore I have no compunction in correcting things. I'm not correcting the mistakes of the jury itself, I'm correcting the mistakes we made in presenting things to the jury.

Mr. Mansfield: You have no reluctance, I assume, in granting a new trial when you feel it is justified?

Judge Whiteside: If it is not interfering with the jury process.... if the jury process didn't function properly.

Mr. Mansfield: Aren't we quarreling, a little bit now, on semantics?

Judge Whiteside: No, because in a new trial you have a new jury.

Mr. Mansfield: I understand, but you nevertheless have effectively wiped out that jury's verdict.

Judge Whiteside: Oh, definitely, but we do that on wrong charges given to the jury and for various reasons.

Mr. Mansfield: All I'm suggesting is that it is important only in the sense that it relieves you of wanting to agree with it.

Judge Whiteside: No, not when you agree with it, because in many instances we have, both as trial judges and as appellate judges, let stand verdicts we did not agree with, but we felt were within the province of the jury.

Mr. Mansfield: Alright, but here again, I think you can say that pretty arbitrarily.

Judge Whiteside: I have no serious problem with that. We never get that resolved in some cases.

Mr. Mansfield: I'm not saying it's consciously arbitarily, but again I'm quarreling with the fact that you are not at all reluctant where you think the situation warrants.

Judge Whiteside: Right, it's a judgment we have to exercise and I think it is a part of the system. When is or is not the judgment warranted? There are instances where you would like to but don't think it is warranted and you don't. There are other instances where you think it's warranted and do.

Dr. Singer: When do you ask the consent of the parties?

Judge Whiteside: On remittitur and additur, but not on a new trial.

Mr. Mansfield: Not on a judgment n.o.v.

Judge Whiteside: And we've had judgments n.o.v., we have directive verdicts, or in our case it would be a judgment on appeal. Yes, all those things are done, and we have no hesitance in doing them when we think it is justified. But, on the other hand, it does not mean that every time we disagree with a jury verdict, we interfere, because I can guarantee you that's not true.

Mr. Aalyson: Do you feel, Judge Whiteside, that you would like to have a constitutional provision that would grant you the right to give additur?

Judge Whiteside: I would like to have it. I think it would serve a very beneficial purpose at times for the parties themselves. My problem with additur and remittitur is how far you go with it. If you are talking about a $15,000 verdict that should be $18,000 or $20,000, that's one thing. But a $15,000 verdict that should be $40,000, I have problems with that. It's how you exercise it. All of these things worry me, because when you start going to too great a deviance to what the jury did, the jury verdict is not a foundation for a simple liability.

Mr. Aalyson: My next question is related to the idea of providing written instructions to the jury. Do you approve or disapprove or have any opinion about the withdrawal of the special instructions that were given before arguments?

Judge Whiteside: I think that is essentially a good rule because it may become confusing and over-emphasize certain instructions and result in duplication and confusing the jury. I don't think it's the same thing as a charge. A charge can be given any time even before the arguments or after arguments. I think there is merit to giving them first, so that the attorneys would then have an opportunity to talk about what the judge had said as opposed to what the judge is going to say. I see a lot of merit to having the charge first or a lot of it first. There are many judges that may do so under the present rules when they see fit, although the final charge must be after the arguments.

Mr. Mansfield: Were you including in your question special interrogatories?

Mr. Aalyson: No, just special charges.

Judge Whiteside: My real concern is not so much whether the charge is in writing or oral because I don't think the writing is going to help when we still use some of the language we use in our charges. We see them and they are technically correct, but I'm not sure we can say they are suited for the jury. I would like to see more tailored charges to the facts of the case. And I know there are some judges who are reluctant to do so because they feel this is commenting on the evidence. Rather than say we find the defendant was negligent, and we find for the plaintiff and as a matter of law, why not say that the defendant ran a red light and we find for the plaintiff?

Mr. Aalyson: Was I making a mistaken assumption when you spoke discussing written charges -- you wouldn't submit them to the jury and let them take them into the jury room?

Judge Whiteside: There is nothing wrong with taking charges into the jury room. But I'm really more concerned with the simplicity of the charge, because I read over and over again, and I did the same thing myself on occasion, where you say very complicated things: "Failing to stop for a red light is negligence per se. If you find the defendant was negligent, you find for the plaintiff, and will proceed to find damages." Why not say: "If he ran the red light you find for the plaintiff"? The jury can understand that much better than all this complication.

Dr. Singer: I just wanted to add that the research I have done supports what you have said.

Judge Whiteside: Mine is only observation.

Dr. Singer: In terms of written charges and charges to the jury in much simpler language, and also in terms of preferences of jurors themselves for a jury verdict both in civil and criminal, in civil trials, we have 78% of jurors who prefer a trial by jury to a trial by judge. And for criminal cases 90% prefer a jury trial. So that in both cases they really prefer a jury trial.

Mr. Nemeth: Judge Whiteside, you were a trial judge here in Franklin County, were you not?

Judge Whiteside: Yes.

Mr. Nemeth: I was with a group of common pleas judges yesterday and the same question arose as to whether or not we should do this. Some of them commented to the effect that even though they would like to do it, they find it, or they would think it a practical impossibility, in a large city court which is under pressure of time. Is this something that you found to be true?

Judge Whiteside: I'll put it this way. I found that the judge has to prepare his charge in advance if he is going to have a good charge. It does take a little more and if it happens very soon in a trial it becomes a problem and it may cause some delay in the case because there is no instant way of doing it. You write out longhand notes and put things together for your charge. Then you give it to your secretary and have her type it, if you have a secretary. On our bench we had two secretaries for 10 judges. We didn't have that much time, and that's one of the reasons I never tried that, because I didn't have the secretarial time. The second thing is doing it in advance. Unfortunately, sometimes attorneys fool you and they get the case submitted and finish up before you expect them to. You expect the defense to go on and they suddenly say "no defense". So now you are going to take a continuance and delay this case or go forward. Well, my attitude was to go forward. And therefore, in most cases, it prevented written charges because I didn't have any time. And I had two impediments, staff and time, in many instances. That doesn't mean it is less desirable. Maybe we should look at it and change it. There are impediments to trying to have written charges to the jury.

Mr. Norris: You mentioned that you could see a reason for a monetary limit so far as the right to trial by civil juries. Are there any areas of jurisdiction, kinds of cases, that you think ought to be removed from trial by jury as we presently try them?

Judge Whiteside: If I were to change the system, rather than detract from the areas, I would add to the areas. I think many of the areas traditionally in equity would be better served by jury trials than by judge trials. As a matter of fact, maybe more so than damage trials. Many are injunctive or specific performance, and some of these areas I think, although traditionally they are in equity, if you are going to change them at all, it should be in the other direction -- to add to the number of cases which are charged with a right to a jury trial.

Mr. Norris: Thank you, Judge Whiteside.

The next witness was Professor Howard Fink of the Ohio State University.

Professor Fink: I thought I might give you a little historical background and some discussion of the cases, very briefly, on additur and remittitur. It is interesting that the questions that have been raised reflect the historical dichotomy between law and equity in judge and jury trials. We know that in the common law system, there were two courts, the law courts and the equity courts. The equity court, through a battle with the king back in 1200, retained its jurisdiction. That court was originally held by an advisor to the king, the chancellor himself, who heard petititons to the king. It went on to become a more regularized court. We say now that equity-type cases, the type of cases that the chancellor's court heard, are not jury trial cases. But the type of case that the law court heard -- the original court of common law that evolved from the king's advisory staff at one time -- has the right to a jury trial. At the same time, the common law, even though it evolved the jury trial, didn't fully trust the jury. There were various safeguards built into the system over the course of time and wewere talking about one or two of these today. That is, the jury in the common law-type case was to be the determiner of facts, not the law. But there were various types of devices that would either take the case away from the jury if there was no conflict in fact, that is, it was illegal for the jury to render a determination in a case where there was no disputing the evidence, no disputing the facts; and if the jury was someway tainted by error -- either their own error or errors that took place during the course of the trial by the judge or by jurors or lawyers -- he could order a new trial. So in two ways, the common law court did not fully allow the jury to be completely in charge of deciding the facts. If there was no dispute in the facts they wouldn't get the case. They would have a directed verdict. Or, if there was some error in the admission of evidence or in the conduct of the juries -- they had gone and visited the scene, or various other things, or rendered a verdict that was excessive or inadequate -- the judge could order a new trial.

And of course, this has carried over. We don't have anything in the Ohio Constitution that explains this but traditionally, and coming mainly from the Federal Constitution, the federal courts recognize that the right to jury trial which is reserved by the Seventh Amendment to the Constitution carried with it the same plan. And I certainly agree with what the speakers have said up to this point. I certainly endorse the right to jury trial. It is the best system that has been evolved for having competent determination by the people. So the people would have confidence in the determination that was made because it was made by 12 people who were picked at random and who knew nothing about the case prior to being seated. I object to the erosion that is taking place in the right to jury trial. I particularly object to the way it has come about. For the federal courts, district judges make local court rules which said that there would be a six person jury rather than a 12 person jury in civil cases. The Supreme Court upheld their authority to do that. But neither the Supreme Court themselves, nor Congress, nor the people ever decided that the right thing to do would be to go to a 6 person jury rather than a 12 person jury. And this question has never come before the people in Ohio. The people, I believe, assume that the constitutional right to jury trial carries with it a right to a jury trial very much like it was in the days of the common law, and that means a 12 person jury. And your studies indicate that this is the best kind of a jury. And we get an erosion of this, not by the legislature, not by the Supreme Court, not by a process in which the people have had their say, but an erosion through a technical court rule, through the rule-making power, that I don't think ever was intended to undercut the constitutional right to jury trial. Now the Supreme Court has upheld this process, but it is not to me a good process, because it hasn't taken the place of hearings with the legislative process or constitutional commissions or anything else. A single district judge, or a group of district judges where there is more than one in the federal court, can decide to have a local court rule under their power and they have no responsibility to the people in deciding this. I think it is very wrong that this right to a jury trial

is being eroded in this way. I think it is a very serious issue in civil cases, and I think the civil cases are just the beginning of erosion in the criminal cases. And if you do that, you have, in effect, undercut the Magna Carta that was so much celebrated and we fought so much to preserve, through this erosion process, and I think it is very dangerous.

Given that the common law didn't fully trust the jury, and had these devices either for granting a directed verdict, a judgment notwithstanding a verdict where there was no conflict in the evidence, or a new trial where the verdict was against the manifest weight of the evidence or where the verdict was excessive or inadequate, a concommitant evolved of the remittitur and additur. Remittitur is where the defendant, who believes that the verdict is excessive moves for a new trial, and the judge conditionally denies a new trial on the condition that the plaintiff will agree to take less than the jury has awarded. The additur is the opposite. The plaintiff moves for a new trial on the grounds that he believes that the verdict is inadequate, and the trial judge conditionally denies this new trial motion on the condition that the defendant will agree to pay more than the jury awarded. If the defendant doesn't so agree, a new trial is held. If he does agree, he agrees to pay more than the jury awarded. I passed out this case of Fisch v. Manger in which the Supreme Court in New Jersey upheld additur as well as remittitur under the right to trial provision of the New Jersey Constitution. There was no legislation about this, but they simply said this additur and remittitur, or at least the roots of them, were known in the common law prior to the adoption of our Constitution. There is nothing unconstitutional about carrying over these limitations on the jury that go along with the right to jury trial that is preserved by the constitutional amendment. Can an appellate court grant a remittitur or an additur -- that's another question that was posed. Generally, it is held that they can, that an appellate court can grant remittitur just as the trial court can. The citation on this is Flame Coal Company v. United Mine Workers, here in the Sixth Circuit, 303 F2d 39 (1962). The Sixth Circuit, our federal circuit here, held that not only can a court of appeals grant a remittitur but they can remit part of the case and uphold the judgment in the rest of the case. The jury here had awarded punitive damages as well as compensatory damages. The court of appeals believed that the compensatory damages were excessive and not arrived at in the proper fashion. So they asked the plaintiff if he would agree to take less of the compensatory damages and would let stand the $50,000 punitive damages against the United Mine Workers as well as the $8,000 in compensatory damages. But the plaintiff had to give up, if he wanted to do this, $32,000 of compensatory damages. The plaintiff agreed, so the remittitur was awarded by the court of appeals. Another state case held that state appellate courts can do this in Ziggen v. O'Keefe in the Texas Civil Court of Appeals, 340 S.W. 2d 260. And here in Ohio, the Supreme Court of Ohio has explicitly said that the appellate court can give remittitur in Bartlebaugh v. Pennsylvania Railroad Co., 150 Ohio St. 387 (1948). The Court upheld the power of the appellate court to grant remittitur on appeal from a lower court judgment. This is on appeal from the court of appeals to the Supreme Court of Ohio, which held that this neither violates Article I, Section 5 of the Ohio Constitution nor the Seventh Amendment to the Federal Constitution. It was an F.E.L.A. case, I believe, so there was a federal question involved. And they themselves granted remittitur, so I think it's unquestioned in Ohio that remittitur is possible by the trial court or the court of appeals or the Supreme Court. But it carries with it this option, that is, it is an optional denial of a new trial if the plaintiff will agree to take less than the jury awarded. And, as Judge Whiteside said, it is not proper to give a remittitur where the jury awarded. And, as Judge Whiteside said, it is not proper to give a remittitur where the jury was influenced by passion or prejudice. It's only where everything else was alright, but they seem to have given too high of a verdict.

If there is passion or prejudice implied by that too high a verdict, then a new trial is the only remedy, rather than a remittitur. Now, as far as additur is concerned, the Supreme Court of Ohio has never discussed it, but Chief Justice Taft, one of our most capable appellate judges in the history of the court, in Markota et. al. v. East Ohio Gas Co., 154 Ohio St. 546 (1951) went on in the case to state his own opinion beyond what the justices felt was necessary to decide the case. He went on to suggest that additur was just as constitutional in Ohio as remittitur. He suggested that it would save some time, but, of course, it would be done in the same optional way that remittitur was. And that was kind of a precursor of what the New Jersey Supreme Court did in exactly that situation -- upheld additur -- even though the Supreme Court of the United States did not uphold additur for federal courts. Their interpretation of the Seventh Amendment of the Federal Constitution was that when you look at the history of the facts prior to the adoption of the Seventh Amendment, there isn't enough evidence of the practice of additur in the common law to uphold it by inference to the Seventh Amendment. But they could find adequate evidence of the practice of remittitur. And a lot of cases had discussed remittitur in the past, and they are not going to upset that, but they won't go further for additur. But the New Jersey court said: "That's not binding on us, that interpretation of the Federal Constitution. Our interpretation of the New Jersey Constitution and our reading of the provisions prior to 1789 was that there was something that is comparable to additur, and we don't have to rigidly adopt exactly the practice in the common law, but some approximation of the practice in common law." I think that cases like Fisch v. Manger are in the forefront of the law and that other states will adopt additur. As Judge Whiteside said, the Supreme Court hasn't stated one way or the other, so the judges are reluctant to use additur, but the Court has stated repeatedly that there is a power of remittitur so they are not reluctant to use remittitur. The rationale that the Supreme Court used in Dimick v. Schiedt, 293 U.S. 474 (1935) was so weak. They said when remittitur is used, the judge is lopping off in excess of what the jury decided. But when he uses additur, he is adding something to what the jury decided. Well, the Supreme Court of New Jersey said, what difference does that make? In each case, he is saying that the fair thing to do is to give something more than the jury awarded or something less than the jury awarded, on the option of ordering a new trial. If that isn't satisfactory to the party who is the winning party.

Mr. Aalyson: Do you agree with Judge Whiteside's analysis of why it is more appropriate to use remittitur -- in the philosophical sense, not because the Supreme Court says you can -- as opposed to additur?

Professor Fink: As I understand what he was saying, it was that it was just as appropriate to grant additur as remittitur, but the judges are less sure of themselves because they don't have the guidance of the Supreme Court of the state. If they had that guidance, they would use additur because it would save time, and save the necessity in many cases for a new trial. But remember, the judge doesn't have the authority to raise the jury verdict himself. He only has the authority to condition his grant of a new trial on the defendant willingly, or as willingly as the threat of a new trial makes him willing to do it, giving more than the jury awarded.

Mr. Aalyson: And it is the same with regard to remittitur?

Professor Fink: Absolutely.

Mr. Aalyson: I understood Judge Whiteside to say in the case of additur two persons had to agree as opposed to one.

Professor Fink: In the sense that one person has moved for a new trial and he is saying to the other person, "I will deny that new trial if you will give more, but otherwise you are going to be faced with a new trial, and you might have to give much more in a new trial if the jury awards more." I think what he also said is that since we are so unsure of a right to give additur that sometimes we ask both parties to make sure and we ask them both to agree so that there won't be any appeal from that decision. But I certainly didn't understand him to say that additur carries with it the agreement of both parties to the denial of a motion for a new trial. Even if he did say it, certainly the history of the practice of additur has been just the same as for remittitur. That is, one side moves for a new trial and the judge says: "I will grant it unless you give more than the jury awarded, or, on the other side, unless you agree to take less than the jury awarded."

Mr. Aalyson: Is the reluctance to use additur peculiar to Ohio?

Professor Fink: No, very few states allow additur. Most of them simply follow Dimick v. Schiedt, the Supreme Court's interpretation of the Seventh Amendment to say that their constitution is worded like the Seventh Amendment, so I guess they don't have problems with additur or remittitur.

Mr. Mansfield: I, like Mr. Aalyson, understood Judge Whiteside to say that the reason for both parties consenting was that in the case of remittitur, the jury had expressed itself even though, in the court's judgment it was too high, whereas in the case of the additur, the jury in a sense had never gotten that far, so the only thing that it passed upon was the verdict. And this area then, it becomes not in a sense tampering with the jury verdict, but creating something brand new.

Professor Fink: But the same thing is true with remittitur. In other words, the question of how low to reduce the jury's verdict in a remittitur situation is the exact obverse of how high to raise the jury's verdict in an additur situation.

Mr. Mansfield: I understand logically that is so, but ....

Professor Fink: In each case, though, the jury has rendered a verdict, and it has found for the plaintiff. In the additur situation, it has awarded some money to the plaintiff, but not, in the eyes of the judge, an adequate amount. So the same problem arises, how high should he raise it? Should he raise it to the highest amount that he would allow to stand without ordering a new trial on the basis of excessiveness, or should he raise it to the lowest amount he would allow to stand and not order a new trial on the basis of inadequacy? And the same thing is true with regard to remittitur. That is, how far to cut back the jury's award in a remittitur. The federal courts say that they reduce it to the highest amount they would allow to stand and not order a new trial on the basis of excessive verdict.

Mr. Mansfield: But you don't agree with Mr. Aalyson, and if I heard Judge Whiteside correctly, you are disagreeing with Judge Whiteside's point.

Professor Fink: I disagree that there is any technical reason why both parties have to agree. Although there have been some cases where, let's say, one party moves for a new trial on the basis of excessiveness. The judge says: "If you will agree, I won't grant a new trial but we will effect a compromise." Now, on the question of whether this ought to be in the Constitution, I think it is already in the Constitution. I think the right to jury trial, as we understand it, carries with it the limitation on the power of trial judges and appellate judges to grant remittitur, and although somewhat less widely accepted, the power to grant additur, as well.

Mr. Mansfield: You mentioned common law. My impression as a general statement is that there isn't any such thing, in federal common law.

Professor Fink: In the general federal common law, right.

Mr. Mansfield: Assuming that is true, what you are suggesting is that the constitutional grant of the jury trial per se carries with it all of these other things that tack themselves on somehow to that process.

Professor Fink: That's right, because the states generally model their constitutional provision on the Seventh Amendment.

Mr. Mansfield: I understand, but the state courts, at least some of them have said that we do not have common law. Ohio is one that hasn't.

Professor Fink: Common law what?

Mr. Mansfield: In the state case law.

Professor Fink: Oh, sure. Almost all the states say that they have a body of common law that is analagous to the English Common Law.

Mr. Mansfield: I was under the impression, perhaps wrongly, that Ohio was one of the states that denied this.

Professor Fink: Oh, no, that can't be right, because most of our rights like torts are not defined in statutes, but the judges made the law. The law of torts is only judge-made. There is no tort statute equivalent to the Uniform Commercial Code. I think what you are saying is that the federal courts have said that there is no federal counterpart.

Mr. Mansfield: No, I'm not saying that at all. If you take a state like California where they base their code on the Louisiana Code...

Professor Fink: Certainly all of the rights could be contained in the legislature and they could make a whole code like the Louisiana Code for contracts and torts and so on. But I don't think that would ever get the right to jury trial because, even in the federal courts and in state courts, when new rights have been created--let's say a new right to tort remedy, like in the wrongful death situation -- the right to jury trial has been held to follow there, even though that wasn't a right that was known under common law, because it was <u>like</u> a right that was known to common law.

Mr. Norris: I want to get your opinion on one area, and that is, should we change the Constitution? We have an expanded right of remittitur and additur now as a result of the appellate rules, in appeals from verdicts rendered by judges. Should we amend the Constitution to permit this same latitude in cases tried to juries? In other words, we don't need consent in this instance. Should we continue to require consent in any other instances?

Professor Fink: My opinion on that is that we should not change that practice. What Judge Whiteside is referring to as far as review of judge-determined fact is concerned, is, again, derivative from the equity court where in an equity appeal, the judges felt that they were in as good a position to redetermine the facts as was the chancellor, because in those days everything was done by deposition in the equity court and they just looked at the depositions and decided the trial judge was wrong in reading the depositions. So we've had a tradition that in court-tried cases there was more latitude for the appellate court to redetermine facts. Now, this has been limited by Rule 53(E) of the Ohio Rules and the federal rules which say that the appellate judges shall only reverse if the findings of fact by the trial

judge, whether it was an equity-type case or a law-type case where the jury was waived by the party, are clearly erroneous. So the rules have given greater credence to the judge's fact-finding determination in an equity case or in a legal case where the jury has been waived. They say the appellate court can only reverse, not if it disagrees with the facts, but only if they are clearly erroneous. I wouldn't change that. I think that there is a well-understood relationship between fact-finding in the judge-tried cases and appellate review and there is also a long history of understanding by appellate courts that they can't redetermine fact. The very basis of the right to a jury trial under the Seventh Amendment says that no appellate court shall redetermine a fact found by a jury. Well, if you change that to say that courts can raise or lower the verdict without this new trial taking place, they would be redetermining the facts found by a jury. We can change the Constitution, but that is changing part of our ancient heritage. I wouldn't like to do that.

Mr. Norris: 53(E), which rule is that?

Professor Fink: That's a civil rule.

Mrs. Sowle: I probably misunderstood something you said, and I'm not sure right now whether you are for additur and remittitur or against them.

Professor Fink: For.

Mrs. Sowle: You're for them?

Professor Fink: Yes, even though I am very much for jury trial. There are times when the jury feels very sympathetic to a plaintiff against, let's say, a major corporation: "General Motors can afford to pay a million dollars." Our system is such that the jury can do that. I think the judge should be able to condition a new trial grant on additur in the same way -- it protects an unpopular or undesirable kind of plaintiff -- as he can protect an unpopular defendant through remittitur.

Mrs. Sowle: But you don't think we need a constitutional change?

Professor Fink: No, I think the Supreme Court can make this determination.

Mr. Aalyson: Do you think we need any constitutional change or modification with respect to the right to trial by jury?

Professor Fink: If there were any, I would put it in there to strengthen it rather than to continue this erosion process.

The next witness was the Honorable Lloyd Moore, Prosecuting Attorney of Lawrence County. (Outline attached)

Mr. Moore: My experience which would be of help to you is drawn from different areas. I have participated in trying better than a couple hundred cases which included 6 person juries, 8 person juries, and 12 person juries. In addition to that I have done some research into the history of the jury and have observed trials in West Virginia, Kentucky, Ohio, and in London, England. I have tremendous intuitive feelings for the value of the jury system and I feel, over-all, that it ought to be strengthened. Sometimes I make statements that are a little bit tongue-in-cheek but are simply meant to emphasize a point. Let's start with the value of the jury system. I think something that is often overlooked when we are talking about making minor adjustments is that the real reason that we have a jury system is that we believe that the people have the right to and it is best that they govern themselves,

rather than being governed by what I call a "professional class", which is really the only other choice. Not only is it good that they do govern themselves, but as Jefferson said, even if it's wrong we would rather have it that way. I think that it is almost the only way to get a disinterested body.

I feel that when people hold a job, they are one single person. They don't have any particular background when they are chosen as jurors. But once they become identified as a person who holds office for a year, two years, six years, or maybe for some longer period of time through re-election, they inevitably get accretions that come to them. They do, like judges do. I don't think there is any question about this. Not particularly so much on the appellate level, but on the magistrate's level they do something called "personal patronage". I don't know whether they do this illegally or unethically. I met with this in my county one time. I think there were a thousand D.W.I.'s that year. Few people went to jail for three days although the Legislature says that they are all supposed to go to jail for three days. Some people did go to jail. These were people that did not have $312.00 -- that was $300 to put up for a bond and $12 for court costs. Everybody else, even if they were repeat offenders, were allowed to forfeit the bond. That has been corrected to a certain degree. But why did the judges do this? Why do they, when the Legislature says that if the alcohol level is over .1 per cent, that is supposed to create a presumption that you were intoxicated? The judges will go ahead, if it is .15 per cent and say, that's not too bad, we'll automatically reduce that to reckless driving. I take it that they are usurping the Legislature as to what they feel is right, or else to establish a friendship either for support for their own election or otherwise, and they are doing it either consciously or unconsciously. I think that this exists practically at every level. At the common pleas level you don't see it so clearly, but somebody that has been a common pleas judge for some twenty years in the community cannot help, no matter how good a man he is -- and I know lots of good judges -- he cannot help but have association in the community with the golf club, with the church, with insurance companies that he has worked for, and one thing and another. And at the very least it will give an appearance of unfairness.

Well, contrast that to the jury. We pick them out, in our county, of almost 60,000 people. They are drawn at random, and the chances are that they are not going to be prominent public people on a statistical basis because the prominent people you could limit, in our county, to maybe two or three hundred people -- plant managers, public officials, and one thing and another -- people who have a wide influence. They were very concerned with the impression that they are going to make on other people. But the average juror who comes in is not concerned with that at all. He is concerned with doing justice in a particular case that comes before him. And when you do get those obvious people on, you have your challenges and you can eliminate them and then you are back to where you were before.

Now, how do lawyers try to make this system <u>not</u> work? The people want a jury that will be fair, that will try and find out what the real facts are and then see what should be done with those facts. We people who are lawyers, what we try to do, if we are honest about it, inside the rules, playing legally? We try to prejudice the jury, and the chief place that we try to prejudice the jury is automatically on voir dire. The lawyer, if he is a good lawyer,likes to have a full display of his talents and he likes to have a judge that will give him tremendous leeway on voir dire. He does everything which I could do and everybody here could do it if he wanted to concentrate that way. He memorizes the names of the jurors and then the jurors start remarking on that. They say, "Wasn't that marvelous, he went through the whole thing and he knew everybody's name all the way through." This is an attempt to draw attention to himself or draw attention away from the facts. And then

in small counties, particularly, where one is not so anonymous as lawyers are in big cities, I think you will appreciate that lawyers are persons that probably have been there ten or fifteen years. At least one person out of every three or four is going to recognize his name. The lawyer won't necessarily recognize that many people, but he will have contacts and his name is in the paper, he runs for office, he does this or that, and they will recognize him. Then there are other lawyers who in voir dire say, "Hey, you went to school with so and so, didn't you?" And then they fellow who comes in from New York is at a disadvantage in trying that case. I'm suggesting that maybe the voir dire possibly ought to be limited and conducted mostly by the judge. The lawyers could get only a little feel as to personality. They ought to have a limited voir dire, but they ought not be allowed to freewheel the way that they often do, and frankly the way that I have done when judges permit it. I have to do it in order to protect my client. But I think that this is the chief place that lawyers try to unseat the system by creating a very prejudiced jury to begin with. I think that most of you have heard it, but there is a common saying that the trial begins when the jury has been picked. In our county, the trial is over when the jury has been picked because by then we have laid all of our seeds and we have got our jurors there. One time, my partner didn't show up for the voir dire and I handled it myself. I told him our case doesn't look all that great, and why don't we see if we can settle this thing for a couple of thousand dollars? This was where somebody's house had fallen into the basement, but our case really wasn't that good -- we didn't have nice good evidence like I like. My partner asked me who was on the jury and I told him and he said, "No, we'll stay for six." And six is what we got. He didn't fix it or anything, but he knew that we were going to get a good verdict once he knew who was on the jury.

We ought to limit, too, this intensive investigation that lawyers do in the celebrated cases, by only giving them the information at the last minute. I think in this intensive investigation, particularly in smaller communities, the jury is gone over before they ever come down to being investigated, and they probably know which side is investigating them. I think it is best if you just come in and you draw the names and that's it. I think it would be better if instead of exercising our challenges one at a time like we do here, we would exercise the peremptory challenges when we come to them naturally as the case is established. You just seat 20 people there like you do in, I think, Kentucky and West Virginia, at least in cases I've tried, and then you cite strikes, and if that doesn't do it, I think it would be nice if you could just draw two names out and they're stricken. There is no insult to anybody and you have to get rid of four and that way it is quicker. The other way, it's back and forth. As a matter of fact, it has worked out so that you don't even want to use any of your challenges and you end up getting stuck with somebody that you don't want. How can that happen? They say that if you don't use a challenge you waive it. Say you are set, you're happy with everybody, and then all of a sudden the other fellow is going along and he uses three challenges. You say fine, I've waived mine, and then you come up to two people that you don't like and your challenges are gone. At least you should be able to use your challenge to the members of the venire that haven't been called.

I do think it's important that the jury has twelve people, and the larger the better. It says "This is the decision that you're stuck with." It's not just one judge or somebody like that. There are twelve people that say: "This is right, this is justice." Somehow that has more standing than just one man, no matter how learned he might be ordinarily, saying it. I think it is important to keep the jury for that reason. I think it's important to keep the jury at a substantial size for that reason.

Someone once said that the jury is a continual education system for our citizens. And it will cease to be that in large part if it is relegated to strictly civil cases, which for the most part has been done in England, which is probably the other place where the jury trial is somewhat still popular, but only in criminal cases. They have kept it in civil cases only for special things such as breach of promise, libel, and a few other things. But even there if the judge feels that because of the prolonged examination of documents, for example, it is too complicated for submission to a jury, or some like reason, he can say that that will be a judge trial as well. They had a famous case about three or four years ago, which involved the London Times. There were thousands of documents in the case and the judge ordered a judge trial. The appellate level said that this was a huge trial and whether or not an institution such as the Times should exist should not rest on the opinion of one man. They did remand the case, and they said as far as this business of the documents is concerned, that most of these documents were going to end up not being decisive; that they had to go through a pre-trial; that they had to be sorted and sifted; and that they had to be put in shape to be presented to the jury.

Sometimes people say that a jury trial may take months and the jurors spend more time in jail than the defendant does, so to speak. Do you know who is responsible for that? I think it is the lawyers, again, and the judges, who mark the importance of a case by the time and attention that they give to it. There are exceptions, certainly, but it is hard to see how almost any question couldn't be presented within a month. Why do they wait so long? They wait so long because the judge says, "I have a commitment at 3:00." And the lawyer says, "I've got a comittment in Sacramento and I've got to go to that. Can we start late Monday or can we skip?" Or the judge, in order to make it look like he is bending over to be fair, lets in repetitive evidence. Juries reach decisions quickly. By quickly, we're talking about perhaps twelve minutes, and you say, "Well, they didn't give that deliberation." Frankly, some cases don't deserve much deliberation because they are so clear. And others may take nights, but most don't run over a day, or overnight and going into the next day. Judges ordinarily won't decide quickly, and if they don't decide that way, it's hard to tell when they will decide, and juries expedite the making of decisions.

I think the jury is a good cross-section, but the studies that Dr. Singer has done, I think, confirm what most of the lawyers know almost intuitively: they know to get a smaller jury. Just think about it mathematically. As an example, if you have got a 10% or 12% black community, they are less apt to be on one particular jury. And I think that's what we are likely to have. We're not talking about an average of all of the juries. We're talking about what can possibly be on one particular jury. I don't see anything wrong with having some sort of computer selection of the venire so that we do get some sort of cross-section; blue collar workers, college graduates, minorities. If you have 10% or 20% Catholics on the venire, then there would be a selection of chance to see what any particular person was. But as to the fact that you get a cross-section, I really don't see anything wrong with that. There might be something the matter with that, but I don't know it.

I think that a unanimous jury is one of the things that insures the effective participation of minorities, of whatever point of view they happen to be. Also, even if you had a judge that is the finest judge in the world, at some time he is going to have to render opinions in school cases, and he is going to have to go against the local factory which may be popular. These things after a while can build up on him and give him a bad public image in his community that he doesn't deserve. The jury protects him from this. The jury takes the responsibility for finding the facts. And then they are dissipated and gone. There's nothing that can come to bear on them. It could happen that you have the same twelve try more than one case, but ordinarily during the term, they are either sick or something happens,

so that you never have exactly the same twelve.

Another reason why juries aren't sometimes as good as they are is that judges, again on personal patronage, excuse people. Usually when they start out, they don't. They say, "I'm not going to excuse anybody." But then after they have been in four or five years, they get this feeling of being a "nice guy". I don't know what it is. But now we are excusing in our county about 40% of the jurors that are called. I think if you want to make some changes, one of them would be to eliminate the exemptions. One group might be lawyers. You might want to consider that. If somebody wanted to get rid of the lawyers, they could challenge them. You are not going to have that many lawyers anyway, and so it might be just as well. I told them once I'd be glad to be down for a federal jury, but they never asked me to come down. I think you ought to eliminate all of that. Well, you say, how about a doctor? There might be an emergency and we can't have him down there. And they say we need these doctors. No, nothing is more important than justice, I think. Doctors all like to think how smart they are, the same as lawyers and accountants and all professional people. But at the same time, if they are all that smart, why don't they come down and sit on a murder case? I know a doctor who takes a two week professional leave every year in which he goes to seminars and things. And then he takes another two weeks where he goes to play golf and what have you. I'd say, "Okay, Doctor, you are scheduled for operations next week when this trial is coming up, so we are going to set aside two weeks following that when you just have got to be there." There could be some kind of arrangement. The same thing for a fellow in business. In an emergency, maybe the judge ought to be allowed to excuse him. But I say, he has some other time when he comes down and does jury duty. And when you get down to it, it is maybe one person in 6,000 every two years who is on jury duty. I forget the statistics but we looked in the encyclopedia. This is defeating the purpose of the jury, because if the jury becomes something exceptional, if it is limited only to criminal cases, then it will not have that public backing and participation that it ought to have. I think a person ought to, as a matter of public policy, be on the jury about every three years. I just wonder how many people here now have been on a jury. Let's see how many raise their hands.

Mr. Norris: We are all lawyers, Lloyd.

Mr. Moore: All lawyers? Well, even then, it is not anything exceptional when you have fifteen people and only three or four have ever been on jury duty and they are persons as old as we are. And I think this is bad. I think the jury works when the people get out and participate in it.

When the jury was at its apex in our country, according to the Supreme Court, the jury decided law and facts. That only lasted until about 1804 or something like that, and very quickly eroded and changed, and by 1828, juries decided law and fact only in criminal cases (which they still do frankly, I think, in many instances) and they decided only facts in civil cases. We started out by saying that if you don't want a jury you can <u>waive</u> it in writing. Nowadays, if you want a jury you must <u>request</u> it in writing. I don't even think that's a good idea. The judge looks at you and says, "What's the matter, don't you like my decisions?". We ought not be put in that position. It ought to be automatic. I think the jury can decide other things other than it is deciding now. And you can destroy the jury in many ways. I quote Will Durant who says, "You can destroy any institution if you do one thing, and that is retain the name." We've retained the jury no matter if we've changed it and made something else entirely different out of it. The jury has declined tremendously, not only in other countries but in ours.

Additur and remittitur I mention as one of the declines. Really, I don't mind settlement, but the way the courts put it, it really is only a kind of settlement in

Ohio. I don't think there is any real difference between additur and remittitur. Differentiating just doesn't make any sense at all because it is a logical matter. Say that the person who got the real great verdict wants to avoid a new trial by making it not so sweet. He hasn't lost anything and the other person is agreeable. The only danger that you run into there is if a judge tries to swing his weight around on something like that or maybe there was a big question on liability or something and maybe that was the thing that the jury was worried about, that liability question, and it probably shouldn't be tried in that way. I don't think that additur is a really big problem. I do think that you ought to have additur just as much as you have remittitur. I once represented a school teacher or principal who got punched by a parent coming in. I sued for assault and battery and the jury returned a verdict in favor of the plaintiff, but for no money, and so the judge says, "an additur of $200." It wasn't all that horrible, but he ought to have gotten something. He did get punched and his nose did bleed and a few things like this. So the judge had an additur.

I don't even object to that really in criminal cases. In criminal cases, I'm the prosecutor. I lost a criminal case, a clear case, where we had a big, heavy policeman out there who was sick. He took money just to pay his hospital bill, and he admitted it. The jury found him not guilty. I don't feel bad about them finding him not guilty. We had a fellow one time that there was tremendous evidence against that he was guilty of an armed robbery of an Eagles Club down in Ironton. You could ask, "How did they ever find the man innocent?". We had one trial and we finally had another and in addition to that, his crime went back before another crime which was about the same he committed, and he did four years in Georgia. In the meantime, he had been living for a year up in Cleveland. The jury figured if he could make it for a year, maybe he could make it for a little while longer. They pardoned him. I don't really object to that. I would object to it if a judge were doing it, but if there are twelve people who have looked at it and say, I don't really mind. Under our rules of courts you can't tell them that they can pardon people, but jurors oftentimes understand this and do pardon people because of things like I'm saying.

The size of the jury ought to remain at twelve. It wouldn't exist the way we know it tomorrow if we don't do things tomorrow the way we did them yesterday, with small exceptions. In other words, we have to be careful of the exceptions that we make. Tradition is what makes civilization. Sure, civilization wouldn't grow if we didn't make changes. But we make them gradually. We had a Revolution and still have the same common law. In Russia, they still have some of the same problems, and they've got the same enemies as far as the foreign policy and one thing and another is concerned even though they had a Revolution in 1917. Many things don't change.

Just listing a few other topics: One of the articles that you submitted to us to read says that in a small group more people participate. In a way I suppose that is right. But at the same time, like law school, where you have a class of eighty or ninety, the people participate who want to. That doesn't mean the rest of them are dunces. Jurors vote and they know what they are thinking, and their vote counts just as much as the people who are spouting off all the time. I think the deliberation they do is a kind of listening and give-and-take. That doesn't mean that they are not effective. According to that one study, they do participate to a large degree. I have had juries, both 12 member juries and 6 member juries, where I heard these noises from the jury room and they were sweaty and worn out and they had been working at this thing. And they usually work at it. As to the percentage required, I think it ought to be unanimous. I think Professor Zeisel did a study indicating that there are maybe five percent hung juries with 12 member juries. I don't think that's a big price to pay. And then one of the studies said that it goes to maybe three percent when you have a 6 man jury. It's a small factor ordinarily. My factor now

seems to be a little larger but, you see, that's just an individual experience. It does insure participation of all points of view. And in the public's mind, I think, it leads to a certainty of result. The English judges comment on this. They have what they call a "majority verdict" in criminal cases. The jury has to go two hours in deliberation before they can go to that, and then it is discretionary with the judge whether they go to that or not.

Some improvements I see are possibly computer selection of the venire; an automatic strike system, which many courts do now; a pamphlet on history; payment of prevailing community wage, or at least labor-type wage; also, I think the judiciary ought to be overseen by some other body other than the judiciary. I don't think the judges should have the right to change the jury system. I don't think that they do it for the right reasons; I think there ought to be a mandatory minimum of deliberation, the reason for that being that judges are too easy. The jury comes back in and says that it can't agree and he says: "Fine, go home." This, again, is personal patronage.

Mr. Norris: Many of these suggestions would be accomplished by statute or by rule, I assume, and they may not be constitutional subjects.

Mr. Moore: You ought to say what the jury is and then you ought to tell them to leave it alone, constitutionally.

Dr. Singer: I agree with many of Mr. Moore's remarks, except that I would not like to see the voir dire curtailed, nor done particularly by judges. I feel that judges do not have the knowledge which lawyers have in terms of a particular case, and it kind of prejudices a particular case when it is presented in court. For this reason, and for other reasons I would prefer voir dire to be done mainly by lawyers. I believe that a lot of the voir dire done expressly by judges is a talking to the jury rather than a questioning of the jury and an observation of their reactions. I'm not sure I would like the investigation of the jury ahead of time, either. This is not being done, for instance, in New York City. And perhaps the list of jurors should not be given our previously and jurors should not be investigated previously. But certainly, voir dire should be done by lawyers. I have found in a study of the impact of prejudicial publicity that the voir dire jury is completely different from those that have not been voir dired at all. I compared these two conditions. Voir dire jurors become very aware not only of the defense side of the picture but they are also aware of the prosecution's side. And they take both aspects into consideration. If it is done by a judge, they may not be able to get both aspects. The judge might somehow bias observations one way or another.

Mr. Moore: I think that what you say is true. You have a much more effective voir dire, as far as finding out the juries, by the lawyers. I think that certainly as to the areas of inquiry, there should be a limited amount of that by the lawyers, and if not by the lawyers, then by giving the questions to the judge. But I think that what happens is that you have effective counsel on one side -- and this is an area particularly where prejudice works -- one does a beautiful job on the voir dire and one does a sloppy job, and then the case is lost before it is ever started. And I think you would just do better if you take the twelve that are called, to tell you the truth.

Dr. Singer: If you take the twelve that are called (especially in cases involving prejudicial publicity) what happens is that each would be swayed by prejudicial publicity one way or another. I have really demonstrated that with voir dire they are not swayed. I think voir dire can be used to a great extent.

The final witness for the day was Marcus Gleisser of Cleveland.

Mr. Gleisser: I am an attorney and a member of the Ohio Bar and a reporter. I've had quite a number of years of experience as a reporter at the civil and criminal courts, at the common pleas, municipal courts and federal courts. I've had a great opportunity to observe various of the juries in action. I've had the shield of journalism around me so that I could go and ask questions that a lawyer was not supposed to and that the judge was not supposed to. I've observed judges in their own chambers and asked them questions that they would have put to various juries, and I have had honest answers, albeit off the record answers, at that point. As a result of this, I became involved enough to do a book on the jury system that brought forth not only the experiences that I've had but some research in other areas and jurisdictions, but in all, then, I hoped to bring a focus of some kind. As a result of this, I have found myself in opposition of the jury system altogether. This may be something somewhat of a different nature than I have heard here, because you seem to be inclined to adjust the jury system. I had raised the question of the uninformed juror -- the well-meaning citizen who arrives in an environment that is completely out of his background, who is thrown into a pit of legal jargon that he has no understanding of, many times reluctantly. He is not of himself desirous of being there. He is brought in against his will and he is not very happy about it. As a result, I have reached the conclusion that there are many other problems of the juries themselves. Now, whether outlining these will assist you in reaching a conclusion of some kind, I don't know, and I'm sure that you must know some of these so I will jump over them awfully quickly.

In the material I got from you there is some discussion of whether you should have a jury of twelve, or of six, and to me there is very little difference. I prefer the 6 member jury, as a time-saver and a money-saver and so on, if you have to have a jury at all. Incidentally, it might be of interest to you to know that while we talk about the juries that they are really not as active as they once were. They are fading away. Arbitration is taking over a great deal of the civil work. Many people prefer arbitration, particularly businessmen who have no time to wait for a long time until a case comes up. There is also the settlement before trial, so that really you have a minimum of cases that actually come before a jury. Really, now we are concerned with a minimum of the legal court activities. I should like to indicate, incidentally, some of the basic problems in the performance of a lawyer before a jury in contrast with the performance of a lawyer where there is no jury. Of course, he is much more of a dramatic person before a jury. He knows he is on stage, and he likes to influence and impress them by a performance that he may put on. Too often, a jury will judge a lawyer much more than they will a case. The personality of a lawyer, the appearance of a lawyer will influence a jury much more than it will a judge, who is trained to sift evidence. Juries reflect the community, not the law. This has been argued as a good point in their favor. What they do actually is to make law a very indefinite thing and an indeterminate thing. You go into court with an idea of what the law is and find that the jury has an altogether different idea of what that law is -- the unwritten law, the law not passed by a legislature or by the precedent of previous cases. They talk and they bring in the prejudices of the streets against race, religion, and petty crime. They reflect their own community, which may take petty crime or whatever crime it may be as a normal thing despite the fact that the law may say no, it is not. Therefore, they would be a softening effect on what the law had intended to be a harsh reaction.

Going back for a moment to the advantage of the 12 man jury against the 6 man jury and that twelve minds have a greater variety to reach a more equitable-type of a conclusion. My observations have been that there are not really twelve minds on the jury, but one strong mind and eleven who will be the followers. I have quite a number of good friends who are trial attorneys, and one of the old techniques is

to pick out the "strong man" on the jury, talk to him, influence him, and hope that he will then influence all of the rest in the deliberations. So that the idea of the ideal jury of twelve independent minds equipped to analyze the complex material brought before them is not actually there. It is really one mind and gut feeling to react to things and try to influence all of the rest. And the influences have been very interesting: "We've been on this case for a long time, and let's get on with it and I will agree with whatever you say. I really don't think so but I will go along with that. It's time to eat dinner or lunch, and we are almost in agreement. I don't fully agree but I will go along with it." It's not an independent agreement at this point. This is to show that the jury is not really the all-seeing, all-knowing type of a vehicle that we imagine it to be. Jurors are, incidentally, selected very carefully by attorneys. Here we get into voir dire, the area that we have been talking about. I have seen them doing the badgering of juries, the pushing of juries, the arguing with juries, trying to influence them into their view of the merits of the case before the trial actually begins. A juror who may not quite seem to be of the nature that they want is of course, released, so that as a lawyer you don't pick an objective jury to find what is justice. You pick a jury who will help you win the case. There is the plaintiff's jury and there is a defendant's jury. As a plaintiff, you of course hope that you have your jury -- not an objective jury, not seeking what is justice -- but helping you in your case. These are the hard facts of the practice of law in the practical applications. Because of that I have long felt that a judge selecting a jury would be much more objective. Some of the sense, where a jury is still remaining is in England, is that the judge has a great deal more to do with the selection of the jury, I believe, and in the federal court, the judge has a great deal more to do with the selection of juries. He will pick twelve, or whatever number it may be, who he thinks can be equitable and say "proceed". You no longer has the chance to turn that jury to your own way before the trial begins, before actually evidence is placed before it. Jurors are open to "legal fiction", as I call it. One of the most obvious, and I'm sure that this has been brought up before, is that the jury will disregard a question and the answer will be stricken from the record. They won't be able to say, "It didn't happen, I didn't hear it". The judge may be able to sift in his own mind and say that this is not applicable to the law that is involved. But with that jury you can deliberately ask a question that you know is not admissible, wait for the objection, hear the objection that it be stricken from the record, and know that it has been driven home in the minds of the jury. Questions asked of a jury after a verdict has been achieved: "What did you think of the question of so and so?" "Well, yes, we thought that was important, we thought that the defendant should have done something." "Did you know that you were not even supposed to be aware of this or consider it?" "Well, we never thought about that." In other words, you've got lay people, who are untrained, who appear and who are thrown a lot of rules without any background as to what the real implications of these rules are. So jurors are supposed to apply the law as it is given by the judge to the jury. Those who have actually observed the jury in action and have seen the flow of the legal verbiage over them and the blank look on their faces must be aware that in many, many of these cases it has no meaning to a jury. The legal definitions, if he is cited the legal definitions -- unless he has gone to law school and knows exactly what they mean -- they have no meaning to a juror. A jury has then lost the precise legal definition. It has simply gotten an impression of a thing. If we want our law to be impressioned rather than specific law, fine, then a jury is, of course, the exact thing to have.

Juries are not supposed to be influenced by outside information. They are supposed to hear the facts from the witness stand to decide the law. They are not supposed to watch it on the television set. And I can just imagine a juror elevated for one time in his life to the court room facet of participation in his government not looking at a television showing a case that he has just been involved in or is

at present and continues to be involved in. They are not supposed to read this in the daily newspapers. And I can tell you of a personal incident that I was involved in as a reporter. In Cuyahoga County (and I'm not sure how others are) we have judges who like a little publicity, who don't object to seeing their names in print. At election time, it's always a very nice thing to have. So they encourage the journalist to get the name, and to get it right if at all possible. In one case that I was covering, a civil case it so happens, I sat in the back of the room when the jury was about to be dismissed for the day and the trial was to be continued on the next day. We all stood up and the judge said in a very congenial and affable way, "I would like to point out Mr. Gleisser sitting in the back of the room. He is a reporter for the local newspaper, and I assume he will be doing an article on what has happened here today, and I admonish you not to read that article. You are not to be involved in anything on the outside." And they all smiled at each other and I went back and wrote my article and it appeared, and the next day I appeared at the trial and a juror called me aside to comment on what a fine article I had written and he agreed with everything that I had had in it! At which point I went up to the judge and indicated this, and the judge gave me a smile and said, "We're pretty far along in this trial, and really you didn't say anything that was unfair in your article, and I see no reason to stir anything up. Besides, you did get my name in it and it was right, and I think we should proceed." Now, here is the legal fiction: "You are not to read these things, but you read them, and we anticipate that you are going to read them. But the law says you cannot read them, and therefore we close our eyes and say you have not." And for the better or worse the jury is influenced by it. The law says we give you a charge to the jury which must be accurate and reflect the law that is on the record. The appeal which may be based on that is not effective because the charge is good. The record doesn't show the blank look on the faces of the jurors, but the record looks good. Deliberations and discussions are very secret and intended to be that way. As a result of the law, attorneys have no indication as to what has caused the jury to reach the conclusion that it has. There is no guideline for the future. And juries do make their own law as they go along, without caring what the law actually says, the written law, the law of precedent: "We feel that the person is defective in his defense, and therefore this ought to be done. Whatever the law says, we don't really care."

Jurors work under many handicaps. Incidentally, all this I say against jurors is not degrading them. These are fine people, honorable people, and quite often, intelligent people, people who are probably very good in their own areas. They are simply amateurs at the practice of law, the equivalent of having a surgeon put you on his operating table and say, "Yes, we shall operate and call people in from the street and determine what we shall do. I'm the professional, but they are the people and they shall be a part of this." Obviously you must gather that I am questioning the efficiency and the effectiveness of the jury, particularly in the complex times that we have now. Back in the early days, when we were a little village and everybody knew everybody else, the jurors at that time were the witnesses to these events. Today, we have the difficult task, Mr. Mark Twain has said, of finding twelve people every day who are blind, and deaf, and can't read and who don't know what is going on in the world. We isolate them from their surroundings and we try to say, "You are the analysts that we have selected." Juries, incidentally, are not allowed to compare the case that they have with any similar case. They have no guidelines. They don't know what similar injuries have brought somewhere else. It's simply an inner feeling that they may have. Juries are brainwashed. Jurors are brainwashed before they even become jurors, brainwashed in a very subtle way, in that the newspapers, the daily journals, carry only the great victories. You find the big win reported in the paper, and the small win never gets into print. A defense win rarely gets into print unless it has something extremely unusual about it. Therefore, those that read the daily papers see the big verdicts and are brainwashed before

they even get in. Jurors are very different in different areas. We in Cuyahoga County have an adjoining county, Lake County, which has been a rural county for some time, and the verdicts there have been quite small. Rural people are somewhat more of a conservative nature. Now we had a freeway put in there and we get many more city people moving there, and they are more sophisticated, and the verdicts have been going up and up and up. They reflect the big city attitude, where money in large amounts are not that unusual. Therefore, you wonder, where is equal justice? If you were an attorney with a good civil case, would you go to a rural county where you may not get much or would you go to the big city county? What I'm saying is are you looking for justice, as an officer of the court, or are you simply looking for a big victory, which is the name of the game quite often to attorneys in practice? I think that often some of the best jurors are kept out, excused, for various reasons. Various professions are kept out. Somewhere in my book I have something about innkeepers not being allowed in the juries, nor captains of sea-going vessels, doctors, dentists, foot doctors, members of the national guard, or contributors to the national guard. Sometimes you run into areas of confusion. In fact, I believe that attorneys are not allowed to be on juries, and the reasoning on that, as I understand it, is that attorneys have a preconceived idea of what the law is. They will not accept it as a given because they have already determined what the law is. What do you do, when you have a member of the jury who comes in and says, "Your honor, I have gone through law school and I have graduated, but I did not pass the bar exam. Now, am I exempt, or am I not exempt?" In one such case I know of, some head scratching went on and examination of the statutes, and this was resolved when both sides agreed to waive him from the jury. I know that a number of the journalists have been excused from being on the jury, and I have often wondered what the reason was. There are many who have served but also many have been excused, and I have often wondered why, and despite the comments around the city room that they are of such low intelligence that they might never be able to reach a verdict, the reason that I have been given is that they are too well informed. They know the inside of things. The reporter is expected to know what the criminal's background is. They are expected to know what facts the police have against him, and therefore, the reporter can't be an objective juror. I wonder just what an objective juror actually is.

I have made some talks in front of some bar associations, and most of these were in Geauga County. And I mentioned arbitration as being a very interesting thing coming out to speed things along. Arbitration, where you can get an informed jury -- where you get arbitrators who have a knowledge of the material that appears before them. You can get a retired doctor to sit on a medical case, on a personal injury case. You can get engineers to sit on a case involving a contract, a very complex contract, a breach of contract. In Geauga County we are very interested in this, and we are doing a great deal of it. Again, this is another way of avoiding the lay type of jurors.

Incidentally, I don't know whether you have gone into the grand jury -- that's another thing which I have great opposition to. The rubber stamp of the local proseuctor, rarely do they vote one way or the other without the approval of the local prosecutor, or the assistant that he has sent in or the encouragement that he gives. It is a secret locked door proceeding which is adverse to the American idea of justice which requires open justice, which the journalists have particularly been pushing. The announcement of the indictment still ruins a reputation, yet the indictee or the accused has no chance to defend himself at a grand jury before all of this has been thrown out to the public by way of the local newspapers and he has his name all ruined before it comes to trial. There is no reason why an indictment can't come from a prosecutor alone, if he feels he has enough evidence, or on an information, which again has to be presented. If you insist on a grand jury, I think Michigan has a one-man grand jury -- a presiding judge who will listen to the facts and determine whether there is a potential, and then issue an indictment, but not allow

himself to hear the case, of course, at a later time. Grand juries also issue reports. They come out and say that the jail is in very bad condition, which we all know. We have been writing about it for a number of years. They come out and report that welfare clients are doing wrong things, which we know. We have been observing that and reporting that to the people on a continuous basis, rather than the one shot deal of the report of the grand jury. The question has been raised whether that is the function of the grand jury. This is something that they have just picked up and are doing because they enjoy it and it makes them feel important. It gives them a day in the newspaper. Rarely do they come out with anything that is very unusual and has not actually been known long before all this. A special grand jury may have a valid function -- a Watergate-type of a special grand jury for a specific event, yes, to be called at the option of the presiding judge. I'm sure you must know that opposition has been growing toward the grand jury over a great many years. It has been abolished in England, where it began, as a defense against the lords, who would take it upon themselves to attack small people. We have no problems here with lords of any kind, and there is really no need for it. This is one of the weakest links of the jury system.

What do we do to improve it? Obviously, abandon juries altogether. The way to get rid of something bad is to just not have it, and to give judges greater authority. We have no juries in divorce cases, which are often very complex and long and drawn out and emotional. In probate matters, we usually don't have juries and in most of the juvenile court cases we don't have juries. We have the Federal Tort Claims Act, which I suspect has already been brought before you. Before it, if there was any action in court against the United States Government it had to be by way of a bill introduced in Congress granting the right to sue. They then said we simply will permit people to sue the government directly, thereby granting a new right which they never had before, and by doing this we have a right to eliminate the jury trial. Therefore, we have the picture of the citizen suing the government, in various actions, whatever they may be, without a jury, and everybody going home in a shorter time and with the least expense and more expediency, and hopefully more justice, which is the purpose of our discussion.

As I said before, juries are often abandoned by way of pre-trial settlements and quite often the fear of what a jury may do. I was involved in litigation not long ago, and we had discussed having a jury, and my attorney said, "You just don't know what these people are going to do, they are totally unpredictable." I would rather take my chance with an arbitrator or with the judge alone. I have some inkling where we are going, but with the jury we just throw ourselves into an unknown sea. We push these people out in a boat without a rudder and tell them to steer the way towards what they consider to be justice, or what the neighborhood considers to be justice. Consequently, there have been pre-trial settlements to a great degree. There has been arbitration, and quite often, with the blessing of the court. The court will create -- we have that in Cuyahoga County -- arbitrators with the trimmings, where you have three attorneys gather in an office and discuss the merits of the case. We present evidence from both sides and they come out with a ruling. If you wish, you can appeal to a court. Most are not. We have also been avoiding juries by creating various commissions. We have a Workmen's Compensation Commission, which takes a great deal of the work that would be going through the jury system. The N.L.R.B. and others are like that -- administrative courts, you might call them, who resolve a great many of the matters. And this is growing. That could be applied to personal injury cases. And I suspect you have probably heard about the Canadian Plan, where those who get a license are charged a fee for various types of licenses depending on the size of the vehicle and are compensated from a fund for injuries. You don't have to stay with that if you feel that you deserve more. You can sue for a great deal more, deducting what has been paid under the original claim -- again avoiding the jury system, and providing minimum payments for all those who are involved. If the juries are to be retained, we should try for better qualified, better

informed jurors and some sort of arrangement, to test qualification. I know now they must be able to read and write and be a certain age. Some other qualifications should be made to make sure they have some idea of what they are listening to.

The assessor plan -- in Germany, where they tried the jury system, they have gotten away from it. The French tried it and have greatly modified it. In Israel, whose legal system adopted a great deal of English background, there's no jury. The assessor plan is a plan where you have two what may be called "professional jurors", who may sit for the entire term of court, and who sit with the judge. He can guide them on the law and discuss the facts. But the determination of guilt or innocence is done by majority vote.

Then, there's the question, why do we need the twelve jurors when six would do just as well? Despite all that's been said, if we have to have a jury, I would vote for the 6 person jury. I see nothing wrong with that. It's better than a 12 person jury, but not as good as not having a jury at all. Assuming that we want to continue the jury, then why not divide responsibility - I'm referring now to civil cases. Why not have the jury determine the liability and then have the judge determine the amount of money that will be awarded? This is similar to a criminal case, where the jury finds guilt or innocence and the judge imposes sentence. In this way we can avoid the problem of remittitur and additur, when the judge himself determines what the damages are.

Getting back to where we started -- giving the judge more power. Let him select the jury to his satisfaction, and order the lawyers to proceed. Don't let them badger or push the jurors into the form the lawyers would want for their own advantage or benefit. Another good question -- shall we take the judge out of politics? We have the Missouri Plan, where we have him appointed for an initial period when he runs against himself without opposition. This gives him more security, yet he remains liable to the voters. And this is one of the most important points against the jury -- the fact that they are not liable to anyone, really. They appear out of nowhere, they make a decision, and then they fade away into nowhere. A judge who makes an error can be criticized, much different from a jury, which serves and then fades away.

Mr. Nemeth: How did you come to these conclusions, which are pretty radical, aren't they?

Mr. Gleisser: By observation, by interviewing; by seeing juries react to various of the steps of law such as the voir dire; and conversations I've had with some of them at the conclusion of a case, where I suddenly became aware that some of them had no idea of what they were going through. In a long proceeding, their minds tend to wander. They are not excited about what they are involved with, and they are not eager to be involved in it.

Dr. Singer: You must have talked to different jurors than I have. But, you offer as one reason for abolishing the jury that at one time a juror read a newspaper account written by you. A lot of people would say that it is not the jury that should be abolished but that the press should refrain from publishing that. Now, I'm not advocating either the censorship of the press or the abolition of the jury -- but your example could very well lead to another conclusion.

Mr. Gleisser: I was using that as an example that jurors do not follow instructions.

Dr. Singer: Let us admit that judges are human beings, too, and as open to the pressures of the community as are all of us.

Mr. Moore: Perhaps more so, because they are up for re-election.

Mr. Gleisser: We're talking now of the honor of a judge -- his ability to resist public pressure...

Dr. Singer: There is a difference between the quality of the judges on the federal courts and the state courts. In fact, there is a study coming out by the National Science Foundation. But there are many good state judges.

Mr. Gleisser: I think you'll find that depends on the territory. You might want to propose an improvement of the qualifications on the part of state judges.

Dr. Singer: Oh, yes. I agree with that.

Mr. Moore: The people involved in Watergate ... doesn't that make an impression on you about professional people?

Mr. Gleisser: Many questions have been raised in the newspapers about the morals and ethics of the legal profession, which I have defended quite often. Yes, simply because a man has passed a bar exam and taken an oath doesn't make him any more moral than he was before. But, wouldn't you feel that the additional training in law would give him a little better qualification than no training at all? Are we wiping out all of our professional training?

Mr. Moore: You wouldn't be wiping it out if you put in in the form of an instruction by the judge.

Mr. Gleisser: As a prosecutor, you have observed what the reaction is of the jury.

Mrs. Sowle: I have a couple of questions. Do you really think that professional training better equips an individual to make a finding of fact than ordinary laymen?

Mr. Gleisser: I hope it would provide an improved analytical mind, a mind which can discern which are the important facts and which are not. This is part of the basis of the law and logic that one learns, I hope, in law school. Without that, law school is a great big failure.

Mrs. Sowle: A different aspect of the question: You mentioned in your article, and you made the statement in your presentation, that the purpose of a trial should be to achieve justice. I'd like your definition of "justice".

Mr. Gleisser: Equality, going back to the old cliche that we are a nation of laws and not of men, that the laws should be equal, or as nearly equal that, assuming the facts are relatively equal, when you perform an act and are caught, you can expect a certain result; that if you perform an act of negligence and something flows therefrom, you can expect a certain result. This is justice.

Mrs. Sowle: Well, there is a different approach to justice than that, which says that what we should be able to expect from our court system is a method of settling disputes peaceably, that is, that people will have sufficient confidence in their court system to have their disputes settled therein. If you look at justice from that standpoint, do you think the jury does not serve that function -- does not leave the litigants feeling that they have had their dispute settled in an acceptable way?

Mr. Gleisser: It depends on whether you are a winner or a loser. I've heard people who've won saying, "This is just great", and those who've lost saying, "This is just awful. Those juries don't know what they're doing". Now, in a settlement, we've agreed to whatever our differences have been. We may not be completely happy, but at least we've reached an agreement. It is not made by somebody who has never grasped our case, never grasped what we have to say. I have seen lawyers stand in front of a jury calling them bigots. The defendant was black, the jury was all white. Now, he had no love for that jury, let me tell you. He made that very clear.

Mr. Moore: You mentioned equality, all being treated alike. And then we have these gross examples in sentencing that have been cited to us which come from our blue-ribbon federal judges. These people are trained, according to you. In one case, they'll give probation, and in the next case, maybe they'll give twenty years. How can we account for that?

Mr. Gleisser: This is of course the discretion of the judge, and his wisdom. The judge is not a computer, where certain facts are fed in, some buttons pushed, and we get a result. If that were enough, we'd have no need for a judicial system. However, the judge doesn't do this in the dark. He is aware of what other judges are doing and what they have done. If a reporter comes to him, asking, "Why did you do this?", he defends himself. He has logically worked this out, and has reached a conclusion. If you ask a jury, "Why did you do this?", they just shrug and say, "Well, we just felt this way."

Mr. Moore: Why didn't the judge in the $625,000 bug-bite case direct a verdict? You indicate no one ever saw the bug.

Mr. Gleisser: He tried to be extremely fair. I talked to him and asked him that question. He smiled and said, "Well, let the jury decide. I don't want to take it on my neck." In other words, it's a way of evading your obligation as an administrator of justice. The case was reversed in the state courts, and then reinstituted in the federal courts, which, incidentally was part of the plaintiff attorney's "game plan". I asked him why he did that, and he said he could "perform better" in the state court, and get a better verdict in the state court, "and then I hope that my moves will bring me to the proper place".

Mr. Aalyson: Although we're considering civil juries here today, do you feel that the use of the jury should be eliminated in criminal trials as well?

Mr. Gleisser: Restricted or limited. I would rather not say eliminated. The criminal case in my mind is a much more simple case than is a civil case. It's simply, "These are the facts. Did the accused commit the crime? Was he there, at the spot, at that time?" It is not as subtle as a contract case or other civil litigation. And I'm aware that before you can take away a man's life or put him away for many years, he'd prefer to be judged, as they say, "by a jury of his peers", except that I've heard lawyers say, "If your man is guilty, waive the jury and take the judge alone. If there is some doubt, try to get a jury, because, of course, you need a unanimous verdict. If you get anybody on your side, you've got a hung jury."

Mr. Aalyson: My notion is, I think you would prefer to see the jury eliminated in civil cases, is that correct?

Mr. Gleisser: Yes.

Mr. Aalyson: Would you prefer to see the jury eliminated in criminal cases, based on the same reasoning?

Mr. Gleisser: Yes, I'd go along with that, with the provision that in a capital case, you have a three-judge court because of the severity of the sentence.

Mrs. Eriksson: In recommending abolishing the jury in a civil case, do you tie this to a recommendation that judges be selected by the Missouri Plan?

Mr. Gleisser: Yes. Better qualified judges -- the Missouri Plan would create a situation where more better qualified attorneys would be interested in becoming a judge.

Mr. Mansfield: Mr. Gleisser, may I ask whether your profession as a reporter has had any effect on your opinion?

Mr. Gleisser: No, my opinions come from my personal observations of juries, and conversations with jurors, judges, and lawyers.

Mr.Mansfield: ...In your capacity as a reporter?

Mr. Gleisser: That's true, but remember I am also a lawyer.

Mr. Mansfield: I presume you had a period of time when you practiced law.

Mr. Gleisser: No, not full-time. So I am speaking mainly as an observer. And if a journalist is supposed to be a representative of the public in the courts, reporting for those who can not appear in court, I am the representative of the public.

Mr. Mansfield: Well, I would disagree with you there.

Mr. Gleisser: This is the result of the reaction I have had to what I have seen and what I have heard. I ask, as an attorney, how would I react to what I have just heard from this juror or about this jury?

Dr. Singer: One observation. The abolition of the jury, as I see it, would remove one option of the parties, that is, whether they want to go to the jury or to the judge. No one is forced to have a trial by jury.

Mr. Gleisser: That's true, and fewer and fewer are.

Dr. Singer: Then why don't we allow people to choose?

Mr. Gleisser: Why not broaden it to arbitrations?

Dr. Singer: I think that would be very fair.

Mr. Moore: I think judges are quick to defend juries in criminal cases. I've heard English lawyers tell me it's a better trier of fact than what the judge is, but for expediency, they don't want to get involved with it.

Mr. Mansfield: I think we've reduced this to an argumentative situation, so if there are no further questions, we'll adjourn. Thank you.

The meeting was adjourned.

SUBMISSION TO THE OHIO CONSTITUTIONAL REVISION COMMISSION

on the subject of

THE CIVIL PETIT JURY

JUNE 25, 1976, (An Outline)

BY LLOYD E. MOORE

I. Mr. Nemeth requested that I make myself available to you as a resource concerning the petit jury, with particular emphasis to be given to the number of members of the jury, the proportion of the jurors required to reach a verdict, and the subject of remittiturs and additurs. I wish to preface those particular subjects with a few general observations.

A. The object of government: "...I have considered the happiness of the people as the end of government."
Julian, A.D. 363

1. For over seven hundred (700) years, English speaking people have considered trial by jury as a necessary safeguard of their happiness.

B. Governmental Institutions derive much of their strength from long established traditions and should not be changed without good reason.

1. "Where reason cannot instruct, custom may be permitted to guide." Edward Gibbon

2. "Customs are the only durable and resisting power in a people." Alexis De Touqeville

C. Professed friends of jury trial are often its insidious enemies (e.g., by judges and legislators).

1. "Institutions may with impunity be altered or destroyed from above if their names are left unchanged." Will Durant

2. "Mankind is governed by names." Edward Gibbon

D. Many claim to accept that the jury is the finest instrument of justice but that it is too expensive for civil trials.

1. "Nay, take my life and all; pardon not that:
You take my house, when you do take the prop
That doth sustain my house; you take my life
When you do take the means whereby I live."
Merchant of Venice IV.i.375

2. "The institution of the jury, if confined to criminal causes is always in danger...."
Alexis De Touqeville

II. THE VALUE OF THE JURY SYSTEM

A. The first and overriding argument in favor of jury trial is participation in government by the people.

1. Thomas Jefferson said that it is better to be ill-governed and self-governed than governed by another. He also said that if you are forced to choose between the making of laws and their execution, the latter is the more important.

2. Jury duty is the most important governmental duty regularly performed by citizens of this Country. The ballot is exercised for a moment and is impotent until the next election. The community speaks through juries daily.

B. Of almost equal importance with participation of citizens in democracy is the value of the jury as a disinterested instrument of justice.

1. No official can be or appear to be disinterested in judicial results if he is the product of a long period of professional training and experience and if he serves on a continuing basis.

2. Jurors are selected from a large group. Any having an interest, real or apparent, will be stricken by the parties and judge.

C. The jury creates a large body of opinion in support of the decision in favor of the winning party. This makes the decision more acceptable to the loser and to the community in general. The loser can console himself that if he has another case, he will have a new jury--not so with a judge.

D. The jury system continually educates our citizens about our system of justice.

1. It encourages a higher quality of performance by judges, lawyers and litigants.

E. Juries reach decisions quickly. Judges are quick to have cases submitted (they encourage waiving of opening statements, arguments, even witnesses and urge everything to be submitted in briefs, which there is no assurance that they understand or even read). Judges take weeks to months and even years to reach a decision. They tell inquiring lawyers that it is the next thing on their list. They ought to be locked up without food, water or fire until they reach a decision.

F. The jury, fairly selected, gives a cross section of community experience that no judge or single professional class can give.

G. A unanimous jury insures effective participation of substantial minorities if the jury is fairly selected.

H. Juries insulate judges from unpopular decisions.

III. THE DECLINE AND DESTRUCTION OF THE JURY SYSTEM

A. Around 1800, juries decided law and fact.

B. Around 1828, juries decided law and fact in criminal cases only, and facts in civil cases.

C. From 1850 on, it was, at various places and times, permitted to waive a jury if done in writing; then it was required that a jury be requested in writing or waived automatically.

1. Civil juries were permitted to return less than unanimous verdicts. This was extended to criminal cases in some instances.

2. The size of the jury was reduced from twelve (12) to eight (8), six (6) and even five (5). This change has even reached criminal cases in some States.

D. Judges control juries by:

1. Motions to dismiss
2. Motions for summary judgment
3. Pretrials
4. Delay
5. Appellate procedures
6. Granting new trials
7. Rulings on evidence
8. Instructions
9. Judgments notwithstanding verdicts
10. Additurs and remittiturs

E. Juries survive mostly in America--Their decline in other Countries generally coincides with a decline in democracy abroad.

F. Juries can also be destroyed by:

1. Arbitration
2. Contracts providing for arbitration
3. Statutory causes of action which do not permit jury trials.
4. Juries are not effective where societies are fractionalized by civil strife--but then what system of justice, other than the prevailing military power, is?

IV. SIZE, PERCENTAGE REQUIRED FOR VERDICT, REMITTITURS & ADDITURS

A. Size - The number of jurors should remain at twelve (12) because:

1. Supported by tradition
2. Better cross section of community

3. Better chance for minority representation

4. Longer deliberation

5. Gives opportunity for more citizens to participate in government

6. Gives backing of substantial groups of citizens to the decision

7. The study by Beiser & Varrin indicates that small federal juries reach substantially different results in two (2) respects:

   a. More decisions in favor of the plaintiffs

   b. Six (6) person juries rendered smaller verdicts

B. Percentage required for verdict

1. Unanimity insures deliberation.

2. Unanimity insures participation of minorities.

3. Unanimity lends certainty to the result.

4. Unanimity maintains the solid twelve (12) in support of the verdict.

C. Remittiturs and Additurs

1. Should not be required except by agreement i.e. judges could suggest it as a settlement in a case where otherwise he would have to grant a new trial but he should never refuse to grant a new trial if that was otherwise required because one of the parties refused to go along with the courts' additurs or remittiturs. Voluntary additurs and remittiturs are settlements.

V. AREAS OF POSSIBLE IMPROVEMENT IN JURY SYSTEM

A. Computer selection of venire to insure good cross section of community

B. Automatic strike system
(Twenty [20] jurors seated, questioned, peremptory

challenges exercised, then each side strikes four [4] each and if other duplicates, the extra remaining struck by lot.)

C. Pamphlet explaining history, functions, legal terms, procedures and conveniences to all jurors

D. Adequate pay (prevailing community average)

E. No excuses from jury duty except for emergencies for which alternative jury service is arranged.

F. No exemption from duty, except for judges and practicing lawyers--perhaps not lawyers.

G. An independent body, in which the judiciary does not predominate, to oversee the job judges do with their courts. This body would have the right to reprimand, correct, suspend and dismiss judges for various degrees of incompetency.

H. Take away judges' power to make rules concerning juries; also, divest legislators of this power. These are constitutional matters.

I. Mandatory minimum time of deliberation of at least four (4) hours

J. Judges do voir dire except limited questions by lawyers

K. List of jurors not given out ahead of time for investigation

L. Allow jurors to hear evidence (limited to three [3] examples a side) of similar cases in certain areas, e.g. damages.

M. The jury and its duties and responsibilities should be specifically spelled out in the Constitution.

VI. THINGS TO LOOK OUT FOR

A. Friend of the jury who wants to change it.

B. Studies which indicate that there is no substantial difference in the verdicts by smaller juries (as compared to a twelve [12] person jury) and at the same time say that smaller juries have a higher quality of deliberation.

C. Persons who criticize a jury for awarding damages caused by a bug which was never seen but who do not criticize judges who saw a sufficient connection between the bug and the injuries to permit the jury to decide the case.

D. Persons who think Six Hundred Twenty-Five Thousand Dollars ($625,000.00) is too much money to compensate a fifty-eight (58) year old worker for the loss of two (2) legs.

E. Persons who are overly interested in saving time and money (We're richer now than ever--we ought to be able to spend more on justice).

F. Those who compare different results by juries considering the same case, e.g., the Sheppard case. No doubt one consideration of the second jury was the ten (10) years in prison Sheppard had served. The jury may well have exercised the sovereign power of pardon--a legitimate jury function.

G. Those who say the average man is not capable of rendering a just decision--the implication is that only the critic or those like him are capable of rendering justice, i.e., a professional class.

VII. DO NOT CONSIDER THE JURY IN A VACUUM--YOU WOULD REJECT IT BECAUSE OF ITS IMPERFECTIONS. CONSIDER IT IN COMPARISON TO ITS COMPETITORS (JUDGES, ARBITRATORS, ADMINISTRATORS, COMMISSIONERS, ASSESSING BOARDS, AND JUSTICES OF THE PEACE)--YOU WILL RETAIN IT BECAUSE OF ITS EXCELLENCE.

Ohio Constitutional Revision Commission
Committee to Study the Grand and Civil Petit Juries
September 24, 1976

Summary

The Committee met at 9:30 a.m. on September 24th, 1976, in House Room 10 of the Ohio House of Representatives. Present were Chairman Norris, and Committee members Mr. Aalyson, Senator Gillmor and Mrs. Sowle. Also present were Director Eriksson and Mr. Nemeth of the Commission staff, and Messrs. Michael Foley and Richard McQuade of the Ohio Prosecuting Attorneys Association. The Committee had before it Grand Jury Draft #1, dated September 24, 1976. It was prepared by staff at the request of the chair for discussion purposes only, in an effort to embody some of the more generally agreed upon approaches by witnesses at the Committee's January hearing on grand jury reform. Richard McQuade, who is the Prosecuting Attorney of Fulton County spoke as a representative of the Ohio Prosecuting Attorneys Association.

Mr. McQuade: Thank you, Mr Chairman, and members of the Committee. I have just minutes ago received a copy of the draft of the proposed change in Article I, Section 10 of the Constitution and if you don't mind I will go directly to addressing the proposed draft. It seems to me from reading the draft that this Committee is making a worthwhile and necessary effort to expedite the trial of criminal cases. There are certainly areas regarding the duplication of effort in the preliminary hearing and the grand jury, which serve pretty much the same function of determining whether or not probable cause exists. The difficulty I suppose a prosecutor has in commenting on a proposed change in the grand jury is one of conditioning. We are conditioned to understand grand jury as a right that is afforded the defendant. It is the defendant who must stand in court, have his rights to the grand jury explained to him, and the court must find that he intelligently waives the same, and the defendant by law has to waive the right to grand jury in open court and in writing. So what it seems to me we are doing here in an effort to expedite the process of criminal cases, we are taking what has been an historical constitutional right from the defendant. Although I noticed in your draft that the defendant on timely demand can have a grand jury convened. It occurs to me that many cases, especially lesser felonies -- and I'm talking about burglaries, thefts, matters of this sort -- can be processed as well by information as by grand jury indictment. And especially in jurisdictions like in Franklin County or in Hamilton County, where there are literally thousands of felony cases processed a year it would be an advantage to the state, and I would think to the defendant and to society, to expeditiously dispose of cases. Where I have trouble with the draft and with the elimination of the grand jury is where it is kept to capital offenses only. Certainly that is the supreme penalty, life itself, for the commission of a crime. Nevertheless, the felonies of first and second and third and fourth degrees all do involve a substantial deprivation of freedom, of liberty, and of property. Felonies of the first degree, as I recall, are punishable by 15 years to life. Felonies of the second degree all have substantial terms of imprisonment -- 5, 7, 15 years, what have you. And it seems to me that we have to take a good look at the substantial deprivation of freedom and liberty involving felonies of the first or second or third degrees before we say that there is no automatic entitlement to a grand jury. Although, again, I agree with the basic concept that it is going to involve a better quality of justice and a speedier quality of justice if we allow the prosecuting attorney to initiate felonies complaints on his information. On the other hand, I am troubled also by the language in which this draft proposes that the prosecution must be by information unless the state makes a timely demand for a grand jury or the accused makes a timely demand for a grand jury as provided by law. I have no problem with demanding of the common pleas court that a grand jury be convened if that is what's envisioned here. I would like to know whether that's going to be discretionary with the court or mandatory with the court. It would seem to me that because of the nature of the grand jury and its

many obvious benefits that it should be stated that it is mandatory, once a demand is made, that the court convenes a grand jury. What I'm saying is that when you say "as provided by law", I'm concerned about what the law is going to be. And it seems to me that the grand jury is so important that we don't want to allow any discretion with the common pleas court if the demand is made. Going on in the draft, I have some difficulty with the language that is repeated twice, that in a preliminary hearing or a grand jury hearing the prosecuting attorney must present any evidence that tends to exculpate the accused. My problem is this, having been about ten years in this business: it is difficult, first of all, to anticipate what the defense is going to be. In some cases it is obvious, like self-defense. In other cases, for instance alibi -- in how many instances have we had alibi slapped on us the day before a trial, never thinking that that was going to be the defense that this defendant was going to raise. What I'm saying is that you are putting the burden on me to anticipate what evidence is favorable to this defendant. Now what that involves is me making subjective conclusions on matters of evidence. For instance, perhaps I have some evidence that I believe is inadmissible in any trial, and as we know evidentiary questions are settled by the court, what you are asking me to do is subjectively determine that that is admissible evidence, and that that evidence tends to exculpate this defendant and is presented to it. The other thing that concerns me about it is how are you going to enforce it if I don't do it? Or how are you going to enforce it if I overlook it? What result is that going to have? Is that going to quash the indictment? Is that going to quash the court's decision in a preliminary hearing? Am I going to be fined? I think that probably is my biggest problem with it - the enforcement. In addition, it seems to me that not only am I required to make subjective evaluations as to evidence, but I am required to make subjective evaluations as to affirmative defenses. And I think that not only does that tend to ruin or put in shambles what you call the adversary system in the trial of criminal cases, but it puts an almost unconscionable burden upon it. Bear in mind that Rule 16 of the Criminal Rules already has that language in there, and it has bothered me every time I get a discovery letter.

Mr. Norris: What kind of language is in Rule 16?

Mr. McQuade: I don't have the language of the Rule with me, Mr. Norris, but it says that on a motion to the court the prosecuting attorney must disclose to the defendant certain items. I've got to give him any statement that I have in my possession made by a defendant or a co-defendant. I must give him the names and addresses of all witnesses. I must give him the results of any scientific experiments or tests that I have in my possession, for instance a firearms report or in the instance of a homicide or rape the coroner's report or medical report. In addition, I must give to him any evidence known to me that is favorable to the defendant. Now, there is no sanction if I don't do it that I'm aware of in the Criminal Rules. And I think the sanction is probably deliberately left out because it was expected that that was probably an impossible burden to place on a prosecuting attorney. You are asking me to second-guess what the defendant's case is. It seems to me you are also asking me to do a substantial amount of the defendant's work or the defense attorney's work and I have plenty of problems doing my own. So not only would I like to see that language eradicated from this part of the Constitution but frankly also from the Criminal Rules. It seems to me that language must come from some sort of mental process that believes that prosecuting attorneys are by their very nature over-zealous, unethical, and will convict a man just to have a record. I don't find that to be. I've been in this business for ten years and I've been in the Ohio Prosecuting Attorneys' Association for as long. I don't think that that is the way prosecutors approach cases. It seems to me that if a prosecuting attorney has a substantial affirmative defense in a case he is not in any case going to shield that from a grand

jury. He is not going to be in a position of trying to aggravate a murder case when he knows that really the elements that exist are involved during manslaughter, and deliberately withhold those elements from the grand jury. We are not self-destructive. We don't go out to deliberately try cases that we know are sure losers. As a matter of practice prosecutors weed them out in our grand juries, and I'm sure that every prosecutor does. When there are substantial affirmative defenses, when there are questions of alibi, questions of self-defense and what have you, those are indeed presented to the grand jury. Bear in mind of course that the function of the grand jury is important, too. I'm not telling you anything new. But we must keep in mind in discussing all of this that the grand jury does not acquit, and the grand jury does not convict. The grand jury merely determines whether or not there is probable cause. Finally, let me go to the suggestion that the presence of advisory counsel be afforded witnesses in the grand jury. I can envision some circumstances in which the presence or the advice of counsel is necessary to the grand jury witness. I would think it would be difficult for a grand jury witness, and especially a labelled witness, to make distinctions as to transactional immunity or use immunity or privilege. But that does not require the advice of counsel in the grand jury. As a matter of fact and as a matter of procedure, every prosecuting attorney in this state when a witness says, "I want to talk to my lawyer", says "Fine, he's right out here and he is available. Go right out of the grand jury room and we will wait for you." And perhaps, what the presence of the attorney, I think, violates a couple of traditional features of the grand jury. One, it obviously violates secrecy. You say, well, he knows what his client is going to say anyway. But bear in mind the grand jury has the right to ask questions of this witness. And ours do. Our grand juries are pretty active. These questions that are addressed by the jury may inadvertantly violate the secrecy that I believe is important to the grand jury. Secondly, we all know, and we all respect, the degree of enthusiasm and of advocacy of defense counsel. But once that defense counsel is present at the grand jury he is not going to be, I know, I guarantee you, advising only on matters of privilege and self-incrimination. You are going to have advice on evidence: "Don't say that, that's heresay." And you are going to turn the grand jury into an adversary hearing without any question. And that's not what it was meant to be and it does not function well. The question is raised that does not involve privilege, that does not involve self-incrimination, but involves a rule of evidence, and defense counsel says, "Don't answer that, that's not admissible in evidence." Now who is going to determine whether that guy answers? Bear in mind that traditionally rules of evidence don't apply to the grand jury. Heresay is admissible. And the Supreme Court of the United States has even said that illegally seized evidence is admissible because the body is an investigatory, not an adjudicatory, body. And the Supreme Court in three recent decisions -- in the Morrow decision, Calandre decision and Dionysus decision -- in all of those decisions reaffirmed the grand jury's right as an investigatory body to use illegally seized evidence and inadmissible evidence. And in fact Justice Powell said that the grand jury could use tips, rumors, inadmissible evidence, what have you, in the search for the truth and in order to lead to other evidence that may be admissible. So if the attorney is present in the grand jury, it seems to me that again you have the problem of violating the secrecy of the grand jury, you have the difficulty of turning it into a circus, where evidentiary questions will have to be decided, judges called, and full-blown hearings on evidence held. And I would suggest instead of the statement that is contained in your draft here that some statement be arrived at that the witness may at any time interrupt his testimony to the grand jury or leave the grand jury room to consult counsel on matters of privilege and self-incrimination. That would be satisfactory. That pretty much constitutes my comments on your draft. Mr. Norris, I would like to submit a paper encompassing these comments with the citations and cases, and I would like to answer any questions you may have.

Mr. Norris: If you have a written statement, if you could get it to us within the next week hopefully that would be fine.

Mr. McQuade: Fine.

Mr. Norris: Questions of the witness?

Mr. Aalyson: Do you believe that prosecutors are as diligent in attempting to assert the innocence of an accused as they are in attempting to establish guilt?

Mr. McQuade: I believe that when a prosecuting attorney gets to the point that he is going to request an indictment in a case, he has concluded in his mind (he is an advocate of the system) that that is a proper case. The other side of that coin is that his demand to the grand jury is not always met. There are a number of studies that have come out. There was an ancient study by Wayne Morse from the University of Oregon, a study of about 7,500 or 8,000 indictments in the state of Oregon. Of those, about 5 or 6% were not indicted. Now, that is a significant number of people. That's 400 or 500 citizens whose cases were presented and were "no billed". There was a study done by the Ohio Prosecuting Attorneys Association in 1973 of 8 or 9 members of the executive committee. Collectively, they had about 3,000 indictments, and there were 400 "no bills". That's about 12%. This group has statistics that were recorded by Bill McKee in Richland County that in his county, out of 112 presentments for indictments there were 43 "no bills". I talked to George Smith in Franklin County and his assistant Jim O'Grady yesterday. They averaged 20 to 25% "no bills". Those I think are significant figures and figures tending to prove that the prosecuting attorney is doing his job. Bear in mind we are not jurors. There are many close cases we have: the go-go girl who is selling something house to house. There are many cases when it is close enough. I don't make the decision when it is close. I say, we are going to take it to the grand jury and we are going to let them decide, and they decide. It is not my function to determine probable cause. It's my function to present what I feel may be a legitimate claim to the grand jury.

Mr. Aalyson: What screening process does a prosecuting attorney use to determine whether he feels there is enough to warrant his taking a case to the grand jury?

Mr. McQuade: The screening would vary from county to county. I know the small county. We have county courts. I have the job of prosecuting in the county courts so I have control of the felony from the very beginning through to the end. Bill McKee, George Smith, people who have municipal courts, may or may not have that control, depending on whether they have assistants handling their preliminary hearings and preliminary statements in the proceedings in the municipal court. I would say generally that the criteria used by the prosecuting attorney in determining that are whether, first of all, the elements of the offense are present. That varies from case to case. It may have to do with arguments, or values of particular arguments. The second thing I would think, are there affirmative defenses present? That's where you run into trouble. Again, if the prosecuting attorney starts making decisions on the efficacy of an affirmative defense, he has lost his role as an advocate and become indeed a juror. And, by the way, that is one of the problems you are going to have, it seems to me, if you allow felony prosecutions to be initiated by the prosecuting attorney, because then I am making the ultimate decision. If I initiate a case by information, the next process is arraignment and the next process is trial. I am making that decision. I am doing the screening of all of those felony cases. Indeed, what you are doing is giving the prosecuting attorney more power because he is making those decisions. That's fine with me, but what I would do as prosecuting attorney is I would take the guy

that is coming out of the building, the one where the door has been opened and he is coming out with a T.V. set and is caught by the police hands down, or gives a statement of confession -- those are rather easy. Yes, I'll take those by information. But in the serious cases, the homicides, the rapes, the aggravated burglaries, the arsons -- those cases, I would prefer you have the grand jury make the judgment. By the way, let me add one other thing. Under law, the grand jury is the only place in which the prosecuting attorney can get sworn statements under oath as to what happened. That's the only place. Otherwise, we are relying on statements generally given to the police or even written out by the police, by the victim, or by witnesses. Nothing under oath. And there isn't an attorney alive who hasn't had a witness turn on him. And that's another feature of the grand jury that has a good deal of merit.

Mr. Aalyson: I'm rather puzzled by your feeling that you should not be required to determine what is or is not evidence which tends to exculpate. Why not just turn over any evidence where the thought flickers through your mind? Why would you oppose this?

Mr. McQuade: I guess because it puts an additional burden on my duties. Not only am I preparing my own case. Again, I am making subjective evaluations as to evidence. First of all it seems to me that I have to say, "This is a self-defense case" or "This is an alibi case, this evidence tends to exculpate".

Mr. Aalyson: This is where I am troubled. What difference does it make what the theory of defense is if during the course of your investigation or preparation you come across something which raises the question in your mind as to whether or not this might be exculpatory?

Mr. McQuade: First of all, what you are assuming is that the evidence is obvious, that it hits you right between the eyes. And that is not always the case. There may be a statement in a witness' statement, there may be an event that took place. Surely, if I have a witness who says "John Jones wasn't there, he was in Adrian, Michigan", that's quite different. But what if I have other evidence? Would this apply to a motion to suppress? Let's say I have got a warrantless search of a motor vehicle. Now, am I to make a decision that because it is warrantless that this may tend to exculpate this defendant because of the law?

Mr. Aalyson: Why not?

Mr. McQuade: Because I'm an advocate. My reaction is that it is a valid legal search. Is that the defense attorney's reaction? Is that the defendant's reaction?

Mr. Aalyson: Aren't you an advocate for the accused in a sense as well as against him? Don't you have a responsibility to establish innocence as well as guilt?

Mr. McQuade: I believe that. I believe the prosecuting attorney is an officer of the court. He is an advocate and on the other hand, his primary duty is to do justice. What I am saying to you, sir, is that you are asking me, still in a trial situation, to anticipate subjectively what the evidence may be. Let me point out again that it is in Criminal Rule 16. It's there now and frankly, I don't know how to deal with it. There are cases that are obvious but there are many cases that are not so obvious.

Mr. Aalyson: Thank you.

Mr. Norris: One of the few areas that my witnesses from defense and prosecuting bar and judiciary agreed on was this exculpatory evidence burden. Lee Falke, for example, Judge Tague, Tom Swisher from the Bar, and I think Jack Patricoff as I

recall, all agreed that there ought to be some burden on the prosecutor in a grand jury hearing to present evidence that he knows about that tends to exculpate. And there just wasn't any disagreement.

I have some problems with the draft language as a result of the testimony. Let me ask you this: if this Committee decides that we are going to place some burden on the prosecutor to do this, have you any suggestions to improve that language? I am a little concerned with one point you just made, and that is that "exculpatory" may be so broad that it may include evidence that bears on admissibility of evidence. I don't think that's what I envision as exculpatory but I think it is broad enough that it might require you to do that and I think that's wrong. I don't think you need to bring forth evidence as to whether you had a warrantless search, for example, because that might tend to discharge the defendant on a technicality because you couldn't get evidence in. We are talking about the evidence, what you found in a car, and that either tends to exculpate or not. I agree with you that you ought not to make judgments on exclusion of evidence just because down the road this might tend to free somebody. I don't think that's what we're talking about but I think the language might present that problem. I'm wondering if you have got any suggestions to make on how we might improve on that language and tighten it up a little.

Mr. McQuade: If you are asking for alternative language, no I do not. I can present some and I would like to do that. My preference, Mr. Norris, would be to eliminate it.

Mr. Norris: Yes, I understand that.

Mr. McQuade: I don't understand the necessity of it. If it is in the Criminal Rules at this point, then why have it in the Constitution? Secondly, and I want to emphasize, I think it presumes a thing that is just not factual, and that is that a prosecuting attorney would deliberately withhold from a grand jury to the injustice of the defendant evidence that tends to show the innocence of the defendant. It doesn't seem to me that any prosecuting attorney in his right mind is going to indict a guy for a charge he can't prove. If he is, he ought to be removed. And I just don't see any evidence of that.

Mr. Norris: Well, if when you submit to us your written statement, if while preparing that, some alternative language comes to mind, I would like to see it. I understand your problem. Your position is that you don't want it at all and if you feel that submitting any alternative language compromises that position I understand that. I am not going to demand that you do it. I'm just saying if you think of something that would be of help, I would appreciate the assistance.

Mr. McQuade: I will. (Mr. McQuade's written statement is attached.)

Mr. Norris: The next question I have, we have alternative language there in the third paragraph, enclosed by the brackets, which reads: "An accused / a person_/ has the right to the presence and advice of counsel." Now that is to indicate that we had some testimony to the effect that any witness before a grand jury ought to have the privilege of having his attorney inside and other testimony that only the accused should have the right to have his attorney inside but not other witnesses. My question to you is whether you see any distinction. Whether we ought to limit it, for example, to the attorney for the accused or whether you see any valid distinction.

Mr. McQuade: Mr. Norris, I really don't see a distinction for two reasons. One, it is very rare, I would say, that an accused is called to testify before the

grand jury. I have had it happen to me, but always at the request of the defendant's counsel. I have never subpoenaed an accused to the grand jury. Now that doesn't mean that in the investigatory process that the grand jury is going through, the attention of the grand jury's investigation may not shift to a certain witness because of his testimony. So it occurs to me first of all that the presence of an attorney in the grand jury, the physical presence of someone sitting there, is too broad language to have. I would think that if it was amended to merely state that a person has a right to the advice of counsel, that that accomplishes what you want done. And "person" meaning the accused or any witness, I guess. Again, I believe the presence of defense counsel at the grand jury is going to turn it into a circus. I believe that and I think it is a dangerous precedent to set.

Mr. Norris: I want to make certain that I understand your feelings concerning the first paragraph of the draft and if I summarize this correctly. You apparently have sympathy for the problem of this duplication between the preliminary hearing and the grand jury and would like to eliminate that somehow. And you have some "gut reaction" against just having a guarantee of a grand jury only in the instance of a capital case. You know, really, when you think it through, our problem has been somehow to eliminate that duplication. Is this not an acceptable way to do that, to grant to either the prosecutor or the accused the right to demand a grand jury, again, assuming that we doctor the language to your satisfaction that you really get it when you demand it?

Mr. McQuade: Exactly. Yes, I could live with that without any problem. You see I have a concern. Someday I'm probably going to be out of this office and be on a defense bar and I am trying to take a look at both sides at what happens here. If George Smith's grand juries are "no billing" 25% of the cases, that is a very legitimate argument for secrecy. Because one of the reasons for secrecy of the grand jury is indeed that, to protect people who are unjustly accused. Now it seems to me because of the statistics that you have on this that there are indeed a large number of cases with "no bills", that the prosecuting attorney as well as the accused ought to have a mandatory right to the grand jury.

Mr. Norris: I have tried to run through in my own mind and what times as defense counsel I would want to make the demand and what times as prosecutor, and I guess there are times under those circumstances that I would and times that I wouldn't. For that reason it seems to be an acceptable alternative, because you are not withdrawing any right from anybody.

Mr. McQuade: What concerns me is what you are forcing me to do if I determine there is probable cause. I am then in a position of filing an information against the person and then there is notoriety. There are newspapers. There is T.V., and this case might indeed have been washed out by the grand jury if we presented it to them. I think that is an important right to respect.

Mr. Norris: Further questions of the witness?

Mrs. Eriksson: You spoke of your feelings that the right to a grand jury should be extended to the other serious felonies and not just capital offenses. Would you simply make the grand jury mandatory in those cases and eliminate the preliminary hearing, which is what happens here with respect to capital offenses? This draft is written so that in capital offenses there is a mandatory grand jury and no preliminary hearing.

Mr. McQuade: Is that what is meant here?

Mr. Norris: Yes. No preliminary hearing.

Mrs. Eriksson: That's what is meant here, and I was wondering if that would be your feeling if you were going to extend a mandatory grand jury to other felonies, if you had thought through it.

Mr. McQuade: As prosecuting attorney, I really have no problem with a mandatory grand jury in capital offenses.

Mrs. Eriksson: You indicated that you thought it should apply to....

Mr. McQuade: That really has to do with my problem with the last sentence of the language "grand jury hearing as provided by law". If that's mandatory, and I have an absolute right to a grand jury, I'm happy with it.

Mrs. Eriksson: Alright. That's what I wanted to know.

Mr. McQuade: It does seem to me that the fact that you have demanded that capital offenses, which get the most severe penalty imaginable, be heard by the grand jury, is good reason for keeping it there for all offenses.

Mrs. Eriksson: The intent of the draft is that on the demand of either the prosecutor or the defendant you could have a grand jury. That is intended to be mandatory language.

Mr. McQuade: Well, as Mr. Norris and any legislators know, when you say "as provided by law", you've given a good deal of authority to the legislature. I have great trust in the legislature but I would rather know that I have a mandatory right to it.

Mrs. Eriksson: And of course the intent of the draft is also to eliminate the preliminary hearing in those cases where you have a grand jury.

Mr. McQuade: Of course, that's the law. Once you indict him, he is not entitled to a preliminary hearing.

Mrs. Eriksson: But, of course, now there are often both.

Mr. McQuade: Well, you have certainly heard testimony on the problem of the preliminary hearing. Not only the haste which has to be had because of the Rules of Superintendence now, but some of the municipal courts handle forty or fifty thousand cases a year. It seems to me that it is worthwhile to take some of the burden off of them.

Mrs. Eriksson: One other question. You indicated that if the prosecuting attorney had the discretion to start felonies by information and no grand jury were demanded, it would go information, arraignment, trial. But the intent of this, of course, is to permit the accused to demand a preliminary hearing. If the accused did not demand either a preliminary hearing or a grand jury then your assumption is correct. But it would not automatically follow that he would demand a preliminary hearing.

Mr. McQuade: I didn't understand it that way and if that is the intent, I think you will have to do some changing either in this language or in the statutes.

Mrs. Eriksson: I think that is the intent. That's why I'm asking the question. I want to make sure that we understand.

Mr. McQuade: Procedurally, an information is an accusatory document signed by

the prosecuting attorney and filed in the common pleas court. There is no provision for any preliminary hearing in the common pleas court.

Mrs. Eriksson: No, and I think the intent of our draft is to require that there be a preliminary hearing if the accused demands a preliminary hearing. And that if that were held the common pleas court would have the same ability to dismiss the accusation as a grand jury. Not, "if it goes to a preliminary hearing and it is dismissed there it goes to a grand jury." That would no longer, I think, be possible under our intent.

Mr. McQuade: That's unfortunate.

Mr. Norris: What's unfortunate?

Mr. McQuade: What I understand the lady to be saying.

Mrs. Eriksson: We're trying to eliminate having both in one case.

Mr. McQuade: If that is the intent, that is unfortunate. What I understand the lady as saying is that if a charge is dismissed or reduced in a preliminary hearing by a county court or municipal court, then the prosecuting attorney is "escorted to the door". You do not have the power to grant a grand jury.

Mr. Norris: Right.

Mr. McQuade: I think that is unfortunate, Mr. Norris. First of all, you make me put on my whole case within 5 or 15 days. Now, an investigation of a rape case or a homicide case is far more extensive than that. And I'm not sure that I would have the case tied up in that period of time.

Mr. Norris: Now, you are saying your whole case. You only have to put on enough to determine probable cause.

Mr. McQuade: Well, do we? The law now allows the county court judges and the municipal judges to reduce the offense, for instance, from homicide to manslaughter. It seems to me that what we are asking for here is a mini-trial, and I have some difficulty with that. Secondly, the journals of Ohio prosecutors are replete with cases that were dismissed at the county court level or the municipal court level and were then indicted and convicted. There is a presumption here that a part-time county judge has greater wisdom or knowledge about a case than 8 or 9 members of the community, and I don't think that's warranted. You have important cases tried before part-time judges in many counties, 40 counties in fact, I think pretty much on the merits, a decision being made by a county judge who I am not confident is always competent to make that decision.

Mr. Aalyson: Would you be in a position prior to having the preliminary hearing to make the determination as to whether you wanted a grand jury and therefore demand one?

Mr. McQuade: That's a fact. That's often done.

Mr. Aalyson: Of course, this is what the section is attempting to give -- the right to demand a grand jury if you felt that you couldn't make your case before the time alloted. Then, I suppose you could demand a grand jury.

Mr. McQuade: I see really no problem with that. In your larger counties, I presume, you have the continuous grand juries. We do not, obviously. I think

we have perhaps 20 days with a grand jury a year in the smaller counties. What will probably happen is that it will be more expensive for these counties to handle it in this manner but it can be done. You would be calling them back more often because we've got to get inside the five day....

Mr. Aalyson: Something which occurs to me for the first time is what if the State and the accused or the defendant make inconsistent demands - one for a grand jury and one for a preliminary hearing....

Mr. Norris: It's information. The only demand that you can make is for a grand jury. It's going to be by information and preliminary hearing unless a grand jury is demanded.

Mr. McQuade: Let me go back to the previous problem that you addressed. It is anticipated by the Committee that if I file a bill of information in the common pleas court that that defendant still has the opportunity to have a preliminary hearing.

Mrs. Eriksson: Not if you demand a grand jury.

Mr. McQuade: But if I file a bill of information....

Mrs. Eriksson: Under this draft, if you file a bill of information, yes, he has a right to a preliminary hearing.

Mr. McQuade: That would occur in the common pleas court?

Mr. Norris: This doesn't say that. It says court of record. I think we are kind of anticipating that the legislature would follow up and do it in the common pleas court. I think that is the only way in our urban counties that we can avoid this terrible confusion we have in the division of prosecutorial duties between municipal prosecutors and county, but that's going to be up to the legislature.

Mr. McQuade: Point of fact, is it necessary.

The distresses a defense attorney can put upon me in a Criminal Rule 16 letter, by virtue of which I must give him all of the names and addresses of my witnesses and by virtue of which I must give him all of the expert testimony I have. It seems to me that if the interest here is to facilitate speed and justice, it doesn't seem to me that we are injuring the quality of justice by saying that if we have an information, we go to arraignment and we go to trial. That's what I think the prosecutors, especially in the metropolitan areas, would prefer to see because there are a lot of these cases that get out of hand.

Mr. Norris: I think what we got to was the point of deciding grand jury or no grand jury or, let's just say, preliminary proceedings or no preliminary proceedings. What I think our witnesses were saying to us, and this draft really is contemplating that okay, is that if we are going to retain a preliminary proceeding, let's make it meaningful. If making it meaningful is something that you don't want, it seems to me the alternative is to abolish all of them, file an information and then you don't get either a grand jury or a preliminary hearing. You've got to have preliminary hearings of some kind or another, but whether it is grand jury or preliminary hearing it ought to be meaningful or else why bother? It's a nuisance. And that's the reason I think we had the testimony and so much agreement that the way you make it meaningful is to require some evidence on the other side. If you don't want to do that, why bother? Let's just abolish the grand jury and the preliminary hearing altogether, it seems to me.

But I think prosecutors want a grand jury sometimes because you don't want to stick your neck out in many of these cases and just file an information and get lumped on it. But then again, if you are going to retain it, then you probably better make it mean something. That is our dilemma as we look at the grand jury.

Mr. McQuade: I guess my only comment would be that I would envision resistance on the part of the common pleas court to holding preliminary hearings, so if you can pop it back to the county court or the municipal court for a preliminary hearing after an information is filed that's well and good.

Mr. Norris: Well, this draft lets them do it. It only says a court of record.

Mr. McQuade: In point of fact I think the procedure generally now is that under the Criminal Rules they can demand of us to file a bill of information, and we have 15 days as I recall under the Criminal Rules to indict, or we have got to go forward on the information. I know that many of the large city prosecutors have announced that if they are non-violent offenses, we will try them on informations. I don't think the response has been too good.

Mr. Norris: Further questions of the witness?

Mr. Nemeth: Mr. McQuade, going back to a point that you made near the beginning of your presentation, you stated you opposed the presence of counsel either for a witness or potential defendant in the grand jury hearing, but that you would not oppose a provision in the Constitution to the effect that a witness or potential defendant could interrupt his testimony at any time and consult counsel outside the grand jury room. Now, isn't that something that he is already allowed to do?

Mr. McQuade: I'm not sure. I haven't seen any law on that. In practice, yes, and I think in the federal system it is provided by law. Our operation has always been that if he wants to consult with his lawyer, "There he is, go out and talk to him".

Mr. Nemeth: Let's assume that this is already permitted. Then the second question is, of what real benefit would this be to a witness? Because in that situation, the witness would be in the position of having to decide whether or not the answer to a given question would be incriminating or inadmissible, and he would then have to bear the burden of deciding whether or not the material being asked for is covered by a privilege. In other words, the layman, without the assistance of counsel in essentially an adversary situation, would have to make a determination as to whether or not he should consult his attorney. So how much real value would there be in a provision like that?

Mr. McQuade: I would make another assumption, and that is that if this guy knows enough to have an attorney there, his attorney is going to have schooled him on where these areas may arise. Secondly, if he is accused, he later has an opportunity to exonerate himself and to contest the use of these statements in a trial on the merits. Now it seems to me that those factors, when compared with the kind of a circus that the grand jury might turn into, the fact that the secrecy of the grand jury may be violated with the presence of an attorney, are the overriding considerations.

Mr. Norris: I want to make sure I understand your testimony. I think I know what your answer to this is going to be. In this framework we have in the draft, we have said that the favored procedure is going to be information unless one of the two opts for grand jury. Now, we could just as well say it will be grand

jury unless one of the two opts for preliminary hearing. I would assume that you would prefer between those two alternatives the one that is in the draft. You would prefer being able to opt for a grand jury, thereby assuring the grand jury, rather than flipping it around the other way, which means that you couldn't have a grand jury if the other party opted for a preliminary hearing.

Mr. McQuade: I'd much prefer the grand jury.

Mr. Norris: Okay. I though that's what you were saying and it seemed to us in structuring this alternative that that would be the better of the two routes, fairer for both parties.

Mr. McQuade: If we are still interested in protecting those who are unjustly accused, it seems to me that that is an awfully good reason to retain the grand jury system.

Mr. Norris: Thank you. We appreciate your appearance.

Mr. McQuade: Thank you.

Mr. Norris: Let's go over this draft and see where we are as best we can. If you turn to the first page of the memo dated September 24, staff has done a good job there of in essence breaking down the points that are found in the draft, and maybe by going down these we can just discuss generally what we want to do and then pick out the language as the next step. The first thing the draft does is to continue the exemption of cases arising in the armed forces of the United States from the provisions of the section. I don't assume we have any problem with that one. That is presently in the Constitution. So that part is okay, again, not referring to specific language but only to subject-matter areas. Second, it would make grand jury indictment the exclusive means of initiating the prosecution of a capital offense. That's new. Do we have any problem with that?

Mr. Aalyson: I have no problem except to wonder if the right should be that of the accused. If he doesn't want a grand jury, why should he have one? What's the purpose of providing that there must be one in capital offenses as opposed to giving him, the accused, the choice?

Mr. Norris: I'm trying to think where that came up in the testimony. Logically, I think I can't argue with your conviction but there may have been some reason. Julius, do you remember any testimony that excepted capital crimes from the idea of the option? I guess what you are really saying, Craig, is that all felonies are felonies.

Mr. Nemeth: One or two of the speakers mentioned that prosecutors should be able to share the burden of deciding whether to charge someone with a capital offense, in all cases. They also named three or four other classes of cases which the prosecutor should have the option to take to the grand jury, such as rape, or use of force by police.

Mr. Norris: He could always opt for a grand jury.

Mr. Aalyson: Yes, he could if he wanted to, and the grand jury does nothing more really than say that there is probable cause. I don't see any reason to have the prosecutor share the burden with the grand jury. I've got nothing against it, but it just seems to me that we could clean up the language if we let the option exist in every case.

Mr. Norris: Paul, do you have any feelings on that?

Mr. Gillmor: It sounds reasonable to me.

Mr. Norris: I agree. There isn't any reason for making an exception for capital offenses. So the burden is placed squarely. Alright. Let's go on to the third one, making the information an exclusive means of initiating the prosecution, and here we would be saying now, all felonies, unless the defendant or the state requests a grand jury hearing. The General Assembly would specify by law when and how a request is made and I guess what the prosecutor was saying to us is that the intention is fine but the language ends up in the wrong place in the sentence. Maybe where it ends up you might not end up with a grand jury but this is what we really intend to do is have the legislature say when the demand is made, at what point and how it is made. Any problem again with a statement of intent here?

Mrs. Eriksson: I think perhaps now, after hearing Mr. McQuade I have a problem, a sort of "chicken and egg" problem. He's saying that once you have filed an information, you have accused somebody, and this is in contrast with the present procedure of the grand jury because it is the grand jury that makes the accusation. And I think that in his mind, at least, if you file the information then there is no point in demanding the grand jury, because the grand jury is not performing its traditional function. It is in effect performing a preliminary hearing function. And I wonder if we need some other term or if we need to expand on what "information" means. I'm not sure about the "or" sequence here.

Mr. Norris: That's a good point.

Mr. Aalyson: I think he also was concerned and properly so with the idea that once the information is filed, notoriety attaches. So it occured to me while he was speaking that perhaps we should require the prosecutor, if he intends either to file an information or to ask for a grand jury, to present this information in some form to the accused so that the accused before an information is filed would have the opportunity to make a selection of a grand jury.

Mrs. Eriksson: There again I think the problem is the time. The prosecutor may go to a grand jury without knowing perhaps who the accused is. Or do not prosecutors ever operate that way?

Mr. Norris: Oh, yes. And there are times when you want secret indictments and the problem of going with information at that point is you are never going to find the defendant. What he's talking about though is if they decide they want to go by information.

Mrs. Eriksson: Right.

Mr. Norris: I don't know how you are going to handle that mechanically, to put him on notice at that point.

Mrs. Eriksson: Yes, there must be some way of doing that.

Mr. Norris: Ann, I think maybe your dilemma is solved if we really turn the grand jury into a more meaningful hearing. Let's assume the prosecutor decides to file an information. Obviously at that point the defendant's demand for a grand jury doesn't serve its purpose of wanting secrecy. If the defendant feels this is a baseless charge then that has been blown. So that would be some reason to go to him first, I agree. But if he has other reasons, if he feels that there is exculpatory evidence, I don't want all this stuff dragged out in a preliminary hearing in public, so for that purpose a grand jury is of some assistance as long as the prosecutor has to bring out the exculpatory evidence.

Mr. Aalyson: Do you see some difficulty in requiring the prosecutor, if he reaches a decision that he is going to either file an information or go to the grand jury, to notify the accused that he is going to do so and then give the accused an amount

of time to make a decision on what he wants to do?

Mr. Norris: Yes, because you might lose him. If we are talking about a white collar crime the guy is always going to be there. That's one thing. But if what you want to do is file that information and arrest him, in many instances the first time the accused knows that is when they have got him.

Mr. Aalyson: Can we not provide that the information would be secret until the accused makes his election?

Mr. Norris: But once the guy is arrested, that's not very secret. That does create a problem.

Mrs. Eriksson: Yes, and as far as the grand jury, I am not concerned about that because the prosecutor under this draft has the right to the grand jury anyway so he wouldn't have to notify anybody. That problem I think eliminates itself. It's only with the information in the instance where the prosecutor has made that choice and the problem of course of the defendant's leaving is a real problem.

Mr. Norris: In the majority of cases, you better get hold of them while you can.

Mr. Aalyson: We put the person in the same position as he is now, Ann, do we not? If we provide that the prosecutor may apprehend him at the time he proposes to file the information and he's got to make the selection, the guy isn't any worse off than he is now. The information is filed and then they apprehend him. The notoriety exists under either system and to no greater degree.

Mr. Norris: It may just be something that we can't eliminate -- that initial notoriety. The alternate route to get rid of it, of course, is to always provide the grand jury.

Mr. Aalyson: Then there is always the opportunity if the prosecutor thinks the guy might skip to himself elect the grand jury.

Mr. Norris: Yes, there are times when you don't need secrecy. But with organized crime and drug rings, for example, you've got to have secrecy because those guys know they are doing it, but they don't know when things are going to kick, and you have got to have secrecy to get them. Now if there has been a murder or a robbery, the event has happened, it's been publicized that there has been a murder or robbery, so it is a matter there of not having to have secrecy. In filing the charges you just don't hit him at the same time you file the charges. You identify him in essence. So in those cases there is no real reason why the prosecutor needs the secrecy of the grand jury. You have to put the finger on the guy right away. If you give him notice, then he is going to skip. Why don't we for the purposes of right now just stick with that kind of language unless something occurs to us during the day or later. I take it that for discussion purposes #3 is okay.

#4 imposes a duty on the state to present any evidence it has which tends to show the innocence of the defendant. I've made some notes here in addition to what Julius has. Julius, when you say "California" are you relying on the Johnson case? The syllabus of that case reads this way: "When district attorney seeking indictment is aware of evidence reasonably tending to negate guilt he is obliged to inform grand jury of its nature and existence so that grand jury may exercise its power to order evidence produced." That's the case of Johnson v. Superior Court. It's a Supreme Court of California case, 124 Cal. Reporter, 32 (1975). According to my notes, Lee Falke was for that and Judge Tague and Tom Swisher of the Bar Association said they had no problem with the concept. I don't have any

problem with the concept but I am getting concerned about the wording.

Mrs. Eriksson: I think that this language in the syllabus might even be better, "evidence reasonably tending to negate guilt".

Mr. Norris: Yes, I think that is better. Two legitimate objections I think were raised. One is that the prosecutor ought not have to anticipate defenses so he has to go out and look for evidence, and I think that this language that we have in the draft "be able to produce" is pretty scary. Also, I think the point was well made that "exculpate" is a broad enough term that could be reasonably interpreted as an evidentiary question. That's just not right. That's not what he has to do. If he has evidence that would really negate guilt as opposed to letting the guy loose, that is one thing. But I don't think we should make him try the other fellow's case for him. I don't know how we limit that, Ann. Do we use terms to limit the evidence to "good faith"? Let's assume we even come up with better language, "reasonably tending to negate guilt", or whatever it is. Let's assume that the prosecutor's got something in his file and he makes a mistake either in judgment or he just forgets it and he doesn't bring it to the attention of the grand jury or in the preliminary hearing. What happens? I guess the case gets thrown out. It obviously has to.

Mr. Aalyson: We're seeming to provide this only in the case of grand jury hearings.

Mr. Norris: Also preliminary hearings. It's in there twice. That does incidentally create a little bigger problem mechanically in the preliminary hearing than in the grand jury. In the grand jury the prosecutor can just tell the grand jury, which is pretty neat. That's fine, that's really what we are talking about. But in the preliminary hearing, at least the way we have preliminary hearings now, you have to present witnesses, which is probably an unnecessary burden. So when we say "present any evidence", we really want to tell the trier of fact at the point, whether it is a grand jury or a judge, but I don't know whether we need to bring in all that. So maybe down in that preliminary hearing language we need something that doesn't actually require him to present the witnesses, but just tell the judge.

Mr. Aalyson: Inform him.

Mr. Norris: Yes, I think maybe that's not too bad, "inform the judge of any evidence". Yes, and we could use that same language up in the grand jury. "Inform the grand jury of any evidence it may have which tends to negate.....". Are we agreed on the concept that there ought to be some reasonable burden on the prosecutor to present evidence?

Mr. Aalyson: I'm in favor of that. I think that's a good idea. I think that if there is a tendency on the part of the prosecutor, the tendency is surely to be the prosecutor rather than the impartial judge and say, "I will look for innocence as well as guilt.

Mr. Norris: To me it gets down to the question that if there really is a protection to the accused, let's make it somewhat meaningful. The burden should still be only probable cause, but there has got to be something, or just abolish it altogether. It's just a waste of time I think right now. I'm a little curious about some of those percentages of "no bills". I find that awfully difficult to believe that there are "no bills" in 25% of those cases. Something is wrong. Either they are bringing in an awful lot of lousy charges to the grand jury or they have got a lousy assistant handling it, because if the prosecutor wants an indictment he is going to get it.

Let's go to #5, "permit an accused (or in the alternative, every person) testifying before the grand jury to have counsel present during his testimony."

Mrs. Eriksson: Don't you think that part of Mr. McQuade's problem is that he believes counsel is therefore going to question witnesses? And that is not what we intend.

Mr. Norris: That is not what we intend at all.

Mrs. Eriksson: Because I can't see any difference between the witness running out of the room to ask his attorney whether he should answer this question or whether the attorney is sitting in the room, apart from his question about secrecy.

Mr. Norris: As Julius points out, it is no real right to be able to run out of the room, because a layman has got to be able to make a decision as to what questions he should question, and that's not fair. If he's going to have a right he ought to have it.

Mr. Aalyson: There was one other point that Mr. McQuade raised, and that was that the lawyer might tend to tell the witness not to answer a question which is not objectionable on the basis that it might tend to incriminate the witness himself. But we could avoid that problem I think simply by saying in the grand jury hearings the criminal rules of evidence need not apply.

Mr. Norris: Maybe we could come up with brief language that would clearly show that the purpose is only to advise his client, not to question witnesses.

Mr. Nemeth: ...to advise his client on matters of self-incrimination?

Mr. Norris: Right, exactly.

Mr. Aalyson: Limited only to matters of self-incrimination.

Mr. Norris: Paul, what do you think?

Senator Gillmor: It looks alright.

Mr. Norris: Should we limit it to the accused or any witness?

Mr. Nemeth: Ann and I batted this around a little. It seems that it might pose a problem under some circumstances, because there are of course cases in which you don't know whether an individual is just a witness or whether he is going to end up being the accused. So making a distinction and just permitting an accused to have counsel present...

Mr. Aalyson: And is he really an accused before the grand jury makes an indictment?

Mr. Nemeth: He would be under the circumstance where he elected to have a grand jury hearing.

Mr. Norris: It should be every person. I agree with his point. Is that okay with you, Paul?

Senator Gillmor: Yes, I think it should be, too.

Mr. Norris: #6, "permit the general assembly to impose additional duties on the

grand jury". I'm trying to remember. The Constitution has been silent on that, is that correct? It is done by statute. Do we need to have that in there or not? There was general agreement by the witnesses that a grand jury ought to be able to do these kinds of things if the legislature wanted them to. I'm just wondering whether we even need the language. What do you think?

Senator Gillmor: Our original intent was to clean up the Constitution, so that if it is in the statutes, we don't have to put it in the Constitution.

Mr. Norris: Ann or Julius, do you have any thoughts on the necessity of retaining that language?

Mr. Nemeth: You really don't. I would prefer not to see it there.

Mr. Norris: Let's take it out then.

Alright, other suggestions include the following, which are not in the draft: "Permit the General Assembly to abolish the grand jury or limit its use".

Mr. Aalyson: That's inconsistent with the position that we have already taken, isn't it?

Mr. Norris: "Permit county prosecutors to convene in multi-county grand juries to investigate crime that seems to spill over county lines".

Mr. Nemeth: They want this as an alternative to the Attorney General's doing it. They want to do it locally.

Mr. Aalyson: I have a little reservation about permitting a prosecutor in one county to go into another county and do something especially if the other county is opposed to doing it.

Mr. Nemeth: No, this would be strictly on a cooperative basis.

Mr. Aalyson: I see. I would have no objection if they could agree upon it.

Mr. Norris: Could that be done by statute?

Mr. Nemeth: It isn't now.

Mr. Norris: But it could be done by statute.

Mr. Aalyson: I was going to say empowering the legislature to permit it might be okay. I don't think we want to draft a constitutional provision which would set up the procedure by which it might be accomplished.

Mr. Norris: But couldn't the legislature do it even without the authority?

Mrs. Eriksson: I think so. I think the legislature authorizes the Attorney General to convene.

Mr. Norris: So let them do it.

Mr. Nemeth: You might mention it in the report as a suggestion.

Mr. Norris: Yes, that's good, that we felt that it was a commendable suggestion, but the legislature is capable of accomplishing that.

"Leave the grand jury system as it is and implement any change by statute". That's inconsistent.

"Abolish the grand jury altogether". We have decided not to do that.

"Require all grand jury testimony to be transcribed and made available to defense attorneys upon request". What is the status of the Criminal Rules?

Mr. Nemeth: I think they can demand that now under Rule 16.

Mr. Aalyson: The grand jury testimony? It's not transcribed. I don't know, I'm not familiar with the criminal procedures under the new Criminal Rules.

Mr. Norris: I guess we will have to check Rule 16 so we will at least know.

Okay. Let's go to the draft itself and just go through it quickly. I guess what we are talking about in the third line, we would essentially be crossing through "capital offenses shall be prosecuted only by grand jury indictment".

Mr. Nemeth: And cross out the comma and the "and" and the "other" in the following line and insert "all".

Mr. Norris: "All felonies shall be prosecuted only by information unless the state makes a timely demand for a grand jury hearing". Why don't we just put a period there and strike "as provided by law"?

Mr. Aalyson: Somebody is going to have to spell out the procedural method.

Mr. Nemeth: That was the original intention of putting that phrase in there.

Mr. Norris: Couldn't the legislature do it anyhow?

Mr. Nemeth: Yes, except if it is not specifically spelled out that it has to be provided by law, it could also be the Supreme Court who did it by rule.

Mr. Norris: Yes, that's right. Who do we want to do it, the legislature or the Supreme Court?

Mr. Aalyson: I don't have any preference. I just wonder who is going to do it if we don't say. Both parties might do nothing but just sit, and how would we be able to make a timely claim, and what is timely? I think we should prescribe it to be done by law.

Mr. Norris: Do you prefer the Supreme Court or us?

Mr. Gillmor: I think the philosophy of the constitutional amendment was to let them handle procedural matters...

Mr. Nemeth: Except that this may be construed to be a substantive right.

Mr. Norris: We're saying that it is a substantive right. Where would you put it in the language? Maybe the prosecutor's concern was really not well taken. Maybe it is alright right where it is.

Mr. Aalyson: I would think that we might strike out the word "timely", put a period after "hearing" and then say the legislature shall prescribe the means.

Mr. Norris: You could always say "the state makes a timely demand as provided by

law for a grand jury hearing" and put it up there. That would take care of the prosecutor's job. Then clearly "as provided by law" modifies "demand" and not "hearing". Why don't we try that?

Mrs. Eriksson: Or even a little more awkwardly put it after "timely".

Mr. Norris: You make a judgment on that, Ann.

On to the next paragraph: "In the absence of a grand jury hearing an accused has the right...". What we anticipate here is we have an information that has been filed, and we are assuming he isn't going to demand a grand jury hearing. There will not then be a preliminary hearing unless he demands that, right? Isn't that what you mean by the term "right"?

Mr. Nemeth: Yes.

Mrs. Eriksson: Is that what we mean?

Mr. Norris: That's what you were mentioning, Ann. I guess I hadn't thought about it. I had thought about it always being automatic, but I don't know that it needs to be. He may not want one.

Mrs. Eriksson: I think we have to specify if he is going to have to demand it.

Mr. Norris: Alright, then we can say the accused has the right to demand a preliminary hearing. That's a pretty good idea. Why not demand it?

Mr. Nemeth: This way it would be a positive duty on him to make the demand. Is that what we want to do?

Mr. Aalyson: Not unless somebody is telling him he has to do this. I think we should leave the right vested in him.

Mr. Norris: Right. It's okay. Let's leave it the way it was, because today we do waive preliminary hearings, we do that all the time.

Mr. Aalyson: You always have the right to waive. You don't want to take away the right to waive.

Mr. Norris: We say, "you have the right". We don't say, "there shall be a grand jury hearing". He has the right to, so he can waive it. I think that's okay.

Mr. Aalyson: For example, in the workmen's compensation act, it says a trial shall be by jury unless waived. Why did the legislature put that in? I don't know.

Mr. Nemeth: I think in the federal system, for example, you have to make a jury demand, which is the flip side of the coin.

Mr. Aalyson: Yes. In a criminal proceeding. I don't think we should impose the burden on the accused to make a demand. He should have the right.

Mr. Norris: Let's leave it just the way it is, "has the right to a preliminary hearing by a court of record to determine probable cause. At such hearing the state has the duty to present..." and then you are going to have to come up with language on that, right?

Mrs. Eriksson: Yes, to inform the judge or the grand jury...

Mr. Aalyson: Or the trier of the facts.

Mr. Norris: Two thoughts. One is the informing as opposed to presenting evidence and the other is language that limits what he has to present when he has to inform.

Mrs. Eriksson: Right, I think we should go back over this California case.

Mr. Nemeth: How about putting in a specific clause saying that if he inadvertently forgets or something, that doesn't nullify the case.

Mr. Norris: I think some way you have to have some good faith test, and I don't know what it's going to be, but see what you can come up with and we can talk about that this afternoon.

Okay, in the next paragraph, it should begin "a person has the right to the presence and advice of counsel" and we're going to say "in matters of self-incrimination" or something like that.

Mr. Aalyson: "Excepting matters of self-incrimination"?

Mrs. Eriksson: I think we said "only on matters of self-incrimination".

Mr. Nemeth: I think that won't completely satisfy the prosecutors because I think they have somewhat of a fear that if counsel is present in the grand jury room, he will actually get the gist of the case, so to speak, and will be able to build his defense because he has been there and has heard the line of questions.

Mr. Norris: I guess what we are saying is that that's not really a legitimate complaint.

Mr. Aalyson: I think the defendant is entitled to know everything he can. I think that is so inconsistent with our idea that the prosecutors have the burden of proof. Is it implicit and is it the right of a person, in this case it would be an accused, at a preliminary hearing to have counsel?

Mr. Nemeth: That right is already established by the interpretation of the Federal Constitution.

Mr. Aalyson: Alright, I was wondering whether we wanted to limit it just to the grand jury.

Mr. Norris: I guess that takes care of it.

Mrs. Eriksson: In the very first phrase, "except in cases of impeachment" is of course taken from the present Constitution. The way this has been reworded it occurs to me that that may no longer be necessary.

Mr. Norris: The "except in cases arising in the armed forces"?

Mrs. Eriksson: Yes.

Mr. Norris: That's good.

Mrs. Eriksson: Because the circumstances of impeachment are different.

Mr. Aalyson: Why do we except those cases -- because the armed forces have their own tribunals?

Mr. Norris: Yes.

The next thing we want to move on to is civil juries. You have a memo dated September 15 and also a draft accompanying it.

Mr. Aalyson: If I might interrupt, I have one question that arose on Article I, Section 10 which was amended primarily by deleting material, if not exclusively. The last phrase there just preceding the last deletion which was "and may be the subject of comment by counsel". Why are we leaving in the last phrase there, "but his failure to testify may be considered by the court and jury"? If he is not required to testify, why should they consider anything? I don't think that ought to be allowed. They are going to consider it anyhow. I know that. But I don't think the Constitution ought to grant them the right to consider it. Because you are eliminating the requirement that he testify, the fact that he doesn't testify should not be a part of the case.

Mr. Norris: The deleted language is the result of a federal Supreme Court case. Prosecutors, if defendants didn't testify, would always raise hell about it. That has been knocked out. But the Court has held that the jury itself can speculate on why he did not do it. You just can't comment on it. If we eliminated all of the language after the semicolon, that wouldn't keep the jury from considering it.

Mr. Aalyson: That's right. And it would also get rid of some unnecessary language in the Constitution is what I'm saying.

Mr. Norris: Yes, I think he's probably right. I don't think it makes any difference.

Mrs. Eriksson: This is simply because this was what the Bill of Rights Committee agreed to.

Mr. Nemeth: The Griffin case just referred to comment.

Mr. Aalyson: I understand that, and I have already said that they are not going to refuse to consider, but I think it is unnecessary language in the Constitution.

Mr. Norris: This really doesn't have anything to do with our civil petit jury or grand jury, and what we ought to do, Craig, is when they come up with the Bill of Rights Committee report, that's the next meeting, isn't it...

Mrs. Eriksson: That's already been accepted.

Mr. Norris: Well, we blew it.

Mr. Aalyson: I bring it up because it's surplusage.

Mr. Norris: We would be accused of going beyond our charge, but we could bring it up in our proposal.

Let's go to civil juries and that one draft. We had really two areas of consideration in civil juries, and September 15 was the date of the memo. One was the testimony that we received generally about whether they ought to be increased in size or eliminated altogether. My own conclusion after listening to all of that testimony was that it was pretty much a waste of time. I don't feel that we really learned much. And the Supreme Court has already reduced the size of the jury to eight. We had somebody that wanted to increase it back to 12. We had somebody that wanted to eliminate juries altogether. I just kind of concluded

that there was not much to be done in that area. As a result I did not ask staff to draft anything in that area for purposes of discussion, but did ask them to draft something in the other area that was left to the Committee on the Civil Petit Jury, and that is the right of appeal from a jury determination of fact in the area of damages. We learned and the memo points this out that under the new rules of appellate procedure when the trial court sits without a jury, the court of appeals may substitute its judgment. If it feels the decision of the trial court is against the manifest weight of the evidence it can reverse and substitute its judgment right now. That's the rule. But in a jury case it cannot. It can neither add nor reduce the jury verdict, absent agreement by the parties. It can only reverse on the manifest weight of the evidence and remand for a new trial. The reason for that is that where a jury was involved, it has been held that clearly the right to jury trial is abridged if the court does that. What I have done is to ask staff to draft for discussion purposes an amendment which in effect would implement Rule 12C for all trials, whether by jury or by judge, and would permit the court of appeals in either instance to vacate that portion of a judgment of a trial court which relates to the award of damages and render the judgment which should have been rendered on the evidence. Or it could remand the cause to the trial court for new trial. I have done this for discussion purposes. I have had some strong feeling that we have to at least consider the fact of the inconsistency. An appellate court, it has always seemed strange to me, can consider anything except damages. It's kind of time consuming to have to go back and try all over on just that issue alone. If you place some high burden against the manifest weight of the evidence, why make a distinction between damages and other kinds of issues at a trial. So that's the reason I had this drafted, and again we chose to do it more or less in conformity with Appellate Rule 12C which applies to trial without jury.

Mr. Aalyson: I have some comments. Number one, I am an ardent believer in the right to jury and I believe that it should be extended to every case in which a litigant requests it, except in some case that might be described as de minimus. You might want to put a dollar rule on it, I don't know what else you can do but put a dollar rule on it. It can go under that but I don't think it should go over that. I was impressed, contrary to your own experience, Alan, with the testimony of the witnesses with regard to the size of the jury. Maybe I was impressed because it seemed to me that there was pursuasive testimony supporting my own view, and that is that there seems to be a lesser deliberative quality in a jury which is composed of fewer members. I believe that we should go back to the 12-member jury. Along that line, since I do believe in juries and their benefits, I am aware of some of their inefficiencies. I am somewhat opposed to giving a judge or group of judges the right to tamper with the jury decision either with regard to weight of evidence or with regard to the amount of a verdict. I recognize on the other hand that juries do make mistakes. But I believe that the right to correct that mistake, unless it involves a matter of law, should be placed in the hands of another jury rather than the hands of the court. So for that reason, I would recommend some changes that would, number one, entitle parties who believe they have been aggreived to jury trials, and number two, restrict the right of a court, no matter how many members it might be composed of, where a jury has heard a case, to the remedy of a new trial if it believes that there has been a malperformance of the jury of its function in regard to a matter that involves a determination of the facts rather than a matter of law.

Mr. Norris: Which is where we are right now.

Mr. Aalyson: Except that we give the courts, maybe not constitutionally, the rights to remittitur and additur. And the courts are, I think, prone to use the

right of remittitur and very clearly reluctant to use the right of additur. And I would say let's take away both remittitur and additur. And if the court is convinced that the jury has given too large or too small a verdict then let the court have a new trial and commit it to another jury.

Mr. Norris: Of course, the reason I asked for this draft to be drawn is that I don't think we have remittitur and additur. That's not really a remedy. That's only by agreement of both parties. The judges in an appellate court cannot add or remit, where there has been a jury. They can where there has been no jury. So we really don't have that right. We talk about it but we really don't have it. Parties can agree to anything at any time, so it is not really a grant of power.

Mr. Aalyson: I accept that, but I think we should limit it to the granting of a new trial.

Mr. Norris: I conclude where we have now. Paul, do you think we ought to give the court of appeals the right to remit or add?

Mr. Gillmor: I would be inclined to give them that right, but I don't really have strong feelings on that.

Mr. Norris: I'm beginning to conclude that I'm the only one in the state that does.

Mr. Aalyson: What is there that says that a judge or a group of judges is any more competent to decide the value of a case than a jury is? If we subscribe to the idea that there should be jury trials, then I say let's not let the judges tamper with what the jury did unless the judge thinks that as a matter of law they have done something wrong.

Mr. Norris: Yes. I'm just arguing with the remedy. What I'm trying to say is that you ought to have remedy if there is error. If there is error, if the jury makes a mistake in weighing the evidence, you've got a remedy. You and I are just arguing about the remedy. You're saying if there is error, new trial. I just felt that for consistency, if you've got error, that's what a court of appeals is for. I'm not saying they are superior, just that they ought to be able to remedy the error. And you're saying that the way to remedy the error is reverse and ask for a new trial.

Mr. Aalyson: Yes.

Mr. Norris: Well, that's a legitimate argument. If there is no great sentiment for that, let's pass over it. If we have some other members present this afternoon, we can advise them that that is kind of on a hold, and try to get their position on that. I guess my problem with the testimony on enlarging the juries as a matter of constitutional law is that yes, we had some persuasive testimony, but the more deliberate problem with that is that in terms of volume most of the studies go the other way. You can make an argument either way, and I'm not persuaded that we have to go back where we were. There are so many studies that urge reducing the juries for just the opposite reason. We didn't have those in front of us, but I think we are all aware of the cries to reduce jury size. And perhaps the Supreme Court has done the right thing in reducing it to eight.

Mr. Aalyson: Most of the studies that I have seen talk about reducing jury size mostly in terms of costs and expedition, and the expedition comes from the standpoint

of selection rather than what the jury does when it gets a case. It takes longer to select twelve than it does eight but in my own experience, and I have tried hundreds of jury cases in a limited field, the amount of time which might be saved by reducing the size of juries so as to save time in the selection process is more than lost in the way the courts treat juries, by giving them 1½ hours for lunch rather than an hour, quitting at 4:30 rather than at 5:00, or starting at 9:30 rather than 9:00. So I think the argument is not a valid argument in that respect.

Mr. Norris: You have eight-person juries now in workmen's compensation, don't you?

Mr. Aalyson: Yes.

Mr. Norris: Isn't there a clause that sticks you with twelve somewhere in the Constitution?

Mrs. Eriksson: Corporation appropriation cases, and we are recommending the elimination of that one.

Mr. Norris: That's in somebody else's report?

Mrs. Eriksson: It's in the Bill of Rights report.

Mr. Norris: Alright. I want to make sure we don't miss these things. Paul, do you have any feeling that we ought to constitutionally require 12?

Mr. Gillmor: No, I don't think we should.

Mr. Norris: Why don't we do this after we come back? We can have available a half-dozen copies of the section of the Constitution that talks about civil juries? I don't think we've got that in front of us. And let's just go over that and be sure staff brings to our attention any changes which the Bill of Rights or any other Committee has made. Let's at least go through that line by line after lunch and make sure that we don't want to make some changes, and figure out where to go from there. Anything else about civil juries that we ought to be talking about besides enlarging the size?

Mr. Aalyson: Does the Constitution presently contain any provision as to when you are entitled to a jury trial?

Mrs. Eriksson: It just says that the right to trial by jury shall be inviolate.

Mr. Aalyson: Does "trial" imply criminal proceedings?

Mrs. Eriksson: Yes.

Mr. Aalyson: Where do we derive our idea that there shall be juries in civil cases?

Mrs. Eriksson: From the same section, actually. That is the basic statement in the Constitution and the Federal Constitution actually limits the right to trial by jury in civil cases to cases of 20 or 25 dollars. The Ohio Constitution simply makes the exception that in civil cases you can have a verdict by the concurrence of three-fourths of the jury.

Mr. Aalyson: Have we interpreted this to mean that there is an implied right to a jury?

Mrs. Eriksson: Yes. Well, the right to trial by jury shall be inviolate. It

doesn't say whether that is civil or criminal and therefore it is assumed to be both. However, there are Supreme Court cases which say that it really means only in types of cases that existed at common law.

Mr. Norris: But I can demand a jury right now in any civil case except an equity case.

Mrs. Eriksson: Any civil case where you had a right at common law to a jury.

Mr. Norris: As I recall, when we wrote the small claims court act, for example, if I get sued on a $2.35 charge account bill, I can demand a jury, can't I?

Mrs. Eriksson: Yes, if it is the type of case that would have existed under common law.

Mr. Aalyson: I seem to recall some discussion in civil procedure in law school, that in a traffic case, for example, you should ask the justice of the peace what the fine might be because depending on the size of it that would determine whether you could demand a jury.

Mr. Norris: That's criminal law. We've always provided by law in criminal cases. It must be involving imprisonment or a fine in excess of a certain amount, one or the other, you get a jury trial in a criminal case. I don't know where that authority comes from.

Mrs. Eriksson: I think generally any case of imprisonment.

Mr. Norris: Yes, and I think we have a monetary limit, too.

Mr. Nemeth: The monetary limit, I think, is $100.

Mr. Norris: Yes, $100. It's a minor misdemeanor, that's right. And I don't know where we get the authority to do that but it has always been done. It used to be $50.

Mr. Aalyson: If you have a right to trial by jury in criminal cases, it shouldn't have any dollar limit on it.

Mr. Norris: But in civil cases there isn't any. We provided in the small claims court act that failure to take it upstairs to the regular division amounts to a waiver of a trial by jury. You could have a trial by jury in a civil case for a nickel if you want.

Mrs. Eriksson: I think that our memo on Section 5 for the Bill of Rights Committee must discuss the authority for this limitation.

Mr. Norris: Our consideration is limited to civil juries, anyhow. So I suppose a legitimate concern would be whether we want to put in a dollar limit. You are arguing that we should not.

Mr. Aalyson: No. I don't oppose a dollar amount if it is a reasonable amount. I'm concerned with the idea that the Constitution should spell out the right to a jury and under what circumstances, perhaps, more explicitly than it does.

Mr. Norris: Do you have some language from other constitutions concerning monetary levels?

Mrs. Eriksson: Only the Federal.

Mr. Norris: There isn't any other state constitution?

Mrs. Eriksson: I don't know that we have ever really looked at it, but I think many of them are very similar to Ohio's.

Mr. Norris: We don't want to put in some dollar amount because it becomes outdated automatically. Is there some alternative approach to the language that we could use?

Mrs. Eriksson: We will look at some of the recent ones.

Mr. Norris: Well, let's come back after lunch and we will discuss those two areas.

The meeting recessed until 1:00 p.m.

Mr. Norris: Our main concern this afternoon is to work on the grand jury language. We also asked staff to provide us with the language in the Constitution dealing with civil juries so that we could consider the question of increasing the size of juries or at least stating the size of juries and also the question of whether or not we ought to specify in the Constitution for civil juries a dividing line on the amount. Ann was going to check if she had time, also, how other states treat this, if they have a monetary dividing line. It's not really a good idea to write $20 into the Constitution as we have at the federal level, but if there was some other kind of acceptable test or something. Craig has suggested that he would be interested in at least looking at it, so that's one thing we ought to talk about. And the other thing is size. I guess we concluded this morning that under the Ohio Constitution you are really entitled to a jury trial on any civil issue on which you would be entitled to a jury under common law, so that there is no dividing line on a monetary amount. We have that section before us -- Article I, Section 5. We need to go over this and decide whether or not we want to make any changes. Our charge is to look into civil juries.

Mr. Nemeth: I don't know what Ann is going to find.

Mr. Norris: Senator Gillmor was here this morning. Craig has already expressed some interest in writing into the Constitution the size of the jury. I don't know how firm he is on that. Katie, what is your feeling? Do you think we should just leave it the way it is and let the Supreme Court set the size of the jury, which it has done. The maximum size is now eight.

Mrs. Sowle: The maximum is eight?

Mr. Aalyson: The minimum is eight, isn't it?

Mr. Norris: Anything you can get three-fourths of below that, you can go down to. Four.

Mrs. Sowle: And by law you can have three-fourths, not a unanimous jury?

Mr. Norris: That's in the Constitution.

Mrs. Sowle: Yes, but it says that laws may be passed to authorize the rendering of a verdict, and I assume that there are laws passed.

Mr. Norris: You know, I hadn't noticed that. I thought it was constitutionally required.

Mr. Aalyson: It can be less.

Mr. Norris: Yes, obviously we do have laws to permit it because that's where we are now. That means to me that we could enact a law requiring a unanimous verdict in civil cases.

Mrs. Sowle: I think that there is wisdom in "laws may be passed" language there, the present language, because the recent research may indicate, what we heard at the last session, that a 12-person jury is better than eight. But I'm not sure that I would want to do that in the Constitution, because we have constantly changing opinions and studies and everything else on it. It may well be that 12 is better than eight, but I think that might be a better decision for the General Assembly to make than to have in the Constitution.

Mr. Norris: If we do nothing, the question becomes who should decide the size? We don't want to freeze it in the Constitution. Who should decide the size, the General Assembly or the Ohio Supreme Court? The way things are now, since the Constitution doesn't say "shall be provided by law" concerning the size of the jury, the Supreme Court has decided that that is procedural and they have done that. We can solve that if we think that is alright, then we don't have to do anything. If we decide on the other hand that the General Assembly could do it rather than the Supreme Court, then we ought to write in "provided by law". I've gone through a lot of soul searching over the years on this whole civil rule procedure. I think I know where I am now. I tried in my first session in the General Assembly to introduce civil rules of procedure, as a matter of law. And there is no way you can get that through the General Assembly. And yet within two years we had the Modern Courts Amendment. So in that case clearly hindsight shows that the Supreme Court was a better body to vest that authority in than we because we wouldn't change it. It was controversial and the legislature tends to avoid any controversy. I guess you get into almost the same area with the size of juries. I think that is really the kind of decision we have to make. If we decide we don't want to freeze the number in, and I don't want to freeze the number in, where should the responsibility lie -- the Supreme Court or the General Assembly?

Mr. Aalyson: There is one other area where the decision might be properly made and that is with the litigants. As long as they couldn't select any number they wanted to, that is above a certain limit for example, they could waive the right to jury trial altogether. If one wants a designated number he should be entitled to it. It's something to think about. I find that the rule, by tradition if not otherwise, was 12 and that often times in the interest of expediency the court would suggest that perhaps a smaller jury might be desirable. I've never been a party to a suggestion of that sort where the lawyers weren't able to agree. Although I suppose there are instances where one would insist upon the the maximum number, and that would be it. I'm the one who this morning was advocating the right to trial by jury, civil or criminal, no matter which number. And, as I was saying this morning, Katie, I was persuaded or perhaps pleased with the study which coincides with my own view that a large number of jurors provides a higher quality of deliberation. And I suggested that perhaps we ought to consider going back to the rule of 12, but I don't know that I am in ardently strong support of that as long as there is the right to a jury.

Mrs. Sowle: Where do you think the decision ought to be, in the Supreme Court or in the General Assembly?

Mr. Aalyson: I'm not so sure that I think either body should have that decision, and that's why I suggested the litigants. What occured to me was maybe we ought to guarantee the right to 12 if either of the litigants demands it, in much the same fashion as we guarantee the grand jury if the accused or the state demands it. I don't know how many would demand it but there is a big division in the bar, at least in my reading of the matter, and I don't know why this division occurs as it does because I can't explain my own reasoning except by what I said this morning.

But the plaintiff bar seems to like large juries and the defense bar seems to think there is no reason to have large juries. I don't know why the division should fall in that fashion. It seems to me that if, as a plaintiff's counsel, you have to convince at least 9 as opposed to 6, or as defense counsel you have to convince 3 as opposed to 2, that this just considering pure numbers does tend to promote a better quality of deliberation. If you've got more people kicking the problem around, you are likely to get more ideas and a better cross-section of the mood of the community than if you have fewer people. That's why I'm reluctant to have the right taken away from someone to have a jury of 12, if he chooses. I choose that number 12 on account of history. I'm not saying that 12 would be better than 15, for example, but we have had 12 for a long time, and it is my idea that if one wants 12, he is entitled to 12. Am I correct that you can have 12 in a criminal proceeding or has it gone down to eight in the criminal proceedings, too?

Mrs. Eriksson: No, I think the Supreme Court rule applies only to civil cases.

Mr. Aalyson: I think that is true and assuming that it is, if we consider 12 to be necessary for the dispensation of justice in a criminal case, why can a lesser number do it in a civil case?

Mrs. Eriksson: This is as far as Ohio is concerned. The Williams case in Florida was a criminal case...

Mr. Nemeth: That was a six-person jury.

Mr. Aalyson: And it was proper?

Mrs. Eriksson: Yes, that was a six-person jury, by statute, I think, in Florida, and that was upheld.

Mr. Nemeth: From a federal constitutional standpoint, you can have a smaller jury than 12.

Mr. Norris: I think from our Constitution, the Supreme Court could have a smaller jury, because this is the only provision there is.

Mr. Aalyson: Yet they elected not to, and I can't see why it would be more appropriate to have a larger jury in a criminal case than in a civil case. It seems to me the arguments would be the same with regard to size.

Mrs. Eriksson: I didn't suceed in finding all of the material that I was looking for. I did bring along some material from Illinois and Michigan. I didn't get quite far enough in my files to find the memorandum on this provision and I will go back and do that because it does specify what the Supreme Court has done with respect to Ohio. As far as the other states, and I was looking only at the question of civil cases, whether there was a limit as you had suggested as there is in the Federal Constitution. The new Constitutions in Michigan and Illinois did not do anything. In Illinois, the old section said: "The right of trial by jury as heretofore enjoyed shall remain inviolate, but the trial of civil cases before justices of the peace by a jury of less than 12 men may be authorized by law". That last part, the trial of civil cases before justices of the peace was eliminated in the new Constitution. largely on the theory that it referred only to justices of the peace and they nolonger existed in Illinois. So that isn't too much help. And the new Michigan Constitution with respect to jury trial says: "The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in a manner prescribed by law. In all civil cases tried by 12 jurors, a verdict shall be received when 10 jurors agree." But there is no mention of a monetary limit in either case.

Mr. Norris: We know that the change from 12 to 8 made by the Supreme Court has also gone past the legislature. The legislature didn't object -- at least it didn't object very loudly -- because there was no resolution of disapproval. Getting back to the question of who should decide, I think it's got to be flexible. My own inclination has been that what you do is include a consideration process, and that is by allowing the General Assembly to amend procedural rule proposals by the Supreme Court. That seems to me to be the best of both worlds. We have the Supreme Court and we have the General Assembly input anytime it is thought to be necessary to make a change in the size of the jury or the matter of deciding how you come to the size. Now we have part of that. The Supreme Court initiates, the General Assembly can amend it only if they can convince the Supreme Court to throw the whole rule out if they don't submit to it. Maybe that is a good procedure. I'm not sure that I would want to write anything in that either froze the number or got too specific about the procedure and how you decide. And I can see we have done that in the grand jury, but that's a pretty startling change in the grand jury.

Katie, do you have strong feelings that we ought to specify the mode that it should be? Are you satisfied with the Supreme Court deciding the size subject to General Assembly review? One thing that has given problems, and I was in there every year until the Supreme Court took it over, we had proposals to reduce the size of juries, and always ran afoul of this three-fourths thing because it couldn't be any other percentage. Do we need to take a look at that? Do we need to say that the General Assembly or the Supreme Court may decide what percent less than unanimous verdicts there may be? Three-fourths can create some arithmetical problems. If you've got four, that's easy. If you've got eight, that's easy. But what about six, that's kind of goofy.

Mrs. Sowle: You could have a six-person jury if you had a unanimity requirement.

Mr. Norris: Sure, we have six-person juries. If people opt for that, I suppose you have to have five in agreement for a verdict. Three-fourths, wouldn't that be five? So mathematically, it doesn't work on six but we have a lot of six-person juries.

Mrs. Sowle: It says not less than three-fourths, so five out of six is within the constitutional requirements. You couldn't have four out of six.

Mr. Norris: No, but you could say that the General Assembly or the Supreme Court may provide for less than unanimous verdicts in civil cases. Reword that and not stick with a percentage -- that is another option open to us. I think we at least ought to consider it. I don't know if we will want to make that change. Is there any feeling that that ought to be changed. Some states just require a majority, which in a six-person jury, you could have four or five or six.

Mrs. Sowle: I'm not sure I would like majority unless you have fairly large juries. I'm not sure I can defend that. I think it may have something to do with how great the burden is when you have the burden of proof. That's usually there for a pretty good reason and you diminish the requirement somewhat when you say all you have to get in the jury is a majority of six. It seems to me you reduce the burden on the person who has the burden.

Mr. Aalyson: I don't know if you reduce the percentages on a larger jury because he has to persuade a greater number. If you were to amend this to change the three-fourths, it would have to be something in the nature of authorizing the enactment of laws to authorize the rendering of a verdict by a lesser number than unanimous, but greater than a majority, I assume. It could be done by going less than a majority. It's not as likely, I don't think.

Mr. Nemeth: The U.S. Supreme Court has never said what the minimum acceptable size for a jury is, in either civil or criminal cases, as far as I know. But they did indicate that there was a size below which they wouldn't go, because then the verdict would not be a produce of group deliberation.

Mrs. Sowle: In the Williams case, with the six-member jury, was that a unanimous verdict?

Mr. Nemeth: I think it either had to be unanimous or had to be five out of six.

Mr. Aalyson: I don't know whether Julius or Ann mentioned it, but this section has been construed to provide that the right of jury trial shall be inviolate in civil cases as that term was interpreted under the common law. Or did it mean a common law civil case? I'm getting back to my area of major interest -- workmen's compensation. Workmen's compensation has a constitutional remedy which deprives an injured individual certain benefits and rights which he had under common law. I assume a workmen's compensation case could not be a civil case?

Mr. Nemeth: It is a civil case, but it is not a civil case of the type which existed at the time the Federal Constitution was adopted.

Mr. Aalyson: I brought this up in the What's Left Committee. If we concede that a workmen's compensation case involves almost always a damage to the person, what reason is there to discriminate between one who is damaged not on the job and one who is damaged on the job with regard to his right to a jury trial to determine what the remedy should be?

Mr. Norris: Is there no jury trial right in the constitutional language on workmen's compensation?

Mr. Aalyson: No, there is not. There is in the statutory language, but it provides for a jury trial only in the case of an injury as opposed to an occupational disease, which is the interpretation of the Constitution by the Supreme Court.

Mr. Nemeth: In common law, was there a right of an employee against an employer for injury?

Mr. Aalyson: Yes, if he could establish negligence, and there were the normal legal customary defenses, of course.

Mrs. Sowle: But wasn't it a problem that he usually lost because of the assumption of risk?

Mr. Aalyson: One of the defenses was assumption of risk. But he still had the right to sue and before a jury. The thing that concerns me is that although an injured individual now has the right to bring his case before a jury under workmen's compensation, the individual who has been subjected to an occupational disease and is just as, and probably more often, more highly disabled does not have the right to go to a jury. I think that should be considered. I believe that we should consider amending this to provide that the right to trial by jury should be inviolate in civil cases, and use some language to indicate that that doesn't mean civil cases as they existed under the common law.

Mr. Norris: Then you get into giving a jury trial in equity cases.

Mr. Aalyson: Depending upon the language you use. An equity case is a civil case, it wasn't in common law...

Mr. Norris: If you use the term "common law" though, that excludes equity. That's the magic of the term "common law".

Mrs. Sowle: I have a vague idea of the civil cases that we have been talking about and the term "civil cases" is probably not frozen. In other words you use certain tests. Just because there is some new type of tort, doesn't mean you can't bring it within a term like this.

Mr. Norris: "Product liability" for example.

Mrs. Sowle: Yes.

Mr. Aalyson: "Product liability" is nothing more than a form of a personal injury case.

Mrs. Sowle: Craig, has that problem that you pose with regard to the occupational disease been argued on a federal Equal Protection theory?

Mr. Aalyson: I don't know whether it has been. It has been argued in the state court and the state court has held that because the Constitution seems to speak of injury and occupational disease in separate classifications, that when the statute provides a right to a trial by jury in every injury case it is excluding occupational disease cases; therefore there is no right to appeal to a court in an occupational disease case. I'm not persuaded by the Supreme Court's argument. I think it's a specious argument. If you look at the Constitution, I think the Constitution was obviously not to differentiate between injury and occupational disease but to be sure that diseases were covered as injuries. The Supreme Court has made this different interpretation and has restricted appeals in occupational disease cases for conditions which oftentimes, it has been my experience, are much more disabling than injury conditions are. And you don't have the right for someone to make an appeal to a jury in an occupational disease case.

I can cite you a parade of horrors, but I will give you a specific example to demonstrate why I think a change needs to be made. There was a case decided by the Supreme Court not too long ago, within the past 10 years, where an individual suffered from silicosis. He was permanently and totally disabled and he died from the condition, or so it was contended by his decendants. During the course of his lifetime, his attending physician diagnosed him as having silicosis. He filed a claim with the Industrial Commission and the Industrial Commission caused him to be examined by a number of physicians who said that he didn't have silicosis, so his claim was denied. Before the appellate process could resolve it he died and the widow brought a claim for benefits. After his death, he was autopsied, and the coroner said no question he is suffering from advanced extensive silicosis, and there is no question that this has caused his death. Under those circumstances, the claim was filed for death benefits, the claim was sent out for review to a disinterested specialist. The specialist came back with the opinion that the man did not have silicosis and that was not the cause of his death. The Commission accordingly turned him down, turned the widow down. The representative of the widow filed an action in mandamus to upset this on account of its being an abuse of discretion on the part of the Industrial Commission. The Supreme Court said, sorry, we cannot upset this decision because there is some basis for the Commission's decision, to wit, their examining specialist who reviewed the file. Obviously there is no jury in the world that would have reached the decision the Industrial Commission and the Supreme Court reached, the Supreme Court not on the basis of the evidence but on the basis of a rule that they would not upset an administrative decision if there is evidence to support it. This is why we need a jury in my judgment. I have seen other cases, one I was involved in, where a fellow ran a cable into his knee. You can't believe

this, but he was turned down by the Industrial Commission because somebody said he ran it into his left knee when he ran it into the right knee. I remember his pulling his pant leg up and saying "Here's the blue hole, it was this knee". The doctor made a mistake. We had to go to court to a jury to change this because some doctor said the left knee. Sometimes the jury appeal is a very desirable thing, and I think it would be a desirable thing for us to consider making it a requirement in all civil cases unless you want to put a monetary limit on it. I don't think that every $2 case should necessarily go to a jury. If you have a right to sue, you ought to have a right to have the jury hear your appeal.

Mr. Norris: Are you telling me that the Ohio Supreme Court has said that under Article I, Section 5, there is no right to a jury trial?

Mr. Aalyson: No, I don't mean to imply that. The Supreme Court of Ohio has said that Section 35 of Article II, workmen's compensation, provides for compensation in case of injury or occupational disease. The legislature has provided that, in any injury case, either party may appeal an adverse decision to the court of common pleas -- in any injury case. The Supreme Court said, "Well, the legislature has said injury case. We think that they must mean only injury and not occupational disease becasue they are empowered to make legislation under the constitutional provision and the Constitution talks about injury and occupational disease. If the legislature says only injury, they must have meant to exclude occupational disease. Therefore, there is no appeal in occupational disease cases."

Mr. Norris: But they never considered Article I, Section 5 saying that the legislature could not limit ...

Mr. Aalyson: No, as far as I know they have not. That's not to say they have not. That's why I was asking, has it been the interpretation of the Supreme Court that civil cases in Article I, Section 5 comprehends only a civil case such as existed at common law? At common law there was no workmen's compensation. That's why I'm saying maybe we should consider changing that to provide that in every civil case there shall be a right to jury trial, but to give the legislature the right to prescribe the basis upon which a verdict shall be rendered -- unanimous, or majority. There is no reason to distinguish between disability caused by an occupational disease and disability caused by having a box fall on you, as I see it. Either one deprives you of a freedom in a sense. It damages your body.

Mr. Norris: Why don't we instead put in a jury trial provision in the workmen's compensation section?

Mr. Aalyson: If you can accomplish that you are going to do more than has been done by the legislatures for the past twenty years I have been in practice. We have tried it as plaintiffs' representatives without success.

Mr. Norris: Would it be any more successful if the Committee recommended it?

Mr. Aalyson: I don't know.

Mrs. Sowle: Craig, I really think that sounds like a very nice federal Equal Protection suit. That the person who has the occupational injury is being denied equal protection of the law under that interpretation of the state legislation.

Mr. Aalyson: But the Supreme Court of the state refers to its own Constitution, and it seems to me you would be likely to have a federal judiciary say this is a problem of state constitutional interpretation and we will not mess with that.

Mrs. Sowle: State interpretation -- but what I'm suggesting is that you use the Fourteenth Amendment. You have to interpret the Fourteenth Amendment, too, and say that this distinction made by state law is irrational.

Mr. Norris: My problem is in changing this section to accomplish your suggestion. I don't want to open the barn doors and end up establishing jury trial in all kinds of areas where we did not have it before and probably don't want to have it. There are a lot of cases where you are not entitled to a trial by jury. We could, since we are talking about civil juries, recommend a change to that section on workmen's compensation. That would limit it and we wouldn't have any problem. It scares me to say "all civil cases" because I don't know what that means for sure.

Mr. Aalyson: An equity case is a civil case, I should think. Why isn't it included here?

Mr. Norris: The term "civil case" in this section here only pertains to the size of the majority. It does not talk about entitlement.

Mr. Aalyson: It says the right of trial by jury trial shall be inviolate.

Mr. Norris: Then it says "except that in civil cases" so the term "civil cases" does not really modify whether or not you are entitled to it. Apparently the Supreme Court has talked about common law.

Mrs. Eriksson: There are several different interpretations. One is "at common law", the other is "any case you were entitled to at the time the constitutional provision was adopted", which is essentially the same thing, except in different states it might vary with respect to different types of cases.

Mr. Nemeth: The state constitutional provision or the federal one?

Mrs. Eriksson: The state constitutional provision, because the federal constitutional provision, with respect to civil cases, has not yet been interpreted.

Mr. Norris: Craig, would you buy an amendment to Section 35 which guarantees a right to jury trial?

Mr. Aalyson: I'd buy an amendment to Section 4123.519 which says "in all injury cases or occupational disease cases"...

Mr. Norris: We can't do that here, but I don't have any problem with amending that other section.

Mr. Aalyson: The problem is we have already gone by that.

Mr. Norris: We can reopen that.

Mrs. Eriksson: As a matter of fact, that was sort of held open because of the legislative committee and that is really in this report to be presented October 6 by you.

Mr. Norris: We can pick it up in our report. We've got other sections that have been addressed. This Section 10 has been addressed by the Bill of Rights Committee. We can address it again from the standpoint of our charge, which is civil juries. That would sure avoid a can of worms.

Mr. Aalyson: Are there other civil cases in equity where a jury is not permitted?

Mr. Norris: Mandamus, and a long list of exclusions in small claims court.

Mr. Nemeth: Divorce procedures...

Mrs. Sowle: What about the family law, what about dependency and neglect, that type of thing?

Mrs. Eriksson: This analysis of the Illinois Constitution is so succinct that it leaves a good deal out. It mentions workmen's compensation. It also mentions administrative process which licenses and regulates professions and business activities. It says numerous other exceptions are also recognized.

Mr. Aalyson: There are a lot of exceptions. I was going to say "except for equity" but there are too many that don't involve equity.

Mr. Norris: Katie, do you have any problem with picking up that workmen's compensation section and putting that in there?

Mrs. Sowle: No.

Mr. Norris: I'm willing to fly with it, Craig.

Mrs. Sowle: You're talking about a jury trial on appeal following an administrative hearing?

Mr. Aalyson: Yes, it presently exists as to injury, which means somebody falling down or somebody falling on him, as opposed to occupational disease, which usually comes from exposure to some substance or condition.

Mrs. Sowle: Like "black lung", or something like that. But what does the Constitution do?

Mr. Aalyson: The Constitution simply says in effect that laws may be passed to provide for compensation in case of injury or occupational disease. It doesn't say anything about juries. The statute then provides the right to appeal to a court in all injury cases and the Supreme Court has said that by reason of saying injury they have excluded occupational disease.

Mrs. Sowle: But there is no specific section in the Constitution authorizing or taking away all jury trials?

Mr. Aalyson: No.

Mr. Norris: Let's recommend that then, writing in the guarantee of jury trial in the workmen's compensation section.

All members present agreed.

Mr. Norris: Now, let's go back into the question of the size of the majority. Do we want to leave that the way it is or do we want to provide that either the General Assembly or the Supreme Court may provide for something less than unanimous but something more than a majority?

Mrs. Sowle: We have not less than three-fourths now. It seems to me that unless we hear some arguments that this is not satisfactory, I don't see any need to change it. Except that you have pointed out that sometimes it's hard to come up with the right number. It has to be a multiple of four.

Mr. Aalyson: If you leave it at three-fourths, you've almost got to stick with 12, 8 or 4. If you made it a majority or left it unanimous, you could go to any number. It would have been a good idea to have a flexible size for a jury, I suppose, if the idea is improved by making it even more flexible.

Mrs. Sowle: Let me try to explain a visceral reaction. If you had a majority and if the legislature could provide for lowering it to a simple majority, what effect is that going to have on the debate that goes on in the jury room?

Mr. Aalyson: As one who has talked to innumerable juries in the early stages of his career, I found that they almost always begin by extensive discussion rather than a vote.

Mrs. Sowle: They don't start with a ballot?

Mr. Aalyson: Right. They want to talk. They are all somewhat impressed with their civic duty, I feel, when they walk in there and they usually start talking instead of voting. I don't know whether that is true in criminal cases. I don't handle criminal cases. But it has been my experience that they are rather jealous of their right to express their opinion and they want to do that before the foreman starts writing on paper. They want everyone to know what they are thinking.

Mr. Norris: What should we do?

Mr. Aalyson: I'm kind of indifferent. I think Katie wants the three-fourths out. What do you feel?

Mr. Norris: I think we have to make a recommendation. We have covered the subject and we have to at least say that we stick with it or we recommend a change. You can't just ignore it, because it has created some problems. Katie, would you rather not change the majority provision?

Mrs. Sowle: All I'm saying is I'm not sure that I have heard a sufficient reason to go to the trouble of recommending a change and fighting it through. To do that you need to say, we think this is bad and full of problems, and I have yet to hear those.

Mr. Norris: Then we will recommend no change in the majority procedure there. Leave it at three-fourths. So at this point, the only recommendation for change we have goes back to another section of the Constitution on workmen's compensation, unless there is a strong feeling that we need to provide again a change in who decides the size of the jury. If we do nothing, it stays the way it is and the Supreme Court decides the size, subject to veto by the General Assembly.

Mr. Aalyson: I think the Supreme Court is in a better position to get input from those who are interested and concerned about what the size of the jury should be. People who are concerned about the size of the jury are those who are involved in legal action. I think the Supreme Court would be better able to gauge the sentiment of the group than would be the legislature. And also the Supreme Court is more concerned with expeditious handling. They are that body that has the most interest in the area and the greater opportunity for knowing about it, and the one most likely to make better decisions. Perhaps even more rapid change.

Mrs. Sowle: I think that's precisely right.

Mr. Norris: Leave it alone. So what we are really saying is that Article I, Section 5 is recommended for no change. The only change we have recommended so

far in the area of civil juries goes to another section, workmen's compensation. If that is the only section of the Constitution we need concern ourselves with, trial by civil jury, then I think we have probably covered that, unless, Katie, you want to recommend any changes in the proposed draft that we had this morning on remittitur or additur.

Mrs. Sowle: No, I have nothing.

Mr. Norris: This morning we recommended no change in the draft. The last thing that we need to cover on civil juries, it seems to me, is the question of whether or not we want to have a dividing line on entitlement in terms of the amount in controversy. Is there a feeling that that ought to be done.

Mr. Aalyson: I don't think so because I think that economic considerations determine whether or not one will bring an action before a jury, and I don't think we are in a better position to say what the value of that consideration should be than the person involved. You bring the action if it is to the plaintiff's economic benefit, you don't if it's not. I think it sorts itself out.

Mrs. Sowle: There is one area in which I think this problem is kind of interesting and it is the area of libel and slander. Because there are times when a person brings libel suits, for example, to vindicate his honor, without the expectation or even the desire of recovering money. Because you could get nominal damages, of course. The person in that situation may be very desirous of a jury and I'm not sure that I would want to deprive that person of a jury.

Mr. Aalyson: More than that, if you put a limit, he could immediately raise his demand to a dollar above the limit and avoid the limitation. I don't think it could be enforced.

Mr. Norris: No change there, then. We will not be recommending a change on monetary amount to entitlement to a jury trial.

Mr. Aalyson: We are concerning ourselves only with civil juries?

Mr. Norris: Right, the civil petit jury. Criminal petit juries have been handled already by the Bill of Rights Committee. Okay, is there anything else that we need to raise in the area of civil petit juries?

Mr. Nemeth: Would anyone like to make a recommendation for specific language change in that section referring to workmen's compensation?

Mr. Aalyson: I could, I suppose.

Mrs. Eriksson: I suspect we already have that in one of the drafts that we have considered before.

Mr. Aalyson: It may be, Ann, but I think that more likely in other drafts we were trying to accomplish other things, and it would be better to limit it just to that one draft.

Mr. Norris: At this point, let's go on to grand juries. I think probably the best thing to do is have the staff draft something on that workmen's compensation, and circulate it to the three of us who decide that's what we want to do. And if we agree on the language, just plug it into our recommendation. We're going to have to take a mail poll of all the members of this Committee to decide whether they agree with the final version, but let's do that as a preliminary poll among

the three of us to agree on the language.

Now we have Draft #2 before us in the area of grand juries.

Mr. Aalyson: What is a court of record? Municipal? County?

Mr. Norris: Yes, both are.

Mr. Aalyson: I don't know enough about the criminal process to be very helpful except maybe by questions. Who would determine in what court of record this information would be filed, for the preliminary hearing and when it would be held and would it make any difference from a standpoint of the protection of the accused's interest?

Mr. Norris: Absent us saying anything, it's going to be either the Supreme Court or the legislature, whoever gets to it first. I don't know what the breakdown is. Today, in the urban counties, it's the municipal court who holds the preliminary hearing. But my understanding is that in some of these smaller counties, the common pleas court holds it. Maybe county courts hold them all.

Mrs. Eriksson: I think county courts hold some.

Mr. Aalyson: But you don't have any idea how it is determined?

Mrs. Eriksson: By the General Assembly.

Mr. Aalyson: If the General Assembly determines, that's fine with me. I'm concerned about the fellow who is brought in before the county court who is an ex-J.P., who didn't have any knowledge to begin with. But I think the General Assembly would tend to guard against that.

Mr. Norris: It seems to me that the Supreme Court could usurp that anytime they wanted to because it is the ultimate judge of what is a substantive right and what is procedural, and if they decide that is procedural, they're "king of the hill". But it is one or the other. We could say common pleas court, and I hope that is ultimately going to be the result, either through the Supreme Court or the General Assembly. But I don't know that in the Constitution we ought to say that.

Mr. Aalyson: If we say that, we eliminate the municipal courts.

Mr. Nemeth: If the three-tier court system is adopted, then it would be all the more likely that it would be the common pleas court.

Mr. Aalyson: As long as somebody is looking out for this and it isn't a total selection by the prosecutor.

Mrs. Eriksson: No.

Mr. Aalyson: The next thing that bothered me and I guess it always does is the use of the word "reasonably". Who decides what's reasonable?

Mr. Nemeth: That's the language out of that California case.

Mr. Norris: I like that language. I think it is an improvement over what we had this morning.

Mr. Aalyson: I like the language with the exception of the use of the word "reasonably". Why not "anything which tends to negate guilt"? Just leave out "reasonably".

Mr. Norris: You get to the point where you are probably putting the prosecutor under a heck of a burden to bring up every little nitswitch. That's probably the best we can do here. I have a question here. We talked about self-incrimination and privilege, and we've got that bracketed. What does that mean, Ann, privilege? Today can you assert privilege in a grand jury hearing? You can assert self-incrimination.

Mrs. Eriksson: I don't know.

Mr. Aalyson: The inference is going to be you can, if we put it in.

Mrs. Eriksson: That's why we put it in brackets.

Mr. Norris: I guess my inclination would be, we're really talking about limiting it to what you can do right now. If staff research indicates that privilege can be asserted successfully now, then I'd say leave it in. But if research indicates that's a rule of evidence and it is not assertable, let's leave it out.

Mr. Aalyson: The person who holds the privilege is the only one who can waive it, not the person who is going to testify. Let's not go by that one so quickly. Let's suppose the practice now is to permit an excuse for not testifying as to privileged information.

Mr. Norris: If we find that privilege is not assertable now and that disturbs you, then we can come back to it.

Mrs. Sowle: I feel fairly certain, although I am not familiar at all with this area except that I have done in the past some research on the newsman's privilege. The newsman does not want to reveal his source to a grand jury, because that is going to hurt him in his relationship with sources. The issue has always been not can you assert a privilege before a grand jury, but is there that kind of privilege? In some cases, for example, there is a statutory privilege. I'm like Alan, I think we ought to let the staff look at it, but I'd be very surprised if we were to eliminate this.

Mr. Norris: Let's see what comes up there.

Mr. Aalyson: In privilege currently as we talk about husband-wife, physician-patient, attorney-client, and that sort of thing -- this is statutory, is it not, rather than constitutional?

Mrs. Eriksson: They are spelled out in the statutes, yes. However, whether it is also a constitutional right or not I don't know.

Mr. Aalyson: But it is not spelled out in the Constitution?

Mrs. Eriksson: No, it's not spelled out in the Constitution.

Mr. Aalyson: The news people tend to go back to the First Amendment.

Mrs. Sowle: With some success, but not much.

Mr. Norris: The last bracketed paragraph, about lack of liability by the prosecutor.

Mrs. Eriksson: That was just an attempt to deal with this problem. It strikes me that it is probably unnecessary, but we though we should present it to you so that you could make a decision.

Mr. Aalyson: It would make it a lot more palatable for the people who might be opposed to what we are going to do, or what we are thinking about doing, if this were in there, I think.

Mrs. Sowle: If this is in there, how is the provision enforced?

Mr. Norris: Serve a letter on the prosecutor is what you do. You say to the prosecutor, "I expect you to raise this in the grand jury hearing, and by gosh, if you don't that's not in the verdict". If I as defense counsel put the prosecutor on notice...

Mrs. Sowle: It's not inadvertent then.

Mr. Norris: Not inadvertent. In other words, that's the way you enforce it. You put the prosecutor on notice and then it would not be inadvertent if he didn't.

Mrs. Sowle: Let's say he doesn't do it. What is the penalty?

Mr. Norris: That would just quash the indictment.

Mrs. Sowle: Let's say you don't find out that the defense doesn't know about a piece of evidence that the prosecutor has access to. The prosecutor doesn't present it to the grand jury. He finds out after he is convicted. Then what?

Mr. Nemeth: It might be the basis for a post-conviction remedy.

Mrs. Sowle: But this says "does not impair the validity of the criminal process"...

Mr. Norris: Again, the question becomes, is the omission "inadvertent", and if you can prove that he knew about it, it's not inadvertent.

Mrs. Sowle: Okay.

Mr. Norris: Let's leave it in. I think Craig is right.

Mr. Nemeth: If anyone has any suggestions for improving that language, I'm sure we would both be very happy to hear it.

Mr. Aalyson: It seems to me that maybe you ought to say "the inadvertent ommission by the state to inform the grand jury of evidence" which is what you compelled them to do earlier.

Mrs. Eriksson: Instead of "inform the grand jury or the court".

Mr. Norris: Yes, and since we picked up either a preliminary hearing or a grand jury hearing, you may want to rework the language a little bit, because that tends to be a little repetitious. I like that "impair the validity of the criminal process". Any other comments on the draft?

Mrs. Eriksson: I had one other very slight problem in the second paragraph. In the first paragraph you say that felonies shall be prosecuted in such a fashion. Then in the second paragraph you say that in the absence of a grand jury hearing, an accused has the right to a preliminary hearing. In my last reading over of this it occured to me that that might be a person accused of even a petty misdemeanor, a right to a preliminary hearing.

Mr. Norris: Yes, you are right.

Mrs. Eriksson: We might expand it to say "a person accused of a felony".

Mr. Norris: Yes, "a person accused of a felony has the right...". That might not refer back to the armed forces exemption. Maybe you need to say "in such felony cases, in the absence of a grand jury hearing...". You want to make sure that the military exemption still applies to that second paragraph. Any other comments on Draft #2? If not, I assume that we are recommending the adoption of Draft #2 as suggested for amendment, and that includes the decision by staff on the privilege language. Anything else that we need to take up in the area of grand juries? Okay, why don't we go forward in this way. We will ask staff to first advise us on suggested language on the workmen's compensation section. And then at the same time advise us of what they found out with "privilege" and circulate that to the three of us in a Draft #3 for this. Then we will let them know by telephone of our agreement or disagreement and if we can't agree by telephone, we will have another meeting. Once that is done, the agreed form of our report, when agreed on by telephone, would be circulated to all members of the Committee for a ballot. That would essentially end our work, and that would be our recommendation.

The meeting was adjourned.

A DEFENSE OF THE GRAND JURY

To: Constitutional Revision Committee

From: Richard B. McQuade, Jr., Prosecuting Attorney of Fulton County, Ohio, and President Elect, Ohio Prosecuting Attorneys Association.

Mr. Chairman and Members of the Commission:

In Ohio, the grand jury is created by the State Constitution in Article I, Section 10, which provides that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of the grand jury. The Constitution goes on to state that the number of persons necessary to constitute a grand jury and the number necessary to concur in an indictment shall be determined by law.

We understand that this Commission proposes to alter the grand jury system as follows:

1. that indictment by grand jury shall only be mandatory in cases of impeachment, cases arising in the armed forces of the United States, or in the militia when in actual service in time of war or public danger, capital offenses;
2. that all other cases be prosecuted by information with a preliminary hearing in a court of record to determine probable cause, except if a grand jury is demanded by either the accused or the prosecuting attorney;
3. that counsel may be present on the behalf of any witness testifying before the grand jury;
4. that at grand jury, the prosecuting attorney is obligated

to present any evidence which tends to exculpate the accused.

We have been informed by this Commission that the reason for these changes is in order to avoid duplication of effort and the accompanying delay. The members of the Ohio Prosecuting Attorneys Association agree with these goals; however, the changes, as now proposed, would so alter the grand jury system as to make this noble institution of limited value. It is our purpose in this paper to indicate the problems these proposals will cause, and therefore, the reasons that the members of the Ohio Prosecuting Attorneys Association is in opposition to any of the present proposals. In addition, our association would like to put forward language which would effectuate your goals without the unacceptable defects that the proposed changes would create in the grand jury system.

An understanding of the evolution of the grand jury system is necessary to any study aimed at changing its role.

Traditionally, the grand jury alone had the power to indict and initiate prosecution. It could do so on the basis of information acquired through its independent investigation or in conjunction with the prosecutor. In the beginning it was not intended that the grand jury fulfill a protective function. The grand jury that emerged from the Assize of Clarendon in 1166, was designed solely to fulfill an accusatory purpose. "Twelve of the more lawful men of the hundred" were required to make a sworn presentment of all felons. In time, this accusatory role developed a protective aspect, since no citizen can be indicted by the prosecutor alone, nor can any citizen be indicted by the grand jury without probable cause. This later protective function

developed and grew from a need to protect both the jurors and the private citizens from royal opposition in England.

Both the accusatory and protective functions that underlie the early grand juries were later embodied in the Fifth Amendment of the United States Constitution and in Article I, Section 10, of the Ohio Constitution. So it is today, that a person may not be placed in jeopardy of a felony prosecution without the right to have a body of citizens find it probable that he committed the offense charged. And if the grand jury finds otherwise, the fact that they investigated the citizen is held in secrecy.

1. SHOULD INDICTMENT BY GRAND JURY BE CONFINED ONLY TO CAPITAL AND A LIMITED NUMBER OF OTHER OFFENSES?

While capital offenses demand the ultimate penalty, life itself, the sentences for other felonies may involve extreme deprivation of freedom, liberty and property. For instance, the penalty for violation of Section 2903.02, R.C., murder, is imprisonment for an indefinite term of fifteen years to life. The term for imprisonment for a felony of the first degree, like aggravated burglary, rape, and manslaughter, is from seven to twenty-five years. The sentences for felonies of the second degree, such as felonious assault, robbery and burglary, is from five to fifteen years. The sentence for a felony of the fourth degree, the lowest felony category, is from two to five years.

If the grand jury is to serve a protective function for the citizens of Ohio, then it is logical that its scope should not be limited to a small class of cases: but rather that its protective function should encompass all cases in which a substantial deprivation of liberty or property is involved.

Indeed, the grand jury's accusatory function is important to the citizen. The degree of crime committed largely depends on whether or not the act was "purposely, knowingly, recklessly or negligently" done. In other words, the intent with which an act is done determines its gravity. In the accusatory function, the grand jury by its examination of witnesses is in an excellent position to determine the intent with which the crime was committed, the manner in which it was committed, and determine the degree of the offense. This is true because its proceedings, unlike a preliminary hearing, are secret. The prosecuting attorney feels free to expose his entire case to the jurors: while by contrast, at an open preliminary hearing, it is common practice to put on as little of the State's case as possible. Hence, the judge at a preliminary hearing has the gross outline of the case upon which to decide probable cause, but he lacks a complete record from which to make refinements as to the degree of the crime and the intent of the accused.

The arguments in favor of limiting grand jury indictments must, of necessity, be based on fiscal economy and the speed of criminal justice. But here, we are concerned with fairness to both the citizens of Ohio and the accused. Demanding grand jury indictments in cases in which the accused's life is in balance, demonstrates a belief in the effectiveness of grand jury. This effectiveness should not be eliminated for those who face incarceration for long periods and substantial fines.

The proposed changes would do nothing to speed up the criminal justice system. They do not alter the requirements of Section 2945.71, R.C., which reads in material part: "a person against whom a charge of felony is pending: (1) shall be accorded a preliminary hearing within

15 days after his arrest; (2) shall be brought to trial within 270 days after his arrest." Hence, under the new language the requested grand jury would still have to be held within 15 days as is now required, if the grand jury proceedings are to take the place of a preliminary hearing; nor would the proscribed time in which the trial must start be altered. The time in which it takes a case to go through the criminal justice system, thus, has not been affected.

Duplication is indeed present in the current system. The Ohio Prosecuting Attorney's Association agree that unwarranted duplication should be eliminated. The procedure now in force requires the prosecuting attorney, once he has demonstrated probable cause at a preliminaty hearing, to again present the matter to a grand jury. This double effort is unwarranted unless following the preliminary hearing new evidence appears that would affect the gravity of the crime. Hence, in the majority of such cases there appears to be no reason why the preliminary court should not bind the case directly to the Common Pleas Court for trial.

For this reason, the association proposes the following alternative language:

> A criminal charge shall be initiated by complaint, information or indictment; when a charge is by complaint or information, the accused shall have the right to a preliminary hearing in a court of record to determine probable cause; unless prior to the preliminary hearing the accused has been indicted. If at preliminary hearing the Court finds that there exists probable cause that a crime was committed and the accused committed the crime, the accused shall be bound over to the Court of Common Pleas for trial before a petit jury; unless either the accused or the state demand of the Court of Common Pleas that the case be presented to the grand jury, which demand shall be granted as a matter of right.

However, all duplication is not unwarranted. With some frequency, a prosecuting attorney will have the Court rule against the State at the preliminary hearing; and yet, the grand jury will indict the accused. This indictment will result in either a plea of guilty as charged or a conviction at trial, thus demonstrating the human fallibility of a single judge. The proposed changes would eliminate this safeguard against human error. Under the proposals, once the judge has found no probable cause, there is no presentment to a grand jury or appeal provided by which the prosecuting attorney can rectify the mistake. Nor do the proposals allow for the flexibility necessary to present evidence discovered after the preliminary hearing to the grand jury in order to reduce or raise the degree of the original charge.

Additional problems with the ambiguous language of the amendment are apparent to us. To whom does the accused or the state make their demand for a grand jury? Assuming that it is the Common Pleas Court, does the court have any discretion in granting the demand? This Commission has indicated that the granting of a grand jury is to be mandatory, but this intent is not indicated in the present language. Would the prosecuting attorney be able to make a blanket demand for a grand jury in all felony cases within a given year; or in the alternative, establish a routine policy of demanding a grand jury on a case by case basis for all felonies? At the end of the sentence under examination dangles the phrase "...as provided by law." What does this phrase mean? Does it only refer to the fact that the legislature can make adjustments in the time period in which the demand must be made; or is the fundamental right of the accused and the state to demand the protection of a grand jury going to be subject to the

vagaries of the changing political winds that blow through the legislature. Certainly such a basic constitutional right should have a firmer foundation.

The above are some of the major ambiguities and problems we see in the language of the current proposals, but perhaps the most dangerous change is laten. The commissions' amendment would abolish the secret indictment. Since the prosecuting attorney would have to demand a grand jury, he would apparently be required to caption his demand as the State vs. a named accused. Thus alerting the suspected felon, who is still at large, to flee and placing the public onus of a criminal charge upon the citizen who is ultimately not indicted. This onus would be particularly embarrassing to public officials who the grand jury decide should not be indicted. The secret indictment is necessary for the protection of the individual citizen suspected of a crime on the one hand, and the general public's right to thorough criminal investigation on the other. The loss of the secret indictment would seriously hamper the grand jury from effectively investigating the suspected criminal activity-particularly the conspiratorial crimes of organized crime.

Secrecy is in fact the reason so many misunderstand the function of the grand jury and some are even mistrustful of its proceedings. However, secrecy is the essential benefit of the grand jury as opposed to the preliminary hearing.

The modern justifications for grand juries secrecy include:

1. To prevent the accused from escaping before his indictment and arrest or from tampering with the witnesses against him.
2. To prevent disclosure of derogatory information presented

to the grand jury against an accused who has not been indicted.

3. To encourage complaints and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public knowledge, thereby subjecting them to possible discomfort or retaliation.

4. To encourage the grand jurors to engage in uninhabitated investigation and deliberation by barring disclosure of their vote and comments during the proceedings.

By contrast the preliminary hearing requires the filing of a complaint, the arrest or summons of the defendant, and the attended notoriety. Bear in mind that the filing of a complaint and the determination of probable cause at a preliminary hearing involves the judgment of the prosecuting attorney and a judge, whereas the issuance of an indictment requires the collective judgment of nine (9) grand jurors.

Those critical of the grand jury, prefer preliminary hearing as a mode to discovering the state's evidence against the accused. Prior to January 1, 1974, that argument may have had some validity. Today, however, criminal Rule 16 demands that the prosecuting attorney provide the defendant with statements of the defendant or codefendants, including summaries; a copy of the defendant's prior record; the right to inspect, copy or photograph any books, papers, documents, photographs, or other tangible objects within the custody or control of the state; the right to inspect and copy any results or reports of physical or mental examination or scientific tests or experiments in the control of the state; the names and addresses of all witnesses which the state intends to call at trial; and any evidence favorable to the defendant

within the knowledge of the prosecuting attorney. Rule 16 also allows the court to make an in camera inspection of any witnesses' statement, after direct examination, and to turn over to the defendant any statement that is inconsistent. In addition, Rule 16 (3) requires the defendant be provided with a copy of the testimony of the defendant or codefendants before the grand jury. Further, it should be noted that once the prosecuting attorney has identified the names and addresses of the witnesses to the defendant, the defendant's counsel is free to talk to them and take his own statements.

Opponents of the grand jury system also argue that the protective function of the grand jury is immaterial because it is a "rubber stamp" for the prosecuting attorney. This argument presumes that prosecuting attorneys are over zealous, and present for indictment cases in which the evidence is slight. This position assumes further that the prosecuting attorneys are self-destructive. It is absurd to think that a prosecuting attorney would seek an indictment in a secret proceeding knowing he will be soundly defeated in an open trial. Obviously, indictments may be presented by a grand jury in cases in which evidence is slight and the presumption is not great. But two factors should be kept in mind:

1. The grand jury does not function to determine the guilt or innocence of the defendant, but only to determine whether probable cause exists that a crime was committed and that the defendant committed it.
2. The prosecuting attorney does not function as a juror making a determination of probable cause. His function is only to present the evidence, and

> the grand jury is the final arbiter. To be sure, the prosecuting attorney has a screening function, but that function is normally only exercised where there is a paucity of evidence on criminal conduct.

Statistical data indicates that the grand jury has functioned effectively in screening cases and failing to indict on unfound charges. A study was conducted by Dean Wayne Morris of the University of Oregon Law School. After an exhaustive study of perhaps 8000 presentments for indictment and an extensive questionaire sent to prosecutors and judges, Morris found that in 5.15% of the cases the grand jury disagreed with the disposition recommended by the prosecuting attorney. While the percentage may seem low, it translates into nearly 400 cases involving citizens in which there was no "rubber stamp." In New York, in recent years, state grand jurors have refused to return indictments in approsimately 9% of the matters submitted for their consideration. For instance, in 1970, the number of total defendants considered for indictment were 39,019, the number of indictments returned 30,545, the number of no bills 3,457, the number of youthful offenders 2,196, and the number of cases returned to the preliminary court was 2,821.

In 1973, a survey of nine prosecuting attorneys making up the executive board of the Ohio Prosecuting Attorneys Association revealed that out of 2,998 presentments a total of 400 no bills were returned. Thus, in the nine Ohio counties represented, 12% of the presentments resulted in no indictment. Mr. William McKee, the Prosecuting Attorney of Richland County, indicates that in 1972 there were 155 presentments to the grand jury in his county. Of these 155 presentments, indictments

were returned in 112 cases and there were no bills in 43. In the following year, 1973, there were 108 presentments to the Richland County Grand Jury, of which 78 resulted in indictment and 30 ended up as no bills. It should be noted, that in 1972, sixteen of the no bills were secret, and that in 1973 seven of the no bills were secret. Hence, the grand jury not only saved 23 citizens from the burden of criminal prosecution; but also, protected them from the onus of a public criminal charge.

Critics of the grand jury point to the statistics such as we have cited as an indication that the grand jury is not doing its job. On the contrary, the fact that prosecuting attorneys convict nearly all of those indicted is an indication that the prosecuting attorneys are doing an admirable job of screening the cases prior to presentment to grand jury. In addition, the grand jury is performing its traditional function of eliminating other cases of questionable value from the indictment process.

The grand jury detractors also argue that evidence, inadmissible at trial level, is admitted before the grand jury and may be considered in presenting an indictment. This argument ignores the traditional investigatory function of the grand jury.

The investigation of crime by the grand jury implements a fundamental government role of securing the safety of the person and property of its citizens. The role of the grand jury as an important instrument of effective law enforcement, necessarily includes an investigatory function with respect to determining whether a crime has been committed and who has committed it. When the grand jury is performing its investigatory function into a general problem area,

society's interest is best served by a thorough and extensive investigation. A grand jury inquiry is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find out if a crime has been committed. Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecuting attorney, or the personal knowledge of the grand jurors. And it is only after the grand jury has examined the evidence that a determination of whether the proceedings will result in an indictment can be made. Traditionally, the grand jury's sources of information are widely drawn and the validity of an indictment is not affected by the character of the evidence considered. These principles have been upheld time and time again by the Supreme Court of the United States. For instance, see Branzburg v. Hayes, 408 U.S. 700, 92 Supreme Court 2665; Costello v. United States, 350 U.S. at 364, 76 Supreme Court at 409; and United States v. Calandra, 414 U.S. 338, 94 Supreme Court 613.

Inadmissable evidence is not without probative value and the grand jury's function is investigatory not adjudicative. Such evidentiary rules, for example, the inadmissability of heresay evidence, are rooted in and dependent upon an advisary proceeding, and indeed, the heresay rule is riddled with exceptions. Further, any infringement of the accused's rights may be remedied by operation of the exclusionary rules at trial. To make such rules of evidence applicable to the grand jury would place the burden of applying them on the lay grand juror and to subject their judgment to the court's review. This practice would cause dilatory preliminary trials on the evidence and enable the court to impinge on the independence of the grand jury.

II. SHOULD ALL GRAND JURY WITNESSES HAVE THE RIGHT TO THE ASSISTANCE OF COUNSEL

The traditional and prevailing rule is that grand jury witnesses may not be accompanied by counsel during his interrogation. Again, we should point out that the grand jury is an institution of investigation rather than one of prosecution. To permit counsel for witnesses at grand jury proceedings would disrupt traditional ex parte nature of the proceedings and would cause intolerable delay. In addition, the presence of counsel would breach the secrecy of the grand jury while it is still in session and pose the threat of a single attorney representing coconspirators, being able to tamper with the testimony. The presence of counsel at grand jury is unnecessary in light of the protective tradition it serves, and if a witness' rights are abused, the witness, of course, has the opportunity to exhonerate himself at trial.

Moreover, the presence of counsel representing a witness is inconsistent with the prevailing rule that any evidence, whether or not admissable, may be considered by the grand jury in performing it's investigative function.

Bear in mind that the traditional privileges and proscriptions of the Fifth Amendment apply to grand jury proceedings. A witness may not be compelled to testify against himself. In addition to the privilege against self-incrimination, the grand jury may not invade the statutory privileges between husband and wife, confessor and penant, physician and patient, lawyer and client.

Further, immunity from prosecution, at least on the basis of his testimony, may be granted to a witness in conjunction with his grand jury interrogation. The witness may be granted either "transactional immunity", barring his further prosecution as to the transaction upon which he testified, or the more limited "use immunity", which grants

him immunity from the use or derivitive use of his testimony in a prosecution against him.

III. SHOULD THE PROSECUTING ATTORNEY BE COMPELLED TO PRESENT EVIDENCE THAT TENDS TO EXCULPATE THE DEFENDANT AT GRAND JURY PROCEEDINGS?

This requirement to present exculpatory evidence places upon the prosecuting attorney the burden of making subjective judgments as to what is beneficial to the accused. This decision must be made without knowledge of the defense's theory of the case. Nor do the proposals provide any effective means of enforcing this provision. In fact, this requirement is not enforceable unless the process is to be sadled with dilatory evidentiary appeals. We would recommend that this requirement be deleted.

It is only prudent that the prosecuting attorney make available evidence to the grand jury, since there is little value in an indictment if it has no possibility of leading to convictions at trial. This willingness to disclose evidence to the grand jury results from the fact that the proceedings are secret.

Further, this requirement loses sight of the limited function of the grand jury. The grand jury does not determine the guilt or innocence of the accused, nor does it determine the nature of or severity of the punishment. Its sole consideration is whether a crime was committed and the probable cause that the defendant committed the crime. The advocates of the requirement are confusing the looser "probable cause" standard to accuse an individual of a crime with the more restrictive "beyond a reasonable doubt" standard required to find an individual guilty of a crime.

It is precisely because there may be probable cause to indict, and yet, reasonable doubt as to guilt that a trial is conducted following an indictment. It is, therefore, inappropriate that the grand jurors, as this requirement implies, should invade the domain of the petit jury. Rather, at trial the defendant has ample opportunity to present any evidence which is favorable to his cause.

IV. CONCLUSION

The Ohio Prosecuting Attorneys Association agrees that unwarranted duplication of effort and delay in processing a case through the criminal justice system should be eliminated where possible; but the members of the Association oppose these proposals, because they will not accomplish the stated goals, nor has their implementation been justified on any other reasonable grounds. The proposed language is ambiguous and full of latent dangers--the elimination of the secret indictment and the lack of a correction for a judge's erroneous decision that there is no probable cause.

When the fact that approximately 12% of the presentments to Ohio grand juries result in no bills is coupled with the fact that in excess of 95% of those who are indicted are convicted, it is apparent that the truly innocent have little to fear from the present system. The "rubber stamp" theory is not only unfounded, but based on a misunderstanding as to the purpose of the grand jury. The discovery which defense attorneys rightfully desire is accomplished through Criminal Rule 16.

Institutions of long standing, such as the grand jury, require accomodation to contemporary circumstance. For this reason the

Association proposes that those cases in which probable cause has been found at the preliminary hearing should be bound directly over for trial. This change would reduce the workload of the grand jury by at least half and reduce double effort. Thus, meaning the majority of cases will be handled by preliminary hearing alone.

But that which is of long standing is proven. The burden of proof should be on the advocates of change. Their offering should be more than ambiguous language that does not effectuate their stated goal. Both the accused citizen and the society in general is entitled to the continued protection of its collective judgment in these days of increasing concern about crime.

The Ohio Prosecuting Attorneys Association and its members for the above reasons oppose the present proposed amendments.

Respectfully submitted,

Richard B. McQuade, Jr.

Richard B. McQuade, Jr.
Prosecuting Attorney of
Fulton County, Ohio and
President Elect of
Ohio Prosecuting Attorneys Association

To: Committee to Study the Grand Jury and Civil Petit Jury
From: Constitutional Revision Commission Staff
Date: September 15, 1976
Re: Remedies available to the court of appeals in cases of excessive or inadequate damage awards

Two questions are to be answered relating to a damage action tried to a jury, in which the defendant's liability is established and which case is appealed:

1. Can the court of appeals weigh the evidence, conclude that the amount of damages awarded by the jury is "against the manifest weight of the evidence", and enter a different judgment?

2. Can the court of appeals remand the case with instructions for retrial on the issue of damages alone?

The court of appeals' function in determining whether the trial court did or did not commit prejudicial error is governed by Rule 12 of the Rules of Appellate Procedure. Rule 12(C) provides:

> In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

The analysis of this rule by the Ohio Legal Center Institute (there are no drafter's notes) points out that Rule 12(C) introduces a new concept in Ohio, giving a court of appeals an option to enter its own judgment or remand a case to the trial court, in the special situation where: a) the case is a civil action b) trial was to a court without a jury (e.g. in an equity matter or where the jury was waived) c) the majority of the judges find that the only error is that the judgment is against the manifest weight of the evidence d) the majority of the judges do not find that the appellee is entitled to judgment as a matter of law. If these four criteria are met, the court of appeals has two options: a) to weigh the evidence in the record and render the judgment that the trial court should have rendered or b) to remand the case to the trial court for further proceedings. As the Legal Center analysis points out, "the purpose of the provision allowing the Court of Appeals to retain the cause and weigh the evidence is to prevent unnecessary and time consuming remands and retrials". But the analysis also notes that "when the Court of Appeals reverses a case tried to a jury (emphasis added) on the ground that the judgment is against the weight of the evidence, it may not render a final judgment unless the adverse party is entitled to such judgment as a matter of law. If a fact issue remains, the cause must go back for retrial, otherwise the party is denied his right to trial by jury." (In these circumstances, jury cases must be remanded, under Rule 12(D), as stated in Hanna v. Wagner, 39 Ohio St. 2d 64 (1974)). It would, of course, be

possible to propose a state constitutional provision specifically granting a court of appeals the right to substitute its judgment in a jury case involving unliquidated damages. However, such a provision would be contrary to the present rule in Ohio and contrary to the general rule in other jurisdictions. And, while there is no definitive U.S. Supreme Court case on the matter, such an approach would almost certainly be subjected to a court test as being an abridgement of the right to jury trial under the Federal Constitution.

In regard to the second question -- whether the court of appeals can remand for a trial on the question of damages alone -- the Rules are not specific, and no Ohio case on the point has been found. However, Civil Rule 59(A) -- which applies to trial courts -- states in part:

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
> (6) The judgment is not sustained by the weight of the evidence...

No specific case has been found interpreting this provision, but it is logically susceptible to the interpretation that the trial court could, in the stated circumstances, order a new trial on the issue of damages alone. It would also seem logical to assume that a court of appeals could order the trial court to do what the latter has the power to do, even if the court of appeals itself could not order a retrial limited to the issue of damages because the Rules do not specifically authorize it to do so.

Conclusion

The present inquiry was begun to determine whether there was a way for the court of appeals to enter a different judgment than the trial court, in a case involving unliquidated damages, assuming that the only prejudicial error found was in the matter of damages. Under Appellate Rule 12(C), the court of appeals has such power now, in a case tried without a jury. Further, it appears that no matter how it is written, any state constitutional provision attempting to extend this procedure to a case tried to a jury would be subject to attack under the Federal Constitution as violating the right to jury trial.

The question remains whether a state constitutional provision specifically authorizing a court of appeals to order an additur or a remittitur (both voluntary remedies) should be inserted. As indicated by the cases and the testimony before the committee in June, appellate courts have this power now, although they are reluctant to use additur. It is open to question whether a constitutional provision would change that result.

Lastly, on the question of ordering a new trial on the question of damages alone, whatever uncertainty there is with regard to this could more easily be rectified by an amendment of the Rules than by an amendment of the Constitution.

Attached is a draft for discussion.

Ohio Constitutional Revision Commission
Committee to Study the Grand Jury and Civil Petit Jury
September 24, 1976

Draft #1
(add to Article IV, Section 3(B)(2))

IN ANY CAUSE ON REVIEW WHETHER OR NOT TRIED TO A JURY, IN WHICH LIABILITY IS ADMITTED OR PROVED, BUT IN WHICH ON THE BASIS OF THE RECORD ON APPEAL THE AMOUNT OF DAMAGES AWARDED IS INADEQUATE OR EXCESSIVE, IN ADDITION TO ANY OTHER POWER GRANTED TO IT BY THIS CONSTITUTION, BY LAW, OR BY RULES OF THE SUPREME COURT, A COURT OF APPEALS MAY, IN ITS DISCRETION, VACATE THAT PORTION OF THE JUDGMENT OR FINAL ORDER OF THE TRIAL COURT WHICH RELATES TO THE AWARD OF DAMAGES AND EITHER WEIGH THE EVIDENCE IN THE RECORD AND RENDER THE JUDGMENT WHICH SHOULD HAVE BEEN RENDERED ON THAT EVIDENCE, OR REMAND THE CAUSE TO THE TRIAL COURT FOR A NEW TRIAL [LIMITED TO THE QUESTION OF DAMAGES] [ON ANY OR ALL OF THE ISSUES].

Ohio Constitutional Revision Commission
Committee to Study the Grand Jury and the Civil Petit Jury
November 8, 1976

REPORT

Article I, Section 10
Article I, Section 10A
Article I, Section 5
Article II, Section 35

The Committee to Study the Grand Jury and Civil Petit Jury hereby makes the following recommendations for amendment of the Ohio Constitution:

Article I

Section	Subject	Recommendation
10	Trial of accused persons and their rights	Amend
10A	Determination of probable cause	Enact new section
5	Trial by jury	No change

Article II

35	Workmen's compensation	Amend

Article I, Section 10

Present Constitution

Section 10. 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 otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Committee Recommendation

The Committee recommends that Section 10 be amended to read as follows:

Section 10. ~~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 otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.~~ In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him,and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or

against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury ~~and may be the subject of comment by counsel~~. No person shall be twice put in jeopardy for the same offense.

Comment

Section 10 in its present form was adopted in 1912, the provision regarding the right to indictment by grand jury being carried over substantially unchanged from the Constitution of 1851, in which it first appeared. The Committee recommends the deletion of the first sentence of Section 10, relative to the grand jury, because that subject is covered in a separate section, a new Section 10A, in this report. Under the Committee proposal, the remaining provisions of Section 10 relate only to an accused's rights at trial and to certain trial court procedures.

The provision of the next to last sentence of this section which permits the failure of an accused to testify to be the subject of comment by counsel has been previously recommended for repeal by the Bill of Rights Committee and by this Commission (Part 11, Bill of Rights, p. 32). In light of Griffin v. California, 380 U.S. 609 (1965), which invalidated a similar provision of the California Constitution, no other conclusion is possible but that the provision offends the Fifth Amendment right against self-incrimination. This Committee, therefore, endorses and renews the previous recommendation.

Article I, Section 10A

Committee Recommendation

The Committee recommends that a new Section 10A be enacted, as follows:

Section 10A. EXCEPT IN CASES ARISING IN THE ARMED FORCES OF THE UNITED STATES, OR IN THE MILITIA WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER, FELONY PROSECUTIONS SHALL BE INITIATED ONLY BY INFORMATION, UNLESS THE ACCUSED OR THE STATE DEMANDS A GRAND JURY HEARING. A PERSON ACCUSED OF A FELONY HAS A RIGHT TO A HEARING TO DETERMINE PROBABLE CAUSE. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE TIME AND PROCEDURE FOR MAKING A DEMAND FOR A GRAND JURY HEARING. IN THE ABSENCE OF SUCH DEMAND, THE HEARING TO DETERMINE PROBABLE CAUSE SHALL BE BY A COURT OF RECORD. AT EITHER SUCH HEARING BEFORE A COURT OR AT A GRAND JURY HEARING, THE STATE SHALL INFORM THE COURT OR THE JURY, AS THE CASE MAY BE, OF EVIDENCE OF WHICH IT IS AWARE THAT REASONABLY TENDS TO NEGATE THE GUILT OF AN ACCUSED OR OF A PERSON UNDER INVESTIGATION. THE INADVERTENT OMISSION BY THE STATE TO INFORM THE COURT OR THE JURY OF EVIDENCE WHICH REASONABLY TENDS TO NEGATE GUILT, IN ACCORDANCE WITH THE REQUIREMENTS OF THIS SECTION, DOES NOT IMPAIR THE VALIDITY OF THE CRIMINAL PROCESS OR GIVE RISE TO LIABILITY.

A PERSON HAS THE RIGHT TO THE PRESENCE AND ADVICE OF COUNSEL WHILE TESTIFYING AT A GRAND JURY HEARING. THE ADVICE OF COUNSEL IS LIMITED TO MATTERS AFFECTING THE RIGHT OF A PERSON NOT TO BE A WITNESS AGAINST HIMSELF AND THE RIGHT OF A PERSON NOT TO TESTIFY IN SUCH RESPECTS AS THE GENERAL ASSEMBLY MAY PROVIDE BY LAW.

Comment

Introduction

The recommendations with respect to the grand jury are the result of extensive testimony received by the Committee at meetings in January, June, and September of this year, and extensive staff research and Committee deliberation. Those testifying before the Committee on this subject included Judge Robert G. Tague of the Perry County Common Pleas Court; Judge Frederick T. Williams of the Franklin County

Common Pleas Court; The Honorable Richard B. McQuade, Jr., Prosecuting Attorney of Fulton County and President-Elect of the Ohio Prosecuting Attorneys Association; The Honorable John T. Corrigan, Prosecuting Attorney of Cuyahoga County; The Honorable Lee C. Falke, Prosecuting Attorney of Montgomery County; Mr. Jack Patricoff, Chairman of the Criminal Justice Committee of the Ohio State Bar Association; Miss Judy Avner, Co-Director of the Coalition to End Grand Jury Abuse; Mr. Donald M. McIntyre, Associate Executive Director of the American Bar Foundation; and Mr. Thomas Swisher, Director of Research of the Ohio Bar Foundation.

The proposed Section 10A is a substitute for the grand jury provisions deleted from present Section 10. It carries over the exception of cases arising in the military from the provisions of the section (because the services have their own tribunals) but contains no reference to cases of impeachment (because they are not "felony prosecutions" and therefore do not need to be excepted). Neither does it contain a provision now in the Constitution which states that the number of persons to constitute a grand jury and to return an indictment shall be provided by law, since this matter is now covered by Criminal Rule 6.

The adoption of the proposed Section 10A would have four principal effects:

1. To make the information the primary method of initiating felony prosecutions, but permit either the accused or the state to demand a grand jury hearing.
2. To grant to every person accused of a felony the right to a hearing to determine probable cause, either before a court of record or a grand jury.
3. To impose a duty on the prosecutor to tell either the court or the grand jury about evidence he knows of which tends to negate the guilt of an accused or of a person under investigation. However, an omission by the prosecutor would not affect the validity of a prosecution unless it was shown that the omission was deliberate.
4. To permit any witness before a grand jury to have counsel present to advise on the right not to testify against oneself and the right not to testify with regard to certain privileged matters (husband/wife,

attorney/client, physician/patient communications, etc.) which right is defined by state law.

History

The grand jury in contemporary American law can be traced to twelfth century England. (In Ohio, under Criminal Rule 6(A), a grand jury is to be called by the common pleas court "at such times as the public interest requires".) The historic role of the grand jury is to determine whether there is probable cause to conclude that a particular crime has been committed and that a particular person or persons have committed it. If the grand jury so finds, it is its duty to return an indictment -- a formal accusation of crime -- upon which a trial is based. (In Ohio, an indictment is returned to the common pleas court which called the grand jury, under Criminal Rule 6(F).)

At its inception, the grand jury displayed aspects of both modern grand juries and petit juries, that is, it functioned both as an accuser of crime and a trier of facts. By the time of the American Revolution, however, grand jury and petit jury functions had become clearly separated and grand jury proceedings had come to be conducted strictly in secret in order to protect those who may have been wrongly accused, to protect witnesses, and to prevent those who may have committed a crime from escaping before trial. The grand jury came to be regarded as a buffer between the individual and the state, and for that reason was incorporated into the Constitution of the United States in the Fifth Amendment, which reads in part:

> 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.

"Capital or other infamous crime" has been held to refer to felonies, so that the federal constitutional right to indictment by a grand jury is limited to such crimes, even though a grand jury may investigate, and indict for, misdemeanors as well.

Most states, including Ohio in 1851, adopted state constitutional provisions

conferring the right to indictment by a grand jury patterned on the Fifth Amendment model. However, the Fifth Amendment right to grand jury indictment is not binding on the states. Hurtado v. California, 110 U.S. 516 (1884). As a result, there are variations among the states in the manner in which felony prosecutions are handled. In a majority of states, felonies may be prosecuted by information or by indictment at the option of the prosecutor. A smaller group, which presently includes Ohio, requires indictment by a grand jury but authorizes a defendant to waive indictment. A still smaller group of states requires indictment in all felony cases.

Rationale of Change

Except in the instance where an indictment has already been returned at the time of arrest, a person arrested on a felony charge in Ohio is entitled to a preliminary hearing. Such hearing is held in a municipal or county court, and its function is to determine probable cause. If the court finds such cause and the defendant does not waive the right to a grand jury indictment, the defendant is "bound over" to the common pleas court, and the matter proceeds to a grand jury hearing, whose purpose, like that of the preliminary hearing, is to determine probable cause. Further, testimony before the Committee indicated that it is common practice to take a case which is dismissed by the court at a preliminary hearing to the grand jury in order to obtain an opposite result in terms of continuing the prosecution. Thus, a duplication of effort and a waste of time are inherent in the system. It is the elimination of this duplication and waste that is the chief motivation of the Committee in recommending that the Constitution provide for either a preliminary hearing or a grand jury hearing, but not both, in each felony case.

The implementation of this provision will undoubtedly require some changes in the statutes and the rules. The proposal is so drafted that it would require proceeding by information unless a demand were made for a grand jury hearing either by the accused or by the state. If the state made such a demand at the very beginning stages (even before a suspect was in custody), that would determine

the course to be followed, which might lead even to a secret indictment, as at present. However, a change would have to be made to accommodate the situation in which the state elects to proceed by information and the accused has not had an opportunity to elect to proceed on the information or to ask for a grand jury hearing. To effectuate this right of choice, provision will have to be made for the secret filing of informations, in much the same manner as secret indictments -- which will continue to remain available -- are filed today. The proposal does not specify to which court the demand for a grand jury hearing is to be addressed. It is implicit that the demand is to be addressed to the court which has jurisdiction of the case. If the Commission recommendation for a single level of trial courts is adopted, it follows that the court would be the respective court of common pleas.

Since the proposal grants the right to a hearing to determine probable cause (which the state does not have to grant today), it follows that once a demand for a grand jury hearing is made, it must be granted, because the determination of probable cause is mandatory.

The proposal to require the prosecutor to inform a judge or a grand jury of known evidence which tends to negate guilt is intended to reinforce the often stated belief that it is the prosecutor's duty to seek justice, above all else. And the proposal to establish the right to the presence and advice of counsel is intended to give substance to the protection of specific rights that are universally recognized but which, in the view of the Committee, are not and can not be effectively protected by any other means.

It is universally recognized that the constitutionally prescribed privilege not to testify against oneself and the statutorily prescribed privilege against divulging certain communications (such as attorney-client or husband-wife) may be asserted before a grand jury. However, a grand jury proceeding has historically not been regarded as a trial, but as an inquest to determine probable cause. On the basis of this distinction, the Supreme Court has not yet held the basic rules of evidence, the right to counsel while under interrogation, the right to face

one's accuser, and the right to testify in one's own behalf, applicable to a grand jury hearing. See Costello v. United States, 350 U.S. 359 (1956). On the other hand, it is now well established that at a preliminary hearing held to determine probable cause, a defendant is entitled to the presence and advice of counsel, to testify, and to present or cross-examine witnesses. Coleman v. Alabama, 399 U.S. 1 (1969). Even before Coleman, serious inquiry had begun as to whether what had been said about the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel in cases such as Escabedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) did not justify the conclusion that a grand jury hearing was of such a critical nature as to require the presence of counsel to protect the rights of a witness not to testify against himself and to claim statutorily prescribed privileges which can be asserted. See Ronald I. Meshbesher, "Right to Counsel Before Grand Jury", 41 F.R.D. 189.

It is in this context that the Committee studied the question of the grand jury. The testimony presented ranged from a suggestion that the grand jury be abolished to one that it be retained unchanged. The Committee determined early in its study that there were some classes of cases in which the grand jury could serve a useful purpose. These included cases which involved complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases involving use of force by police or other cases which tend to arouse community sentiment; and sex offenses and other types of cases in which either the identity of the complaining witness or the identity of the person being investigated should be kept secret in the interests of justice unless the facts reveal that prosecution is warranted.

The Committee further concluded that it did not wish to deny either an accused or the state the opportunity to seek indictment by a grand jury on a case by case basis, even though in "ordinary" criminal prosecutions the preliminary hearing, with its attendant safeguards, seems the more appropriate method for establishing probable cause.

Having concluded that the grand jury should continue to exist as an alternative

method, the Committee is further of the view that grand jury proceedings must be refined in order to strengthen the hand of the grand jury in gathering all the facts relevant to a decision and in order fully to implement the recognized rights of witnesses and potential defendants.

Although there was some opposition expressed to the requirement that the prosecutor inform the judge or grand jury of evidence which tends to negate guilt -- on the basis that this would result in the prosecutor's having to "try the case of the defense"-- a majority of those who addressed the Committee favored, or did not oppose, such a proposal. It must be pointed out that the proposal, as worded, does not require the state to "try the case of the defense", or impose a duty to search for evidence, but only to bring before the judge or jury all those known facts which may have a bearing on the determination of probable cause. The Committee was advised that prosecutors do this now as a matter of practice. Some jurisdictions presently require such disclosure by statute. See Johnson v. Superior Court of San Joaquin County, 124 Cal. Rep. 32 (1975). The Committee concluded that fair disclosure of relevant facts which may be in the possession of the state because of its particular position, at the early stages of a criminal prosecution, is of such fundamental importance that there should be a constitutional directive with regard to it.

The proposal to permit the presence of counsel in the grand jury room to advise a testifying witness would resolve a dilemma which has troubled both the bench and the bar as the concepts of privilege and the right to counsel have become more clearly defined. It has become increasingly difficult to justify a distinction between right to counsel outside the grand jury room and right to counsel inside it. The most plausible argument against permitting counsel inside the room is that this would admit another person into the room and thus break the traditional secrecy of grand jury proceedings. However, this argument falls when one considers that a witness has the theoretical right to leave the room to consult with counsel on every question. Further, an attorney could be sworn to secrecy

as effectively as anyone else in the room. Whatever the problems with the presence of counsel may be, the need to effectively safeguard the rights of a witness, who may at the same time be the target of an investigation or at least a potential defendant, far outweighs them. See Sheridan v. Garrison (D.C.E.D. La. 1967), 273 F. Supp. 673. It must be emphasized that the proposal presented here would limit the right of counsel to advise a witness to matters of privilege personal to the witness. Counsel would be permitted in the grand jury room only while the client-witness was testifying, and could not object to the admission of evidence (such as hearsay) which did not involve a question of such privilege. Several states now permit counsel in the grand jury room under specific circumstances, e.g. Arizona Rules of Criminal Procedure 12.6; Michigan Statutes Annotated 28:943; Washington Revised Code Annotated 10.27.120. There is at least one bill presently pending before Congress giving a grand jury witness the right to counsel inside the grand jury room in federal prosecutions, H.R. 10947. The Committee concludes that the granting of this right has become appropriate for inclusion in the Ohio Constitution. In the view of the Committee, this course is the only one which can give substance to protection of specific rights which are universally recognized but which are not and cannot be effectively protected by any other means.

In addition to the proposals included in the draft, the Committee received several other suggestions. These included a possible provision to permit local prosecutors to convene multiple-county grand juries to investigate crime which overlaps county boundaries, and a requirement that all grand jury proceedings be transcribed. While these suggestions have merit, the Committee concluded that they are more properly matters to be disposed of by statute or court rule.

Article I, Section 5

Present Constitution

Section 5. The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

Committee Recommendation

The Committee recommends no change in this section.

Comment

This section was adopted in its present form in 1912, when the provision allowing the passage of laws authorizing a verdict by no less than three-fourths of the jury in civil cases was added. The Committee reviewed this section insofar as it applies to civil trial juries, in accordance with its charge. The particular constitutional questions addressed were whether jury size should be stated in the Constitution, whether non-unanimous verdicts should be permitted, and whether the Constitution should specify a minimum dollar amount below which civil cases are not eligible for jury trial, as the Federal Constitution does. The Committee also discussed the status of a court's power (particularly the power of a court of appeals) to change the dollar amount of a jury verdict in a case involving unliquidated damages, where the only issue is that the verdict is either inadequate or excessive. Also discussed in connection with "ideal" jury size was the possible relationship between jury size and the outcome of a case.

Among the distinguished speakers who appeared before the Committee were Professor Alice Padawer-Singer, Senior Research Associate of Columbia University's Bureau of Applied Social Research and Director of the Bureau's Jury Project; The Honorable Alba Whiteside, Jr., Judge of the Tenth District Court of Appeals; Professor Howard Fink of the Ohio State University Law School; The Honorable Lloyd Moore, Prosecuting Attorney of Lawrence County; and Mr. Marcus Gleisser, a Cleveland attorney who was formerly the courthouse reporter for a Cleveland newspaper.

Civil jury size in Ohio ("eight members unless the demand specifies a lesser number"), and except in one circumstance in which such size is specified by the

Constitution, is set forth in Civil Rule 38(B), and the special majority requirement is recognized in Civil Rule 48.

Testimony before the Committee ranged from a suggestion that trial juries be abolished (because jurors at times do not do in practice what they are supposed to do in theory and because juries are viewed by some as wasteful of time and money) to a suggestion that perhaps even more types of cases should be tried to juries than are tried to them at present (because jurors most often represent a cross-section of, and the good sense of, the community). There was also some evidence presented that jury size may have an effect on outcome in that larger juries appear to be less extreme in their verdicts. Upon consideration, the Committee concluded that the available evidence is insufficient to warrant a recommendation to limit the use of the jury, to change jury size, to abolish the authority for a less than unanimous verdict in civil cases, or to change the locus of the power to determine civil jury size.

With respect to a court's power to alter the dollar amount of a jury verdict, testimony and research indicate that Ohio courts have such power in the remedies of additur (adding to an amount) and remittitur (subtracting from an amount), both of which are traced to the common law. However, to implement these remedies requires the consent of the party to whose disadvantage the additur or remittitur would be. Under Civil Rule 12(C), a court of appeals now has the power to substitute its own judgment in the matter of the amount of unliquidated damages, without consent of the parties, in a case which was tried to a court, as opposed to being tried to a jury. However, no such authority exists to modify a jury verdict, and it is highly doubtful that such authority could be granted because it would most likely be held to constitute a violation of the federal constitutional right to trial by jury. Therefore, the Committee proposes no change in this regard.

In addition to testimony directly relating to the above topics, the Committee received several other suggestions, including one to limit the amount of investigation of prospective jurors attorneys are permitted to do prior to voir dire, in order to prevent the selection of a jury which is favorably disposed one way or

the other at the beginning of a trial; and to give the trial judge the dominant role in the voir dire examination, on the theory that the judge will be more thorough and less biased than counsel for the parties. The Committee concluded that while these suggestions have merit as topics of discussion, whether or not they are implemented should be left to statute or court rule.

The only change recommended by the Committee relates to expanding the right to a jury trial in a specific category of cases covered by the workers' compensation provision, as set forth in Section 35 of Article II.

Article II, Section 35

Present Constitution

Section 35. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum therof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

Committee Recommendation

The Committee recommends that Section 35 of Article II be amended to read as follows:

Section 35. For the purpose of providing compensation to ~~workmen~~ WORKERS and their dependents, for death, injuries or occupational disease, occasioned in the course of such ~~workmen's~~ WORKERS' employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease,

and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. THE CLAIMANT OR THE EMPLOYER MAY APPEAL A FINAL ADMINISTRATIVE DECISION IN ANY SUCH DEATH, INJURY, OR OCCUPATIONAL DISEASE CASE, OTHER THAN A DECISION AS TO THE EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS, AND MAY DEMAND A JURY TRIAL. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per ~~centum~~ CENT thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per ~~centum~~ CENT of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

Comment

The history and background of Section 35 of Article II are set forth in the report of the What's Left Committee dated September 7, 1976. The section was added to the Ohio Constitution in 1912, and amended in 1924. It provides an administrative remedy for injuries that, at common law, were redressed through a negligence lawsuit and replaces the common law right to sue in those instances covered by the constitutional provision and implementing statutes.

The What's Left Committee considered a number of proposals for change in the section but determined that no changes would be recommended since the legislature can, by statute, make the necessary changes in the workmen's compensation system. However, the committee studying civil trial juries examined the section in the context of the right to a jury trial, and determined that an inequity presently exists that should be remedied by a change in the constitutional provision.

Section 35 of Article II does not provide for appeal to court nor jury trial in any cases. The decisions make it clear that the right to appeal to court is statutory and it is a strict construction of the language of the statute (section 4123.519 of the Revised Code) that denies the appeal in occupational disease cases, since the section refers only to injuries. Szekely v. Young, 174 Ohio St. 213 (1963). In order to permit a jury trial in all cases, it is necessary to specify both that the decision may be appealed and that a jury trial may be demanded because neither is presently a constitutional right.

The Committee recommends that Section 35 be amended to permit an appeal and jury trial in all cases. The draft uses the language of the statute, including the exception for a decision as to the extent of disability.

The recently-enacted workmen's compensation law (Am. Sub. S.B. 545) changes "workmen's" to "workers'" compensation throughout the Revised Code. The Committee recommends this change in the Constitution, also.

Ohio Constitutional Revision Commission
January 31, 1977

Civil Juries and Damages

Introduction

At the December 7 Commission meeting, the staff was asked to investigate the possibility of amending the Ohio Constitution to provide for the following:

1. Granting the General Assembly the power to limit the amount of damages recoverable in a civil action
2. Granting a court of appeals the power to alter the amount of a jury verdict when such verdict is inadequate or excessive.

A third point, raised at the luncheon, was the possibility of limiting or prohibiting the recovery of punitive damages in a civil action. This memorandum is addressed to all three of these questions.

Limiting the Amount of Damages Recoverable in Civil Cases

Interest in limiting the amount of damages recoverable is traceable primarily to the current problems of the Ohio Medical Malpractice Act passed in 1975. This act has been declared unconstitutional in at least four common pleas cases. They are Graley v. Satayatham and Alhgrim v. The Cleveland Clinic Foundation, companion cases reported in 74 Ohio Ops. 2d 316 (1976); Simon v. St. Elizabeth Medical Center (Montgomery County Common Pleas Court, Case No. 75-2081); and LaValley v. Riverside Methodist Hospital (Franklin County Common Pleas Court, Case No. 76CV-07-2999).

The time for appeal in the Graley and Alhgrim cases has expired without either case having been appealed, and there are as yet no final appealable orders in either the Simon or LaValley cases. Riverside Hospital, which is a defendant in a number of similar cases in Franklin County, has recently instituted an original action in the Franklin County Court of Appeals with the aim of forcing the Franklin County Common Pleas Court to permit the Franklin county cases to proceed to arbitration in accordance with the statute. No hearing has been held in that Court of Appeals case as of this time.

In the Simon decision, which raises more of the constitutional issues than any

of the others, the claimed defects in the statute are as follows:

1. The pleading requirements under the Act (R.C. Section 2307.42) are in conflict with the Civil Rules and are, therefore, an unconstitutional infringement by the Legislature upon a Judicial function as established by Article IV, Section 5(B) of the Ohio Constitution.
2. The limitation on the amount of general damages recoverable under the Act (R.C. Section 2307.43) is violative of equal protection under the laws pursuant to the Fourteenth Amendment of the Federal Constitution and Article I, Section 2 of the Ohio Constitution.
3. The compulsory arbitration required under the Act (R.C. Section 2711.21) violates the right to trial by jury guaranteed by Article I, Section 5 of the Ohio Constitution and is also violative of fundamental due process and equal protection under the laws.

This memorandum discusses only the denial of equal protection argument growing out of the $200,000 limitation on general damages and the jury trial question, which grows out of the compulsory arbitration feature.

The Simon court concludes that Section 2307.42, containing the $200,000 limitation, and related sections, "confer benefits on the medical malpractice defendant unavailable to other defendants in tort cases; thus, in effect, depriving plaintiffs in these cases of benefits available to others." (Decision, pg. 6A) In the court's view, unconstitutional classifications are created 1) between physicians and other professionals subject to malpractice suits, and 2) between medical malpractice plaintiffs and malpractice plaintiffs in other categories. The same rationale is followed in the other Ohio cases cited. Not raised in the Ohio cases but discussed in some out-of-state ones is the allegedly unconstitutional classification resulting from the selection of an arbitrary cut-off point or limit, in that those who fall below the limit can theoretically obtain full recovery, while those whose damages exceed the limit can not.

The Graley and Ahlgrim cases applied the "compelling state interest" test to these classes and concluded that "there obviously is 'no compelling governmental

interest' unless it can be argued that any segment of the public in financial distress be at least partially relieved of financial accountability for its negligence." 74 Ohio Ops. 2d, 320. In support of its conclusion that a statute attempting to limit the amount of damages recoverable was unconstitutional, the court cited Jones et al. v. State Board of Medicine (Fourth Judicial District, State of Idaho, Case No. 55527). It may be noted that this case was subsequently reversed by the Idaho Supreme Court. (555 P. 2d 399) The expressed purpose of the Idaho act, which also contains a ceiling on the amount of recovery, was declared to be "***to assure that a liability insurance market be available to *** physicians and licensed hospitals *** and that the same be available at a reasonable cost, thus assuring the availability of such hospitals and physicians for the provision of care to persons of the state." The court said that it did not agree that the limitation on recovery for medical malpractice did constitute an infringement on a "fundamental" right, and refused to apply a "strict scrutiny test". It said that legislation of this type would be upheld if the classification created "rests on some ground of difference having a fair and substantial relation to the object of the legislation." 555 P. 2d, 410-411. The Court then remanded the case for additional evidence, findings and conclusions, declining to rule on whether this particular statute met the requirements of due process: "If as asserted by appellants here the Act in question is found to have been created in response to a problem of statewide concern in Idaho and by alleviation of that problem, it is found to serve the health and welfare of the people of the state of Idaho, and if the means adopted in the Act are held to be reasonably related to the solution of the problems, then the Act will survive the challenge", said the Court (555 P. 2d 420.)

The Idaho Supreme Court's decision, of course, is not binding in Ohio, and the ultimate fate of the Ohio statute is impossible to predict. Furthermore, malpractice is only one of a number of categories of cases in which a legislature may wish to limit the amount recoverable. The Idaho case does illustrate, however, that a statute limiting the amount of recovery can survive constitutional muster if properly drawn, as such statutes have done in several other states. For references to

malpractice legislation in other states, see A Legislator's Guide to the Medical Malpractice Issue (The National Conference of State Legislatures, 1976).

There remains the question of whether it is necessary to include a provision in the Ohio Constitution authorizing the General Assembly to limit the amount of recovery. The answer appears to be that the Assembly already has this power, if it wishes to exercise it, with one exception, namely recovery based on the death of a person, which recovery can not be limited because of the prohibition contained in Article I, Section 19a. This section would have to be repealed or amended before legislation limiting the amount of recovery for death could be enacted.

Despite the fact that a constitutional provision may not be needed -- none was found in any other state constitution during this research -- and with the understanding that a limitation on recovery in a particular class of cases will always be subject to scrutiny under the "means focus" test articulated by the Idaho Supreme Court in the Jones case, or a similar test, the Commission may still wish to propose an amendment, perhaps worded as follows, in effect "reversing" Section 19a of Article I:

> Section 19a. THE GENERAL ASSEMBLY MAY, BY LAW, LIMIT THE AMOUNT OF DAMAGES RECOVERABLE BY CIVIL ACTION IN THE COURTS. ~~The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.~~
>
> OR
>
> Section 19a. THE GENERAL ASSEMBLY MAY, BY LAW, LIMIT THE AMOUNT OF DAMAGES RECOVERABLE BY CIVIL ACTION IN THE COURTS, OR IN CLASSES OF SUCH ACTIONS, ~~The amount of~~ INCLUDING SUCH damages recoverable ~~by civil action in the courts~~ for death caused by the wrongful act, neglect, or default of another~~, shall not be limited by law~~.

Whether a general limitation on damages, as distinguished from limitations on specific classes of cases,would be sustained as compatible with the right of trial by jury, either under the Federal Constitution or a state constitution, is open to

question at this time, since no state has such a limitation and there is no case on the subject.

Granting Court of Appeals Power
to Alter the Amount of an Excessive or Inadequate Jury Verdict

The present status of the power of an Ohio court of appeals with respect to altering the amount of a jury veridct is discussed in a previous memorandum, dated September 15, 1976. There it was concluded that an attempt to confer such power on a court of appeals, in a case tried to a jury in which the only error appears to be the inadequacy or excessiveness of unliquidated damages would likely run afoul of the right to trial by jury provision at least of the Ohio Constitution, if not the Federal Constitution.

The Supreme Court of the United States has not, as of this time, made jury trials in civil cases mandatory on the states. In fact, jury trials in civil cases occur with relatively lower frequency in one state, Louisiana, than they do in other states because Louisiana traces the origins of its legal system to the Napoleonic Code, under which juries had a much more limited function than at common law. The Court has long recognized this distinction and has given no indication that Louisiana's civil trial procedure suffers from a constitutional infirmity as the result of this limitation on the use of civil juries.

Theoretically, at least, it would therefore seem that absent some provision in its own constitution, a state is free to limit or abolish the use of juries in civil cases. In Ohio, such a limitation or abolition would require the amendment or repeal of Section 5 of Article I, which provides in part that the right of trial by jury shall be inviolate. But unless such a change is made, the power of an appellate court to alter a jury's finding with respect to an issue of fact is strictly circumscribed. "Judicial review" of the size of jury verdicts already exists, but the reviewing court, other than applying consensual remedies in a case involving unliquidated damages, can only remand for a new trial. Based on the common law concept that a verdict is indivisible, it used to be held in Ohio that an appellate court could not even remand for a new trial on the issue of damages

alone, but had to remand for a trial de novo. Edelstein v. Kidwell, 139 Ohio St. 595 (1942). There is some question as to whether this result would still obtain since the passage of the Modern Courts Amendment. Under the Ohio Rules of Civil Procedure a trial court can now order a retrial limited to the issue of damages alone. It seems, therefore, that a court of appeals could probably remand a case on that basis, or could be authorized to do so under the Rules. However, a court's actually changing a jury verdict presents a different problem, in that in changing such a verdict the court is substituting its judgment on an ultimate issue of fact for the judgment of the jury. The deeply ingrained reluctance of the People to permit courts to substitute their judgments on issues of fact is evidenced by the existing provision of the Ohio Constitution which states that a judgment resulting from a trial by jury can not be reversed as against the weight of the evidence except by a vote of all three members of a court of appeals which hears the case. Article IV, Section 3(B)(3). Even in this instance, though, the result is a remand and not a substituted judgment. The Supreme Court of Ohio has consistently taken a conservative view on this question. See Hanna v. Wagner, 39 Ohio St. 2d 64 (1974). But if it is, nevertheless, recommended, a provision permitting a court of appeals to substitute its judgment for that of a jury on the question of damages should at the very least set forth a "manifest weight of the evidence" standard, and might read like this and be inserted as the last sentence of Article IV, Section 3(B)(3):

> "THE AMOUNT OF DAMAGES AWARDED IN A JUDGMENT IN ANY CIVIL ACTION OR PROCEEDING WHICH WAS TRIED TO A JURY, AND WHEN ON APPEAL ALL THE JUDGES HEARING THE APPEAL FIND THAT THE AWARD OF DAMAGES IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND DO NOT FIND ANY OTHER ERROR PREJUDICIAL TO THE APPELLANT, AND DO NOT FIND THAT THE APPELLEE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW, MAY BE INCREASED OR REDUCED BY THE COURT OF APPEALS. IN SUCH CASE, IN ADDITION TO ANY OTHER POWER IT MAY HAVE, THE COURT OF APPEALS MAY VACATE THAT PART OF THE JUDGMENT APPEALED FROM THAT RELATES TO THE ISSUE OF DAMAGES AND WEIGH THE EVIDENCE IN THE RECORD AND

RENDER ITS OWN JUDGMENT AS TO SUCH DAMAGES."

This section follows, to some extent, Appellate Rule 12(C), which provides for a substitute judgment by a court of appeals in a non-jury case.

Another possibility for accomplishing the same result with fewer words would be through an amendment of Article I, Section 5 (Trial by Jury) to read as follows:

> "The right to trial by jury shall remain inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury, AND TO PROVIDE FOR THE INCREASE OR REDUCTION BY A COURT OF APPEALS OF THE AMOUNT OF DAMAGES AWARDED BY A JURY WHEN ALL THE JUDGES HEARING THE CASE ON APPEAL CONCUR IN A FINDING THAT THE AMOUNT OF DAMAGES AWARDED IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

The latter approach was suggested at the December 7 Commission meeting. With either approach, however, one possibility which must be considered is that a judgment on damages by a court of appeals under these circumstances may have to be appealable to the Supreme Court in order to satisfy Due Process and Equal Protection requirements.

Limiting or Abolishing Punitive Damages

The suggestion for a possible constitutional amendment authorizing the General Assembly to limit or abolish punitive damages in a civil case was made at the December 7 Commission luncheon. Research indicates that the limitation or abolition of punitive damages could be accomplished by statute, if desired. Several states do not recognize the doctrine of punitive damages now. They are Illinois, Massachusetts, Nebraska and Washington; in addition, it is applied only to a limited extent in Louisiana and Indiana. Olek, Damages to Persons and Property, Section 269, pg. 541 (1955 ed.) In those jurisdictions where punitive damages, as such, are not allowed, aggravating factors (e.g. fraud) are most often compensated by a statutorily-set multiple of actual damages. Even the Supreme Court of

the United States has on occasion suggested the propriety of states limiting or abolishing punitive damages, at least in instances where their existence tends to inhibit "fundamental" rights, such as freedom of speech as it applies to publishing and news media. See, for example, the separate opinions in Rosenbloom v. Metromedia, 403 U.S. 29 (1970).

If, despite the apparent lack of need for such a provision (research indicates none in other states) the Commission wishes to recommend one, it could be in the following language:

"THE GENERAL ASSEMBLY MAY, BY LAW, LIMIT OR ABOLISH THE AWARD OF PUNITIVE DAMAGES IN CIVIL ACTIONS IN THE COURTS."

The Right to Jury Trial and Compulsory Arbitration

Since the requirement of compulsory arbitration as contained in the Ohio Medical Malpractice Act has been held unconstitutional by a few lower courts in Ohio, a comment on such a feature seems in order, to raise the question whether a constitutional change is necessary to facilitate the use of arbitration in Ohio, if it is desired to do so. Arbitration in general has long been upheld against the right to jury trial argument. In Application of Smith, 381 Pa. 223, 112 A. 2d 625, app. dism. 350 U.S. 858 (1955), it is stated: "...there is no denial of the right of trial by jury if the statute preserves the right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal... All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions... which would make the right practically unavailable." The right of appeal is provided for by Ohio law. Whether the provision that the decision of the arbitrators is admissible in evidence before the jury constitutes an "onerous burden" can not be answered at this time. As of 1975, thirteen states had authorized prescreening or arbitration of medical malpractice claims, and Indiana, Louisiana, Massachusetts, New York, Ohio, Pennsylvania, Tennessee and Wisconsin (under some circumstances) admitted the findings in a later court case. A Legislator's Guide to the Medical

Malpractice Issue, supra, pg. 8. If this feature of the Ohio statute should ultimately be declared unconstitutional, it appears that legislative correction is all that would be required. No request for the drafting of a constitutional provision on this subject was made, and no constitutional action appears warranted.